Contemporary Labour Law

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Off duty misconduct

When can it give rise to disciplinary action?

by P.A.K. le Roux

The principle that an employee may be subjected to disciplinary steps for acts of misconduct committed whilst not on duty is accepted both in the Code of Good Practice: Dismissal and in numerous decisions and awards.

Item 7(a) of the Code of Good Practice refers to the contravention of a rule regulating conduct in the workplace or **of relevance** to the workplace as being capable of being the subject of disciplinary action. The test for determining relevance is that the employer must have a legitimate interest in the conduct or activities of the employee outside working hours or outside the workplace and that there must be a link or *nexus* between the conduct and the employee's duties, the employer's business or the workplace. See Grogan **Dismissal** at 285 *et seq.*

The application of these principles is illustrated in two recent decisions, namely **Dolo v Commission for Conciliation, Mediation & Arbitration & others** (Unreported JR 1655/07 19/10/2010) and **City of Cape Town v South African Local Government Bargaining Council & others** (Unreported C490/2009 4 February 2011).

In the **Dolo** case the applicant employee worked as a table inspector at the Gold Reef City Casino. She became romantically involved with a married man (referred to in the judgment as the "boy friend".) He was accused of defrauding his employer through the production of false invoices for goods allegedly provided to his employer. Payments arising from the presentation of these false invoices were made into the applicant's bank account – she received these payments on behalf of her boy friend - the bulk of which was then paid over to the boy friend or paid into his bank account. Twelve such deposits were made involving an amount of some R 200 000.00. The applicant also signed the first

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"In each instance, a multiplicity of factual considerations can determine whether the employee's conduct outside the workplace holds implications for their continued suitability for employment or some form of corrective discipline."

Dolo v CC MA & others

false invoice presented for payment.

The Applicant did not deny any of the above facts. She admitted to them in an affidavit that she submitted to the prosecution service. This was done in order to ascertain whether she would give evidence against her boy friend in a criminal prosecution instituted against him. If she did so openly and honestly there was the possibility that she would be indemnified against criminal prosecution.

When these facts came to its knowledge, the employer took disciplinary steps against the employee on the basis that her collusion with her boyfriend had created serious "financial doubt" about her and that the trust relationship had been destroyed. She was also charged with bringing the name of her employer into disrepute. She was found guilty of both charges and dismissed.

She challenged the fairness of the dismissal. The commissioner found that the employer had been entitled to take disciplinary action against her, despite the fact she was not guilty of misconduct *vis-a-vis* her employer, but also found that dismissal was not an appropriate sanction. The employer was ordered to re-employ her in a position that did not involve a daily interaction with cash, even if this meant that her salary was reduced. She was also subjected to a final written warning. It is at least arguable that an award ordering the re-employment of an employee working in a casino environment who has been found guilty of participation in a series of dishonest acts over a period of 2-3 years involving some R 200 000.00 is reviewable. Nevertheless, the employer decided not to review the award and offered the applicant a lower paid job as a receptionist. She refused this offer and she took the award on review.

The applicant raised various grounds for review, the most relevant being that she had not committed any wrong against her employer. The Court accepted that her participation in the scheme held implications for her suitability to occupy a position in which she was entrusted to deal with the employer's cash. It referred to the fact that Item 7(a) of the Code of Good Practice:Dismissal referred to conduct of relevance to the workplace and stated that –

> *"What the emphasized portion makes clear, is that misconduct outside the workplace and outside of working hours may have a bearing on an employee's continued suitability for employment. In each instance, a multiplicity of factual considerations can determine whether the employee's conduct outside the workplace holds implications for their continued suitability for employment or some form of corrective discipline." [At par 19]*

The Court also referred to the following excerpt from **Hoechst (Pty) Ltd v Chemical Workers Industrial Union & Another** (1993) 14 ILJ 1449 (LAC),

