

IKHOWUDI YOKUZIPHATHA KUTHINTELO NASEKUPHELI SWENI KOKUXHATSHAZWA EMSEBENZINI

“Kuphelise Ngoku ukuxhatshazwa eMsebenzini!”





IMITHETHO YOKUZIPHATHA KAHLE EMISELWE UKUN- QANDA NOKUQEDA UKUHLUKUNYEZWA EMSEBENZINI

“Qeda ukuhlukumeza Emsebenzini Manje!”



employment & labour

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Kungani Kuyi le mithetho?

Le mithetho iqondiswa Umbuthano weILO wa-190 kanye nezincomo zayo ezimayelana nokuqeda Ubudlova kanye Nokuhlukunyezwa Endaweni yomsebenzi, unyaka wezi-2019 Ukucwasa (Umsebenzi kanye noMkhakha) Umbuthano we-111 kanyaka wezi 1958 (Umbuthano 111) kanye Nombuthano wama-151 ohlobene Nempilo kanye Nokuphepha.

Le mithetho ichitha umthetho oyinhlanguanisela wokusebenza kahle obhekela indlela yokusingatha amacala okunukubeza ngokocansi endaweni yokusebenzela oshicilelwe kwiGazethi Kahulumeni inombolo 27865 mhla zi- 4 kuAgasti/Ncwaba wezi 2005.

Izinjongozalo mthetho

Inhlanguanisela yemithetho yokusebenza ihloselwe ukubhekelela ukunqanda nokuqeda kanye nokulawula zonke izinhlobo zokuhlukumeza ezigcwele endaweni yokusebenza.

Le nhlanganisela yemithetho inikeza imihlahlandlela–

- kubaqashi, nabasebenzi ekunqandeni nasekuqedeni zonke izinhlobo zokuhlukumeza, okwenziwa ngendlela yokucwasa okungafanele endaweni yokusebenzela;
- Ngenqubomgomo yehhovisi lezabasebenzi, izinqubo nezinkambiso ezimayelana nokuhlukunyezwa kanye nezinqubo ezifanele zokusingatha ukuhlukumeza kanye nokunqanda izigameko ezilandelayo.

Ubani ovikelwa yilomthethonqubo?

Nakuba le mithetho isebenza endaweni yokusebenza njengomhlahlandlela kubaqashi, abasebenzi nakulabo abafake izicelo zomsebenzi , abenzi bokubi kanye nezisulu zokuhlukunyezwa bangahlanguanisa, kodwa azigcini nje ku:

- abanikazi;
- amavolontiya;
- abaqashi;
- amaklayenti kanye namakhasimende;
- abaphathimanagers;
- abahlinzeki;
- izinduna;
- osonkontileka;
- abasebenzi;
- abantu abanobudlelwano nebhizinisi;kanye
- abafuna umsebenzi kanye nabafake izicelo zomsebenzi;
- nabantu abaqeqeshwayo ngokomsebenzi okuhlanganisa abasebenzi abasoqeqeshweni lomsebenzi (interns), abasebenza ngaphansi kwesibophezelo sokufunda (apprentices), kanye nalabo abaqeqeshwa ngomsebenzi (Learnerships)

Kukuziphi izimo lapho lomthetho usebenza khona?

Ukuvikeleka kwezisebenzi ekuhlukunyezweni kuhlanganisa noma isiphi isimo lapho umsebenzi esebenza noma kwizimo eziphathelene nomsebenzi. lokhu kungahlanguanisa, kodwa kungapheleli:

- indawo yokusebenza ihlanganisa kokubili izindawo zomphakathi kanye nezizimele lapho abantu benza khona umsebenzi wabo;
- izindawo lapho umsebenzi ekhokhelwa khona, ethatha ikhefu lokuphumula noma lokudla noma esebenzisa indlu yangasese, ehlanza izingubo, noma eshitsha, encelisa ibele nase zikhungweni zempilo;
- uhambo oluhlobene nomsebenzi, uhambo, ukuqeqeshwa, imicimbi noma ukuzijabulisa;
- ukuxhumana okuhlobene nomsebenzi, okuhlanganisa ulwazi kanye nokuxhumana okwenziwa ngobuchwepheshe bezokuxhumana nezinye izinhlobo ze-inthanethi;
- indawo yokuhlala enhlinzikwe umqashi; okuhlanganisa isikhwama sezindlu;1
- lapho uya noma ubuya emsebenzini ngezithuthi zokuhamba ezihlinzekwe noma ezilawulwa umqashi;

1 *Biggar v City of Johannesburg* (2011) 32 ILJ 1665 (LC).

