What You Need To Know As A Subcontractor During Covid-19

In an earlier article published, we discussed how COVID-19 has brought about unprecedented events. Employers might find themselves in a challenging position of ensuring the health and safety of their employees as directed by the Occupational Health and Safety Act 85 of 1993, versus not breaching any legislative requirements or employee rights to fair labour practices as envisaged in Section 26 of the Constitution.

This article will focus on the legislative duty bestowed upon employers, more specifically with relation to sub-contractors to ensure a conducive work environment for employees, versus their contractual duty to their client in terms of their service level agreement or any other agreement.

Recently, we were confronted with a labour matter wherein a sub-contractor to a mine was issued with a directive that all pregnant employees are not allowed on site (both on surface and underground) due to internal Covid-19 policies to ensure the health and safety of the said pregnant employees. According to the directive, employees must disclose as soon as they find out that they are pregnant, and not come back onto site until their maternity leave has ended – this can be dubbed as early maternity leave.

At first sight, the above may be deemed as unfair discrimination against pregnant employees, as in terms of section 9(3) of the Constitution no person my unfairly be discriminated against based on pregnancy, amongst others, unless the employer can prove that the discrimination is justifiable in terms of Section 36 of the Constitution. It is important to remember that in terms of Section 2 of the Constitution, the Constitution is the supreme law of the Republic. Law or conduct inconsistent with it might be unconstitutional. Our courts have however found on many occasions that certains rights in the Constitution may be limited as long as it complies with the provisions of section 36 of the Constitution (also known as the Limitation Clause).

Readers will remember from an earlier article that employers have been directed by directives issued by Mr Thembelani Thulas Nxesi, Minister of Employment and

Labour, on how businesses, employees and employers ought to implement certain safety protocols to alleviate the spread of the Covid-19 virus.

While the notion is noble and seeks to ensure the health and safety of the employees, subcontractors might find themselves conflicted between carrying out the instructions of their clients (pregnant employees are not allowed on site) and facing possible charges of unfair discrimination by the pregnant employee.

While the mine itself might have the financial muscle to continue paying out benefits and sometimes full salaries for this early maternity leave, some employees may find themselves having to stay away from work as early as two months or as early as they find out about their pregnancy. UIF payments for pregnancy only accrue under the strict labour laws of South Africa during the four months unpaid maternity leave period which pregnant women are entitled to. This legislation is based on Section 25 of the Basic Conditions of Employment Act. These laws are designed to help regulate maternity leave and protect women against unfair discrimination related to their pregnancy. Employers are, however, not obliged to remunerate employees for this maternity leave and the employee needs to claim UIF maternity benefits through the Department of Labour.

Some sub-contractors might not have the means of paying salaries during this early maternity leave, which leaves the employer vulnerable to cases of unfair dismissal at the Commission for Conciliation Arbitration and Mediation (CCMA).

A commissioner who finds an employer guilty of unfair discrimination in the CCMA, is empowered in terms of the Employment Equity Act, 55 of 1998 to issue a further punitive damages compensatory award on top of the usual award that the employee would be entitled to, if found guilty of the offence.

It is therefore important for sub-contractors to note that while they are contractually bound to their client, their employee is employed by them as the sub-contractor and not by the main client. The subcontractor can therefore not cite any external directives (such as that pregnant employees are not allowed on site) or agreements when faced with unfair discrimination charges.

Further, it is the employer’s responsibility in terms of the Basic Condition of Employment Act and the Labour Relations Act to ensure a conducive environment for their staff. This includes an employee providing the employer with services in exchange for remuneration. This give and take relationship will continue in

accordance with the employment contract and only in very rare circumstances will remuneration be withheld which will usually be due to a breach of the employment contract.

Therefore, when faced with directives that leave employers open to legal suits (such as that pregnant employees are not allowed on site), they should consider other avenues to ensure that the employee is compensated during this early maternity leave period.

Contact your legal representative should you be unsure as to how to proceed with such a matter.

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