> *"Where misconduct does not fall within the express terms of a disciplinary code, the misconduct may still be of such a nature that the employer may none the less be entitled to discipline the employee. Likewise the fact that the misconduct complained of occurred away from the work-place would not necessarily preclude the employer from disciplining the employee in respect thereof.*
>
> *...*
>
> *In our view the competence of an employer to discipline an employee for misconduct not covered in a disciplinary code depends on a multi-faceted factual enquiry. This enquiry would include but would not be limited to the nature of the misconduct, the nature of the work performed by the employee, the employer's size, the nature and size of the employer's work-force, the position which the employer occupies in the market place and its profile therein, the*

nature of the work or services performed by the employer, the relationship between the employee and the victim, the impact of the misconduct on the work-force as a whole, as well as on the relationship between employer and employee and the capacity of the employee to perform his job. At the end of the enquiry what would have to be determined is if the employee's misconduct 'had the effect of destroying, or of seriously damaging, the relationship of employer and employee between the parties'." [At 1459 B-I.]

The Court found that the commissioner had been correct in taking the view that the applicant's integrity had been tarnished through her involvement in the boy friend's scheme and that, as a result, her trustworthiness had been placed in doubt and that it was not an unreasonable conclusion to come to that an employee who is prepared to assist a third party to defraud that other party's own employer of substantial sums over a period of more than two years, is someone an employer would be justifiably reluctant to employ in the first place, or to retain in a position requiring the incumbent to be sufficiently trustworthy to handle money and supervise others handling money.

This and the other grounds for review raised by the applicant were rejected by the Court.

The decision in **City of Cape Town** case dealt with the situation where the employee concerned had been dismissed for obtaining a driving license in a fraudulent manner – she had presented a fake Namibian license to the South African licensing authorities for conversion to a South African license. This had occurred 9 years earlier. This criminal offence committed by the employee had been discovered by the Scorpions who had been conducting investigations into licensing fraud. She challenged her dismissal.

The arbitrator found that the employer 'had the necessary jurisdiction" to discipline her. He did this on the basis of the nature of the offence she had committed as well as the position she occupied at the time that her offence came to the knowledge of the employer.

The reasoning is set out in the following excerpt -

"[28] It is not disputed that Ncamane holds a senior management position requiring a high degree of trust. As head of contract administration Ncamane is responsible for managing contracts for the supply of goods and services within the City. The city's contention is that Ncamane has, by her conduct, rendered herself no longer trustworthy to do her job.

[29] I am persuaded by the employer's argument. The conduct in question involves the dishonest subversion of a system in which the authorities, and the public at large, invest their trust and need to be able to invest their trust. In her workplace Ncamane has control over a system in which, similarly, the employer must be able to place its confidence. An employee who holds such a potion of trust has a duty to refrain from conduct (both inside and outside of the workplace) that will undermine the trust placed in her."

However, as in the **Dolo** case the arbitrator found that dismissal was not justified. This was because the misconduct had taken place outside the workplace and had taken place 9 years earlier. A lesser sanction should have been imposed. The arbitrator did not impose this lesser sanction himself but remitted the matter back to the employer for the determination of an appropriate sanction.

The employer launched review proceedings on the basis that the arbitrator had erred in finding that dismissal was not an appropriate sanction. The Court embarked upon a detailed examination of decisions dealing with the question of when dismissal is justified in cases of dishonest conduct. Its conclusions in this regard are of interest outside the context of off-duty misconduct and are therefore set out below –

"[29]In the present matter the respondent made herself guilty of dishonest conduct. From the cases cited, it appears that dishonest conduct does go to the heart of the employment relationship and is destructive of it. Where misconduct involving dishonesty is considered to be gross or serious, there may not be scope for mitigating factors. The converse also applies. Where misconduct involves an element of dishonest conduct which is not gross or serious, mitigating factors may (and in fact should) be considered in determining a sanction

short of dismissal. Whether or not the dishonest conduct is relevant to the employee's duties is not necessarily decisive: The focus is on the effect of the conduct on the trust relationship between the parties. The fact that an employee shows remorse for his or her actions and takes responsibility for his or her actions may militate depending on the circumstances against imposing the sanction of dismissal. The converse also applies, dismissal may be an appropriate sanction where the employee commits an act of dishonestly, falsely denies having done so and then shows no remorse whatsoever for having done so."

