



ARBITRATION AWARD

Case Number: GAJB 24054-21

Commissioner: Lungile Matshaka

Date of Award: 21 January 2022

In the **ARBITRATION** between

Theresa Mulderij

(Union/Applicant)

And

Goldrush Group

(Respondent)

Union/Applicant's representative: _____

Union/Applicant's address: _____

Telephone: _____

Telefax: _____

E-mail: _____

Respondent's representative: _____

Respondent's address: _____

Telephone: _____

Telefax: _____

E-mail: _____

DETAILS OF HEARING AND REPRESENTATION

1. The matter was set down for arbitration hearing on 10 January 2022 in terms of section 191 (1) of the Labour Relations Act (LRA), No. 66 of 1995, as amended, at the Offices of CCMA in Johannesburg. The Applicant represented herself at the hearing, whilst the Respondent, Goldrush Group, was represented by its General Manager HR, Ms. M Mdluli. The proceedings were digitally recorded, and witnesses gave evidence under oath.

ISSUE TO BE DECIDED

2. I am required to decide whether the Applicant's dismissal was substantively fair based on incapacity by refusing to be vaccinated, and if not, to consider the Applicant's request of either be reinstated or fully compensated.

BACKGROUND TO THE ISSUE

3. The Applicant was employed on 9 March 2018 as a Business Related and Training Officer and at the time of termination of her services, she was earning R13 000.00 per month.
4. The Applicant has referred a dispute of an unfair dismissal based on the grounds of incapacity.
5. Following the Applicant's decision not to comply with the Mandatory Vaccination Policy, the Applicant was required to attend a hearing to be held virtually on MS Teams on 28 October 2021 at 09h00.
6. At the inquiry, the Applicant was advised that she will be given ample opportunity to state her case within a fair procedure and shall be entitled to a representative and / or interpreter, if need be, from within the Company. She was further advised that she may want to bring in witnesses to substantiate her defense, but the onus rests with her to arrange for their release from duty, through the correct channels, to attend the hearing.
7. At the hearing, the presiding officer concluded that the Applicant is permanently incapacitated based on her decision to not getting vaccinated and by implication her refusal to participate in the creation of a safe working environment. It was the presiding officer's view that the Applicant's incapacity is permanent as she had indicated that she had no intention of being vaccinated.

8. In the circumstances, the presiding officer further concluded that it would be fair for the Respondent to elect to terminate the contract between itself and the Applicant, i.e., to dismiss the Applicant.
9. The Applicant is challenging the substantive fairness of her dismissal. As relief, she is seeking reinstatement or maximum compensation.

SURVEY OF EVIDENCE AND ARGUMENTS

Respondent's evidence

10. Mr. Cecil Berkhout, in his testimony, confirmed his position as a Group Health and Safety Manager for the Respondent. He further confirmed that he has served in this position for the past four (4) years.
11. After noting in a Government Gazette regarding voluntary and mandatory options of vaccination, the CEO requested the HR General Manager, Ms. Mdluli and himself, to generate a Voluntary as well as a Mandatory Vaccination policy document.
12. After drafting a new policy document alluded to above for a review process by EXCO, it was in turn forwarded to the Respondent's attorneys, CDH, for the final review. The latter went through the document and produced a final draft policy.
13. Once they have identified the risks and hazards, the draft policy document was sent to EXCO for its final approval. The next stage was to create a Mandatory Vaccination Policy Committee that consisted of the Group HR Manager (M Mdluli), Operations Manager for the Group (K Thejane) and Group Health and Safety Manager (C Berkhout). An Appeals Committee which consists of the CEO of the Group was also put in place.
14. In essence, on their part, Mr. Berhout, pointed out that the Committee had to compile and generate all risks and hazards that the employees were exposed to and mitigate these to acceptable levels.
15. The EXCO opted for the Mandatory Vaccination Policy. It was then left to the Committee to map out the way forward on the implementation of the policy in accordance with the guidelines set down by the Government regulations which had to be met.

