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Research Report on

THE ENFORCEMENT OF MANDATORY WORKPLACE POLICIES WHICH ARE NOT INCLUDED IN THE CONTRACT OF EMPLOYMENT

by

STUDENT NUMBER

2623933

Submitted in partial fulfilment of the requirements for the degree of

Master of Laws by Coursework and Research Report

at the University of the Witwatersrand, Johannesburg

Date: 24 March 2025

DECLARATION

I, (Student number, **2623933** declare that this Research Report is my unaided work. It is submitted in partial fulfilment of the requirements for the degree of Master of Laws (by Coursework and Research Report) at the University of the Witwatersrand, Johannesburg. It has not been submitted before for any degree or examination in this or any other university.

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Abstract

The Research Report attempts to contribute to the existing legal framework by providing practical guidelines and solutions for employers on how to enforce mandatory workplace policies that are not included in the employment contract, in a manner that will mitigate non-compliance or challenges to the policy.

It is common practice that employers develop and implement mandatory workplace policies mostly to regulate and guide the conduct of employees under the circumstances where such policies apply.

Sometimes, mandatory policies are challenged by employees who refuse to comply for various reasons. The issue is that there is no legislative precedent to guide employers with uniform authority on whether a mandatory policy can be implemented and how it should be enforced. Equally, there is no legislative precedent on how to mitigate or resolve problems and challenges of non-compliance to mandatory policy.

The Research Report uses a literature review in attempting to guide employers by providing an analysis of the procedural steps to be followed when implementing and enforcing a policy, the rights and obligations of parties to comply with a mandatory policy once enforced, the legal position relating to such a policy and, the consequences of non-compliance.

The Research Report concludes that employers can implement and enforce mandatory policies under the current legal framework and, once a workplace policy is enforced, that policy is elevated to the same level as an agreement or contract, therefore, any conduct of non-compliance with such a workplace policy is misconduct and unlawful.

KEYWORDS

Bill of Rights.

Code of Good Practice.

Collective Bargaining.

Constitution.

Consultation.

Contract.

Employment.

Employer.

Employee.

Enforcement.

Implementation.

International Labour Organisation.

Labour Relations Act.

Mandatory.

Organisation.

Policy.

Stakeholders.

Trade Union.

Workplace.

Worker.

ABBREVIATIONS AND/OR ACRONYMS

BCEA - Basic Conditions of Employment Act 75 of 1997.

CC - Constitutional Court of South Africa.

CCMA - Commission for Conciliation, Mediation & Arbitration.

COVID-19 - Corona virus.

EEA - Employment Equity Act 55 of 1998.

ILO - International Labour Organisation.

LAC - Labour Appeal Court.

LC - Labour Court.

LRA - Labour Relations Act 66 of 1996.

LRAA - Labour Relations Amendment Act 6 of 2014.

OHSA - Occupational Health and Safety Act 85 of 1993.

PAJA - Promotion of Administrative Justice Act, 2000.

WHO - World Health Organisation

Chapter 1

1. Introduction

1.1 Background

Every organisation has some kind of policy and procedures which define a set of parameters by which employees and managers are expected to conduct themselves.

The practice of implementing and enforcing mandatory workplace policies has been around for many years in South Africa as policies are usually implemented to control or guide the conduct of employees and everyone who engages in the workplace to address a particular identifiable problem.

However, just like any other workplace-related grievances, sometimes a policy may be challenged by employees who refuse to support and adhere to it.

Example: During the 2019 COVID pandemic, several employers, businesses, and institutions enforced mandatory vaccine policies to combat the spread of the pandemic. Some employers who enforced the mandatory vaccine policies on their employees were challenged by employees who refused to comply or observe the mandatory vaccine policies on the basis that the vaccine policy violated one or more of the employee's pre-existing rights.

As more and more workplace policy-related grievances were reported, some disputes were argued at the CCMA and Courts. It became apparent that under the South African legal framework, there was no established precedent, case law or legislation to be used as authority or guidance on the uniform manner to develop, implement, and enforce mandatory workplace policies in response to these mandatory policy challenges.

There is no uniformity in how employers implement and enforce workplace policies and no uniformity in the consequences of non-compliance or, dealing with employees who refuse to comply with mandatory workplace policies because, some employers opted to dismiss employees from their employment for failing to comply with the mandatory vaccine policies, whilst other employees were refused entry to certain buildings, shops and schools for failing to produce a vaccine certificate or proof of compliance with the mandatory policy.

Even though the practice of implementing workplace policies has been in existence for many years before the pandemic. The challenges to mandatory vaccine policies highlighted several questions for academics, regarding the rights of the employer versus the rights of the employee and the rights of a minority employee who opposes the policy versus the rights of majority employees whom the employer must protect by implementing a workplace policy.

Usually, a workplace has officials tasked with specific duties and responsibilities during an emergency. An issue which may contribute to the policy noncompliance is that employees do not always stay in the same jobs, positions, or responsibilities for their entire working careers. Sometimes they are promoted, transferred, and some retire or are removed from the workplace for various reasons.

When employee change happens, new employees are often expected to take over roles and responsibilities, but the policies and procedures are not updated to reflect these changes. This omission is a contributory issue for policy compliance and implementation.

Noncompliance with a workplace policy can compromise health, safety and security matters, which can result in injuries, death or very serious consequences. It may not only be life and death issues where a workplace can suffer from not properly updating their policy and procedure. Every area of the business may likely be affected, which can damage the organization’s reputation.

The CCMA and Courts have so far dealt with the challenges to mandatory policies on a case-by-case basis depending on the merits of each case without prescribing the applicable law or principles and, without restricting the application of the legal framework to a blanket approach or, an established precedent.

Therefore, questions regarding the enforcement of mandatory workplace policies remain unclear and unanswered because there is no definitive principal answer, or, at least at the time of writing this Research Report, there was none.

1.2 Significance of the study

There is a loophole or *lacunae* in the current legal framework when resolving issues of mandatory policies and establishing applicable legal principles. There is no legislative manual or guide which employers can consult on how to enforce mandatory policies which are not included in the contract of employment.

The Research Report attempts to fill that gap by recommending practical guidelines by analysing the current legal framework and recommendations of other scholars and case law to come up with all-inclusive consultative procedures to be followed when developing, implementing and enforcing workplace policies to achieve a solution-oriented uniformity regarding the duties and obligations of parties once a policy has been implemented and to mitigate non-compliance with the policy.

The recommended processes will assist in providing resolutions to the problems and difficulties which some employers are confronted with regarding the uncertainty of the lawfulness of enforcement of a mandatory workplace policy and potential consequences under the Labour Relations Act.

While policy implementation may be an established practice, the Research Report will assist when mandatory policies are challenged by employees on various grounds, citing violations of any of the rights protected under the Bill of Rights in the Constitution and violations of contractual rights in terms of any pre-existing contractual relationship between the parties.

It is important to note that, if any challenge to a workplace policy is not properly resolved or addressed, it will defeat the whole purpose and objective of the policy which by its very nature is intended to control or guide the conduct of employees.

Employees are likely to resist or reject any mandatory or forced changes to their employment conditions unless they feel that they are given the assurance that the mandatory changes will be mutually beneficial to their conditions of employment.

The Research Report will highlight the importance of having an all-inclusive policy-making relation, involving all stakeholders and parties who could be affected by the policy.

The Research Report's examination and analysis are not confined to one type of policy and, it is not limited to vaccine policies. It attempts to examine the enforcement of any mandatory workplace policies in general without being specific to one type.