The Court went on to hold that dismissal was the appropriate sanction and the award was set aside and replaced with a finding that the dismissal was substantively fair. In the view of the Court the employee had been grossly dishonest and had also committed an act of corruption. Her conduct constituted a criminal offence. She had persisted with driving with a false license for some 9 years and would have continued to do so if she had not been caught. She had lied during the course of the investigation, at the disciplinary enquiry and during the arbitration. The employee was entrusted with dealing with public funds and the employer was therefore entitled to expect that her conduct be beyond reproach. The fact that the employer suffered no direct loss was irrelevant. The fact that her misconduct was only discovered some 9 years later was also irrelevant and could not constitute a mitigating factor. She benefitted from her conduct on an ongoing basis. **P.A.K. le Roux**

The duty of an applicant for employment to disclose information

by P.A.K. le Roux

The notion that job applicants are required to respond to relevant questions put to them honestly and accurately has been accepted by our arbitrators and the Labour Court. It has also been accepted that the failure to comply with this duty can lead to dismissal being justified. There may also be a duty, in appropriate circumstances, to disclose information that has not been requested or addressed by means of a question. See in this regard **CLL** Vol 18 No 12 at 111.

Two recent decisions of the Labour Court and an award of a commissioner deal with this topic.

MEC for Education, Gauteng v Mgijima & others [2011] 3 BLLR 253 (LC)

The employee in this case applied for the post of Deputy Director-General advertised by the Gauteng Department of Education (GDE). At the date of her application she was employed by the Department of Arts and Culture (DAC). At the time she was interviewed for the new post she had been suspended by the DAC pending disciplinary charges being brought against her. She did not volunteer this information to the interviewing panel. Indeed, when she was asked whether there were any "skeletons in the closet", she replied in the negative. Shortly after the interview disciplinary charges were brought against her. The GDE offered her the appointment with effect from 1 December 2007. She signed her contract of employment on 5 November 2007. It was also around this time that she entered into an agreement with the DAC in terms of which she resigned from the DAC and in terms of which the DAC withdrew all the charges against her.

Some months after she commenced work for the GDE it came to know of her suspension and the fact that the DAC had brought disciplinary charges against her. The GDE formed the opinion that the failure to disclose these facts justified disciplinary action being taken against her. The parties agreed to a pre-dismissal arbitration in terms of s 188A of the Labour Relations Act, 66 of 1995. The arbitrator found that the employee was not guilty of any disciplinary offence and the GDE took this decision on review.

The Labour Court's decision is of importance because of its discussion of the test to be applied when reviewing an arbitration award, but only the aspect of the employee's non-disclosure of information will be dealt with here.

The basis for the arbitrator's finding was that there had been no duty on the employee to disclose this information, whether to the interview panel, or later to the GDE's Head of Department. He gave various reasons for this, namely -

- The "well developed" principle of common law that a person is innocent until proved guilty had been infringed. The allegations against the employee had not been proved at that stage and she had not been given the opportunity to defend herself against the allegations.
- The charges were withdrawn by the DAC.
- The argument that she was under a duty to disclose these facts when she was asked whether there were any skeletons in the closet "did not hold water". The question was too vague and subject to two possible interpretations - i.e. were there unproven allegations of misconduct against the employee and had these allegations been proven? In the arbitrator's view the question was whether there were any proven allegations of misconduct and her answer in the negative had therefore been correct.

The Court rejected the reasoning of the arbitrator on two grounds. The first error was to rely on the concept of "innocent until proved guilty" in this context. Of more importance, however, was the arbitrator's emphasis on, and consideration of, the question whether the employee was in fact guilty of misconduct with which she had been charged by the DAC.

The Court found that this was not the issue that had to be considered by the arbitrator. The issue was whether she was under a duty to disclose the fact she had been suspended and that disciplinary charges had been brought against her.

This rendered the award reviewable and it was set aside. The following excerpt reflects the Court's view.

