

# Employment Law update



## Desertion- who decides?

Employers are often confused as to when employees are deemed to have deserted the workplace. Should employers wait a mandatory number of days before declaring an employee a deserter? Are there any obligations on the employer to discharge the onus of proving the employee's desertion? Well, the Labour Court has answered these questions and more in *Glencore (Pty) Ltd v and Others*.

The facts in this case are that the employee was dismissed after his absence from work between 30 June 2013 and 16 July 2013. Upon the employee's return, medical certificates were produced to justify his absence however; the employer proceeded with his dismissal and based same on the violation of clause 4.4 of its Disciplinary Policy and Procedure ("**Policy**"), in terms of which an employee is deemed to have deserted the workplace after six consecutive shifts/days of not reporting the absence or notifying a supervisor of their reasons. The Labour Court held that the arbitrator misconceived the core issue in his determination of the dispute when he ruled that the employee's dismissal was unfair.

The Labour Court found that the following facts were unavoidable in its evaluation of the matter:

1. Prior to the employee's absence, the employee had applied for leave which the employer had denied due to its operational requirements;
2. The employee alleged that he did not have his supervisor's contact details and that he had given a colleague the message that he was ill, to pass on to his supervisor on his behalf however, the employer emphatically denied receiving any message to this effect; and
3. The medical certificates did not account for the employee's absence during 4-7 and 12-15 July 2013.

The Court went on to emphasise that the arbitrator inaccurately established his ruling on the fact that employees are entitled to sick leave in terms of the Basic Conditions of Employment Act ("BCEA") and the legality of the employer's interpretation of its Policy. The issue the Court found was whether or not the employee met the conditions of clause 4.4 of the employer's Policy. The Court went on to say, "*in circumstances where an employer in terms of its own disciplinary code/policy and procedure is permitted to deem an employee to have deserted after a certain period, there is no requirement for that employer to establish an intention to desert on the part of the employee.*"

Another important consideration held by the Court is that, "...where it was held that an employer who has the means of communicating with the absent employee must do so. It is my view that even if there is such a requirement or obligations on the employer, it does not absolve that employee of

*his/her obligations to contact the employer, especially where the company policy explicitly so requires.”* The court found that the employee did not act in accordance with the employer’s Policy. His efforts were insufficient in trying to inform his supervisor about his absence and further, his attempts to fax his medical certificate failed and he never tried to confirm if the employer received same.

From this judgment it is evident that an explicit, fair and clearly defined Disciplinary Policy is imperative for an employer. It is the very same policy that the parties shall bound by in most labour disputes and should it fall short, the employer may be exposed to significant and unnecessary risk.

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