REPUBLIC OF SOUTH AFRICA

IN THE LABOUR COURT OF SOUTH AFRICA, DURBAN

JUDGMENT

Not reportable

Case no.: D621/12

In the matter between:

VISHNU CHETTY **Applicant**

and

TOYOTA SOUTH AFRICA (PTY) LTD **First Respondent**

COMMISSIONER BESS PILEMER **Second Respondent**

COMMISSION FOR CONCILIATION

MEDIATION AND ARBITRATION **Third Respondent**

Heard: 10 July 2014

Delivered: 19 November 2014

Summary:

JUDGMENT

SCHUMANN, AJ

[1] In this matter the Applicant seeks an order that an award by the Second Respondent dated 28 May 2012 in a dispute between himself and the First Respondent be reviewed and set aside and replaced with an award that his dismissal was unfair. The Applicant seeks reinstatement with full retrospective effect. The arbitration which produced the award in question followed upon a referral to the Third Respondent by the Applicant of a dispute relating to an allegedly unfair dismissal.

[2] At the heart of the matter is an e-mail which was received on the Applicant's computer, forwarded to one "Judy S" at another company on three occasions from the Applicant's computer. A hardcopy was also printed on the First Respondent's printing facilities. This hardcopy came to the attention of a shop steward who handed it to the First Respondent's Senior HR Manager. After investigation the Applicant was charged with "circulation of racially offensive e-mail using company resources". He was found guilty and dismissed.

[3] The First Respondent's policy relating to internet and e-mail usage states:

> "'The display and/ or transmission of any offensive (racial, sexual, religious and/ or political) images, documents or messages on any company system is a serious violation of company policy and may result in severe disciplinary action. Furthermore, offensive material may not be archived, stored, distributed, edited or recorded using company equipment and/ or computing resources'."

And further:

> "'Any material which may be deemed offensive by colleagues, customers or suppliers, may not be archived, stored, distributed, redistributed, edited, printed or recorded using our network or computing services'"

[4] The rationally offensive “joke” contained in the e-mail is set out in the Second Respondent’s award and I do not propose to repeat it. As the Applicant conceded that it was racially offensive one might only add that it is also particularly crass and stupid and it is astonishing that the e-mail was distributed with the apparent vigour that it was.

[5] The main thrust of the Applicant’s challenge to his dismissal both before the Third Respondent and this Court was that the First Respondent could not prove that the Applicant had sent the e-mail in question (he denied having sent it) and that the sanction of dismissal was inconsistent, and therefore unfair, as two other employees had been found guilty of similar offences and not dismissed.

[6] The Second Respondent rejected the Applicant’s evidence that he had not sent the e-mail on the three occasions reflected in the record on his computer and contended that they may well have been sent by another employee who had a grudge against him. Such employee, so the Applicant contended, may have accessed his computer to send the e-mails and set him up for disciplinary action. The Second Respondent’s reasoning in rejecting this conspiracy theory and concluding that the probabilities strongly indicated that the Applicant had sent the e-mails, is set out in paragraph 8.1 of her award. Her reasoning cannot be faulted.

[7] A feature of the second aspect on which the award was challenged was a previous well known case where an employee of the First Respondent (Cronje) had been dismissed for sending an e-mail caricature depicting Robert Mugabe as a gorilla with an offensive caption. The dismissal was confirmed in proceedings before the Third Respondent and this Court. This, according to the First Respondent, demonstrated its commitment to eradicating such behaviour and its consistency in such cases.

[8] It was contended on behalf of the Applicant that two previous incidents which occurred in the First Respondent's workplace indicated that the sanction of dismissal was inconsistent. The only evidence led in regard to the first such incident was that (as the Second Respondent states in her award, at paragraph 8.3) "two black men were arguing and the one called the other a baboon". The Second Respondent correctly found that this case was distinguishable. Context is everything. Words which are capable of more than one interpretation are unlikely to be used in a racially demeaning sense between persons of that race. Even if some form of ironic racial slur could be imputed to the word used it is significantly less offensive coming from a person of the same race.

[9] The second incident related to a gender insensitive "joke" in the form of a cartoon. The cartoon did not form part of the record but was apparently produced at the arbitration. All that can be gleaned from the record was that it had something to do with a woman carrying a crate of beer and the caption "it's a man's life". While it could certainly be argued both that this cartoon was as pointless and silly as the e-mail the Applicant was alleged to have sent and that most women would find it offensive, the two are significantly distinguishable.

[10] Gender stereotyping is very often rooted in the traditional roles women have played in society and such roles may differ from culture to culture. While civilised nations are constantly seeking to correct the imbalance through, *inter alia*, constitutional reforms, it remains a worldwide problem that is being dealt with in different degrees.

Racism is different in that it is rooted not in traditional norms and culture but is the degradation and dehumanisation of one racial group by another on arbitrary grounds and arises, more often than not, from the unfortunate realities of colonial conquest.

[11] While gender equality and the eradication of gender stereotyping remains a vital issue, I do not believe that any valid complaint could be made if I were to state that, particularly in the context of the social and political history of this country, racism is the more serious offence.

[12] The Second Respondent expressly found the case of the gender insensitive material to be distinguishable (paragraph 8.3 of the award). That she did not articulate in detail her reasoning is neither here nor there and does not, in my view, render the award reviewable.

[13] The commissioner correctly considered the mitigating factors but found that the manner in which the Applicant had breached the policy in again making the racially offensive comparison of black persons with apes (as had been done in the Cronje case) justified the Applicant's dismissal.

[14] That judgment call has been entrusted to commissioners by the Labour Relations Act and there is no basis on which I can or should interfere with the award.

[15] Accordingly I make the following order:

The application for review is dismissed.

No order as to costs.

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SCHUMANN, AJ

Acting Judge of the Labour Court

Appearances:

For the Applicant: Adv D Pillay instructed by Jay Reddy Attorney

For the Respondent: Mr M Maeso of Shepstone and Wylie