> *"[8] In short, the crucial issue before the arbitrator was not whether Mgijima was guilty of the charges brought against her by the DAC or the materiality of those charges, but her non-disclosure at the time of her interview (and indeed during the subsequent period leading to the signing of her contract) of the fact that she was on suspension and facing serious disciplinary charges. The post for which Mgijima applied was a senior post, one that clearly required unimpeachable honesty and integrity on the part of its incumbent. Quite what effect Mgijima's conduct during the period of her employment by the DAC may have had on her suitability for appointment to the GDE was a matter for the GDE to determine. Mgijima's failure to disclose material information in response to an express invitation to do so deprived the GDE of the opportunity to make an informed decision as to the effect, if any, of the suspension and pending charges on the contemplated employment relationship.*
>
> *[9] It follows that in the exercise of his functions, the arbitrator failed to apply his mind properly to the issue before him, and that in doing so, he acted other than as a reasonable decision maker would. For this reason, the award stands to be set aside."*

Fipaza v Eskom Holdings Ltd (2010) 31 ILJ 2903 (LC)

The employee in this matter commenced employment with Eskom in 1995. In 2003 she and Eskom agreed that she would be granted 3 years' leave of absence during which time she would study in the United Kingdom. The agreement envisaged that she would return to work on 5 July 2006 but Eskom extended this by two months until 5 September 2006. In the letter to the employee informing her of this extension she was informed that if she did not return to work on 5 September 2006 her employment would be terminated.

When she did not return to work on this date a disciplinary enquiry was held in her absence and she was dismissed. The chairperson of the enquiry held that "her failure to engage" had led to the trust relationship being destroyed.

After she had been informed of her dismissal the employee addressed a letter to Eskom querying her dismissal and Eskom's failure to provide reasons. Eskom responded in an e-mail in which it referred to her failure to return to work after having been granted an extension and her failure to communicate with Eskom. The letter also stated that if a vacancy existed for which her skills were required she was free to apply for the job.

"The failure by the employee to immediately disclose that criminal charges had been laid against him, obviously impacts negatively on the employment relationship, and I was not at all surprised that the employer regarded this fact alone as destructive of the relationship of trust and confidence which ought to exist between an employer and an employee."

Poonen v JHI

In 2008 the employee did apply for a job. The recruitment form that the employee had completed required her to provide details of her previous employers, the position she had held, the period of employment and her duties. It did not require her to disclose the reasons for the termination of employment. Although the employee had not completed this part of the form she had referred to her *CV* and this had contained the required information. The issue of her dismissal was not dealt with in her application form and it had not been raised by the interviewing panel. Neither had she raised it herself.

She was offered the position and she accepted this offer. However, Eskom later withdrew the offer of employment because of her prior dismissal and the fact that she had not informed Eskom of the fact that she had been dismissed by it. Eskom argued that there had been a duty to do so.

The employee then challenged the fairness of her dismissal in the CCMA but the commissioner found that the dismissal had been fair on the ground that she had failed to disclose that she had been dismissed by Eskom. She then took this award on review to the Labour Court.

She challenged several of the commissioner's findings, including findings to the effect that the applicant had intentionally failed to disclose her dismissal to Eskom and that Eskom (in the form of the interview panel) had not known that she had been previously dismissed by it. The Court rejected these arguments and came to the conclusion that there had been sufficient evidence before the commissioner to justify these findings.

Of most relevance here was the challenge to the commissioner's finding that the employee's failure to disclose had been amounted to a fraudulent misrepresentation. Here the Court argued that there had been no misrepresentation that amounted to a "distortion of the truth" - there had simply been a failure to inform Eskom of her dismissal. Whether this failure constituted a misrepresentation depended on whether there had been a duty to disclose this information in the circumstances where the Eskom had not solicited this type of information.