Before an employer decides to develop, implement and enforce a workplace policy, there are several questions the employer needs to address, such as the reason, purpose, objective and, intention of the policy. Who are the parties who will be involved and the parties who will potentially be affected by the policy? The rights and obligations of those parties?

Equally, once a mandatory policy has been implemented, it creates certain obligations for all parties concerned. The Research Report will analyse the obligations and duties of both the employer and employee, the status of the mandatory policy on whether it replaces the prior existing contractual arrangements.

1.3 Research Question

The Research Report aims to answer the question of whether an employer can enforce mandatory workplace policies which are not included in the contract of employment.

In answering this question, the Research Report will seek to answer the following secondary questions:

What is the function of a workplace policy?

What is the legal position where a mandatory policy creates a potential direct, or indirect conflict with one of the rights in Constitution 108 of 1996?

What are the duties of employers and employees during the development and enforcement of a policy?

What are the consequences of non-compliance with a mandatory workplace policy?

1.4 Literature Review

1.4.1 What is the function of a workplace Policy?

A workplace policy can be described as a proclamation which supports how human resources management will control or respond to challenging issues in the workplace.

It is a mechanism which leads, controls, and bears values of expectations on employee conduct and performance. [1]

A policy in the workplace can be any mandate or, guideline prescribing expected applicable act or best practices. A policy that an employer effect must support the administrative objectives and workplace principles they wish to create. [2]

The type and extent of a policy and procedure should be tailored to fit and address the size and unique circumstances, including the organisational culture and business practice needs of the organisation.[3]

It should take the form of a written statement which records an organisation's practices and procedures concerning part of its business practice, which can give guidance on day-to-day operational requirements to comply with employment legislation.[4]

It may be a record of resolution and clear standard(s) on behaviour to be supported or implemented to reach that resolution. The declaration of intention must be recorded in simple language, free of complex terminology. The volume of the policy will differ according to the content of the challenges it aims to address. [5]

Policies can be implemented for various reasons, depending on the issues and problems the employer needs to tackle. Some examples of regular policies and practices in an organisation could be, health and safety policy, anti-discrimination and harassment policy, grievance handling policy, discipline, and termination policy. [6]

Operation of mandatory policy requirements may be perceived to affect and conflict with pre-existing contracts between employers and workers because of the prohibition of certain conduct or a limitation of existing provisions in a contract. [7] This is because

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[1] State of New South Wales through NSW Industrial Relations. *https://www.industrialrelations.nsw.gov.au/employers/nsw-employer-best-practice/workplace-policies-and-procedures-checklist/* (Accessed 14 July 2023). See also NSW Department of Commerce. *https://thepeopleindairy.org.au/wp-content/uploads/2019/02/workplace_policies_procedures_v1.pdf* (Accessed 22 March 2024).

[2] Indeed, Career guide. *https://www.indeed.com/career-advice/career-development/workplace-policy-examples#:~:text=A%20 workplace%20policy%20is%20 any, or%20customer%20 interactions%20and%20 hiring* (Accessed 10 July 2023)

[3] Davidson, M Workplace Policies Advice for HR. *https://www.davidsonmorris.com/workplace-policies/* (Accessed 12 March 2024) See also, M van Staden & M van Eck *'Is Retirement Age a Moving Target? A Review of Recent Jurisprudence'* (2021) 42 ILJ 2099 at 2099-2115.

[4] The Team, Employment Hero (2021) *https://employmenthero.com/blog/what-is-a-workplace-policy/* (Accessed 12 March 2024). See also Law Insider. *https://www.lawinsider.com/dictionary/workplace-policy* (Accessed 22 March 2024)

[6] NeoGov. PowerDMS.(2020) *https://www.powerdms.com/policy-learning-center/10-workplace-policies-your-organization-needs* (Accessed 22 March 2024)

[7] Schafer, K University of Cape Town Thesis in Doctor of Laws on page 4 Footnote 17. "Hartley, CF (1979) 4 ELR, 236, 237." *https://open.uct.ac.za/bitstream/11427/11036/1/thesis_law_2002_schafer_kas.pdf&tbm=ilp&sa=X&ved=2ahUKEwi-msPU0OuDAxX-licCHZy0AN0Qv5AHegQIABAF* (Accessed 17 July 2023)

mandatory policies are binding and do not allow any deviation unless there is an exception agreed upon. [8]

1.4.2 The legal position where policy creates a potential direct, or indirect conflict with one of the rights in Constitution 108 of 1996

The intention of a policy must be to safeguard the rights in chapter 2, of the Constitution, particularly, the Bill of Rights. [9] The Constitution is direct by stipulating that these rights may not be limited unless such limitation is done under the law of general application, in compliance with the requirements listed in Section 36, to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, considering all relevant factors.

These rights must be guarded, upheld, followed, and asserted with no limitation to the worker's rights. Employers also have rights at work. Hence, the inclusion of the limitation clause in Section 36 of the Constitution.

The Constitution Act 108 of 1996 is the highest law. All employment regulations, policies and rules in South Africa must comply with the Constitutional framework. The employer and policy drafters should aim to consider as inclusive as possible, all the listed protected rights in the Bill of Rights, Chapter 2 of the Constitution.

Any limitation of any of the listed rights must be done in terms of Section 36 under the law of general application only to the extent that it is fair, justifiable, and reasonable.

The Constitution regulates legislation, not the conduct of parties. [10] Some of the socio-economic rights under the Constitution include the right to fair labour practices stipulated in Section 23. [11]

Section 23 applies to employer organisations, employees, and employers because it would be an extraordinary interpretation of the text to limit the scope of this section to Government action only. [12]

Section 23(1) of the Constitution stipulates everyone has a right to fair labour practice. A workplace offers rights and obligations to both the worker and the employer. The

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[8] Ibid, 7 Footnote 18. "Lipstein, CF. *Offentliches Recht* 39,42,43."

[9] The Constitution 108 of 1996. Section 36.

[10] Le Roux, R. University of Cape Town Thesis in Doctor of Philosophy on Page 122 Footnote 80 "Davis, HD and Haysom, N (eds) South African Constitutional Law: The Bill of Rights 2ed (2005) at 3 to 1, 3 to 26, and at 3 to11, 3 to14." *https://open.uct.ac.za/server/api/core/bitstreams/51ce7c7a-a44a-4865-a52e-a66a97b5e6f0/content* (Accessed 1 August 2023).

[11] The Constitution 108 of 1996. Section 23.

[12] Ibid, 10. Page 123 Footnote 86 "Cheadle, Davis D and Haysom, N (eds) South African Constitutional Law: The Bill of Rights 2ed (2005) at 18 to 1, 18 to 38 at 18 to 7."

rights are listed and protected by the Constitution, one of the rights is the right to fair labour practice which must be upheld.

This was highlighted in the *Mans v Mondi Kraft* [13] case, where the court pronounced that the right to fair labour practices is preserved in the Constitution which protects both the employer and employee irrespective of the type of employment, and work industry, regardless of whether the person qualifies to be an employee according to the legal definition.

1.4.3 What are the duties of employers and employees during the development and enforcement of a policy

The process commences with the identification of a crisis in the workplace and, the source of the crisis to be identified and classified accurately. This step is crucial because the planned policy must address and or resolve the source of the crisis and its consequences.[14]

A risk assessment will be necessary If the employer decides to proceed with a mandatory workplace policy. This process involves a critical review of the organisation to establish whether the mandatory workplace policy to be implemented will address the issue which the employer is trying to resolve.

