REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Reportable

Case no: JR 221/12

In the matter between:

ABRAHAM LEGOBATE **Applicant**

and

QUEST FLEXIBLE STAFFING **First Respondent**

CCMA **Second Respondent**

K KLEINOT *N.O* **Third Respondent**

Heard: 18 June 2013

Delivered: 30 July 2013

Summary: Application to review arbitration. In determining fairness of the dismissal Commissioner to take into account the totality of the circumstances of the case. Dismissal of employee unfair after posting negative comments on intranet after invitation to comment on "mutual respect" by the employer.

JUDGMENT

MOLAHLEHI, J

Introduction

[1] This is an application to review and set aside the arbitration award made by the first respondent under case number GAJB15862-11 dated 24 January 2011 in terms of which the dismissal of the applicant (the employee) was found to have been fair, the consequence of which was the dismissal of unfair dismissal claim of the employee.

The background facts

[2] The applicant who was, prior to his dismissal, employed by the first respondent and assigned to work at one of the clients of the first respondent's call centre was charged with the following offence:

> '11.1 Breach of electronic and communication policy;
>
> 11.2 Serious disrespect;
>
> 11.3 Failure to observe, company/client's rules.'[1]

[3] The charges arose from the comments which were posted by the applicant on the intranet regarding the way management treated employees. The comments which the applicant posted onto the intranet were in response to an invitation by the client in terms of which employees were asked their views regarding the values of the company. For that specific week, when the comments were made, the question posed was about respect and concerned more particularly "mutual respect."

[4] In his response to the question which, as indicated, was posted onto the intranet, the applicant stated the following:

> 'I am asking this because most values has to be practiced in the Call Centre, but we as CSRs we don't get that respect from our management. I feel we being treated like a sheep waiting to be slaughtered for a certain ceremony, when talking about Respect what is it? What do you know about Respect…

[1] See page 51 of the bundle of documents.

> Our management they swop us around as the please, they don't care, all they know is that, we gonna work for their R4000.00 or go around with your cv looking for greener pasture, the move US around without consulting US, Billing, Tech, Activation or Xtra view, we really don't know and confused as our management as which Segment do really fit on, as they keep moving US like Hillbrow Tenants month end . . .
>
> So before you mention Respect, get your act together and Stop harassing Us, we all have families to support, you also promised Us DRIFTERS, that we will c (sic) them on World War 29.
>
> RESPECT, RESPECT, RESPCT, U need DECENCY ... Amen.'

[5] The first respondent convened a meeting subsequent to the applicant posting the above on the intranet. According to the first respondent, they decided to charge the applicant after he failed to show remorse for what he had said and done. In the meeting, the employee indicated that what was stated in the intranet was his opinion.

[6] The employee conceded during the arbitration hearing to having posted the message on the intranet. He contended, however, that he posted the message following the request from the third respondent's client to express a view on mutual respect. He further stated that he was not aware that he was not supposed to post a negative opinion.

The arbitration award

[7] The Commissioner found that it was common cause that the applicant posted the message on the intranet in response to a request to provide views on mutual respect. The Commissioner further found that the applicant understood the request and that he was aware that the message would be seen by his colleagues and management.

[8] The Commissioner further found that despite knowing that his message amounted to a grievance and also knowing that the procedure to follow in that regard, he failed to provide a satisfactory explanation as to why he failed to follow the grievance procedure.

[9] The Commissioner then raised the question as to what standard of respect managers at the workplace are entitled to. In this respect, he observed that employers and employees have a duty of showing respect to each other. And as concerning the contents of the message posted by the applicant, the Commissioner found that the applicant was 'resentful, bitter of management and accused them directly… that they were being disrespectful towards the employees and treating them with disdain.'

[10] In dealing with the substance of the offence, the Commissioner found that:

> '5.10 By making these allegations Mr Legobate was indeed throwing the gauntlet down to management. He knew that his message was a list of complaints but elected to proceed to post it. He cannot then say that he believed that this was an open forum where he could air his opinions. This is in stark contrast to his evidence that he had a meeting with Ms Nortje and she explained the escalation procedure. Further this meeting addressed some of his concerns and he was requested not to send any e-mail. A reasonable man in Mr Legobate's position would have at the very least being aware that giving this caution he should not post anything inflammatory on the intranet.
>
> 5.11 The message is disrespectful and cannot be seen in any other light. By posting such a challenging message on the intranet Mr Legobate brought the company's name into disrepute as this was an open forum for all employees. As a result of his behaviour he potentially jeopardised Quest's contract with the client.
>
> 5.12 At no time during arbitration did Mr Legobate express remorse for his actions.'

