JUTA AND COMPANY (PTY) LTD

Juta Covid-19

Talking Points

Issue 10

Unlocking the workplace – SAFETY FIRST

John Grogan and Avinash Govindjee

To date, the Covid-19 onslaught has killed more than a million people and nobody knows how many more deaths will follow. The death toll in South Africa is so far relatively modest. But like elsewhere in the world, efforts to curb the pandemic have caused psychological distress and economic devastation. This is hardly surprising since large sections of the economy have been shut down here for nearly two months. Relaxation had to follow. As in other counties, many workers who have been locked in their homes are now returning to workplaces as South Africa gropes from Alert Level 5 towards 3. While many will welcome this 'relaxation', to thousands it will be cold comfort – they either have no jobs to return to or they will now receive 'section 189(3)' notices telling them that their employers no longer need them. But for the remainder, a return to work will entail a physical danger they have never faced before.

To minimise the spread of the Coronavirus in newly opened workplaces, the Minister of Employment and Labour has put a large part of the burden on employers. Acting in terms of regulations issued under the Disaster Management Act regulations, he has issued a directive setting out measures employers must take to protect their workers' health and safety as well as that of members of the public exposed to workplace activities. This directive supplements the provisions of the Occupational Health and Safety Act 85 of 1993 (OHSA) (which has always required health and safety measures that are 'reasonably practicable') and Risk Assessment Guidelines issued by the Department of Health, modelled on best practices in the mining sector.

The directives require a range of measures to be taken by all employers, large and small. These include Covid-19 risk assessments before operations resume, and the appointment of a manager to deal with workers' concerns. The number of workers at the workplace at any given time must be reduced as far as possible by shift rotation, staggered working hours, remote working arrangements and the like. Social distancing must be enforced and barriers set up where work stations are closer than one-and- a-half metres apart. Symptom screening and sanitation measures are also prescribed and employers must provide a minimum of two cloth masks to employees to wear at work. OHSA inspectors are empowered to monitor and enforce the Directives, and contraventions may be met with punishment in terms of OHSA, including possible fines up to R100 000 and/or imprisonment for as long as two years.

Unions and workers have already expressed concern that some employers are not doing their bit. If workers have grounds for concern, they have a number of options. The first is to refuse to work. Whether employers may discipline and ultimately dismiss workers who won't work for fear of their safety, and if so how, is an open question and depends on the facts (see *Pikitup (Soc) Ltd v SAMWU and Others* [2014] 3 BLLR 217 (LC)). Before the lockdown, the Labour Court

held that ambulance drivers could not strike because they feared being attacked. But now things have changed: it seems safe to say that employers cannot ignore their workers' health and safety concerns. Living in fear of contracting a contagious disease that has infected millions raises health and safety concerns to a new level, in spite of what the court may have said in *City of Johannesburg v Democratic Municipal and Allied Workers of SA and Others* [2019] ZALCJHB 370 (14 November 2019).

What may employers do if their workers won't work? According to prevailing law, they may pursue insubordination or absenteeism charges against employees who unreasonably refuse to work if the employer has taken reasonable steps to comply with the regulations. But in these unique times, prudence calls for patience. Before disciplinary action is taken, reluctant employees should be reasoned with and counselled. Dismissals of these employees are certain to end up before an arbitrator as cases concerning either misconduct or incapacity. Employees may find it difficult to convince arbitrators that their fear of contracting Covid-19 is so intense that it amounts to incapacity, properly construed. Even if they are able to do so, a fair dismissal based on incapacity might follow. In *UASA obo Nel / General Motors of SA* [2010] 7 BALR 777 (CCMA), for example, an arbitrator found that an employee's fear of vertigo was so intense that dismissal was justified because the job required working at heights, and no viable alternative work was available. (Also see *NUMSA obo Magagula / Aveng Trident Steel (Pty) Ltd* [2015] 12 BALR 1284 (MEIBC)).

The position would change if the employer has not complied with mandatory health and safety practices. This might found claims for constructive dismissal or even damages claims from customers based on vicarious liability. In extreme cases, workers might embark on protected strike action if they collectively refuse to work because demands for safer working conditions are not satisfied (see the *City of Johannesburg* case). These are just some of the cases among the many that will certainly be referred for arbitration or adjudication during coming stages of the lockdown or afterwards.

Thousands of other people face a danger not catered for in the regulations: malnutrition. For these people, the government has provided for a paltry R350 per month of social relief, for which about three million people applied in the first three days after it became available. With business rescue applications and retrenchments mounting inexorably, official predictions are that three to seven million more workers will be unemployed due to the pandemic. Workers who keep their jobs may consider themselves lucky, however risky returning to work may be.

John Grogan is an Advocate and well-known writer on labour law.

Avinash Govindjee is Dean of Law, Nelson Mandela University and consultant to Cliffe Dekker Hofmeyr Inc.