

THE PLACE OF CULTURAL RIGHTS IN THE WORKPLACE

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Abstract

Freedom of religion is a constitutional right of every employee. It is the duty of the employer to respect and honour this freedom of religion of the employee. The question arises what the employer must do if there is conflict between the right to religion and the interests of the business.

The current approach in the South African law is that the courts are of the opinion that employers are not very sensitive regarding the aspects of religion. Case law also favours the employee in case of judgements regarding the absence at the workplace due to religious reasons.

The proposal is made that each case be investigated on its own merits. The approach should still be sensitive, but not so much that the legislation is boycotted. It is also recommended that no specific religion should get preference and that religion and science should work together. All religions must be given the same treatment, but the legislation should still be the determining factor.

Keywords: Cultural rights; workplace

1. INTRODUCTION

South Africa is known as the rainbow nation, due to the various cultures of the people in South Africa. The rights of all these types of people need to be protected and the protection can be seen in the Bill of Rights. The Bill of Rights provides that everyone has the right to freedom of conscience, religion, thought, belief and opinion. (Section 15(1) of the Constitution of Republic of South Africa 1996)

The constitutional right to practice one's religion is thus of fundamental importance in an open and democratic society (Prince v President at par 25 per Ngcobo J.)

The question can be raised what the effect of the different cultures will be on the compilation of different types of legislation, especially labour law. It was certainly not the intention of the legislator to consider every type of culture in South Africa, before compiling the current labour law legislation. The eleven official languages will for example create an immediate problem, not to even mention all the beliefs, customs and rituals of all the different cultures in South Africa. All the customs of the different cultures are none the less still applied on the grounds of traditional ethical morality, by tribes and communities irrespective of the legality of these customs.

The current approach of the legislator is to keep cultural beliefs out of the labour legislation. The Labour legislation do have clear indications against discrimination of employees based on their race, gender, ethnic or social origin, religion, beliefs and a whole list of other possibilities of discrimination (section 187(1)(f) of the LRA). This is, however, the full scope of protection regarding cultural differences.

Rights and responsibilities exist in a reciprocal relationship between employer and employee. Employers must provide a workplace that is free of harassment and discrimination. If necessary, an employer might accommodate an employee's religious beliefs or practices by allowing job reassignments, transfers, flexible scheduling or modifications of the rules and policies. All of these can be done by the employer in the good interest of the employee, but the employer is not required to do so. This is especially so if it would impose an undue hardship on the employers' legitimate business interests.

An employer would therefore be within his rights to refuse an employee one month of unpaid leave in order to become a Sangoma, as long as he does not allow a Christian employee one month of unpaid leave to do missionary work somewhere in Africa (Du Toit, 2012:1) This would put strain on the business of the employer.

The approach followed by the South African Law seems to be the only logical one, but unfortunately it is not always possible to keep the cultural differences out of the workplace. The case of Kievits Kroon Country Estate (Pty) Ltd v CCMA & others is the latest on raising the question whether South Africa Labour Law is really geared to deal with all the different cultures in the country.

The question that can be raised is whether the recognition of cultural rights receives more leniency than it should, despite the constitutional rights. Is religion incompatible with science?

2. SICK LEAVE

The relevant legislation regarding medical certificates can be found in section 23 of the Basic Conditions of Employment Act 75 of 1997.

Section 23 of the Basic Conditions of Employment Act:

(1) An employer is not required to pay an employee in terms of section 22 if the employee has been absent from work for more than two consecutive days or on more than two occasions during an eight-week period and, on request by the employer, does not produce a medical certificate stating that the employee was unable to work for the duration of the employee's absence on account of sickness or injury.

(2) The medical certificate must be issued and signed by a medical practitioner or any other person who is certified to diagnose and treat patients and who is registered with a professional council established by an Act of Parliament.

(3) If it is not reasonably practicable for an employee who lives on the employer's premises to obtain a medical certificate, the employer may not withhold payment in terms of subsection (1) unless the employer provides reasonable assistance to the employee to obtain the certificate.

