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EMPLOYMENT

Dismissal for intimidation and accusations of racism against fellow employee held to be fair and appropriate

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Dismissal for intimidation and accusations of racism

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Issue

Whether the dismissal of an employee who accused a fellow employee of racism and threatened and intimidated her was substantively and procedurally fair.

Summary

The dismissal of an employee who had accused a fellow employee, a security supervisor, of searching his car because he was a black man and intimidated her by promising to "deal with her", was considered to be substantively and procedurally fair.

Alleged unfair dismissal of the employee for reasons of misconduct

This was the issue considered by the Commission for Conciliation, Mediation and Arbitration ("**CCMA**") in the case of *Lefydi / Bader South Africa (2022) 1 BALR 71 (CCMA)*. This case related to the alleged unfair dismissal of the employee for reasons of misconduct. The employee commenced employment at the respondent as a Supervisor. He was dismissed on 29 September 2020, after a disciplinary hearing was convened and he was found guilty of misconduct.

The employee, thereafter, referred a dispute to the CCMA. It was the employer's case, that the employee had accused Ms Mokhadi Elizabeth Mafoko ("**Mafoko**"), a security supervisor stationed at the employer's premises, of racism. Mafoko testified that the employee had informed her that he had purchased off-cut leather bags from the employer and that they were too heavy to carry to his car. She then suggested that he bring his car inside the employer's premises. She noted that his car would be searched upon entering and leaving the premises.

Before the employee brought his car onto the respondent's premises, Mafoko had received a tip-off that he had loaded a full hide in his car. It was for this reason that Mafoko approached the employee's car when he arrived on the premises and began conducting a search. At the time, two other security officers had already begun searching the employee's car. Mafoko asked the security officers to remove the off-cut leather bags from the car so that she could conduct a thorough search. The employee became angry and accused Mafoko of engaging in a search of his motor car because he was black. The employee then informed Mafoko that he "was going to deal with her". He said he would find out whether Mafoko treated a white lady in the same manner as that which she had treated him.

The employer had a zero tolerance policy for racism. Mr Daniel Modipane, the chairperson of the disciplinary hearing, testified at the CCMA. He noted that the employee had failed to raise a grievance through proper channels in respect of the way in which his car was searched and that "*the most aggravating factors against the applicant were that his actions were directed against a female employee, and that he did not show remorse for his conduct*".

The employee acknowledged that he was aware of the respondent's search procedures but took issue with the fact that Mafoko wanted to search his car after it had already been searched. The employee explained that, he felt as if he was being treated like a criminal which

provoked him, but denied that he made any racial insults towards Mafoko.

Legal provisions considered by the CCMA

In considering the substantive and procedural fairness of the employee's dismissal, the CCMA Commissioner considered the Constitution of the Republic of South Africa, 1996 ("**Constitution**"), the Labour Relations Act 66 of 1995 ("**LRA**"), Schedule 8 of the Code of Good Practice: Dismissal ("**the Code**") as well as various case authority. The relevant legal authority was in support of the finding that employees who falsely accuse other employees of racism assault such employees' dignity.

This may result in the dismissal of the employee making such a false allegation. For instance, in the decision of *Legal Aid South Africa v Mayisela and others (2019) 5 BLLR 421 (LAC)* the court dismissed an employee who had made false accusations of racism against his employer and held that false accusations are demeaning, insulting and an attack on one's dignity and the dismissal of the employee was therefore upheld. The authority also supported a finding that employees who engage in intimidation and/or use abusive language may be dismissed in appropriate circumstances.

CCMA's findings

The employee did not present any evidence challenging the procedural fairness of his dismissal. In regard to substantive fairness, it was held that the employer had proved on a balance of probabilities that the employee had committed the offences of racism and intimidation. Furthermore, the Commissioner noted that throughout the proceedings the employee failed to acknowledge the wrongfulness of his conduct and continued to make unfounded allegations of racism. In light of the employee's lack of remorse for his conduct, it was held that the dismissal of the employee was substantively and procedurally fair.

Importance of the case

Employees who make unfounded allegations of racism against their employer or colleagues commit serious misconduct which may result in their dismissal.



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