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EMPLOYMENT

Can you dismiss an employee for posting a racist comment on Facebook?

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ISSUE

Is a dismissal of an employee who posted alleged racist comments on Facebook substantively fair?

SUMMARY

The dismissal of an employee who posted alleged racist comments on Facebook will be substantively fair only if a reasonable person ascribes the comment as racist and the comment has a negative bearing on the employee's continued employment relationship.

COURT'S DECISION

In the case of *Dyonashe v Siyaya Skills Institute (Pty) Ltd* (2018) 3 BALR 280 (CCMA), the Commission for Conciliation, Mediation and Arbitration ("CCMA") had to assess whether Mr Dyonashe, the employee, was fairly dismissed by his employer, Siyaya Skills Institute. The employee was charged with two charges. The first charge concerned the use of abusive and racist language and / or grossly inappropriate conduct resulting from a racist and / or derogatory statement the employee made on Facebook, where he stated: "Kill the Boer, we need to kill these". The second charge concerned the employee bringing the company name into disrepute, as a client complained about the Facebook comment to the employer. At the hearing, the employee was found guilty of the first charge and dismissed for misconduct. The employee referred a claim for unfair dismissal to arbitration at the CCMA.

The employee argued that his dismissal was substantively unfair, as he was not guilty of the offence for which he was dismissed. He argued further that if he was guilty, the sanction of dismissal was inappropriate, as he was not aware of the fact that he may not post comments on Facebook. The employee also challenged the procedural fairness of his dismissal.

The Commissioner held that the dismissal was procedurally fair. The Commissioner then assessed whether the employee's dismissal was substantively fair by assessing whether the Facebook post was racist and / or derogatory.

The Commissioner acknowledged the case of *SA Equity Workers Association on behalf of Bester v Rustenburg Platinum Mine and Another* (2017) 38 ILJ 1779 (LAC), where the court held that race descriptors are neutral and it is only by locating them in a 'pejorative' context that their use should be condemned as racist. The Commissioner held that the employee's Facebook post was placed in a pejorative context.

The Commissioner then considered the case of *Afri-Forum and another v Malema and another* 2011 (12) BCLR 1289 (EqC), where the court held that the meaning of alleged racist or derogatory words is what the reasonable person would ascribe it to be. The Commissioner held that in this instance, the meaning of 'kill the boer' can largely and objectively be interpreted by a

reasonable person to mean: kill white people. The Commissioner accordingly found that the employee's Facebook post was racist, and that the applicant was guilty of the charge for which he was dismissed.

The Commissioner also considered whether it made any difference to the case that the employee was not at work when he posted the comments or whether it made any difference that the comment was not directed towards a fellow employee. The Commissioner gave effect to the court's decision in *Dolo v Commission for Conciliation, Mediation & Arbitration & others* (2011) 32 ILJ 905 (LC), holding that the employee's conduct outside of the workplace and outside of working hours had a negative bearing on his continued suitability for employment.

The Commissioner concluded that the dismissal was fair, and an appropriate sanction.

IMPORTANCE OF THIS CASE

When determining whether to take disciplinary action against an employee where the employee allegedly makes racist / or derogatory statements outside of work, the first question is whether the statement has a pejorative context that a reasonable person would ascribe as being racist and / or derogatory. The second question is whether the employee's conduct has a negative bearing on his/her continued suitability for employment.

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