- esimweni sabasebenzi basezindlini kanye nabasebenzi bezempilo abaqashwe ezindlini zomqashi noma endlini yomuntu abamunakekelayo, indlu iyindawo yabo yokusebenzela; futhi
- esimweni lapho abasebenzi besebenzela ekhaya besebenzisa ubuchwepheshe, noma kunoma iyiphi indawo ngaphandle kwezakhiwo zomqashi, indawo abakuyo lapho besebenza yiyo indawo yokusebenza.

Kuyini ukuhlukumeza?

ukuhlukumeza ngokuvamile kuqondwa kanje:

- Ukuziphatha okungafuneki, okuthunaza isithunzi;
- okudala isimo sendawo yokusebenza enobutha noma esabisayo kumsebenzi oyedwa noma kubasebenzi abaningi okanye okubalelwa esimweni esinomthelela wokugolomba ukuthotshwelwa ngokusongela; futhi
- kuhlobene nesizathu esisodwa noma ngaphezulu lapho ukucwasa kungavunyelwe ngokwesigaba sesi-6(1) se-EEA.

Izinhlobo zokuhlukumeza

Ukuhlukumeza kungase kube umphumela wokuziphatha ngokomzimba, ngamazwi, noma ngokwengqondo.

- Ukuhlukunyezwa ngokomzimba kuhlangukisa ukuhlaselwa ngokomzimba, ukulinganisa noma ukusongela ukushaya, noma ukubonisa isimo somzimba (njengokuphakamisa inqindi njengokungathi ushaya umuntu noma ukujikijela izinto eduze komuntu).
- ukuhlukumeza ngamazwi kungase kuhlangukise izinsongo, ukuhlaza, ukugcona okunenzondo, ukuthuka, ukwahlulela okungalungile okungapheli, nokugxeka, ukucwasa ngokwebala, ukubandlulula ngobulili, noma ukucwasa nokusebenzisa ulimi olunenzondo kamalunga eLGBTQIA+.
- Ukuhlukunyezwa ngokomqondo emsebenzini kungase kuhlotshaniswe nokuhlukunyezwa ngokomzwelo futhi kuhilela ukuziphatha okunemiphumela emibi kakhulu engokomqondo kumangali(kubamangali) njengoba kuvame ukwenzeka lapho kukhulunywa kabi, boma kunobuqhanga kanye nokuhlangayelwa ngokucwensa.
- Ubuqhanga - lapho ukuhlukunyezwa kubandakanya ukusetshenziswa kabi kwamandla ukuphoqa umuntu noma iqembu labantu endaweni yokusebenza. Ukwesabisa – lokhu ukuziphatha ngamabomu okungadala ukuthi umuntu onemizwa ejwayelekile esabe igozi noma ukulimala. Ubuqhanga emsebenzini bungase buhilele ukuziphatha okunonya lapho othile elimaza ngokuphindaphindiwe omunye umuntu amanze angakhululeki. .
- ukuhlanganyela uhlobo lokuhlukumeza olenziwa iqembu labantu eliqondiswe kumuntu oyedwa noma ngaphezulu.
- Ukuhlukumeza ngezinkundla zokuxhumana noma inthanethi ukuhlukumeza okwenziwa, futhi okubhebhethekiswa, ukusebenzisa ulwazi nobuchwepheshe bezokuxhumana obufana nomakhalekhukhwini, omakhalekhukhwini besimanjemanje, i-inthanethi, izinkundla zokuxhumana noma i-imeyili. Ubuqhanga uma benziwa ku-inthanethi bubizwa ngokuthi ubuqhanga ezinkundleni zokuxhumana.

