

# Victimization of workers at the workplace in relation to occupational health and safety

Over the past 18 months or so, South Africa, as with all other countries around the globe, faced some stark realities in relation to COVID-19, which included the need to “hard lockdown” for a couple of weeks early on in the pandemic.

This impacted on both the private and public sectors alike. In a number of instances, this would go on to affect the bread and butter issues of companies and as a consequence, their workers. As a result of this, businesses would close their doors whilst others still, would need to find ways to slog it out to survive, which included relying on government providing access to workers and employers to grants and other initiatives to prevent closure as far as possible while at the same time ensuring workers and their families would have “bread” on the table.

As time went on and more and more information became available about the virus, what it is and how to protect oneself, government would pass that information on to employers and employees through various forums and media platforms. Despite government’s initiatives in providing information at all levels, employers would choose whether or not they would comply.

The Occupational Health and Safety (OHS) Directions, a comprehensive document on how to prevent infection and spread, produced by the Department of Employment and Labour Minister through NEDLAC, was critical, but once again, as with all laws, would have limited value on the ground for most sectors as noticed through the compliance rate.

The OHS inspectors continued to monitor compliance from day one of the lockdown and would find that employers in most sectors were not complying and after 18 months, the sad truth is that employers are still not complying so many months down the line. The level of compliance before the pandemic has virtually not changed to date and neither is there a vast difference in compliance in most sectors pre-pandemic to what it is now. In fact, any compliance below 80% is a sign of flawed systems, systems that are not working and over which the employer has no control, and neither does the employer care much about his/her employees.

## **So where does this leave us?**

An employer has a duty to provide and maintain, a working environment that is safe and without risk to the health of his employees. The employer must take all necessary measures to ensure that the requirements of the Act are complied with by every person in his/her employment or on premises under his control. Furthermore, the employer must enforce such measures as may be determined to be necessary in the interest of health and safety. Notice that this is not a recommendation or a proposal but rather clearly indicates the responsibility of the employer. The responsibility to comply rests on

the shoulders of the employer first to ensure that there is every effort made to comply and to ensure compliance by everyone else in his/her employ.

### **General duties of employers and self-employed persons to persons other than their employees**

Every employer shall conduct his undertaking in such a manner as to ensure, as far as is reasonably practicable, that persons other than those in his employment who may be directly affected by his activities are not thereby exposed to hazards to their health or safety. An employer does not merely have a responsibility towards him/herself or his/her employees but to every other person who may be affected by the operations of his/her business. This incidentally is not a new requirement and therefore every effort must be made to ensure the health and safety of those outside the immediate perimeter of the business.

### **Duty to inform**

Every employer must ensure that every employee is conversant with the hazards to his health and safety attached to any work which he has to perform, which includes the precautionary measures to be taken and observed with respect to those hazards. Over the last several months I have had many employees contact me about unsafe workplaces in relation to contraventions of the OHS Direction published by the Minister. In many cases the employees have raised the matter with the supervisors only to be laughed at or to be humiliated. In extreme cases employees have been warned or been "fired". So, not only have we had the hardship of the pandemic to deal with but we have employers and their management teams engaging in the most heinous activity describable, that of adding to the current pain of employees. This is clearly an abuse of power and absolutely morally deplorable. This is victimization and can be reported to the Department for further investigation. Where a person has been laid off work, the matter must be taken up with the CCMA or the relevant Bargaining Council.

### **General duties of employees at work**

The duties of the employee is clearly set out and part of those duties is to ensure their own safety as well as that of their fellow employees. This is an instruction and not a nice to have. Yet employers bypass this most important requirement, forgetting, that as a supervisor or manager, they too have that same responsibility in terms of Section 14 as the rest of the employees. So, what does the Act say then is the responsibility of every employee?

Every employee shall at work take reasonable care for the health and safety of himself and of other persons who may be affected by his acts or omissions. As regards any duty or requirement imposed on his employer or any other person by this Act, co-operate with such employer or person to enable that duty or requirement to be performed or complied with. The employee is expected to carry out any lawful order given to him/her, and obey the health and safety rules and procedures laid down by the employer or by anyone authorized thereto by the employer, in the interest of health or safety. If any situation which is unsafe or unhealthy comes to his attention, he/she **must report such situation to the employer** or to the **health and safety representative** for the workplace or section thereof, who shall report it to the employer.

### **Victimization forbidden**

No employer shall dismiss an employee, or reduce the rate of his remuneration, or alter the terms or conditions of his employment to terms or conditions less favourable to him, or alter his position relative to other employees employed by that employer to his disadvantage, by reason of the fact, or because he suspects or believes, that that employee has given information to the Minister of Employment and Labour or to any other person charged with the administration (such as an OHS inspector) of a provision of this Act

**An employer cannot and should not victimize an employee** who has complied with a lawful prohibition, requirement, request or direction of an inspector. Neither may he or she do so where the employee has done anything which he may or is required to do in terms of this Act and furthermore, has refused to do anything which he is prohibited from doing in terms of this Act.

In conclusion, in a climate where employers continues to fail to comply and where the rate of compliance is below 60% as an average with only a couple of outliers, the battle to continue to get employers to comply, whether there is a pandemic or not, continues. It should be remembered that health and safety is a constitutional right and not a nice to have. – (*Szana is Department of Employment and Labour Chief Inspector: OHS*)

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