After a discussing various decisions dealing with the duty of good faith imposed on employees, decisions arising from insurance law and decisions arising from the realm of general contract law, the Court came to the conclusion that there had not been a duty to disclose that she had previously been dismissed by Eskom - this on the basis that there was no general contractual duty to disclose information and that information was not within the employee's exclusive knowledge. Its view is apparent from the following excerpt -

> *"[53] In this instance, the fact of the applicant's dismissal was not within her exclusive knowledge, even though it may have been a material issue. It may have not have been within the knowledge of the members of the interview panel, but it can hardly be said they were not in a position to ascertain the circumstances in which the applicant's previous employment with Eskom ended either by simply asking the applicant, or by consulting Eskom's own records. Moreover, in its dealings with the applicant, Eskom gave no indication that it expected more information than it specifically requested.*
>
> *[54] When the commissioner found that the applicant had a duty to disclose her previous dismissal to Eskom, he did not give consideration to the proper legal principles applicable to determining when such an obligation arises in contract. As a result, he gave no consideration to the principle that there*

is no general duty on a contracting party to tell the other all she knows about anything that may be material, nor to the fact that the applicant's dismissal was not a matter within her exclusive knowledge in this case."

The Court's decision on the facts of the case seem, with respect, to be correct. The fact that she was told she could apply for a job and that Eskom had access to the details of her employment with it, seem to justify this decision. However, it is submitted that the reference to the principle that there is "no general duty on a contracting party to tell the other party everything she knows about anything **that may be material** … " is perhaps too sweeping a dictum. If a fact is material to the decision whether or not to hire a person surely it should be disclosed? The test whether a particular fact should be disclosed will depend on its relevance (or materiality) to the decision whether or not to employ someone.

Poonen v JHI [2010] 2 BALR 209 (CCMA)

The employee in this matter had applied for a job as an accountant. He did not disclose, either at his interview with the new employer, or in his *CV*, that he had been dismissed by his previous employer. In his *CV* he stated that he had left the previous employer due to "growth and improved prospects".

The new employer only found out about his dismissal after he had commenced employment with it. When he was called upon by the new employer to explain what had happened he did not disclose that he had also subsequently been charged with a criminal offence. He indicated that there had been a dispute between him and his superior regarding a loan. The fact that he had been criminally charged only came to the new employer's knowledge when it queried the dismissal with the old employer.

The employee was dismissed for failing to disclose this information to the new employer. He challenged the fairness of the dismissal. The commissioner found the dismissal to be fair. This, because the employee should have disclosed his dismissal to the interview panel and on the basis that he should later also have disclosed the criminal charges brought against him.

Perhaps the most interesting aspect of this award is not the fact that the employee was found to have been fairly dismissed because he failed to disclose information prior to employment, but that the commissioner accepted that the duty to disclose new relevant information (in this case that criminal charges had been brought against the employee) continued after the employment relationship came into being.

The commissioner set out his views in this regard as follows

"4.3 While I am prepared to accept that the criminal charges were only laid against the employee by Pam Golding on 1 May 2009 (ie. approximately 2 weeks after the employee had been appointed as an accountant), there can be no doubt that the employee had a fiduciary duty to disclose this fact to the employer as soon as it came to his knowledge. It is trite law that an employee is obliged to immediately disclose to his/her employer any information which may affect the employment relationship. The employee admitted that he did not disclose to the employer that Pam Golding had laid fraud charges against him and I was singularly unimpressed by his claim that he wanted to 'resolve things first with (his) accuser'. The failure by the employee to immediately disclose that criminal charges had been laid against him, obviously impacts negatively on the employment relationship, and I was not at all surprised that the employer regarded this fact alone as destructive of the relationship of trust and confidence which ought to exist between an employer and an employee. (At 211B-D) "

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The validity of traditional healers' certificates

by Dawn Norton and Phumzile Dlomo

Many South African employees approach traditional healers (also referred to as sangomas) when they are sick. A report (called "Economics of the Traditional Medicine Trade in South Africa") by a company called Futureworks on the Traditional Healers Organization web site estimates that approximately 26.6 million African people (approximately 72% of Africans) consult traditional healers in South Africa. The trade in traditional medicines is worth approximately R2.9 billion annually and the industry employs some 133 000 people. The authors note that -

> *"Many customers report that they choose to use traditional healers as they feel the treatment is more holistic than western medicine. Rituals combining ancestor worship, divination and plant medicines are often part of the consultation process and it is this dual spiritual and physiological treatment that many customers appreciate…"*

Case law

Whilst the use of traditional healers is widespread amongst employees, certificates issued by these healers are seldom produced or accepted for sick leave or other purposes at the workplace; but when they are, cultural controversies can arise.