Prohibited grounds

- Ukuhlukumeza isisebenzi akuvunyelwe ngokwesigaba 6(1) se-EEA, uma ukuhlukunyezwa kuhlobene nesizathu esisodwa noma ngaphezulu esinqatshelwe, okuhlangukisa uhlanga, ubulili, ukukhulelwa, isimo somshado, umthwalo wemfanelo womndeni, ubuzwe noma imvelaphi, ibala, ubulili okhetha ubazihlanganisa nabo, ubudala, ukukhubazeka, inkolo, isimo se-HIV, unembeza, inkolelo, umbono wezopolitiki, isiko, ulimi, ukuzalwa nanoma yiziphi ezinye izizathu zokungahloniphi umthetho.
- Kungase futhi kwenzeke ukuthi umuntu ohlukunyeziwe athole ukuthi lokho kuziphatha kube umphumela wesizathu sokunganaki umthetho, njengoba kuhlongozwe esigabeni 6(1) se-EEA.

Ukuhlukumeza Ngokobulili

- Ukuhlukunyezwa ngokobulili kwesisebenzi kuwuhlobo lokucwasa ngokungafanele futhi akuvunyelwe ngezizathu ezingokobulili, ubulili, noma ubulili okhetha ukuzihlanganisa nabo. Ukuhlukunyezwa kwabantu bobulili obufanayo kungalingana nokubandlululwa okusekelwe ubulili, ubulili okhetha ukuzihlanganisa nabo kanye nokuhlukumeza okusekelwe kubulili.

Ukuhlukumeza Ngokobuhlanga, Ubuzwe noma Imvelaphi

- Ukuhlukunyezwa ngokohlanga kuwuhlobo lokucwasa ngokungafanele okunqatshelwe isigaba 6(1) se-EEA okumayelana nobulungu bomuntu noma ukucatshangelwa kobulungu beqembu njengoba kubonisiwe isizathu esisodwa noma ngaphezulu ezisohlwini olinqabekayo noma umumo walelo qembu. Ukuziphatha okucwasa ngokwebala, okuhlanganisa nolimi olujivazayo, kuphambene nezimiso eziyisisekelo zoMthethosisekelo, ikakhulukazi izindinganiso zokungacwasi ngokobuhlanga, isithunzi, nokulingana..
- Ukuhlukumeza ngokohlanga ukuziphatha okungafuneki okungaba okuphikelela noma isigameko esisodwa esiyingozi, esilulazayo, esithunazayo noma esidala isimo esinobutha noma esabisayo. Ukuziphatha okucabangelwe ukuze kugolombe ukuthotshwelwa ngokusabasi ngemiphumela yokungathobeki, nakho kubhekwa njengo kuhlukumeza nakuba kungafakiwe kwincazelo.

Izinhlobo zokuhlukumeza ngobuhlanga zihlanganisa:

- ✓ Ulimi olululazayo namahlanya anobandlululo, opopayi, noma izithombe noma umbhalo ovamise ukuba ihlaya osetsheziswa ezinkundleni zokuxhumana (memes), okuhlanganisa ukuxhumana okufana nenkulumo enenzondo;
- ✓ Izinto ezibhaliwe noma ezibukwayo ezinobuhlanga, ezinhlanganisa nokuhlukumeza ezinkundleni zokuxhumano;
- ✓ Ukubizwa kwamagama okucwasa ngokwebala noma inkulumbo engeyinhle enomthelela esithunzini somuntu;
- ✓ Ukuziphatha okuhlaselayo ngendlela yobutha obusobala kubantu bohlanga oluthile nomaubuzwe obuthile;
- ✓ Ukukhishwa inyumbazane okucashile noma okusobala ekusebenzelaneni nemisebenzi kanye nezinye izinhlobo zokucwasa; futhi
- ✓ Ukuziphatha okusongelayo, okwesabisa umuntu noma okudala indawo yokusebenza enobutha.