Section 23 indicates two requirements for a valid medical certificate. The employee must be unable to perform his or her normal duties as a result of illness or injury and this must be based on the professional opinion of a medical practitioner.

"Medical practitioner" means a person entitled to practise as a medical practitioner in terms of section 17 of the Medical, Dental and Supplementary Health Service Professions Act, 1974 (Act No. 56 of 1974); (BCEA 1997: Chapter 1)

Certificates issued by traditional healers or Sangomas are not presently acceptable. "A sangoma" is a diviner and practitioner of traditional African medicine in the Zulu culture (Wikipedia 2012). The sangoma is also defined as a person in South Africa who cures people who have illnesses or injuries using plants and other traditional methods (MacMillan Dictionary). Sangomas are Traditional healers and although they do belong to a professional association, this is a voluntary association which is not constituted in terms of an Act of Parliament as required by section 23 (2) of the Act. Sangomas are also not considered to be practicing supplementary health services.

The proposed new amendments of 2012 still don't have any changes in the current position. Absence of an employee who was treated by a traditional healer should be treated as annual leave or unpaid leave. In some cases however, employers can be bound by a collective agreement to accept such certificates of traditional healers (Du Toit J, Claassen A : 2012), but in general, there is no obligation to do so.

The Traditional Healers Act of 2004 was declared unconstitutional in 2006 because public participation never took place before the Act was proclaimed. The "new" Act was assented to in 2007, but it has not yet been proclaimed and until such time there will be no council where traditional healers may register. Traditional healer certificates with practice numbers merely indicates that the traditional healer registered with the Interim Council, established in 2005 that no longer exists (Du Toit J, Claassen A : 2012)

Legislation indicates therefore that a sick note from a traditional healer is not accepted for sick leave. In the latest case law the matter of sick leave and the effect of cultural rights had come into the spotlight.

3. CASE LAW

3.1 Kievits Kroon Country Estate (Pty) Ltd v CCMA & others.

The employee approached the employer and stated that she was attending a traditional healer's course. She requested to work morning shifts to attend the course in the afternoon. After discussing this with the other chefs, they all agreed that they would not have a problem with this arrangement.

They continued in this manner, without any problems. During May 2007 the respondent employee applied for a month's unpaid leave to attend a ritual ceremony which formed part of her training as a sangoma. The employer could not grant the request, since they were already short-staffed and it was a very busy period of the year. He did, however, offer her one week unpaid leave. She refused to accept it.

She left the employment on the 1st of June 2007, after completing her shift, and stayed away for a month. She was then charged with absence from work without permission and insubordination. She was consequently dismissed.

The employer indicated that the employee would not have been dismissed if she had submitted a medical certificate. He did not agree that attending a traditional ritual was a valid reason for being absent from duty.

The employee on the other hand, believed that she would have died had she not attended the ceremony. She felt that dismissal was inappropriate because her absence was due to circumstances beyond her control. The applicant was ordered by the CCMA to reinstate her from the date of the award. This case eventually ended up in the Labour court for review.

The arbitration award indicated that employees have a fundamental duty to render service and their employers have a commensurate right to expect them to do so. Employees are expected to be at their workplaces during working hours, unless they have an adequate reason to be absent. John Grogan indicates that an absence would be adequate if employees could prove that the absence was beyond their control (Grogan 2005:239).

The commissioner indeed ruled that absence from duty was due to circumstances beyond her control. The employee did believe that if she didn't follow the Sangoma course, that she would die. This was also the reason why the commissioner reinstated her.

The labour court acted on review and considered the conduct of the commissioner. The court found that the employee was not sick and the provisions section 23 of the Basic Conditions of Employment Act therefore does not apply. She did not apply for sick leave but had applied for unpaid leave to complete her training course to become a Sangoma.

The interesting fact is that the employee did hand in a sick note from a traditional healer. The court confirmed that the ultimate question that needs to be decided is whether the third respondent's absence from work was justifiable. The labour court could not find any problem with the commissioner's findings.

