

Remote work - employee rights not black and white

According to a recent global study from PWC, only one in ten employees are willing to return to the traditional commute-to-work lifestyle, with many citing the reduced costs associated with travel time and fuel usage, increased family time, and boosts in productivity.



Anne Erwin, consultant attorney: labour and employment law at Reynold Attorneys

But, as more businesses return to the office, the rights employees have when it comes to remote work is not black and white, says Anne Erwin, consultant attorney: labour and employment law at Reynold Attorneys. This as there are no cases yet that she is aware of where an employee has contested their employer's request for them to return to work – but that it is likely coming.

The right to work at the workplace or from home?

Last year, due to the national lockdown that was enforced, employers had no alternative but to send their entire workforce home, unless they were performing essential services. Now, they may require their employees to return to perform duties that may not be accomplished efficiently at home. The issue is, who has the last say, especially if the employee is concerned about their health risks when at work?

Employers have a common law and statutory duty to create a safe working environment, one that abides by relevant health and safety protocols. This means the employee can argue that their employer does not have the right to request they go back to work if they believe that this environment is not

created. The rub comes in if that employee is underperforming at home and would perform more efficiently at work.

“Ideally an agreement is found that works for both parties, but if that is not the case, the employer may have to consider whether an employee's refusal to return to work negatively impacts the employer's operational requirements to the extent that a retrenchment process may need to be followed,” says Erwin.



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Conditions for dismissal

It is highly unlikely that an employee dismissed on the grounds of the employer's operational requirements due to wanting to work from home will take it lying down, which means the matter could then end up at the CCMA. What's more, the case could extend to the Labour Court and even the Constitutional Court if the right to security in and control over one's body (Section 12 of the Constitution) is deemed to have been violated. This places employers in a highly precarious situation.

There are also issues of privacy to consider when employees work from home. If they are using a company's device, such as a laptop or phone, the company has a right to track that device and review performance and activity. Many contracts of employment have a clause to that effect. If the device belongs to the employee however, the rules change and employers could be seen to be infringing on the employee's privacy rights.

Contracts review

Contracts are thus key in this unpredictable environment, but even that comes with its own set of challenges and catch-22s. “Now would be a good time for employers to run their employees’ contracts by their legal team to assess them for this new world of work. At this time, it is unlikely that these contracts include clauses around remote working, use of personal or company devices when working from home, insurance of said devices, etc., unless the employee was employed during Covid-19 when a new contract could have been drawn up.

“The catch is that most contracts have a boiler plate clause that says no changes can be made to the contract unless it is made in writing and signed by both parties. Employers would then need to consult their employees about any proposed amendments, as making a unilateral change to the terms and conditions of employment could be seen as a breach of contract, or even in certain circumstances as a dismissal. If employees don’t agree to the amendments, this could mean the employer has to resort to a retrenchment process, assuming there is a fair case to make that the changes are necessary in terms of its operational requirements,” comments Erwin. “Of course, operational requirements are the last resort, but if the employer has a sound business reason, then it is an option.”



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Ensuring a safe place of work

Remote work is only one of the new issues that employers have to contend with. There is also the case of employees not adhering to health and safety protocols when at work. With the operating environment changing so fast thanks to the pandemic, there are few cases on Covid-19 related to this type of misconduct.

One such case, however, is between Eskort Limited and Stuurman Mogotsi, dated 18th March 2021. The employee, Mr Mogotsi, was dismissed on the grounds of gross misconduct related to his alleged failure to disclose to his employer that he took a Covid-19 test in August 2020 and was waiting for his results, and that on receiving news that he was positive, gross negligence occurred as he failed to self-isolate and continued working while ill, thus putting the lives of his colleagues at risk. It was further alleged that during the period he had reported for duty, he had failed to follow the health and safety protocols at the workplace, including failing to adhere to social distancing.

“The case landed up in the Labour Court and the employee was dismissed,” says Erwin. “We might be seeing more of these types of cases in future.”



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Could vaccines become mandatory?

Vaccines are another area of contention. Presently, no person can be forced to get the jab, although not doing so could result in unvaccinated employees placing other employees’ health and lives at risk. There are a lot of complexities here, and they tap into the Bill of Rights. Yet, if you have a number of employees who refuse the vaccine and are therefore vulnerable to catching the virus, then it could be passed on, meaning the business could be temporarily affected by having to close, affecting it financially or even competitively.

“Government could, of course, limit the right to freedom and security of the person in Section 12 of the Constitution in terms of Section 36 of the Bill of Rights and make it mandatory to have the jab. In other words, protecting the general safety of the public could be seen as superseding an individual's choice on whether to be vaccinated or not. This is not on the table, however, and it would be an extraordinary move if it was undertaken – but these are extraordinary times.”



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Erwin concludes by saying that refusing to have the vaccine could even become an issue of discrimination. “Should a prospective employee make their choice not to have the vaccine known at the interview stage and is then not appointed to the job, or during employment refuses to be vaccinated although the employer wants all employees to be vaccinated, whose rights will triumph? And could this then become a case of discrimination? It is a complex issue, and we won't really know the correct course of action until there are cases to review. Until then, it is wise for employers to brush up on what they can, such as reviewing their employees' contracts and ensuring there are clear Covid-19 health and safety protocols in place. Should they omit to do so, they could find themselves having to deal with expensive litigation at the CCMA or in the courts.”

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