Employers must also consider any pre-existing and current policies to determine if there is an option to amend existing policies instead of creating new ones. The assessment of risk must be conducted through a process of consultation with all relevant stakeholders which includes employees, Trade Unions, health, and safety representatives and or the health, traditional leaders, religious leaders, and safety committee. [15]

After the crisis and source(s) have been identified. The employer should engage in the next process, which is consultations. All possible stakeholders should be engaged to identify as much as possible, all potential sources creating a crisis and, to consider all-inclusive suggested solutions to the identified crisis.

1.4.4 Consequences of non-compliance with a mandatory workplace policy

Section 8(1) of the Occupational Health and Safety Act 85 of 1993 [16] places an obligation on employers to implement satisfactory safety measures to provide and

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[13] Mathe, M. University of Western Cape. Thesis in Master of Laws Page 17 Footnote 60 *"Mans v Mondi Kraft* 2000 ILJ 213 (LC)." *https://etd.uwc.ac.za/bitstream/handle/11394/8141/mathe_m_law_2020.pdf?sequence=5&isAllowed=y* (Accessed 15 May 2023).

[14] *https://diversity.iu.edu/doc/anti-racist/resources-articles-lit/How%20to%20Develop%20Policies%20and%20Procedures%20%20DIY%20Committee%20Guide.pdf* (Accessed 22 March 2024).

[15] Reed, J. (2021). *https://www.engineeringnews.co.za/article/guide-to-implementing-a-mandatory-vaccination-policy-in-the-workplace-2021-12-08* (Accessed 15 March 2024)

[16] Occupational Health and Safety Act 85 of 1993. Section 8(1).

keep as much as possible, harmless, and healthy work circumstances for all employees.

Section 8(2) of the OHS Act, directs employers to apply rational and preventive steps to remove or, alleviate any danger or potential threat to the well-being or health of workers or, any person who could be affected by organizational trade activities to the effect that they are not unprotected from health danger or protection.

The circumstances of the organisation and the crisis which the employer needs to address by implementing a policy will dictate as there may be circumstances where an employer may need to consider mandatory policies other than the proper law. The implementation will depend on a special choice of law rules, offering for the implementation of mandatory policies other than the proper law.[17]

On the employer's side, protection of these rules and guidelines is crucial to limit or resolve an identified crisis, consequently, such mandatory requirements are implemented in the organisation notwithstanding the law which regulates the employment contract in terms of the 'normal' choice of law rules. They are exceptions to the usual choice of law rules. [18]

When developing and implementing a mandatory policy. The employer must allow conditional exceptions for employees with justified reasons such as health, religion, culture etc or other concerns beyond their control, which renders the employees incapable of complying with the policy to be exempt. [19]

On presentation of reasonable and justifiable circumstances, the mandatory policy should allow provision for the employer to exercise reasonable means to accommodate identified workers in a suitable alternative situation that does not necessitate them to comply with the mandatory policy. Example: The COVID-19 vaccine mandate policy.

Consequently, the exemption of workers from compliance with the mandatory policy must not be to the disadvantage of other employees because Section 8 of the Occupational Health and Safety Act 85 of 1993 places an obligation on the employer to eradicate or, lessen any danger or potential danger to the protection or well-being of employees or anyone who might be affected by the employer's organisational activities, that they are not exposed to a health threat or dangers.

Employers should also be careful not to apply drastic actions against workers who have justifiable reasons for not complying with the mandatory workplace policy because, such drastic actions may be found to be unfair for an employer to dismiss

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[17] Arts 3 (3), 5 (2) and 6 (1) of the Rome Convention. *https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX%3A41998A0126%2802%29* (Accessed 2 June 2023).

[18] Fredericks, E. University of Johannesburg. "Philip Provisions 241, 242, *Dicey & Morris Conflict of Laws Vo1* 12I, 23, CF the article of Hartley Rec des Course 266 (1997) 345 et seq" *https://obiter.mandela.ac.za/article/download/10546/15994/65350&tbm=ilp&sa=X&ved=2ahUKEwjYksmJ3-uDAxWFW6QEHZ0mBOAQv5AHegQIABAE* (Accessed 14 March 2023).

[19] *Theresa Mulderij vs Goldrush Group* GAJB24054-21. *https://www.saflii.org/za/cases/ZACCMA/2022/1.pdf* (Accessed 5 June 2023).

workers who have demonstrated that they cannot comply with the policy due to certain justified circumstances, like, legitimate and valid medical grounds.

At the same time the responsibility to accommodate workers who cannot comply with a policy on justifiable grounds should be cautiously evaluated bearing in mind the merits and circumstances of each case, dependent also on whether in the organisational environment, it would be possible to accommodate such a person.

Only after careful deliberation of all appropriate factors, if the employer demonstrates that it is unable to reasonably provide suitable alternative accommodation to an employee, for example, an unvaccinated employee. The dismissal of such an employee under those circumstances may be substantively fair, just, and equitable under the Code of Practice [20] and Section 8 OHS Act.

1.5 Research Methodology

The research report uses a qualitative approach aimed at desktop research. It evaluates applicable literature recorded in published journals, newspaper articles, books, academic thesis, and online sources.

The gap for further research on this subject matter has been narrowed, however, due to the uncommon research methods, approach and findings by different case studies, and the lack of established legislative precedent experienced during the COVID-19 pandemic when challenges were brought against mandatory vaccine policies, there is always a need for further research.

In this context, the Research Report attempts to assess, the ideas and opinions of various scholars and researchers regarding the competing rights of individual employees against the enforcement of a mandatory workplace policy.

A qualitative approach will be useful in this research considering the availability of existing research and case law which deal with the conflicts and disputes of rights involving the enforcement of mandatory policies. The Research Report however does not aim to repeat what other scholars have already concluded. The attempt is to collate existing literature to support a narrative and conclusion that consultative collective bargaining is the most practical approach to develop and implement mandatory policies which are not included in the contract of employment in the workplace.

Detailed knowledge will be gained through the experiences of similar cases which will serve as a guidance on the implementation and enforcement of mandatory workplace policies.

[20] Code of Good Practice.

1.6 Ethical Considerations

Every source used in this Research Report is acknowledged in a scholarly fashion for conducting research, there are no ethical considerations in this kind of desktop study. The research methodology will not involve any interviews; therefore, the Research Report will be based on desktop research.

1.7 Chapter outline

Chapter 1 - Introduction

The chapter outlines the significance of the study, and the method research is conducted. Furthermore, it provides an account of existing research regarding the issue of enforcement of mandatory workplace policies which are not included in the contract of employment.

Chapter 2

This chapter seeks to analyse the practical guideline measures, steps, processes, and stages an employer should undertake to effectively develop and implement a mandatory workplace policy.

Chapter 3

The Research Report attempts to analyze the obligations of the parties to mitigate or eliminate noncompliance with mandatory workplace policies.

Chapter 4

In this chapter the research Report gives its conclusion and recommendations

Chapter 2

Analysis of different steps and stages of policymaking and implementation process

2.1 Introduction

One of the problems identified with the enforcement of mandatory policies is that a policy is implemented whilst there is an existing contract of employment between an employer and employee, therefore, some employees may resist or reject it because they feel that it alters their pre-existing contractual arrangements.

