

Short notes on:

CAN A POSITIVE COVID TEST GET YOU FIRED?

Introduction

With the unexpected emergence of the COVID- 19 pandemic, many South Africans were caught off guard and left uncertain about how this pandemic would impact the workplace and the employer-employee relationship. Furthermore, it raised the question of what needs to be done by employers and employees to navigate through this new uncharted world of lockdowns, social distancing and the wearing of face masks. Although many employers and employees embraced the need for and compliance with strict workplace protocols for protection against exposure to COVID – 19, many still do not comply.

Recently ramifications illustrated of non-compliance were in the case of Eskort Limited v Stuurman Mogotsi and Others (JR1644/20) [2021] ZALCJHB 53 (28 March 2021) (the “case”).

The Facts of the Case

In this case, Mr Mogotsi, a former employee that worked as an Assistant Butchery Manager at Eskort Limited. A manufacturer and distributor of meat products nationally were dismissed for gross misconduct and gross negligence.

Mr Mogotsi travelled daily to and from work with a colleague. The colleague that he travelled with consulted a medical practitioner on 1 July 2020. He was not feeling well and was booked off sick from 1 to 4 July 2020; after being admitted to the hospital, he informed him that he tested positive for COVID-19.

When Mr Mogotsi’s colleague fell ill simultaneously, he started to experience symptoms such as chest pains, headaches and coughs. He then consulted his wife, a traditional healer, that booked him off sick on 6 and 7 July 2020 and 9 and 10 July 2020. His employer subsequently advised him to stay home. Despite this reported to work after 10 July 2020, he continued this even after he was alerted that his colleague that he travelled with tested positive for COVID-19 on 20 July 2020.

Mr Mogotsi went for a COVID-19 test on 5 August 2020 and received his results on 9 August 2020, informing him that he tested positive. However, he reported working after taking the test, failing to disclose to his employer that he took a test and delivered a copy personally after receiving his positive result.

Regardless of his positive result, Mr Mogotsi still reported working. He was seen hugging a colleague and walking on the premises without a mask on. Furthermore, his conduct was not in line with the COVID-19 lockdown regulations, which apply to both employers and employees.¹

The employer initiated a disciplinary hearing. The findings of the process included failure to disclose to his employer that he went for a COVID-19 test and tested positive constituted gross misconduct. Mr Mogotsi referred then referred the matter to the CCMA.

Although the CCMA commissioner stated that the conduct of Mr Mogotsi 'extremely irresponsible'. He found that the employer had deviated from its disciplinary code and procedure, providing a final written warning and not a dismissal. The matter was then referred to the labour court for review in terms of section 9 (4) of the Labour Relations Act 66 of 1995 as amended. The court found that the award was not made within the parameters of reasonableness, overturned the award, and the dismissal upheld.

Conclusion

Therefore, employers need to put suitable COVID-19 health and safety protocols in place and ensure that these are strictly adhered to in the workplace. It is a joint responsibility for both employees and employers to comply. Contact an attorney at SchoemanLaw for all your workplace legal needs.

1

<http://www.labour.gov.za/DocumentCenter/Regulations%20and%20Notices/Regulations/Occupational%20Health%20and%20Safety/OHS%20workplace%20Directive%2028%20Sept%202020.pdf>: accessed 19 May 2021

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