Evaluation

[11] In terms of section 188 of the Labour Relations Act of 1995 (the LRA), the dismissal of an employee is unfair if the employer fails to show that the dismissal was for a fair reason. The dismissal would also be unfair if the employer fails to show that dismissal was a fair sanction in the circumstances of the case.

[12] It is trite that in dealing with a dismissal case a Commissioner is faced with the difficulty of balancing the interests of both the employee and the employer. As stated in a *Bramford v Metrorail Services (Durban) and Others*:[2]

> 'The weight to be attached to the respective interests depends on the overall circumstances of each case.'

[13] In *Senama v CCMA and Others*,[3] the Court in dealing test for review held that:

> 'A reasonable decision reached by a Commissioner, in performing his/her functions as an arbitrator applies the correct rules of evidence... It is also required of the commissioner to weigh all circumstances of the case before him or her to ensure that his decision is reasonable.'

[14] The concept of fairness as envisaged in the Labour Relations Act of 1995 (the LRA) extends the inquiry into the fairness or otherwise of a dismissal of an employee beyond the determination of whether the employee has committed the transgression. It includes also the investigation of whether the dismissal as a sanction was in the circumstances of the case also fair. In other words, part of the Commissioner's duty when dealing with a claim of an alleged unfair dismissal is to determine whether the dismissal was an appropriate sanction in the circumstances of the case.[4] Some of the factors which the

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[2] (2003) 24 ILJ 2269 (LAC) at para 16. See also *NUMSA v Vetsak Co-operative Ltd and Others* 1996 (4) SA 577 (A) 589B-C: 'Fairness comprehends that regard must be had not only to the position and interests of the worker, but also those of the employer, in order to make a balanced and equitable assessment. In judging fairness, a court applies a moral or value judgment to established facts and circumstances.'

[3] [2008] 9 BLLR 896 (LC) at para 18.

[4] In this respect section 188 (2) of the LRA read with item 7(b) of schedule 8 of the LRA reads as follows:

'(b) If a rule or standard was contravened, or not-
(i) the rule was a valid all reasonable rule or standard;
(ii) the employee was aware, or could reasonably be expected to have been away of the rule or standard;
(iii) the rule or standard has been consistently applied by the employer; and
(iv) the dismissal was an appropriate sanction for the contravention of the rule or standard." (own emphasis). The CCMA Guidelines: Misconduct Arbitrations which were published in the Government Gazette GN 602 dated 2 September 2011 provides: "Determining whether dismissal was an appropriate sanction involves three enquiries; an enquiry into the gravity of the contravention of the rule; an inquiry into the consistency of the application of the rule and sanction and into factors that have justified a different sanction." As set out in *Sidumo* (at paragraphs 59 and 62) in determining the fairness of a dismissal the enquiry to be conducted is a two stage inquiry. The first is to determine, "whether or not misconduct was committed on which

Commissioner has to take into account in assessing the fairness of a dismissal are set out in *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*[5] as follows:

> '1. The importance of the rule that was breached,
>
> 2. The reason the employer imposed the sanction of dismissal,
>
> 3. The basis of the employee's challenged the dismissal,
>
> 4. The harm caused by the employee's conduct,
>
> 5. Whether additional training and instruction may result in the employees not repeating the misconduct, and
>
> 6. The effect of the dismissal on the employee.'

[15] In narrowing the issues for determination during the arbitration proceedings, the Commissioner had the following to say:[6]

> '... In terms of substance the sanction is in dispute. It looks like you both agree, it is common cause that the incident took place on 2 June where comments were posted on the Intranet... So as I can see it and from what you have been telling me what clearly is in dispute in this arbitration is whether the comments that were indeed posted were inciting and disrespectful management or in answer to a request to give views on mutual respect.'

[16] In the opening address during the arbitration hearing, Ms Nortje representing the third respondent said the following:[7]

> '... there was an initiative put in place by the client where they were basically asking the staff the views on the values. So for this particular week in question was mutual respect and what the employees thought mutual respect, what the views where on mutual respect.

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the employer's decision to dismiss was based." The second inquiry is entails assessing, "the fairness of the dismissal..."'