At the same time, the employer may feel obliged to implement a mandatory workplace policy either to protect the rights of employees or to control their conduct when facing various situations and circumstances.

These are just some of the challenges from both sides of the parties involved.

In this chapter, the research report seeks to analyse the practical guideline measures, steps, processes, and stages an employer should undertake to effectively develop and implement a mandatory workplace policy.

These procedural steps are aimed at assisting employers to avoid and mitigate challenges and problems which may be put forward by those affected by a policy and effectively refuse to accept it.

The chapter will refer to the findings of the CCMA case of *Theresa Mulderij v The Goldrush Group* which dealt with procedural steps in policymaking and the refusal to comply with or observe the mandatory policy by an employee.

The significance of this case in the Research Report is that it illustrates the steps which should be taken by an employer when implementing a mandatory workplace policy.

2.2 Practical measures and principles to be undertaken by an employer when executing a mandatory workplace policy.

Before developing and implementing a workplace policy, the employer should set out the aim and purpose of the policy, by explaining the reasons why the policy needs to be developed. The explanation should include a list or classification of people and parties who should comply with the policy by setting out acceptable or unacceptable conduct and the consequences of failing to comply with the policy.[21]

[21] Factorial HR Blog. Examples of Company Policies. *https://factorialhr.com/blog/company-policies-and-procedures/#:~:text=Examples%20of%20company%20policies%20include,potential%20breaches%20of%20company%20policies.* (Accessed 13 March 2024)

By way of an example: Schools and Universities have policies and procedures in place to maintain standards for the delivery of school services to the communities they serve.[22]

To elaborate and analyse these measures, the Research Report refers to the ruling in a CCMA case of *Theresa Mulderij v The Goldrush Group* case number GAJB 24054-21.[23] The case outlines the position of both employer and employee when enforcing a policy and, the significance of taking reasonable measures when developing, applying, and implementing a mandatory policy.

In this case, Goldrush Group the employer presented its employees with a compulsory COVID-19 vaccine mandate policy in response to the risk of exposure to Coronavirus in the workplace, the effect of this was that all employees were required to be vaccinated.

One employee, named Theresa Mulderij, refused to get vaccinated in compliance with the vaccine policy because she believed that the policy was violating her right to bodily integrity which is defined in section 12(2) of the Bill of Rights.

The employee applied for exclusion from this vaccine policy mandate. The employer's Vaccination Policy Committee rejected her application for exclusion because it viewed the employee's position as exposed and as a high risk because her job required her to interact with other employees regularly in a constrained and unprotected environment. The employee was appointed in her capacity as a business-related and training officer.

The employer argued that the employee's refusal to get vaccinated was a ground for dismissal and dismissed her because of incapacity.

Effectively, the employee was dismissed for her refusal to comply with the employer's mandatory vaccination policy, which the employer argued that the intention was to make a safer working atmosphere. The employee's rejection to conform to the vaccine policy was rooted in her subjective principles and sentiments against the vaccine.

The principle that the Research Report aims to highlight in this case is that the employer recognized a crisis in the form of COVID-19 sickness, and the employer reviewed the circumstances under which the employer's organisation carries business.

The employer identified potential threats and exposures and decided on the implementation of a mandatory vaccine policy. But, before the application of the policy, the employer consulted with Trade Unions, and employees for three months. Employees were also requested to confirm whether they obtained the policy

[22] Pangaro, J. (2023). *https://www.linkedin.com/pulse/problem-policy-procedure-joseph-pangaro/* (Accessed 27 May 2024)
[23] Matshaka, L. (2022). *https://www.saflii.org/za/cases/ZACCMA/2022/1.pdf* (Accessed 6 June 2023)

document, which recorded the mandatory workplace vaccination policy, and to confirm whether it was clarified to them and that they had examined and understood it. [24]

At the CCMA, the employer argued that, during the establishment of the policy and consultations, all stakeholders were afforded question-and-answer meetings. The employer also sourced the services of a Traditional Healer, Medical Specialist, Lecturer in Traditional Health, Virologist, Senior Adviser for Pfizer worldwide, and a Human Rights Commissioner.

Initially, a draft policy document was presented for final authorization. Various discussions were subsequently conducted followed by the formulation of a committee known as, the Mandatory Vaccination Policy Committee, and the Appeals Committee.[25]

The mandatory policy was open to employees who met specific criteria or requirements to apply for an exclusion, subject to review by the Exemption Committee. The Committee detailed procedural processes for the application of the policy per the guidelines specified in the Government regulations. [26]

Having regard to the accepted CCMA findings in *Theresa Mulderij v The Goldrush Group* case.

The policy-making process should be characterised by negotiation and discussions with all stakeholders, including employees and, all representatives or individuals with a vested interest or, those who are likely to be impacted by the application of a policy. Any person with a vested interest in the matter can be classified as a stakeholder, like employees, labour representatives, Trade Unions, employees, Management, Human Resources etc.

By engaging in discussions and negotiations, the procedure will ensure that the policy content is sufficiently inclusive to address everyone's concern and, its intended purpose. Productive participation by employees and stakeholders in advancing a policy will improve acceptance of the policy and the enthusiasm to comply with its provisions. [27]

2.3 Analysis and outline of the procedural steps

2.3.1 Initiating a workshop for skills-building.

When developing policies and procedures, the employer must consult[28] with all relevant stakeholders, health, and safety representatives, contractors, religious leaders, traditional leaders, employee representatives and Trade Unions. The purpose

[24] Ibid, 23.
[25] Ibid, 23.
[26] Code of Practice: Managing exposure to SARS-CoV-2 in the workplace, 2022.
[27] Resource Center. *https://www.caseiq.com/resources/policies-and-procedures-in-the-workplace-the-ultimate-guide/* (Accessed 22 March 2024).
[28] *https://thepeopleindairy.org.au/wp-content/uploads/2019/02/workplace_policies_procedures_v1.pdf* (Accessed 22 March 2024)

of the consultation is to ensure that every person in the workplace understands the importance of the organisational policies and procedures and the purpose to be implemented effectively.

This will also assist in ensuring that the policies and procedures are addressing their intended purpose or identified problems. Consultation assists in achieving effective policies and procedures and, the stakeholders are more likely to accept and welcome a policy where their objections and contributions are considered.[29]

One of the benefits of consultation is that employees who intend to object to the implementation of the mandatory workplace policy will have an opportunity at that early stage of the process, to raise their concerns during consultations.

The aim is to allow employees, their representatives, and stakeholders to comprehend the purpose of the policy which the employer plans to apply and, also allow all parties to voice their respective concerns or potential conflicts which may occur.

Employers should use the consultation process to the benefit of all stakeholders to understand the concerns of employees and, to manage and dispose of such concerns at this early stage in the process effectively and efficiently. Any objections to the implementation of a mandatory workplace policy should be given consideration and, should be analysed and, the views of both the employer and the stakeholders should be recorded in writing to mitigate any potential risk associated with a dispute at a later stage. The key principle during this process is mutual respect. [30]

If after the risk assessment, the employer is of the view that introducing a mandatory workplace policy is viable and justifiable, the next step is to develop a plan and, or amend its existing plan if any.

This procedure comprises, planning, development, drafting, and preparations to pass a policy by the employer. A tactical methodology and designing the policy will help the employer in applying the planned policy. The procedure will depend on the conditions of the workplace and the crisis which the employer wants to address or tackle.[31]

This step requires meaningful engagement by consultation with employees, their representatives, Human Resources, Trade Unions, relevant officials from Occupational Health and Safety, the Department of Labour etc.

