ABSENCE BASED ON CULTURAL CONVICTIONS

The previous article addressed a question of whether or not mitigating factors can always save an employee from dismissal. This article covers a controversial issue of absence based on cultural convictions in relations to those absences which are catered for in employers' policies. Like all articles from the Labour Desk, reference is made to the prevailing Case Law so as to provide a comprehensive view in respect of the issue under discussion.

An organisation (i.e. employer) exists to achieve certain objectives that are central to sustaining its continued existence or provision of services. In that regard, there are laws, rules and regulations form which employment policies are based and everyone in the employment relationship is bound thereby. This article is based on a case which ultimately ended at the South African Supreme Court of Appeal.

An employee had requested to be exempt from the afternoon shift so that she could attend a traditional healer's course as she indicated that she had been seeing the visions of her ancestors signifying that she had a calling to become a traditional healer. Her request was accommodated by the employer. Thereafter, she asked the employer for permission to take unpaid leave of absence for almost five weeks in order to complete a course to become a traditional healer after being diagnosed as having 'perminisions of ancestors, by her traditional healer. This diagnosis was reflected on a certificate from her traditional healer which she submitted to her employer and it was accompanied by a document from the said traditional healer requesting that she be excused from work to complete the traditional healer's course. Her request was not granted due the fact that she had used up all her annual leave, sick leave as well as compassionate leave. Further she was on a final written warning for staying away from work despite an instruction prohibiting her from doing so.

At an internal disciplinary enquiry, the chairperson of the enquiry also rejected the submission that her period of absence be construed as sick leave. He held that her reliance on the letter from the traditional healer was misplaced because it was not a letter from a medical practitioner that would provide proof of illness as required by the Basic Conditions of Employment Act 75 of 1997. The employee testified that had she not attended the course, she would have been in danger and may have collapsed. She was found guilty and was as a result dismissed from work. Her dismissal was based on the fact that she had disregarded the company's policies and procedures by absconding to attend a course unrelated to her employment without her employer's permission.

She took the matter up with the Commission for Conciliation, Mediation and Arbitration (CCMA) and successfully challenged the outcome as 'unfair dismissal'. The employer then unsuccessfully appealed the CCMA outcome at the Labour Court (LC), and then the Labour Appeal Court (LAC). The employer subsequently took the matter up on appeal with the South African Supreme Court of Appeal. (SCA). It was then adduced that the employer did not understand what was meant by the reference to 'perminisions of ancestors' and that this phenomenon was related to some form of illness. They however, conceded that they would have accepted a medical certificate from a registered medical practitioner as proof of illness, but

they could not accept as a valid reason a request for unpaid leave to attend the traditional healer's course for such a long period.

The SCA remarked that where an employee absents herself from work without permission, and in the face of her employer's lawful and reasonable instruction, a court is entitled to grant relief to the employee if the failure to obey the order was justified or reasonable. It held that; that was exactly what the CCMA's commissioner sought to determine. However, the SCA indicated that it was incorrect of the commissioner to impermissibly attempt to explain the meaning of traditional healing on the basis of biblical discourse and equating the concept with a biblical parable.

The SCA found that the traditional healer revealed at the CCMA that had the employee not heeded the call of the ancestors to attend the course, she had a fearful apprehension of suffering serious misfortune. This evidence, according to the SCA, went unchallenged. The SCA further held that the employer could have explored with the employee alternatives to her taking leave to attend the course at the time when it would be convenient to accommodate her if possible. The SCA went on to indicate that the employer is not expected to tolerate an employee's prolonged absences from work for incapacity due to ill health and that it is fair in the circumstances to exercise an election to end the employment relationship {*Kievits Kroon Country Estate (Pty) Ltd v Mmoledi & Others Supreme Court of Appeal (875/12)*}. The appeal was therefore dismissed with costs including the costs of two counsels.

It is submitted here that the other alternative, considering the fact that the employee was prepared to take the leave of absence without pay, could have been to employ a temporary replacement as it would not have constituted payment for two people for the same job. It is of particular significance that the judgement of the Supreme Court of Appeal does not say that the certificate from the traditional healer should have been construed as a medical certificate from a medical practitioner; but rather, the Court makes reference to exploring with the employee alternatives to her taking leave to attend the course at the time when it would be convenient to accommodate the employee if possible. It is the author's humble submission, therefore, that the Court encourages effective communication in this situation.

However, it must be stressed that in addition to the Basic Conditions of Employment Act 75 of 1997 and other related legislation, there is the leave of absence policy which governs various categories of absences in our Department.

The following cases were referred to when this case was considered by the Supreme Court of Appeal are: Herholdt v Nedbank Ltd (701/2012 [2013] ZASCA 97; 2013 (6) SA 224 (SCA); [2013] BLLR 1074 (SCA) (5 September 2013) and Department of Correctional Services & another and Another v Police and Prisons Civil Rights Union (POPCRU) and Others (107/12) [2013] ZASCA 40; (2013) 34 ILJ 1375 (SCA); 2013 (4) SA 176 (SCA); [2013] BLLR 639 (SCA); 2013 (7) BCLR 809 (SCA); [2013] 3 All SA 1 (SCA) (28 March 2013).

An opinion from the Labour Desk
(4th Quarter of 2013/14 Year)