Izimiso Eziqondisayo Ekuvimbeleni, Ukuqeda Nokulawulwa Kokuhlukumeza

- Abaqashi bangaphansi kwesibopho ngokweSigaba 60 se-EEA ukuthatha izinyathelo eziqala zokulungisa nokuvimbela zonke izinhlobo zokuhlukumeza emsebenzini. Lokhu kuhlanganisa ukuhlolwa kwengozi yokuhlukunyezwa izisebenzi ezichayeka kukho lapho zenza umsebenzi wazo ngokusemandleni azo.
- Abaqashi kufanele babe nesimo sengqondo sokunga bubekezeleli nhlobo ukuhlukumeza. Kufanele bakhe futhi bagcine indawo yokusebenza lapho isithunzi sabasebenzi sihlonishwa khona. Kufanele kwakhiwe umoya nesimo emsebenzini futhi sigcinwe lapho abasebenzi abaphakamisa izikhonondo ngokuhlukunyezwa bengeke bazizwe sengathi izikhalo zabo azinakwa noma zithathwa njengento encane, noma besabe ukuphindiselwa. Ukusebenzisa le mihlahlandlela elandelayo kungasiza ekufezeni lezi zinhloso:
 - ✓ Abaqashi nezinyunyana/nabasebenzi banesibopho sokukugwema ukuhlukumeza.
 - ✓ Bonke abaqashi nezinyunyana/nabasebenzi baneqhaza okumele balibambe ekudaleni nasekugcineni indawo yokusebenza lapho ukuhlukunyezwa kungamukelekile khona. Kufanele baqinisekise ukuthi izindinganiso zabo zokuziphatha azibangeli ukucasuka futhi kufanele bayeke ukuziphatha okungamukeleki kwabanye.
 - ✓ Abaqashi kufanele bazame ukuqinisekisa ukuthi abantu abafana namakhasimende, abahlinzeki bempahla, abafake izicelo zomsebenzi nabanye abasebenzisana nebhizinisi abahlukunyezwa ngabasebenzi babo noma yimuphi umuntu omele umqashi.

- ✓ Abaqashi kufanele bazame ukuqinisekisa ukuthi izisebenzi eziqashiwe azihlukunyezwa abantu bangaphandle njengamaklayenti, amakhasimende, abahlinzeki bempahla noma abanye abasebenzelana nomqashi.
- ✓ Izinqubomgomo nezinqubo ezithathwa umqashi kufanele zinikeze isitatimende esicacile sesimo somqashi mayelana nokuvimbela, ukuqeda, nokuphathwa kwezinhlobo ezahlukene zokuhlukumeza emsebenzini.
- ✓ Abaqashi, lapho kufanele khona, ngokuhlanganyela nezinyunyana, kufanele basebenzise izinhlelo zokuqeqesha ukuqwashisa abasebenzi kuwo wonke amazanga ngokuhlukunyezwa ukuze kuqiniswe futhi kugcinwe ukulandelwa kwemithetho ngezinhlelo eziqhubekayo zokuqwashisa.
- ✓ Abaqashi kufanele bathathe izinyathelo ezifanele ngokuhambisana nale Mithetho lapho kuvela khona izimo zokuhlukumeza endaweni yokusebenza.