This process can be described as the foundation phase in the policy development process. This is the phase where strategies are established for policy content. Collaborative opportunity by stakeholders will be conducive to the drafting process

[29] Weekes, J. Step by Step. How to implement effective policies and procedures. *https://www.healthandsafetyhandbook.com.au/bulletin/step-by-step-how-to-implement-effective-policies-and-procedures/* (Accessed 17 March 2024)
See also: Kabai, M. (2023). *https://www.derebus.org.za/do-company-policies-have-to-be-complied-with/* (accessed 27 May 2024)

[30] Reed, J. (2021). *https://www.engineeringnews.co.za/article/guide-to-implementing-a-mandatory-vaccination-policy-in-the-workplace-2021-12-08* (Accessed 15 March 2024)

[31] Safety Culture Content Team. (2024). *https://safetyculture.com/topics/policies-and-procedures/* (Accessed 22 March 2024)

because it affords everyone the opportunity and assurance to be involved in the draft of a policy and ownership of that policy. [32]

Skills-building workshops will be beneficial to those who took part in the workshop, to be well equipped with a basic understanding and knowledge of the intentions of the intended policy to be implemented. The employer must assign a drafting team to continue the process of policy development and confirmation.

The employer should develop the plan for the workshop and identify matters to be ventilated to drive the resolution of workshop meetings. The employer should be clear on whether the intention is to develop a new policy or, to review an already existing workplace policy.

In a situation where the employer plans to review an existing workplace policy, that employer should make sure all employees, stakeholders, employee representatives and Trade Unions have been provided or, have access to copies of the policy for easy reference and, to review the existing policy. [33]

The content of the policy will be aimed at resolving the source of the crisis which the employer has identified to necessitate a policy. However, the employer must also be mindful of the Bill of Rights under Chapter 2 of the Constitution by ensuring that the policy does not violate any of the listed protected rights. [34]

If the employer opts to develop a new policy which addresses health-related and well-being issues in the workplace. It will be necessary to hold a workshop meeting to invite appropriately competent experts to educate stakeholders on the specialised topics. This process will allow all parties concerned to make informed decisions on the extent of the intended policy. It is also essential for the employer in this situation to consult and work in partnership with associations or experts who operate in the subject matter like Occupational Health and Safety and the Department of Labour on expected acceptable best practices in the workplace and the code of good practice. [35]

2.3.2 Development phase

The employer must establish organisational goals to be achieved by the policy and share these goals with employees. The employer must also design a Human Resource strategy to clarify the direction of the policy and create an annual Human Resources plan to guide the Human Resources department in compliance with the organisational mission and values. [36]

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[32] International Labour Organization Decent Work Team and Office for the Caribbean. *https://www.ilo.org/wcmsp5/groups/public/---americas/---ro-lima/---sro-port_of_spain/documents/publication/wcms_429977.pdf* (Accessed 12 July 2023)

[33] Compliance Bridge Policies & Procedures Team. (2022). *https://compliancebridge.com/what-to-change-about-the-policy-review-process/* (Accessed 23 March 2023)

[34] Labour Relations Act 66 of 1995.

[35] Code of Good Practice. *https://www.labour.gov.za/DocumentCenter/Pages/Code-of-Good-Practice.aspx* (Accessed 12 January 2023)

[36] Ibid, 21.

Any workplace policy and procedure must be constructed to address the needs of the employer's organisation. If an employer elects to use policies and procedures adopted from another source, such policies must be modified and tailored to adapt them to the employer's organisation or workplace. [37]

This is a process where the employer should follow up on the development of skills workshops to equip all stakeholders with necessary foundational information in the process of developing a workplace policy.[38]

South Africa is characterised by multicultural and diverse people. It is essential through the planning phase to take into consideration, features such as religion, and cultural views and, be sensitive and, inclusive of all listed and protected rights.

The material put together by the employer should be culturally diverse and inclusive to accommodate, religious, and linguistic differences, in line with the objective of the policy. Deliberation may be prearranged for systems of conveyance of the policy material, statement, and text together with graphical illustrations for easy-to-understand, drawings, pictures, demonstrations, photographic and audio display, deliberations, translators, and cultural and religious experts.

Small-scale employers may find it challenging to develop a workshop because it may not be practical to develop a formal workplace policy under those circumstances. Those employers may rely on policies implemented by the Minister of Labour. [39]

2.3.3 Nominating Drafting Officials

During the workshop, the employer should choose and nominate drafting officials. The nominated officials can be a combination of agents from the respective stakeholder groups who will represent the interests of their members during the drafting of the policy. All stakeholders must be sufficiently represented in policy drafting.

At this stage, the employer must ascertain that the workplace policy covers the basics and addresses any concerns that employees might have. The employer needs to engage the legal department to make sure that issues of compliance with existing legislation are covered. Allow enough time for the processes of review, adjustments and giving feedback to the policy.[40]

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[37] Ibid, 29.

[38] Dixon, A. (2015). *https://end2endbusinesssolutions.com.au/developing-a-workplace-policy/* (Accessed 22 March 2024)

[39] International Labour Organization Decent Work Team and Office for the Caribbean *https://www.ilo.org/wcmsp5/groups/public/---americas/---ro-lima/---sro-port_of_spain/documents/publication/wcms_429977.pdf* (Accessed 12 July 2023)

[40] Ibid,21.

2.3.4 Draft policy document

The drafting team should start developing the first draft policy. It is also worthwhile during the drafting period to collaborate with experts in the subject matter of the policy for their impartial guidance.

If consultant(s) are sourced to draft the policy, the consultants must be involved in the workshop so that they can be appropriately and adequately informed and prepared just like other employee representatives. Any appointed consultant must work in unison with the drafting officials in developing and drafting the workplace policy.

This is to afford the consultant and all stakeholders a meaningful collaboration and consultation so that the policy content reflects the proposals, concerns, and needs of all those who will be affected. Allowing stakeholders to be role players in the policy drafting, will warrant better ownership of the policy and a situation more favourable to the application of the policy provisions.

2.3.5 Reviewing the Draft Policy

An employer should organise a meeting to study the first draft. Equally, all stakeholders, affected employees and, Trade Unions, must be invited and allowed participation. If a consultant was appointed, that consultant should also participate in this review process of the first draft by also making a presentation of their contributions to all stakeholders affected by the policy. [41]

The employer must make sure the organisation has enough available resources and employees to implement the policy. Because this is a development step of the policy and procedure. When complete, the organisation should have policies and procedures in place ready to be implemented.

2.3.6 Settlement of the draft policy and submission for adoption

At this stage, the drafting team or, nominated agents should revise and then, finalize the workplace policy. The resolutions taken during reviewing engagement and recommendations will determine the outcome.[42]

The employer should make sure all new employees are given a copy during their onboarding phase. Big organisations with online systems such as company intranet, should include copies in the intranet so that all employees always have access. An employer should regularly review policies to make sure they are compliant with any changes to legislation and regulations. These policies should also be updated when there are any organizational changes, as part of the change management plan.[43]

[41] Indeed, Editorial Team. (2022). *https://www.indeed.com/career-advice/career-development/how-to-write-policies-and-procedures* (Accessed 22 March 2024).
[42] Ibid, 29.
[43] Ibid, 21.

2.4 Structure and content of the policy

The workplace policy should have an opening remark and a statement of commitment. The policy must be a reflection and a response to the identified crisis. It must be a solution or at least offer some mitigating or preventative solutions to the identified source of the problem.

