

Woolworths (Pty) Ltd v CCMA and Others (JA90/22) [2024] ZALAC 29: Sick Notes

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and **Khodani Masutha** (Associate)

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INTRODUCTION

In this case, the Labour Appeal Court has highlighted that the onus of proving the fraudulent nature of a medical certificate rests on the employer.

BACKGROUND

Ms Maseko was employed by the Woolworths, the appellant, as a store specialist at the time of her dismissal. Ms Maseko submitted a medical certificate issued by Doctor Frempong in June 2018. The appellant's stores, including the one in which Ms Maseko worked, had received an email warning them about suspicious medical certificates issued by Doctor Frempong. The medical certificate received by Ms Maseko's line manager prompted the appellant to review her file and it was discovered that another medical certificate from the same doctor had been issued in March 2016. When Ms Maseko was questioned about those medical certificates, she said that the medical certificates were not from the same doctor.

An investigation was conducted, and it resulted in Ms Maseko being charged with misconduct for being in breach of company policies and procedures in submitting an irregular medical certificate on 26 June 2018 to validate her absence from work. She was said to have been dishonest when she was asked about her previous consultation with Doctor Frempong. She was found guilty and dismissed.

CCMA

Ms Maseko referred an unfair dismissal dispute the Commission for Conciliation, Mediation, and Arbitration ("CCMA"). The commissioner identified the issue before him as whether the medical certificate submitted by Ms Maseko on 26 June 2018 was irregular. He found that there was no evidence to show that Ms Maseko was not sick in March 2016 and June 2018 on days she submitted medical certificates. The commissioner concluded that medical certificates submitted by Ms Maseko to the appellant were valid and regular having been issued by a qualified and registered medical practitioner.

The certificates complied with the appellants policies and procedures and therefore, Ms Maseko's dismissal was found to be substantively unfair.

The commissioner did not entertain the appellant's submissions regarding Ms Maseko's alleged dishonesty when she was interrogated about medical certificates. (I.e., Ms Maseko had initially told the appellant that the certificates were not from the same doctor.)

LABOUR COURT

The employer approached the Labour Court to have the arbitration award reviewed and set aside. Amongst other grounds, the employer said the commissioner failed to consider the glaring and obvious dishonest version of the applicant when she alleged that she had never visited Doctor Frempong's surgery.

The Labour Court did not, however, consider the issue of the commissioner failing to consider the allegation of Ms Maseko's dishonesty. The court concluded that the decision of the commissioner was a reasonable decision which was justified by evidence that was placed before him.

LABOUR COURT APPEAL

On appeal, the appellant was adamant that the proper determination of the dispute at arbitration was the evidence of two witnesses of the appellant, namely, Mr Malaka and Ms Nkambule. Both gave evidence of untoward conduct at Doctor Frempong's medical practice in respect of the issuing and buying of sick notes. Mr Malaka also gave detailed evidence about his discussion with Zanele, an employee at Doctor Frempong's practice. Although the evidence was hearsay, it was corroborated by other evidence such as the 2016 sick note that was solely issued by Zanele yet containing Doctor Frempong's signature and the fact that Doctor Frempong's diary confirmed that he only met with Ms Maseko later in the morning and not at 07:00 as alleged.

The LAC was of the view that the appellant's approach to this was that, because of what it calls 'untoward' happenings at Doctor Frempong's medical practice in respect of the alleged but unproven issuing and buying of sick notes, Ms Maseko was not sick on 26 June 2018. Therefore, Dr Frempong's medical certificate must have been irregular.

The LAC further said *"a properly a qualified doctor, even one whose conduct may be dubious in the manner in which they conducted their medical practice and sick notes to their patients, must result in all the employees who may genuinely be sick, who may not even be aware of the doctors unconventional methods and the alleged dealings of sick notes subjected to a disciplinary process for using that doctor. This would be regardless of the employee's unawareness of the irregularities or illegal activities which may very well be taking place as the selling of sick notes"*.

CONCLUSION

The LAC said that the idea that an employee who happens to go to a doctor who is not trusted by an employer must be subjected to a disciplinary process for using that doctor is troubling and further said that the employer should investigate their suspicions about the contraventions of the standard operating procedures by that doctor.

The LAC dismissed the appellant's case stating that the commissioner considered and correctly rejected the appellant's witness' evidence which gave insight of what was happening within Doctor Frempong's practice. The LAC found that the appellant failed to discharge the onus of establishing that the commissioner committed a misconduct in relation to his duties as an arbitrator, a gross irregularity in the conduct of the arbitration proceedings or exceeded his powers.

CONCLUDING REMARKS

This decision makes the point that an employer cannot simply subject an employee, who submits an untrustworthy or dubious sick note, to a disciplinary hearing, merely due to the employer's suspicion about that certificate, the doctor or the person issuing the medical certificate.

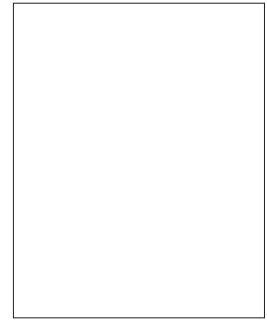
The employer will have to show that the medical certificate was in fact fraudulent, and that the employee knew that this was the case. The LAC has highlighted that the onus of proving the fraudulent nature of a medical certificate rests on the employer.

It is noteworthy for employers that the LAC did not accept the appellant's argument regarding Ms Maseko's alleged dishonesty about her previous sick note from Doctor Frempong's practice.

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