Inqubomgomo Ngokuhlukumeza

- Abaqashi kufanele, kuncike kunoma yiziphi izivumelwano ezikhona nezifanele ezinhlinzekwe umthetho osebenzayo maqondana nokuhlukumeza, basebenzise inqubomgomo yokuhlukumeza, okufanele ihambisane futhi iqondiswe yizimisi zale Mithetho.
- Okuqukethwe yizinqubomgomo mayelana nouhlukumeza kufanele kusakazwe ngempumelelo kubo bonke abasebenzi.
- Ukwamukelwa kwenqubomgomo yokuhlukumeza kanye nokusakazwa kokuqukethwe yinqubomgomo kubasebenzi, kufanele, phakathi kwezinye izinto, kubhekwe ekunqumeni ukuthi umqashi uzifezile yini izibopho zakhe ngokuhambisana nezimiso zesigaba 60(2) soMthethosisekelo we-EEA.
- Izinqubomgomo ngokuhlukumeza kufanele zihambisane kakhulu nezimiso zale Mithetho.
- Izinqubo okumele zilandelwe ngummangali mayelana nokuhlukumezeka kanye nomqashi uma kusolwa ukuhlukunyezwa, kufanele zichazwe kunqubomgomo.
- Ukuba khona kwezinhlelo zokwelulekwa ngokwomgqondo, ukwelashwa, ukunakekelwa kanye nokweseka abasebenzi kufanele kubekwe kunqubomgomo.

Ukubika ukuhlukumezwa

- Isigaba 60(1) se-EEA sihlizekela ukuthi noma yiziphi izinsolo zokuziphatha komsebenzi eziphambana ne-EEA kumele zilethwe ngokushesha kumqashi.
- INkantolo Yokudluliswa Kwamacala Ezabasebenzi inqume ukuthi igama elithi “ngokushesha” kumele lihunyushwe kubhekwe inhloso yalesisimiso, okuwukuqinisekisa ukuthi amacala okuhlukumeza aphenywa ngokwe-EEA, hhayi ezobuchwepheshe. Izinsolo zokuhlukumeza ezenziwa ngesikhathi esifanele, ngaphansi kwezimo, kufanele ziphenywe futhi kuthathwe izinyathelo ezifanele ukuvimbela ukuphinda kwesigameko. Lokhu kungase kuhlenganise nesikhungo sokuqondiswa kwezigwegwe kubasolwa.²

Ubani okufanele enze izinqubo zokubhekana nokuhlukumeza?

- Abaqashi kufanele benze izinqubo ezicacile zokubhekana nokuhlukumeza ngokwe-EEA. Lezi zinqubo kufanele zivumele ukuxazululwa kwezinkinga ngendlela ezwela ubulili, eyimfihlo, ephumelelayo, nangendlela ephumelelayo. Uma umsebenzi ebike isigameko okusolakala ukuthi uhlukumezekile noma efake isikhalo, umqashi uphoqelekile ukuthi aphenye ngezinsolo zokuhlukumeza ezilethwe ezindlebeni zakhe futhi eluleke ummangali ngemigudu engekho emthethweni noma esemthethweni ekhona yokubhekana nokuhlukumeza.

Ingabe abaqashi banaso isibopho lapho baziswa ngezinsolo zokuhlukumeza?

- Yebo, umqashi kufanele:
 - ✓ thintana nabo bonke abathintekayo;

² *Liberty Group Ltd v M* (2017) 38 ILJ 1318 (LAC) at paras 48-54.

- ✓ thatha izinyathelo ezidingekayo zokubhekana nesikhalo ngokuhambisana nale Mithetho kanye nenqubomgomo yomqashi, lapho kufanele khona, isivumelwano sokuxoxisana ngokuhlanganyela; futhi
- ✓ thatha izinyathelo ezidingekayo ukuze kuqede ukuhlukunyezwa.

Kuthiwani uma umqashi ehluleka ukuthatha izinyathelo zokuqeda ukuhlukunyezwa?

- Ukwehluleka ukuthatha izinyathelo ezifanele zokuqeda ukuhlukumeza uma umsebenzi ethula izinsolo zokuhlukumeza ngesikhathi esifanele, kuyokwenza umqashi abhekane necala lokuziphatha komsebenzi ngokwesigaba 60 se-EEA. Kunjalo noma ngabe ukuhlukumeza kunesigameko esisodwa.