However, the development of policy should consider the legal and policy framework, at the same time also consideration should be given to cultural dynamics of the workplace. The introduction should outline the context of the workplace policy.

All policies should be brief and concise, set out in clear plain language, and free from jargon. The standard of compliance with the policy must be easily measurable against non-compliance. The policy should clearly outline what needs to be done in compliance with the policy and, the consequences of non-compliance with the policy should be clearly outlined. [44]

The consequence of any deliberate noncompliance with the policy breach should meet the appropriateness of the severity of the noncompliance, which can be sanctioned in any form including, counselling, disciplinary action such as a written warning, or even a dismissal under serious circumstances. For example: A policy should avoid having general statements like, '*safely discard hazardous chemicals'*, it must rather elaborate on how this should be carried out at a disposal site, e.g. 'hazardous *chemicals must be discarded inside the waste container designated and marked for disposal of dangerous objects*.[45]

2.5 Policy Recommendations.

The policy must address all affected and potentially affected employees in detail, by directing all planned working provisions to be applied in the workplace such as remote work, rotational work, isolated work, and alternative accommodation of workers.

Some problems are not unique to a particular organisation, therefore, when drafting a policy, either the employer, drafting team or, appointed consultant should study and consult the Department of Labour to find out if there are any related policies already developed which may address the same or a similar crisis. The regulatory and policy framework set out in the National workplace policy should be referenced as a guide by the drafting team,[46] a similar approach to the International Labour Organization.[47] If there is no implemented policy in existence, the drafting team can source resolution by engaging in collective agreements, Occupational Health and Safety Standards and code of good practice.

[44] Ibid, 29.
[45] Ibid, 29.
[46] Wang, Y. (2021). *https://www.ilo.org/sites/default/files/wcmsp5/groups/public/@ed_emp/documents/publication/wcms_831186.pdf*
[47] Ibid,46.

An employer must provide adequate information, instruction, supervision, and training to employees in a convenient and accessible manner. It is the employer's responsibility to make sure that new staff and contractors are trained and are comprehensively familiar with workplace policies and procedures, and that existing employees obtain sufficient training or refresher courses. The organisation should adopt the approach of regularly updating, refreshing, and discussing policies and procedures with employees in meetings with staff regularly at team meetings to make certain that employees remain knowledgeable of policy compliance. [48]

It is a recommended good practice to have all staff and contractors acknowledge by signing off after they have perused and agreed to fulfil the workplace policy. The employer can document records of training and orientation by taking a register of employees who attended and, recording details of training material in the event an attendee omits to sign a training record.

2.6 Policy Enactment

Policy enactment is a process in which an employer, such as the Government, University etc is offered official endorsement to implement the policy. Depending on the category of institution, a policy can be enacted at different levels of the organization.

The legal framework requires employer institutions such as the Government to be officially authorised before a policy is implemented. Stakeholders serve a critical role, and they must be involved in policy enactment because they have an interest in behalf of their members.[49]

The employer needs to get management support. This is important because if management is not in support, the employer may find it difficult to implement and communicate mandatory workplace policies to employees. [50]

Depending on the size of the organisation. For example, an employer may give digital or hard copies of all policies to all employees to get them to sign a confirmation that they have received and understood the policy.[51]

It is best practice to put all policies and procedures in writing and make them easily available to everyone. If possible, the employer should opt to keep all policies and procedures in a single manual with copies readily available to all employees. Policies addressing safety measures should also be published on the organisation's intranet if such a facility is available.

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[48] Ibid, 29.

[49] Alfano, T. (2021). *https://genesishrsolutions.com/peo-blog/how-to-ensure-compliance-in-the-workplace/* (Accessed 22 March 2024)

[50] Ibid, 21.

[51] Ibid, 21.

2.7 Conclusion

In this chapter, the Research Report attempted to analyse the procedural steps, stages, and conditions to be undertaken, to develop and enforce a mandatory policy in a manner which will assist the parties to avoid or mitigate challenges and problems.

The conclusion represented in this chapter is that, before any workplace policy application, the employer must identify a crisis and the source of the crisis must be identified.

The employer must then, commence a consultation process with all affected employees, stakeholders and experts who are well-vested in the domain of policy application.

The purpose, objectives and aim must be clear before the commencement of policy application. All relevant factors which may contribute to or assist in implementing the policy must be identified. Example, affected employees, Human Resources Management, Trade Union representatives etc. The responsibilities of each participating stakeholder must be well-defined and set out.

If the intention is to implement or develop a new policy, the employer must make sure the new policy, will not conflict with existing policies, existing rights, or existing contractual arrangements if any.

Reference to the findings in the case of *Theresa Mulderij vs Goldrush Group,* CCMA case,[52] was used to support the principle and view that, an employer must undertake reasonable stages of consultations by largely engaging with workers and stakeholders before applying a mandatory policy in the organisation and, in compliance with the Code of Practice.[53]

Based on the findings in this case, the Research Report concludes that the steps analysed in this chapter may be used as guidance and, if there is any dispute or challenge to a mandatory workplace policy. An employer will likely be successful in convincing the CCMA or Court that it has undertaken reasonable steps before enforcing a workplace policy, provided the employer has followed the procedural steps and stages mentioned in this chapter.

Depending on the crisis which the policy is intended to address. It will be crucial to source guidance from experts in the relevant field, such as the Occupational Health and Safety Act 85 of 1993 Act (OHS) which compels an employer to create a safe working condition in the workplace.

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[52] *Theresa Mulderij vs Goldrush Group* GAJB24054-21.
Mattshaka, L. (2022). *https://www.saflii.org/za/cases/ZACCMA/2022/1.pdf* (Accessed 5 June 2023).

[53] Code of Practice: Managing exposure to SARS-CoV-2 in the workplace, 2022.

Chapter 3

The obligations of employers and employees once a workplace policy has been implemented.

3.1 Introduction

There may be situations even after a policy has been implemented according to the procedural steps and guidelines mentioned in Chapter 2 above, that some employees still refuse to comply either wilfully or due to miscommunication or lack of understanding and knowledge of what is expected from them.

In this chapter, the Research Report seeks to analyse the legal framework relating to the rights and obligations of all parties to comply with a mandatory workplace policy once it has been implemented and the consequences of non-compliance with such a mandatory workplace policy.

The Research Report will also analyse the legal position where a mandatory policy has been integrated into an employment contract, by referring to the findings of the case of *Penxa v Beaufort West Municipality and Others* where a workplace policy was incorporated into a contract of employment.

If a policy materially alters the terms and conditions of employment, the employer and employee must attempt to reach a consensus that benefits both parties, because this might be an issue of dispute. If there is a Trade Union that represents employees, the employer should consult with it, and explain the purpose of the policy, allowing them to provide input.[54]

In the case of *Taguzu v Commission for Conciliation, Mediation and Arbitration and Others* case no JR1785/18. The Labour Court upheld the finding of the CCMA Commissioner that:[55]

'A policy could be invalid if it materially alters the terms and conditions of employment.' The Labour Court in this case held that, if an employee's terms and conditions were altered, the employee ought to have approached the CCMA with a grievance and dispute under the provisions of section 64(4) or section 186(2)(*a*) of the Labour Relations Act 66 of 1995. The Court also made a finding that not signing a workplace policy does not automatically render it invalid.