16. Before the implementation, consultations were held with various unions and all employees in the Group for a period of about three (3) months. They had also to confirm that they had received the document i.e., MWVP (Mandatory Workplace Vaccination Policy), that it was explained to them, and that they had read it.
17. Mr. Berkhout also referred to the provision of exemption in the policy document which enables any employee to apply for an exemption from the Company's Policy related to receiving the COVID-19 Vaccine.
18. He further stated that during consultations they gave an overview of the benefit to vaccinate to all employees that were on the consultations. Question and answer sessions were afforded to them before three specialists namely: Traditional Healer, Medical Specialist, Dr T Mhlanga and Lecturer in Traditional Health, Virologist (Senior Adviser for Pzeirs worldwide) and a Human Rights Commissioner and Senior Advisor, Ms. Z Mbeki.
19. On completion of the consultations the next step was open for the employees to apply for exemption by completing the Vaccination Form for review by the Committee.
19. It came out clear when Mr. Berkhout under cross-examination testified that the main purpose for the Respondent in opting for Mandatory Vaccination Policy was to protect its employees in a safe environment.
20. The Respondent's second witness, Mr. Moodley, in his evidence corroborated Mr. Berkhout's evidence to a large degree. He also confirmed that the Applicant failed or refused to be vaccinated. He went on to say that because of the nature of the Applicant's duties, there is no other position where she could be placed at, as she interreacts with site-owners as well as employees. In this regard, he made it clear that there was no position for her without being vaccinated.
21. Under cross-examination it also became clear that the Respondent can only concern itself with its employees and not those of site owners, as they are the responsibility of the Respondent.

Applicant's evidence

22. The Applicant's evidence, mostly in documentary form, in wishing to be exempted from vaccine mandate was as follows:

22.1 Firstly, she declared her constitutional human right to bodily integrity as laid out in section 12(2) which provides that every person has the right to bodily and psychological integrity, which includes the right to make decisions concerning reproduction; to security in and control over their body; and not to be subjected to medical or scientific experiments without their consent. She went on to say that no person shall be denied the protection that section 12 offers. A plain reading of section 12(2) makes it evident that every person has the preponderant right to make decisions on health and medical interventions and treatment, which undoubtedly includes the acceptance or rejection of a vaccine.

22.2 Secondly, she felt extreme social pressure and emotional discomfort being subjected into deciding between her livelihood and accepting the vaccine under current conditions and specifically having to waive all avenues of recourse against the pharmaceutical companies who manufacture and supply the vaccines and Goldrush (Respondent) in the case of temporary and / or permanent ill side effects. She had also a great personal fear as to what the vaccine might do to her.

22.3 Lastly, since the beginning of lockdown, she has strictly followed the Covid-19 protocols introduced by the South African Government as well as the protocols introduced by the Respondent and the clientele which they service and diligently continue to do so. To her knowledge she has not yet been infected or have infected any of her family members, work colleagues or customer base. She is aware that it has been confirmed by the WHO (World Health Organization) that the vaccine does not stop the spread or contraction of the COVID-19 virus, but only serves to minimize the severity of symptoms and side effects. She therefore does not believe that this vaccine is for the greater good or wellbeing of the people around us but only for good of the individual themselves in terms of the effect of the COVID 19 virus.

22.4 She further stated that she has carefully thought through and made her own informed decision to not be vaccinated and in the same breath respect the decisions of others having accepted the vaccine and the possible side effects that come along with it to protect themselves. She just wishes for the same respect to be afforded to her as well.

22.5 She fully knows and understands the consequences that her decision will have on her both in the case of ever having to contract the COVID-19 virus and the impact it might have on her employment at Goldrush (Respondent).

22.6 She further wishes that Goldrush can find it within themselves to take into consideration her personal and constitutional reasoning laid out above and to grant her exemption from the vaccine mandate and offer her an alternative position within the Company for her to continue to serve the Respondent to the best of her ability.