The general idea is that the employer should respect the cultural beliefs of the employees. The question however, can be raised what the employer should do if he cannot operationally allow the absence from the work for a period of one month.

It may happen, and it sometimes does, that an employee takes the occasional unpaid leave. This doesn't indicate that an employee has the automatic right to claim unpaid leave, especially for such long periods as for a month or two.

An employee who just doesn't show up for work, is usually the most difficult type of absenteeism to handle, because there can be millions of reasons for the absence. The common law expects that the employee should notify the employer of his whereabouts. This is usually done by telephone or by sending a message with another employee. In the age of the cell phone, the excuse of "no telephone" cannot be accepted anymore. Failure of the employee to notify the employer of the reason for the absence within a reasonable time can be seen as serious. If the employee is absent for more than 3 days he/she may well find that he/she has been dismissed for desertion (Labour Guide: absenteeism).

Deliberate absence is a very serious offence because the employee has wilfully chosen to ignore his/her contractual duties and this constitutes breach of contract. Absence from work after a fair refusal of the employer also is a very serious offence that may lead to a summary dismissal. This will be grounds for unauthorized absenteeism, gross insubordination, and refusing to obey reasonable and lawful instructions. (Labour Guide: absenteeism).

In the mentioned case above, the employee was absent from work after the employer refused leave. The absence was also for a relatively long period of time. She didn't try to notify the employer at all. The CCMA and the Labour Court however, found in favour of the subjective belief of the employee that her life was at stake. It can be granted that each case is considered on its own circumstances, but the question can be raised if this was the right decision.

A note of interest is the legislation of the United States of America in the State of California. An employee must notify the employer of his religious belief and if there is a conflict between his/her belief and an employment requirement, he must bring it under the employers' attention.

If he should fail to do so, the employee can be legally discharge for excessive absences from work. This is even if it is later determined that the absences were for religious reasons. (Steinberger 2012)

3.2 Fairy Tales Boutique t/a baby City Centurion v CCMA & others

An employee, who failed to attend a scheduled stock take in order to attend the funeral of her mother in law, was dismissed for gross insubordination. She didn't have any responsibility leave left and was instructed to assist with the stock take.

The CCMA and the Labour Court (on review) found the dismissal to be unfair. It demonstrated "a callous disregard for the cultural practices of black employees and the family circumstances of the applicant" (Par 14 of the judgement). The employee was reinstated. The Labour Court also upheld the decision.

It was found that there was a family emergency, since she had to take care of her mother in law, who had been ill for some time. She was needed, according to her custom, to make the arrangements associated with an African funeral. The commissioner held that the employee is entitled to disobey the employer's instruction in such a case of family emergency.

The fact that the employer had not been unduly inconvenienced by the employee's absence and failure to attend the stock-taking that weekend was also considered. It was found that the employer had ample time to make alternative arrangements.

The question can be raised why they looked at the inconveniency of the employer. The fact that the employer was not unduly inconvenienced seemed to be in favour of the employee in this case. The main fact should be the insubordination and not the fact that the employer could make other arrangements.

In the light of the circumstances, the employee did get the right to attend to her custom of preparing for the funeral and the feeling was that the sanction of dismissal was unacceptable.

3.3 Vincent Sithole v Corporate Junction (Pty) Ltd

Applicant was absent from the beginning of March until the end of April 2010. The company's P.A. did an enquiry about the whereabouts of the applicant and was informed that he was ill.

On the 24th March 2010 a letter was dispensed to the applicant informing him that he should report for duty within 7 days of the letter otherwise his absence would be seen as absconding and that disciplinary action would be taken. The letter was delivered to him on the next day.

The applicant did not respond to this letter. On the 26th of April 2010, the applicant reported for duty and produced a medical certificate from a traditional healer. Rumours started at the workplace that the applicant was not ill, but that he was working for another company during the time he was absent. The company was called Claryon Signs.

