

On the CCMA vaccination dismissal ruling: Employers should be cautious in celebrating the outcome of Goldrush

By [Lucinda Hinxman](#), issued by [Irvine Partners](#)

28 Mar 2022

The recent CCMA ruling that looked at the fairness of a dismissal of an employee refusing to vaccinate, the first of such cases, has sparked a growing and interesting debate regarding the ways in which employee-vaccination-related dismissals could be handled within corporate South Africa.



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In the matter of [Theresa Mulderij v Goldrush Group \(GAJB24054-21\)](#) which was in front of the CCMA in January this year, the dispute resolution body ruled in favour of the dismissal of the employee for refusing to be vaccinated. This ruling sparked debates and may have bolstered many companies' policymaking around vaccination. It is, therefore, crucial to ask, what happens next?

It is important to understand that while indicative of how these matters are likely to be dealt with by the CCMA, a CCMA award is only binding on the parties involved. This means that a ruling cannot essentially be applied automatically across matters of similar nature simply because of this one case. The CCMA is a creature of statute, which means that it only derives and is limited to the powers conferred on it in terms of the Labour Relations Act 66 of 1995. It is only once these matters go through our

courts that the law in relation to these vaccination dismissals will be developed and will create a binding precedent for future CCMA awards and/or court judgments to follow.

How do we get there?

Once an award or ruling has been issued by the CCMA either party can take the award on review to the Labour Court if they are dissatisfied with the outcome. A review is different from an appeal. In an appeal, the court must assess whether the decision is right or wrong. However, in a review, the court must decide whether, on the evidence available to the arbitrator, the commissioner came to a reasonable decision. This means that the court does not decide, as in an appeal, whether the decision is right or wrong.

Once the Labour Court has determined the review and handed down its judgment, the next step would be for either party to take the matter on appeal to the Labour Appeal Court. If the matter is heard by the Labour Appeal Court, it will need to decide whether the Labour Court's judgment was right or wrong.

The last and final chance to challenge a CCMA Award, following a judgment by the Labour Appeal Court, is to take the matter on appeal to the Constitutional Court, should the Constitutional Court grant leave to do so.

Taking the above into account, and the long road which still lies ahead of us before we will have clarity on how these vaccination dismissals will be treated by our courts, employers should be cautious in celebrating the outcome of Goldrush. It is also important to bear in mind that, as the jurisprudence develops, it is unlikely that a blanket approach will be accepted by our courts and each matter will need to be determined on its own merits. The key to these disputes remains the nature of the employer's business and, more importantly, the nature of the employee's position.

In an attempt to wait out the dismissal position from our courts, we have seen employers opt to place employees on suspension for refusing to be vaccinated. This issue was recently determined by the CCMA as well, in [Kok v Ndaka Security and Services \(FSWK2448-21\)](#). In this matter, the employee, employed as a Safety Practitioner, referred an unfair

labour practice relating to suspension to the CCMA. The employee, having refused to be vaccinated, was placed on suspension and instructed only to return to work once he had been vaccinated, or upon submission of a weekly Covid-19 test result (at his own cost). Given that the employee rendered services at a Sasol site (which required a 100% vaccination rate), the employee was unable to attend at the site. The principle of “no work no pay” was applied.

The CCMA went on to find, amongst other things, that the requirement for employees to be vaccinated was a “reasonable practical step” to ensure a healthy and safe workplace as required in terms of the Occupational Health and Safety Act 85 of 1993 (“OHSA”) and that the employer had a clear commercial rationale for requiring vaccination and imposing the suspension. Consequently, the CCMA found the suspension to be fair.

While many employers are navigating whether or not to impose a mandatory vaccination policy on their employees, it is important for employers to remember that it is not compulsory to implement a mandatory vaccination policy in order for employees to be required to return to work. The main legal requirement imposed on an employer in terms of OHSA is for employers to ensure that they take reasonable steps to provide a safe and healthy workplace and comply with the Covid-19 protocols set out in the Covid-19 Regulations, issued by the Minister of the Department of Employment and Labour.

For those employers who have elected to implement a mandatory vaccination policy, a cautious approach should be adopted until we have clarity from the Labour Court and those beyond it, before contemplating dismissing employees for refusing to be vaccinated.

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