The Court also emphasized the point that before policies are implemented, the employer must ensure that employees or the Unions are properly consulted.

In this chapter, the Research Report will analyse the obligations of the parties to mitigate or eliminate noncompliance with mandatory workplace policies.

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[54] Kabai, M. (2023). *https://www.derebus.org.za/do-company-policies-have-to-be-complied-with/* (Accessed 27 May 2024).

[55] *Taguzu v Commission for Conciliation, Mediation and Arbitration and Others* (LC) (unreported case no JR1785/18, 27.6.2023)

3.2 Obligations of employer to mitigate or eliminate policy non-compliance.[56]

3.2.1 The policy and procedure must be easily understandable.

As stated in the previous chapter, communication is key to obtaining cooperation and compliance with a workplace policy as workers need to know what is expected from them and how to achieve it. The policy must be well structured and organised, in a logical manner which is easy to follow or comply with.

Employees are more likely to find it easier to navigate the policy documents if they understand the simple language used and if arranged efficiently, with an explanatory table of contents, distinction of section titles, and relevant terms listed in the glossary.

3.2.2 Policies and procedures should be written in a clear and precise manner avoiding any legal jargon.

Employers should make sure that policy documents are not ambiguous or open-ended leaving gaps in what is expected from employees. The policy must be direct to the point and very specific so that employees are clear on the conduct expected from them to comply with the policy.

3.2.3 The policy documents must be easily accessible.

Electronic copies, online manuals and hard copies of policy documents should be shared regularly within the workplace, and they should be easily accessible to anyone who is affected or expected to comply with or observe the policy. The Human Resources Department must be able to easily refer to policy documents and equally employees must be empowered with search capabilities to enable them to easily find reference to those policy documents.

3.2.4 Regular training of employees on policy compliance issues

Employers should arrange regular workshops or training to refresh and empower employees on policies for optimal compliance so that employees are always familiar with how to comply with policy provisions when in the workplace. Online training tools and facilities may offer a convenient learning experience and the ability to train workers.

3.2.5 The employer should immediately notify employees when there is a policy or procedural change.

Policy documents should be updated regularly and continually to ensure that they comply with applicable legislation, case law and regulations together with changes in company culture. It is also advisable to revisit and revise policies and procedures frequently. The employer should adopt the practice of sharing updates and requesting employees to sign off for acknowledgement of receipt. This process can be achieved more efficiently through online management policy tools.

3.2.6 The employer should seek feedback from those affected.

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[56] Ibid, 54.

The Policy may not be popular or welcomed by some employees. Some policies may be guided by guidelines of applicable legislation or workplace culture. Even though policies may not be flexible to accommodate any changes, getting regular feedback from affected employees is important.

This may be achieved using tools like anonymous online platforms, which may encourage employees, to express their honest feedback. The employer can then utilise the information and feedback received to guide the mood towards the reception of the policy in the organisation, which may encourage an acceptable receptive mindset open to accept and comply with the policy.

3.2.7 Consistency in responding to non-compliance.

Lack of enforcement and lack of consequence management in the workplace can inevitably cause non-compliance, because it may give the impression that policies are not important, inevitably encouraging employees not to take the policy seriously.

Employees who contravene any policies and procedures must be aware of existing rules and must be informed that there are standard rules and regulations applied as consequence management for non-compliance. After all, policies are implemented primarily to maintain order and regulate conduct in the workplace.

3.2.8 Management must set a good leadership example.

Non-compliance with workplace policy can also be discouraged by fostering a compliant organizational culture by management and applying measures to encourage a culture of compliance.

3.3 The legal position when a mandatory workplace policy has been integrated into the Employment Contract

To analyse the legal framework in situations where mandatory policy has been merged into the contract of employment, the Research Report refers to the finding in the case of *Penxa v Beaufort West Municipality and Others* (2022) ZALCCT 16 (LC). [57]

The court made it clear in this case that, where an employer opts to integrate a workplace policy into a contract of employment, the employer is effectively elevating and incorporating that policy and its regulations, into the clause and conditions of the agreement. Accordingly, the employer must comply with the policy and its regulations if an employer fails to comply with the policy. Its conduct may be found to be unlawful, as opposed to unfair.[58]

The ruling in this case provides clarity to the Research Report topic*: 'enforcement of mandatory workplace policies which are not included in the contract of employment.'*

[57] *Penxa v Beaufort West Municipality and Others* (2022) ZALCCT 16 (LC).

[58] J van Wyk, M Heyns and, K Sease, Werksmans Attorneys. Werkmans Attorneys. (2023). *https://www.polity.org.za/article/an-employers-obligation-to-comply-with-their-own-policies-2023-02-09* (Accessed 24 October 2023)

If such a policy is implemented, both the employer and employee are obligated to comply with the policy because the purpose of a policy is to regulate appropriate guidelines in the workplace and any conduct of noncompliance will be found to be unlawful. [59] Any employer or employee who refuses to comply with a workplace policy once it has been implemented may be found to be guilty of misconduct and their action may be unlawful.

3.4 Enforcement of Mandatory Workplace Policy

Enforcement of workplace policy requires the management of the workplace to ensure proper implementation of policies and procedures by all employees. There must be consistency and continuation to make sure that any noncompliance with the policy and procedure is addressed.[60]

The policy document must prescribe full compliance with the listed requirements to make sure that a safe workplace is maintained. Any conduct of noncompliance with policies and procedures must be addressed immediately consistently and conclusively. Management at all levels in the workplace must set an example by complying with and implementing policies and procedures.

If management does not comply with workplace policies, it cannot expect employees to comply with the policies and procedures as one can argue that any disciplinary action against such an employee who failed to comply with the policy will be unfair.

3.5 Policy Enforcement through Collective Bargaining with Trade Unions

The Research Report attempts to argue that it might be a best practice or, a more suitable approach to enforce a policy through Collective Bargaining with Trade Unions because the Trade Unions will be able to communicate and take instructions from their members.[61]

Example: Big workforce employers like 'Shoprite Checkers', 'Pick n' Pay', Industrial employers, Mining houses etc, who usually employ thousands of employees. While communication with every employee is necessary, the Research Report argues that it may be more effective to communicate with the employee representatives, especially Trade Unions.

The employee representatives will be able to raise the concerns of their members as a collective and the employer will have an opportunity to respond or address those concerns, as opposed to dealing with individual employee concerns.

This will also assist those individual employees who are not necessarily aware of their rights or who might not have the courage to challenge an employer who is in a finally and commercially stronger position than the employee.

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[59] *Penxa v Beaufort West Municipality and Others* (2022) ZALCCT 16 (LC).

[60] Ibid, 29.
See also: Neo Gov Power DMS. (2023). *https://www.powerdms.com/policy-learning-center/following-policies-and-procedures-and-why-its-important* (Accessed 28 May 2024)

[61] Code of Good Practice: Collective Bargaining, Industrial Action and Picketing. Section 15

The Constitution allows every worker, the right to (a) create and join a trade union; (b) contribute to the interests and activities of a trade union.[62]

Trade Unions are essential stakeholders in the application and implementation of a workplace policy because, any worker regardless of the arrangement of employment, is granted the right to collective bargaining and to join a Trade Union of their choosing. Therefore, every individual worker will be represented by a Trade Union of their choice during policymaking in the workplace.