There are decisions where reference has been made to certificates issued by the traditional healers in the context of absences from work but no consistent or definitive approach as to their acceptability can be established.

In **Dlongolo v Prima Industrial Holdings (Pty) Ltd** (1994) 3 LCD 98 (IC) the employee left the employer's premises and returned to work some five months later. When he returned he produced a letter from a traditional healer which read as follows –

> *"Re: Mr Elphus Dlongolo*
> *Acting for the above I draw to your attention that:*
> ***1.****He felt ill on the 11/04/91 the sickness being failing to owing allegiance to the ancestors.*
> ***2.*** *His condition has improved to an extent that he can start his lawful duties and you will be also provided by the copy of his certificate certifying that he has been undergoing training."*

He was dismissed and the Industrial Court upheld the dismissal as fair. The case was characterised as one of desertion and the lengthy delay was deemed a fair reason for the dismissal. The Court did not find it necessary to deal with the validity of this type of certificate but did indicate that if it could, in principle, be regarded as valid, this was not the case here because the certificate concerned did not meet the substantive requirements for a medical certificate – ie it had to reflect an "opinion based on a diagnosis".

More recently, in the **Kievits Kroon Country Estate (Pty) Ltd v the CCMA and others** [2011] 3 BLLR 241 (LC) the issue of unauthorised absence and traditional certificates also came to the fore. The employee, a chef employed by the employer for a number of years, requested 1 month's unpaid leave to attend a traditional healers course. She submitted a certificate from the North West Dingaka Association which read,

> *"This serves to certify that Johannah Mmoledi was seen by me on 13/01/07 and was diagnosed to have a PERMINISIONS OF ANCESTORS…*
> *I hereby inform you of the graduation of the abovementioned patient. I am asking you to please give her days from the 4th of June to the 8th of July 2007 to complete her initiation school final ceremony to become a traditional healer."*

Her employer refused her permission, she went anyway, and after she had been absent for approximately 1 week, she was dismissed following a disciplinary enquiry.

The CCMA found the dismissal procedurally fair but substantively unfair. The Labour Court sitting as a court of review confirmed the Commissioner's award that the dismissal was substantively unfair, largely because her absence was justified. Judge Francis concluded at para 28, -

"Management is not equipped to deal with the supernatural. This is perhaps regrettable but it does not seem to me to be unreasonable or unfair for an employer in the mining industry to refuse to accept sick certificates, or indeed to recognise as good cause for absence the ailments and the treatment of its employees, of the kind described in this case."

NUM obo Kamogelo & others / Impala Platinum Ltd

> *"It was either that she heeded the calling of her ancestors or obeyed the rules of the applicant and thereafter face the wrath of her ancestors. She had decided to obey the calling of her ancestors and face the wrath of her employer."*

Although some of the evidence and argument during the arbitration may have adverted to this issue, this is not a decision that really dealt with the validity or otherwise of a certificate issued by a sangoma. The fairness of the dismissal was considered and dealt with on the basis of whether or not her absence from work could be justified on grounds other than illness.

The only decision which seems to address the issue of the validity of these certificates squarely is that in **NUM obo Kamogelo & others / Impala Platinum Ltd** [1998] 9 BALR 1210 (IMSSA) – a private arbitration. Here the arbitrator expressed the following view -

> *"This arbitration concerns a clash of cultures. Western medical science comes face to face with traditional healing. The methods of diagnosis and treatment differ completely. Powerful inherited beliefs inform the attitude and the actions of those who, like the grievants in this case, seek treatment for their ailments from a traditional healer. The technology applicable in the mining industry is of western origin and, as this case shows, it is difficult to find harmony between that technology and the methods of traditional healing.*
> *Management is not equipped to deal with the supernatural. This is perhaps regrettable but it does not seem to me to be unreasonable or unfair for an employer in the mining industry to refuse to accept sick certificates, or indeed to recognise as good cause for absence the ailments and the treatment of its employees, of the kind described in this case."*

The sick leave provisions in the BCEA

There is, of course, another context in which these certificates may be relevant, namely to justify an argument that an employee should be granted paid sick leave. Is an employer obliged to accept a traditional healers' certificate produced by an employee for purposes of paid sick leave? Expressed somewhat differently - is a certificate issued by a traditional healer considered valid for purposes of paid sick leave as contemplated in the Basic Conditions of Employment Act 1977 (the "BCEA").