23. In cross-examination she still made it clear that she was not happy with the vaccination, and nobody would tell whether she could not die. Further, there was no 100% proof that the vaccination is helping or not. She further made the point that the Government could not approve the rollout of the medication which has not been approved by the regulatory bodies.

ANALYSIS OF EVIDENCE

19. As a point of departure, A van Niekerk et al (**Law@work, 3rd Ed, 2014**) point out that the LRA recognizes incapacity as a legitimate ground for dismissal. The Act does not define the term, but the Code of Good Practice in Schedule 8 to the Act refers to two forms that incapacity might assume – poor work performance and ill health or injury. In both cases the employee is incapacitated in the sense of an inability to do the job for which the employee was engaged.
20. The learned authors further make a point that the employer must establish the nature of the employee's condition, the likely prognosis and the extent to which the employee is incapable of doing the work for which he or she was employed. It should be remembered, though, that a decision to dismiss is not a medical question; it is a decision to be taken in the light of available medical evidence and opinion. An employer may not compel an employee to undergo a medical examination. If the employee refuses to do so, the employer must decide on the facts available to it, although an arbitrator is entitled to draw a negative inference from the employee's refusal.
21. Turning to the present case, following a disciplinary hearing, based on the Applicant's decision to not getting vaccinated, the outcome of the enquiry reflects that the Applicant is permanently incapacitated. I have noted the Respondent's view that by implication the Applicant refuses to participate in creation of a safe working environment.
22. In essence the Applicant has put emphasis on her constitutional human right to bodily integrity as laid out in section 12(2) which provides that every person has the right to bodily and psychological integrity, which includes the right to make decisions concerning reproduction; to security in and control over their body; and not to be subjected to medical or scientific experiments without their informed consent.

23. I have listened very carefully to the Respondent's evidence and went through its documentary evidence, though not put in well-organized format, and left much to be desired. In the same breath and notably, the MWVP (Mandatory Workplace Vaccination Policy), from its drafting up to its implementation, followed all the crucial steps. That it also provided applications for exemption for those, like the Applicant, who objected to being vaccinated on Constitutional grounds.
24. Notably, as spelt out in her evidence, the Applicant applied for exemption mainly on the same Constitutional grounds. According to the Respondent, her exemption was ostensibly based on a claim to Bodily Integrity. The Exemption Committee (Committee) considered and declined her application. The Committee identified her as a high-risk individual who interacts with colleagues daily whilst on duty in confined, uncontrollable spaces. This, according to the Committee, puts the Applicant at risk and exposes other colleagues to the risk of possible infection. The Applicant was enabled to appeal in terms of the Policy, needless to say she was also unsuccessful.
25. It also came to light that the Applicant had initially sought to obtain a medical exemption but had abandoned such a plan after doctors she consulted were unwilling to provide a medical exemption.
26. Perhaps, it is important to note that the Respondent in considering her appeal, it was drawn to the writing of Judge Roland Sutherland, Deputy Judge President of the Gauteng Division of the High Court who, memo to his fellow colleagues on issue of vaccinations in the workplace wrote:

"There has been, as yet, only mild protest that this [adopting a no-vaccination-no-entry policy] violates freedom of choice...in my view this is wrong question. The proper question is whether or not an individual is sufficiently civic minded to appreciate that a duty of care is owed to colleagues and others with whom contact is made to safeguard them from harm. If one wishes to be an active member of a community then the incontrovertible legitimate interest of the community must trump the preferences of the individual,"

27. In the light of the above exposition, and after seriously attempting to consider versions of the parties respectively and influenced by the Deputy Judge's pronouncement, in my own sense of fairness, I can only conclude that the Applicant is permanently incapacitated on the basis of her decision to not getting vaccinated and implication refusing to participate in the creation of a safe working environment.

28. I can therefore only conclude that the Applicant's dismissal was substantively fair.

AWARD

29. I make the following award:

29.1 The Applicant's dismissal substantively fair and the matter is hereby dismissed.



Signature: _____

Commissioner: Lungile Matshaka

Sector: Hospitality Sector

Date of Award: 20 January 2022

APPROVED