It is a well-established principle that Collective agreements are not limited to salary increment issues. They involve other challenges affecting both employers and employees relating to workplace complaints, even society. These are rights like human dignity. [63]

The Research Report puts forward the narrative and emphasises that a consultative approach with stakeholders such as Trade Unions is very crucial. Some organisations may have multiple Trade Union representing different workers. In those circumstances, some workers belong to minority unions and others belong to majority unions.

Minority unions are covered in the legal context of the extension and enforcement of collective agreement to non-parties which is acknowledged to be acceptable and operative both on paper and in practice, as seen in the case of *AMCU & Others v Chamber of Mines*.[64]

The Research Report makes the point here that even in workplaces under circumstances where employees belong to different Trade Unions, there is a regulatory framework to accommodate and represent all employees. This principle is called the extension of collective agreements.

3.6 Conclusion

The chapter attempted to analyse and discuss the legal framework governing the rights and duties of parties once a policy has been implemented, the consequences of noncompliance by either party and, the legal protection and remedies at the disposal of parties.

The Research Report attempted to illustrate the view that employers should engage Trade Unions as stakeholders when developing and implementing policies. In this way all employees will be covered and protected, even those belonging to minority unions.

Having regard to the protection offered in terms of Section 23 of the Constitution, Section 8(1) of the Occupational Health and Safety Act 85 of 1993 and the Code of

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[62] The Constitution 108 of 1996. Section 23(2).

[63] *Affordable Medicines Trust and Others v Minister of Health and Others* 2006 (3) SA 247 (CC).

[64] *Association of Mineworkers and Construction Union and Others v Chamber of Mines of South Africa and Others* (CCT87/16) (2017) ZACC 3; (2017) 38 ILJ 831 (CC); 2017 (3) SA 242 (CC); 2017 (6) BCLR 700 (CC); (2017) 7 BLLR 641 (CC) (21 February 2017) at paragraph 78.

Good Practice, an employer can enforce mandatory workplace policies which are not included in the contract of employment. Equally, while employees are obliged to comply with the policy, they also enjoy the protection of these legal provisions.

Stakeholders, whether they form part of majority or minority Trade Unions in the organisation are also protected from any abuse of majority rights from bigger Trade Unions.

Considering the court findings in the case of *Penxa v Beaufort West Municipality and Others* (2022) ZALCCT 16 (LC), an employer can enforce a workplace policy which is not included in a contract of employment and can even go further by integrating such a policy into a contract of employment. Any action of noncompliance with such a mandatory policy may result in misconduct and such action may be unlawful.

The Research Report concludes that the most practical, all-inclusive encompassing manner to develop, apply, implement and, enforce a workplace policy which does not form part of the contract of employment is through Collective Bargaining processes with Trade Unions, following the procedural steps and stages detailed and analysed in Chapters 2 and 3 above.

Chapter 4

4.1 The Conclusion

The Research Report attempts to offer a solution-oriented approach to the problems and challenges relating to the enforcement of mandatory workplace policies which are not included in the employment contract.

To comprehensively analyse this topic, there were secondary questions which had to be considered, such as:

- The function of a workplace policy.
- The legal position where a mandatory policy creates a potential direct, or indirect conflict with one of the rights in Constitution 108 of 1996.
- The duties of employers and employees during the development and enforcement of a policy.
- The consequences of non-compliance with a mandatory workplace policy.

A qualitative desktop research approach was applied to evaluate applicable literature recorded in published journals, newspaper articles, books, academic thesis, and online sources.

The research concludes by finding that, employers are within their rights to develop, implement, and enforce workplace policies as a response to address an existing or identified problem or potential problem.

A workplace policy can be a written statement which records an organisation's practices and procedures concerning part of its employment practice, prescribing guidance on operational requirements to comply with employment regulations.

In other words, workplace policies are implemented and enforced to regulate the conduct of employees in addressing the problem. Accordingly, every policy should have a clear purpose and objective explicitly stated.

However, mandatory workplace policies are sometimes met with challenges of noncompliance or resistance from employees because, they may be perceived as unilaterally altering contractual arrangements or introducing mandatory terms and conditions which were not included in the contract of employment and, or, may even be perceived as violating some pre-existing rights which employees enjoy protection under the Bill of Rights, Chapter 2 of the Constitution.

After analysing the abovementioned secondary questions, the Research Report finds that an all-inclusive consultative approach should be the method adopted by employers during policymaking. The Research Report recommends procedural steps and stages to be applied and observed by employers to include all stakeholders in the policy-making process.

The conclusion is that the procedures recommended will mitigate or eliminate the challenges to the enforcement of mandatory workplace policies and clarify the uncertainty about the obligations of parties in the policy-making process and the consequences of non-compliance.

While the CCMA findings are not binding on Courts and do not make a precedent. The Research report is of the view that the findings of the CCMA case of *Theresa Mulderij vs Goldrush Group* offer a good practical guide for employers and, cement the argument that, if an employer undertakes the recommended procedural steps mentioned in Chapter 2 above, the Court will likely be satisfied with the employer's obligations and, accordingly, the Court will likely find in favour of such employer whenever there is a challenge or problem of enforcement of mandatory policy.

The Research Report aligns its views with the Court findings in the case of *Penxa v Beaufort West Municipality and Others* (2022) ZALCCT 16 (LC) which held that employers could enforce a mandatory policy which is not included in the contract of employment. Such a policy can also be integrated into a contract of employment and any noncompliance with such a policy may result in unlawful misconduct.

4.2 Research Report recommendations and proposal.

The report recommends that the best practical approach to enforce a mandatory workplace policy is to implement it by way of a consultative process involving Trade

Unions and employee representatives while observing and adhering to the following procedures as guidance:

The Purpose of the Policy should be clearly defined.

The policy should address the intended purpose and the reason a policy is required or, why it is required. It should also be clear whether there is an existing policy or if this is a new policy.

It is recommended that employers make use of Policy Templates

Using templates to write up a policy will assist employers avoid 'reinventing the wheel' because they won't have to develop policies from scratch over and over. Templates will also assist with uniformity regarding the format and structure of the policy.

The policy should be inclusive by considering the circumstances of all employees. It must be clear, and straightforward in stating its provisions on what is allowed and what is not allowed because this is the guidance that employees will rely on when reading the policy document.

Policy Implementation

The employer should have a plan for anticipated challenges to the policy implementation regarding obstacles which may hinder policy compliance.

Orientation, Training Feedback and Question-and-answer sessions

The policy development team should arrange an orientation training session to introduce the policy and train employees on how to comply with the policy, this session should be attended by affected employees and employee representatives, Trade Unions wherein they will be allowed to ask any clarity-seeking questions and be allowed to give their feedback regarding the concerns and challenges or difficulties they have with the policy.

If the challenges or concerns cannot be resolved, the policy development team must consider revising the policy or rewriting it to achieve its objectives while accommodating employee's concerns.

Policy Implementation

Even at this stage, the employer should still consider feedback regarding the concerns and employers should try to improve the policy based on feedback received. This is where the practical application of the policy will be tested because there is a difference between reading the policy theoretically and applying it in practice. That is the reason that even after implementation, the employer should still consider employee feedback and analyze it to adjust and further improvements to the policy.

Ideally, the policy should be reviewed and revised a few months after implementation by the policy development team to establish whether it achieves its purpose and objectives in addressing the problems it was created to address

Training on policy procedures and compliance

The workplace should foster a culture of compliance. This can be achieved by management setting an example by complying with the policy and procedures and providing training and refresher training workshops to assist and guide employees to become more aware of the conduct expected from them to comply with the policies and procedures.

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