

When staffers refuse to be vaccinated

● Dismissals over vaccines are usually unfair, but employer can sometimes act within their rights

Silindokuhle Magagula
& Lesego Ralekoa
ENSAfrica

With the rollout of the Covid-19 vaccine in motion, many employers want to impose mandatory vaccination as part of their health and safety protocols. The question is: can they fairly dismiss employees for refusing to take the vaccine?

In this article of the series, we deal with the legal position relevant to this question. **Is the dismissal automatically unfair?**

Section 187(l)(f) of the Labour Relations Act provides that, if the reason for the dismissal is that the employer unfairly discriminated against an employee on grounds set out in the act, this dismissal is automatically unfair. These grounds include age, religion, conscience and belief and “any other arbitrary ground”.

An employee who refuses to be vaccinated, for example, on religious or similar grounds, could argue that a dismissal was automatically unfair on this basis. It will be for the employer to show the reason for the dismissal was not one of these (or other discriminatory) grounds.

Even if it is established that the dismissal was not for an automatically unfair reason, the employer will still

have to show that the dismissal was not unfair. Section 188 of the act provides that a dismissal is unfair if it is not effected for a fair reason falling within one of the three categories of dismissal recognised by the act, and in accordance with a fair procedure. These three categories of dismissal are:

- The conduct of the employee;
- The capacity of the employee; and
- The operational requirements of the employer's business.

We deal with dismissal for each of these reasons below.

MISCONDUCT

Item 7 of the Code of Good Practice: Dismissal requires any person determining whether a dismissal for misconduct is unfair to consider whether or not the employee contravened a rule or standard regulating conduct in, or relevant to, the workplace.

Accordingly, employers could formulate their vaccination policy in such a manner that it creates a rule or

IN CERTAIN CIRCUMSTANCES, THE TERMINATION OF EMPLOYMENT COULD BE JUSTIFIED ON THE BASIS OF INCAPACITY

requirement for employees to take the vaccine. However, the code provides that a disciplinary act must be valid or reasonable. It is entirely possible employees could challenge the reasonableness of this rule, for example, on the basis that it constitutes a serious infringement of various constitutional rights such as privacy or bodily integrity.

But it is also possible an employer may be able to justify the rule on the basis that vaccination is required to enable the employer to comply with its obligations (and those of its employees) in terms of the Occupational Health and Safety Act or the Mine Health and Safety Act. The code also requires the employer to show the disciplinary sanction of dismissal is fair.

The failure or refusal to be vaccinated could also be cast as a form of insubordination. However, an employer would have to show the instruction to be vaccinated was reasonable and lawful and the arguments mentioned above would also be applicable in this scenario.

Although there is no law in SA making it mandatory for citizens to take the vaccine, employers are still required by the occupational and mining safety acts to provide and maintain, as far as is reasonably practicable, a working environment that is safe and without risk to the health of

WORKABLE SOLUTION



/123RF — CHOKNITI KHONGCHUM

its employees. In addition, the increasing number of deaths from the coronavirus and the hardship suffered by businesses satisfy the requirement of reasonableness.

The facts of each failure or refusal to take the vaccine ought to be considered as there may be valid grounds for the employee's failure or refusal that will not justify his/her dismissal.

INCAPACITY

In certain (probably limited) circumstances, the termination of employment could be justified on the basis of incapacity. This could, for example, be the case when a statute or regulation is enacted that requires an employee to be vaccinated as a precondition to do the job. An example may be employees on a cargo vessel who are required to enter and exit other countries to deliver and collect goods. These individuals may be required in terms of the laws of other jurisdictions to present proof of the vaccination on entry and exit.

In some cases, where employees are required to interact with each other and/or where interaction with the general public is necessary for employees to carry out their duties, risk assessments performed by the employer may make it mandatory for

employees to be vaccinated for them to render their services safely. Arguably, employees who do not take the vaccine could be dismissed on the basis that they are unable to render their services safely or adequately.

OPERATIONAL REQUIREMENTS

These are defined in section 213 of the act as requirements based on the economic, technological, structural or similar needs of an employer. Similar needs are not defined in the act. However, in decisions such as SA Transport and Allied Workers Union and Others v G4S Aviation Secure Solutions, the labour court and the Labour Appeal Court have accepted that this concept is broad enough to include factors that generally have economic consequences for the enterprise.

A plausible argument could be made that an employer, in at least certain circumstances, may be able to justify a dismissal on the grounds of its operational requirements.

CONSTRUCTIVE DISMISSAL

In terms of section 186(l)(e) of the act, a constructive dismissal takes place if an employee terminates employment with or without notice

because the employer made continued employment intolerable for the employee.

An employee confronted by a demand from an employer that they be vaccinated could conceivably argue this demand makes continued employment intolerable and resign from their employment and claim they have been constructively dismissed. However, even if it is accepted there was a constructive dismissal an employer could in specific instances, justify the fairness of such dismissal on the basis of its obligation in terms of the occupational and mine health and safety acts.

The key takeaway in this article is that the question whether or not employees can be dismissed for refusing to take the vaccine can only be answered on a case-by-case basis. Dismissal might not be justified in all circumstances and employers should guard against hastily terminating employment without fully exploring whether it is necessary to require vaccination and why employees have failed or refused to be vaccinated.

● Reviewed by Peter le Roux (Executive Consultant) and Lauren Salt (Executive) of ENSAfrica's Employment department.