WERKSMANS
ATTORNEYS

EMPLOYMENT

Employee's right to privacy

3 April 2019 *5 min read*

In *National Union of Metalworkers of South Africa and other v Rafee NO and others (2017) JOL 37705 (LC)*, the court weighed up the competing interest of an employee's right to privacy and the employer's right in protecting his business. An employee was dismissed on two charges, one charge was due to the employee failing to delete photographs off his cellphone that he had taken of the production line of the company without the employer's permission; and thereafter the employee failed to confirm that he had deleted these photographs. In addition, the employee refused to allow his employer to have access to his cellphone to serve as proof to the employer that he had deleted the photos in question.

The employee was subjected to a disciplinary proceeding as he was aware that he needed permission to take any photographs that related to the procedures and functioning of the business, but had failed to obtain such permission. During the disciplinary hearing, the Director stated that the reason they asked the employee to hand over his cellphone was to ascertain whether the pictures had been deleted. The employee refused and claimed that it would be an infringement of the employee's right to privacy as the cellphone contained information about the employee's family. The employer acknowledged the above and then allowed the employee to hand over his cellphone after 4 days, providing the employee with ample time to remove the private information. The employee still refused to hand over the phone, which consequentially led to his dismissal.

The employee referred the dispute for arbitration upon which the arbitrator found that the employee's narration of the events were inconsistent to what was noted in the disciplinary proceeding. Additionally, the arbitrator noted that the request for the employee to hand over his cellphone was reasonable within the circumstances as the employee had been given a number of days to remove the private photographs from his cellphone and the refusal to obey the instruction given by the employer was that of a serious nature, which warranted a dismissal.

The employee thereafter reviewed the application in the labour court and contended that the arbitrator was unreasonable in concluding that the instruction made by the employer to hand over the employees phone was reasonable and lawful as the arbitrator failed to consider that the employee's cellphone contained private information and in doing so there was a violation to the employee's right to privacy in terms of section 14 of the Constitution of the Republic of South Africa, 1996 ("the Constitution"). The employee further stated that the arbitrator failed to consider whether the employer's instruction was an infringement of his rights in terms of section 25(1) of the Constitution, which relates to the arbitrary deprivation of property.

The court stated that the employer had no intention to arbitrarily deprive the employee of his property as he did not wish to confiscate or be prohibited from using his cellphone. In addition to the above, the labour court had to weigh the competing interest of the employee's right to privacy and the employer's right to protect their business. The employee, without a doubt has the right to preserve the confidential information that is contained on his cellphone, in contrast to the employer's right to preserve the confidentiality of his business operations. In *Protea Technology Ltd v Wainer and others 1997 (9) BCLR 1225 (W)*, the court stated that an employer is not entitled to intercept private calls made by the employee, but in instances where the employee is engaged in matters that pertains to the employer and his business, the employee in these circumstances has lost the right to privacy.

The above practically entails that when an employee uses any form of technology or communication that may be directly or indirectly related to his or her business or employer, the employer has the right to obtain the information that is stored and shared in a reasonable manner. Moreover, the employee does have an existing right to privacy in terms of the information that

is stored, but this right is not limited and excludes any information that is stored that may harm or infringe the employer and his business. An employee, therefore, may have to temporarily cease possession of these personal items to prove to their employer that the information contained on their personal device will not negatively impact the employer and his business in any way.

The labour court concluded that the arbitrator was not unreasonable in determining that the dismissal was unfair in the above scenario and consequentially the application was dismissed. In light of the above, the court confirmed that a dismissal resulting from an employee failing to hand over his personal belongings upon which an employer has a reasonable suspicion that the information contained by the employee might have a negative impact on his business is indeed lawful and fair.

Bradley Workman-Davies

Director

View Profile