The law regarding sick leave is contained in ss 22 and 23 of the BCEA. Not only do the sections provide for the number of paid sick days an employee is entitled to in a 36 month cycle, they also stipulate the circumstances in which an employer is obliged to pay for days taken off work by an employee for illness. Conversely, the section indicates the circumstances in which an employer is not obliged to pay for sick leave.

Sections 23 (1) and (2) provides that an employee must produce a medical certificate for sick leave in excess of two consecutive days or on more than two occasions during an eight-week period if requested by the employer, if the employee wants the employer to pay him or her for absence from work due to illness.

Section 23 (2) is clear that –

> *"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."*

Medical practitioners and other professionals, including dentists, psychiatrists, physiotherapists and psychologists are covered by this section. The

professional must be certified to diagnose and treat patients and must be registered with a professional council. At this point in time traditional healers do not satisfy these requirements.

Traditional Health Practitioners Acts

Attempts were made to regulate the profession of traditional healers when Parliament passed the Traditional Health Practitioners Act 35 of 2004. However this Act was challenged in the Constitutional Court by Doctors for Life International and found to be invalid. (See **Doctors for Life International v Speaker of the National Assembly & Others** (2006) 12 BCLR 1399). The reason for the finding of invalidity was that the provincial legislatures did not comply with their Constitutional obligation to facilitate public involvement in the legislative process prior to the enactment of the Act.

Some three years later Parliament passed the Traditional Health Practitioners Act 22 of 2007. Section 4 of this Act established the Interim Traditional Health Practitioners Council. This section, as well as the s 19 dealing with registration to practice, has not been brought into force and is therefore not yet operative. Once (or if) these sections commence, then employers will be required to recognise certificates from traditional healers, provided that the traditional healer has been registered with the Interim Traditional Health Practitioners Council and has complied with all other necessary formalities).

Sectoral determinations

It is worth noting that there seems to be a disparity in treatment of certain categories of employees such as contract cleaners, taxi drivers, forestry workers and farm workers covered by sectoral determinations made by the Minister of Labour – they may submit traditional healer's certificates for purposes of paid sick leave.

The following typical clause in this regard can be found in the Sectoral Determination for Forestry workers -

> *"(6) An employer is not required to pay the forestry worker in terms of this clause if the forestry worker 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 forestry worker was unable to work for the duration of the forestry worker's absence on account of sickness or injury.*
> *(7) Within the scope of their professional expertise, a medical certificate in terms of sub-clause (6) may be provided by:*
> *(a) a medical practitioner;*
> *(b) a clinic nurse practitioner;*
> *(c) a traditional healer;*
> *(d) a community health worker;*
> *(e) a psychologist;*
> *(f) 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; or*
> *(g) any other health professional authorised to diagnose medical conditions".*

Whether this type of clause will be regarded as valid on the basis that it conflicts with the BCEA itself is at least arguable.

Conclusion

In conclusion: a traditional healer's certificate is not valid for purposes of paid sick leave in terms of the BCEA, unless the employee is covered by a sectoral determination which permits the submission of such certificates. Employers may have to accept these certificates if and when the 2007 Act becomes fully operational.

But this question does raise another possibility. What is the position if the employer has, in a contract of employment, collective agreement, or a policy, indicated that it would recognise the validity of such traditional healer's certificate for certain purposes and in certain circumstances and the employer fails to do so in a specific case?

In the context of a case alleging unfair dismissal the failure to accept or recognise the certificate would be relevant in deciding the fairness or otherwise of the certificate.

In the case where a traditional healer's certificate has been tendered to justify the payment of sick leave in accordance with the contract, collective agreement, or policy, the failure to accept a certificate would, of course, not breach the BCEA but could be enforced though contractual remedies or arbitration, in the case of a breach of a collective agreement. ■

Dawn Norton and Phumzile Dlomo