Moonlighting – your side hustle can cost you yourjob

The duty of good faith and the implications of moonlighting for employees was underscored in a recent Labour Court judgment. The court emphasised the necessity of proactive disclosure to employers, affirming that moonlighting, without prior approval, constitutes a breach of fiduciary duties and undermines the employer's prerogative to make informed decisions.

The Labour Appeal Court (LAC) previously cemented the importance of the duty of good faith that employees owe their employers. The LAC confirmed that employees have a duty to inform their employers of any potential conflict of interest, including their involvement in any side businesses that may be in conflict with the business of their employers. Read our insights on the LAC judgment.

The Labour Court recently **[**in the matter of *Vilakazi v CCMA and others* (JR164/20) [2023] ZALCJHB 319 (3 November 2023)**]**considered the principles relating to conflict of interest in the context of *moonlighting*. In this instance, the employee was employed by the University of Witwatersrand (the University) in its business school division, initially as a part-time lecturer. The employee was also employed at Alexander Forbes on a part-time basis but later resigned from Alexander Forbes to take up full-time employment with the University. The employee thereafter also immediately took up full-time employment with Kantar South Africa (Pty) Limited (Kantar). The employee's working hours at the University were in accordance with the Basic Conditions of Employment Act and her working hours at Kantar were office hours, Monday to Friday, at least 37,5 hours per week.

The University's Declaration of Interests policy (the policy) specifically defines "*conflict of interest*",

"*financial interest*" and "*moonlighting*". The policy also outlines that employees are required to declare their interests by completing and submitting a form to the relevant human resources manager on 28 February every year. The form would in turn be submitted to the Vice Chancellor's office for consideration. The Vice Chancellor would then have the discretion to allow or not allow any conflict of interest disclosed. The policy also provides that involvement in any external institutional affairs, including moonlighting, must be approved by the Vice-Chancellor's office.

The employee did not disclose to the office of the Vice-Chancellor at the University her intention to take up full-time employment with Kantar. Her extra-curricular activities were however discovered by the University, and she was notified to attend a disciplinary inquiry, where she faced a charge of gross misconduct. She was found guilty of the charge and dismissed by the University. The employee thereafter challenged her dismissal at the Commission for Conciliation, Mediation and Arbitration (CCMA). The CCMA found against the employee and held that her dismissal was substantively fair. The employee then launched a review application at the Labour Court.

At the Labour Court, the employee argued, based on her subjective assessment, that she could manage the two positions. Moreover, that she did not think it would prejudice the University and she saw no conflict of interest. The Labour Court held that objectively a conflict of interest or at least a very real risk of a conflict of interest to the prejudice or potential prejudice of the University existed. Upon assessing the employee's obligations to her respective employers, the Labour Court remarked that the employee would need to show "*superhuman abilities*" to discharge her obligations under both contracts, which was not "*humanly possible*". The Labour Court also found that the fact that the employee was paid more at Kantar than at the University, placed her loyalties toward the University in question – should there be a case where both employers require specific work to be performed at the same time.

Even in the absence of the policy, the employee was obliged in terms of her fiduciary duties owed to the University, as her employer under her contract of employment, to report her intentions and seek approval from the office of the Vice-Chancellor before even taking up employment with Kantar.

The Labour Court therefore found against the employee and that her conduct amounted to moonlighting. The Labour Court held that moonlighting as a matter of principle is unacceptable, and a breach of an employee's fiduciary duties towards the employer. It must always be the sole prerogative of an employer to decide whether to allow this to take place, and also on what terms it may be allowed. Nothing can be assumed by the employee. That is why full disclosure must be made by the employee to the employer beforehand, so the employer can exercise its prerogative in an informed manner. To disclose to an employer after the fact effectively confronts the employer with a *fait accompli* and cannot undo the breach of the duty of good faith that has already taken place.