

Accommodating cultural beliefs and indigenous customs

Is an employer obliged to try to accommodate an employee's request for leave of absence to be trained as a traditional healer, where the period of absence may be as long as one month or longer? Or to grant leave in excess of the family responsibility leave available to an employee so that she can fulfil her obligation to arrange for a family member's funeral?

These questions were at issue in two recent Labour Court review cases, where the respective CCMA arbitrators and Labour Court benches all answered these questions in the affirmative.

In *Kieviets Kroon Country Estate (Pty) Ltd v CCMA* the employee, employed as a pastry chef, sought permission from her employer to be granted a month's unpaid leave to attend a ritual ceremony for sangoma training that she had been undergoing. She submitted a certificate issued by her traditional healer and other supporting documents, but her request was turned down. She then went on leave without permission and was subsequently dismissed for being absent without leave.

The CCMA found her dismissal to have been substantively unfair, holding that the employer ought to have shown greater sensitivity towards the employee, who seriously believed that ignoring the call to be trained as a sangoma could bring result in harm to her, even death. The question, said the arbitrator, was whether the employee had a valid reason for her absence; she had to satisfy the commissioner that her absence from duty was necessitated by circumstances beyond her control to be absolved from blame. The employee believed that she was called by the ancestors to become a sangoma. Evidence was led that she could have died if she had continued to work and disregarded her calling. Because the average person values his or her life as more important than anything else and would do anything to save his or her life, the employee was faced with two evils and she chose the lesser evil. She found herself in a situation of necessity where the only recourse was to break the employer's rule to save her life. Necessity knows no law.

The commissioner concluded that she was justified to choose a course that would save her life. In the normal course of events and according to human experience, any person would have acted like she did to save her life. On the other hand, the evidence also indicated that the employer would not have suffered irreparable harm arising from her absence. The inescapable conclusion which he arrived at was that the employee's absence from duty was due to circumstances beyond her control, that she was justified to disregard the employer's instructions and attend the sangoma course and that the employer's instructions and refusal to grant her unpaid leave was unreasonable as the consequences thereof would have been to place her life at risk. The commissioner concluded that the employee's dismissal was substantively unfair and she was entitled to the reinstatement she sought.

On review, the court remarked as follows:

'This case sadly shows what happens when cultures clash in the workplace. On the one hand we have an applicant that was concerned about making money at all costs and on the other hand an employee who had visions and had believed that her ancestors were calling her to become a sangoma. The applicant does not regard a calling to be an ancestor as an illness. The third respondent believes that if she did not heed the calling to become a sangoma, she would become ill.'

'The [employee] was not sick. The provisions of the Basic Conditions Employment Act (BCEA) dealing with sick certificates do 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 ultimate question that needs to be decided is whether [her] absence from work was justifiable. It is trite that in assessing the fairness of a dismissal for absenteeism the following factors are normally

considered relevant: the reason for the employee's absence, the duration of the absence, the employee's work record, and the employer's treatment of this offence in the past. The onus rests on the employee to tender a reasonable explanation for his or her absence.'

The court found that the arbitrator's award was reasonable and accordingly dismissed the employer's application for the award to be set aside. The employee was reinstated.

In *Fairy Tales Boutique t/a baby City Centurion v CCMA & others* the Labour Court on review upheld a decision of the CCMA that the employer's decision to dismiss an employee who failed to attend a scheduled stock take to attend the funeral of her mother in law was unfair and demonstrated 'a callous disregard for the cultural practices of black employees and the family circumstances of the applicant.' The employee took care of her mother in law, who had been ill for some time. At the time of her dismissal for gross insubordination (she had been instructed to assist with a stock take, but failed to arrive), the employee had already exhausted her family responsibility leave.

The commissioner held that the employee is entitled to disobey the employer's instruction where 'there was a family emergency and the applicant was needed, according to her custom, to make the myriad of arrangements associated with an African funeral.' She found further that the employer had not been unduly inconvenienced by the employee's failure to attend the stock-taking that weekend as it was common practice that employees from other stores would be brought in to assist. Indeed the applicant's evidence was that 12 employees had been brought in from other stores to assist. The employer had ample time to make such alternative arrangements. The commissioner's award was accordingly upheld and the employee reinstated.

What are the lessons emerging from these cases?

- Employers must show sensitivity to and understanding of the cultural practices of employees.
- Absence from work to answer a calling from ancestors may in appropriate circumstances constitute a justifiable reason for absence from work.
- Even if an employee has exhausted her family responsibility leave the employer should carefully consider requests for leave in circumstances where the taking of leave would not unduly prejudice the employer, but would run counter to the employee's customs and broader family responsibilities.

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