The P.A. started an investigation on the authenticity of the medical certificate by phoning the traditional healer. The information she obtained made her even more suspicious as it was inconsistent and the healer eventually admitted that he was never admitted to the clinic.

It was also proven that an electronic transfer was made from Claryon Signs of the applicant's salary, into the same account as the one that was used to pay in his normal salary from Corporate Junction (Pty) Ltd.

The applicant denied that he did work during the time of his absence and said he had produced a doctor's note. It must be taken into consideration that that it was not a doctor's note, but a traditional healer's note. This note could also not explain the treatment the applicant was on.

All the evidence showed that the employee worked with another company while on sick leave with his current company. This results in a situation where the applicant was unjustly and fraudulently enriched. In law it is recognised that nobody may be enriched at the expense of another.

It is expected that the employee will provide the employer with his labour. This is done during the agreed hours and the employee must be present, even if there is no work for him to do. Failure to do so, will lead to breach of contract by the employee. Both the parties had signed a contract of employment and if the conditions of the contract are not met, it constitutes breach of contract. This can ultimately result in a dismissal.

Should the employee be absent due to sickness, a medical certificate must be issued and signed by a medical practitioner and given to the employer? Traditional healers and Sangomas are currently not seen as medical practitioners in the South African law. They are seen as practicing supplementary health services.

In the present case this is exactly where the problem arose. Although the company was not required to accept the certificate, they did and it was only after further investigation that it was found that the certificate was questionable. The traditional healer, who issued the certificate, also could not proof the certificate's authenticity.

Dismissal is usually only considered in severe cases like theft, assault or gross dishonesty.

It is also only considered as a last resort after considering a various amount of factors, like previous disciplinary records, the length of service and the circumstances under which the conduct had taken place.

The Court found that dismissal was the appropriate sanction under the circumstances. The applicant's dismissal was seen as substantively fair and the matter against the Respondent was dismissed.

4. CONCLUSION

The question that was raised in this discussion, is whether the recognition of the constitutional protected cultural rights more leniency receive than it should be entitled to? The dilemma that was created in the above case studies focuses the attention to the question of the compatibility between religion and science.

The ideas and arguments between science and religion have been flowing for many centuries and show no signs of diminishing. Science is known to be neutral and objective and nobody questions this anymore. Religion on the other hand, has never stood in the way of science. Can religion, or the Christian religion specific, play a part in this developing role of the legal sciences?

It is clear from the Case law that employers must show more sensitivity and understanding regarding the cultural practices of employees. It seems as if the calling from ancestors may in appropriate circumstances constitute a justifiable reason for absence from work.

The above case law was decided by taking the factors of each case into consideration. The evidence clearly indicated that there was a lack of empathy and understanding of cultural diversity in the applicant's workplace.

The legal science seems to bow the knee for the religious beliefs and cultures of the employees. A more sensitive approach of the employer can be encourage, but not at cost of a developing legal science. The cultural rights and believes of the employee should indeed be taken into consideration, but not at cost of the current legislation.

Legislation clearly indicates what is constituted as a medical certificate and the employer also had a clear set of rules and regulations. In the Kievits-case the employee was not ignorant to the legislation and possible consequences and still chose to intentionally break these rules, despite having been informed by the employer of the consequences. Religion has its rightful place, but cannot be used as an excuse to avoid responsibility.

Employees are expected to be at their workplaces during working hours, unless they have an adequate reason to be absent.

The employee also has the obligation to inform the employer if he/she is going to be absent and to respond to any form of communication from the employer. In the Vinsent Sithole-case the employee didn't even bother to respond to the ultimatum letter.

It seems as if the cultural beliefs of the employee weighed much stronger than the current labour legislation. Another question that can be raised is whether a Christian employee or any religion for that matter would get the same treatment on the grounds of his or her beliefs. Will religion be applied consistently throughout?

Religion should support this approach that science and religion can work together. Religion is recognised and protected by our country, but should still be submissive to the laws of the country. The Christian religion will certainly not have it any other way.

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