Isijeziso sokuqondiswa kwezigwegwe

- Inqubomgomo yokuhlukumeza yomqashi kufanele icacise uhla lezijeziso sokuqondiswa kwezigwegwe ezingathweswa umenzi wobubi. Izijeziso kumele zilingane nobucayi bokuhlukumeza okukhulunywa ngakho, futhi kufanele kuhlinzeke lokhu:
 - ✓ kunga khishwa isixwayiso ezimweni ezincane zokuhlukumeza. Isexwayiso esinikezwe umenzi wobubi kufanele sichaze ingqikithi yokungaziphathi kahle kokucwasa;³
 - ✓ ukuxoshwa kunga landele uma izigameko ezincane zokuhlukumeza ziqhubeka ngemva kokuthola isixwayiso, kanye nezigameko ezimbi kakhulu zokuhlukumeza;
 - ✓ ezimeni ezifanele lapho umenzi wobubi etholwa enecala lokuhlukumeza, umenzi wobubi angase ashintshwe indawo yokusebenza noma kwenye indawo yokusebenza ngaphakathi enkampanini; futhi
 - ✓ ummangali unelungelo lokuvula icala lobugebengu noma lokuvulela lowo osolwa ngokuhlukumeza.

Ubani okufanele aqinisekise ukugcina kuyimfihlo?

- Abaqashi nabasebenzi kumele baqinisekise ukuthi izikhalo mayelana nokuhlukunyezwa ziyaphenywa futhi zisingathwe ngendlela eqinisekisa ukuthi imininingwane yabantu abathintekayo igcinwa iyimfihlo ngenhloso yokuvikela ukugcinwa kuyimfihlo kwabo bonke abathintekayo.
- Konke ukuxhumana kwangaphakathi nangaphandle okuhlobene nesigameko sokuhlukumeza kufanele kuthathwe njengokuyimfihlo.
- Ukucatshangelwa kokugcinwa kuyimfihlo akuvimbela umqashi ukuthi athathe izinyathelo ezifanele zokuvikela ukuphepha noma isithunzi sabasebenzi, kungaba phakathi nophenyo noma ngemva kwalokho.

Ikhefu lokugula elengeziwe

- Lapho ilungelo elikhona lekhefu lokugula lomsebenzi seliphelile, umqashi kufanele acabangele ukunikezwa kwekhefu lokugula elengeziwe elikhokhelwayo ezimeni zokuhlukunyezwa okukhulu, lapho umsebenzi, ngokweseluleko sezempilo, edinga ukwelulekwa ngokwengqondo.
- Uma ukuhlukunyezwa kubangela ukuthi isisebenzi sigule isikhathi esingaphezu kwamasondo amabili, umsebenzi angase abe nelungelo lokufaka isicelo sezinzuzo zokugula ngokwesigaba 20 soMthetho Womshuwalense Wokungasebenzi we- 2001.
- Ezimweni ezifanele, abaqashi bangase bacabangele ukusiza ngezindleko zeseluleko sezokwelashwa kanye nokwelulekwa nokunakekelwa kwabahlukumezekile, lapho lezo zimali zingafakiwe kunoma isiphi isikhwama sosizo lokwelashwa.

Ubani okufanele adlulisele Ulwazi Nemfundo Emsebenzini?

- Abaqashi, futhi lapho kufanele khona izinhlangano zabaqashi, kufanele zifake udaba lokuhlukumeza ngokocansi nezinye izinhlobo zokuhlukumeza kumkhombandlela abaqondisa ngawo, ezemfundo, nasezinhlelweni zabo zokuqeqesha ngendlela efinyeleleka kalula.

³ *Future of SA Workers Union on behalf of AB & others v Fedics (Pty) Ltd & another* (2015) 36 ILJ 1078 (LC) at para 166.

- Izinyunyana kufanele zifake udaba lokuhlukunyezwa ngokocansi nezinye izinhlobo zokuhlukumeza ezinhlelweni zazo zemfundo yokuqeqesha abalwela abasebenzi nabasebenzi ngendlela efinyeleleka kalula.

Ungalufinyelela kanjani ulwazi olugcwele le Mithetho?

- Ukufinyelela ngokuvakashela iwebhusayithi yoMnyango Wezemsebenzi Nezabasebenzi: www.labour.gov.za



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