[5] *Sidumo v Rustenburg Platinum Mines Ltd* [2007] 12 BLLR 1097 (CC) at para 78.
[6] Record of the arbitration proceedings at page 86, line 15.
[7] Ibid at page 83, line 10.

> Mr Legobate then went on the Intranet and then put on comments, but not related to work mutual respect, what his view on mutual respect are, instead he slandered management, he put salaries on the Intranet, the insight that employees...
>
> Prior to that there was a discussion on the escalation process if he was not happy. Unfortunately that discussion took place verbally between myself and Mr Legobate.'

[17] In the arbitration award, the Commissioner found the applicant guilty of being disrespectful towards management and also that his conduct had jeopardised the respondent's contract with its client. It is apparent from the reading of the arbitration award that the Commissioner in imposing the dismissal sanction took into account the fact that the employees did not show remorse.[8]

[18] The central issue to the charges proffered against the applicant was that he escalated a grievance to a client in breach of the electronic policy and also distributed the same, not only to other employees but also to the sister companies of the client.

[19] Ms Nortje, testifying on behalf of the first respondent during the arbitration hearing, indicated that the employee was previously verbally warned not to escalate grievances directly to the client but rather to direct them to the first respondent.

[20] It is common cause that the posting by the applicant and several other employees were done in response to an invitation by the client to comment on their understanding of mutual respect.

[21] The question which was posted and which the employees were expected to answer according to Ms Nortje was the following:

> 'Give your views on what mutual respect should be.'[9]

[22] According to him, management was made angry by the posting of the statement by the employee because it created a perception to shareholders

[8] Ibid at page 42, para 5.10 of the arbitration award.
[9] Ibid at page 97, line 7.

and CEOs that they (management) were ill-treating people and did not care for employees.

[23] The applicant conceded that a meeting was previously called by management where he was told that he should not escalate complaints through e-mails.[10] He contended, during the arbitration hearing, that what he expressed in the statement that he posted was an opinion and was made in response to the invitation sent to them through the intranet.

[24] After his evidence in chief, the applicant was prior to cross examination questioned at length by the Commissioner, in particular regarding the explanation by the applicant of his understanding of the statement made in the invitation which apparently reads as follows:[11]

> 'Tell us your views, and be more respectful.'

[25] After a lengthy questioning about the above, the applicant conceded that his statement could be read as a grievance. He, however, testified in response to further questioning by the Commissioner that at the time of writing the statement, he did not think about it in that particular manner.

[26] At the hearing of this matter, the legal representative of the third respondent conceded that the problem was created by the client, in inviting employees to post their views regarding mutual respect on the intranet. It was the client that set in motion the process that led to the applicant posting his views on the intranet. If anything, it would appear that the invitation was ill-conceived by the client in that the risk associated with such an invitation was not considered.

[27] There is nothing in the invitation by client that set out the parameters of the comments which were expected from the employees. The invitation did not prescribe the format and the contents of the comment about the employees' views. It is apparent from the reading of the various submissions by other employees that some presented a theoretical analysis of the concept "respect." The approach adopted by the applicant unlike those of the others is

[10] Ibid at page 196, line 17.
[11] Ibid at page 107, line 5.

descriptive and based on his perception and the situational experience he seems to have had with management. He did that in the context where he was invited by the client to submit his views on the intranet. The invitation does not indicate that the expectation was that positive comments would be made about management neither does it indicate that employees should not formulate their views in a form of a grievance or in a negative manner. There is also no warning to the employees that any negative comments about management could result in discipline and loss of their jobs.

[28] It is for the above reasons that I find that had the Commissioner considered and applied his mind to the totality of the facts and the circumstances of this case, he ought to have found that the dismissal was not an appropriate sanction.

[29] In the premises, the Commissioner's arbitration award stands to be reviewed.

[30] In the circumstances, the following order is made:

33.1. The arbitration award of the third respondent made under case number GAJB15862-11 dated 24 January 2011 is reviewed and set aside.

33.2. The arbitration award is substituted with the following:

'1. The dismissal of the applicant by the first respondent was unfair.

2. The first respondent is ordered to reinstate the applicant retrospectively without loss of benefit.'

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Molahlehi, J

Judge of the Labour Court of South Africa

Appearances:

For the Applicant: In person

For the Respondent: Ms Anndine Dippenaar of Kirchmanns Inc.