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No place for racism in the workplace

by Samiksha Singh and Zola Mcaciso

The Labour Appeal Court (LAC) issued a stern warning that it will not tolerate racism, in any form, in the workplace. In the recent case of the City of Cape Town v Freddie & Others (2016) 37 ILJ 1364 (LAC), the LAC reviewed and set aside an arbitration award in which the Arbitrator found that the employee was unfairly dismissed for making repeated unsubstantiated racist allegations about his manager.

In this case, when the employee's manager guided him on how to properly compile a particular report and instructed him to seek assistance from a fellow employee to finalise the report, the employee embarked on a bombardment of emails to the manager. In the emails he accused the manager of incompetency and of being a dismal failure. The emails were also copied to various employees. When the manager requested that the employee cease such conduct and desist from unnecessarily copying in others in the offensive and inappropriate emails, the employee accused the manager of being a racist and compared him to Hendrik Verwoerd.

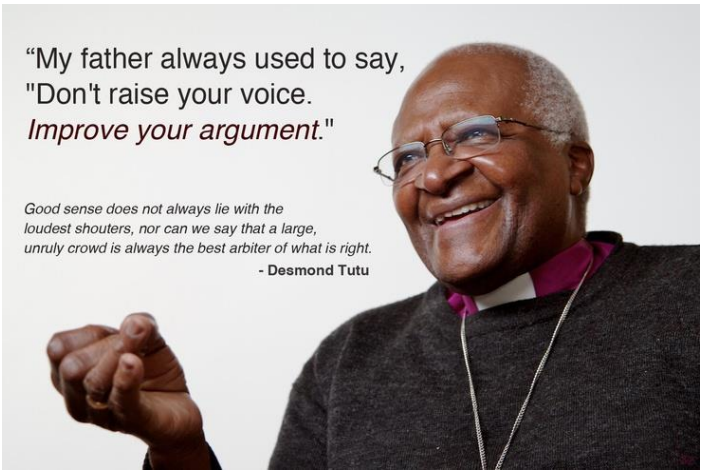
The employer dismissed the employee on charges of serious misconduct in that he was grossly insubordinate, insolent and aggressive towards management and that he had sent derogatory and racially offensive emails to his manager. During the arbitration, the employee attempted to justify his allegations of racism by stating that the manager had insulted him in front of his colleagues. The employee also made unfounded allegations of being discriminated against on the basis of his race.

The employee challenged his dismissal at the Bargaining Council. The arbitrator found that there was no evidence to prove the racism alleged by the employee and that it was the employee's subjective view. The arbitrator held that the employee had shown some remorse (albeit only after receiving advice from his attorney to do so). On this basis and the employee's length of service, the arbitrator found that the employment relationship had not irretrievably broken down and that since the employer was a large organisation, the employee could be placed elsewhere. The dismissal, was according to the arbitrator, unsubstantiated. On review, the Labour Court agreed with the arbitrator and placed emphasis on what it regarded as strong mitigating factors in favour of the employee.

The Labour Court order was taken on appeal. On appeal, the LAC had to determine whether the dismissal was an appropriate sanction. The LAC noted that it was common cause that the employee was guilty of the misconduct and found that the arbitrator was wrong in ruling that the employee was remorseful as his apology was belated and only as a result of his attorney's advice.

The LAC also held that where an employee could not own up to their own misdemeanor and displayed a lack of remorse, the dismissal would be substantively fair. The LAC found that the decision of the arbitrator in this case was not one of a reasonable decision maker and that the employee's dismissal was an appropriate sanction in the circumstances. In respect of racial slurs made by the employee that the manager "was even worse that Verwoerd" (without justification or justifiable cause), the LAC found that it constituted an offensive racial insult and was totally unacceptable in the workplace. The LAC reflected on the history of the country and stated that Hendrik Verwoerd is known as the Architect of Apartheid as he, amongst other things, implemented a system of laws which segregated the different races in our country and allowed the several atrocities to take place against black people (African, Coloured and Indians) without any impunity.

Furthermore, the LAC reiterated that the use of racist language against a person or class of persons constitutes hate speech and is prohibited in terms of the Constitution and other law in South Africa. The LAC also referred to the case of Crown Chickens (Pty) Ltd t/a Rocklands Poultry v Kapp and Others, wherein Zondo JP stated:



An employee who makes his bed must lie in it

by Nicholas Preston, Sean Jamieson and Samantha Coetzer

Employers and employees who elect to resolve disputes between themselves often conclude settlement agreements wherein they record the terms of their agreement. It is common that these agreements include a clause in terms of which the employee agrees to waive his rights to approach the Commission for Conciliation, Mediation and Arbitration (CCMA) and Labour Court (LC) in respect of any dispute arising from his employment or the termination thereof.

Recently, the Constitutional Court (CC) considered such a clause in the decision of Gbenga-Oluwatoye v Reckitt Benckiser South Africa (Pty) Limited and Another (CCT41/16) [2016] ZACC 33. In this case an employee concluded a settlement agreement with his employer after it discovered that the employee had made material misrepresentations during the time of his appointment. The employee misrepresented that he would forego shares at his previous employer, for taking up employment with the company, his new employer. On this basis, the company paid the employee a sign-on bonus of US$40,000.

After the misrepresentation was discovered, the employee was dismissed. He then requested a 'softer exit' and the settlement agreement was concluded. The settlement agreement contained a provision whereby the employee waived his rights to approach the CCMA or LC for relief emanating from his employment.

Despite this clause, the employee approached the LC claiming that, among other things, the waiver provision, being the provision in the agreement which restricted him from approaching the LC or CCMA, was contrary to public policy and that he was forced to sign the settlement agreement.

The LC found that the employee's claim that he was forced to sign the settlement agreement was not supported by the facts and it further dismissed the allegation that the waiver provision was contrary to public policy.

On appeal, the Labour Appeal Court (LAC), confirmed the LC's decision and rejected the contention that the waiver provision was against public policy.

Of interest, when determining whether the waiver provision was contrary to public policy, the LAC considered the relative positions of the employee and the employer in the company, their bargaining power and their understanding of the settlement agreement. It found that the waiver provision was a common provision that brought finality to labour disputes. Accordingly, the LAC found that the provision was not unlawful nor contrary to public policy.

The matter did not end there, it was brought before the CC. The CC held that "when parties settle an existing dispute in full and final settlement, none should be released from an undertaking seriously and willingly embraced".

No place for racism in the workplace - continued

"Within the context of labour and employment disputes this Court and the Labour Court will deal with acts of racism very firmly. This will show not only this Court's and the Labour Court's absolute rejection of racism but it will also show our revulsion at acts of racism in general and acts of racism in the workplace particularly."

This judgment sends a clear message to employees and employers that racist conduct and unfounded allegations of racism in the workplace is wholly unacceptable and will not be tolerated by the courts. The Labour Court and Labour Appeal Court have undertaken to deal with these types of matters with a firm hand. Employers and employees should ensure that racism in the workplace is eliminated. We advise that employers should adopt appropriate strategies and implement relevant policies in order to identify and eliminate racism in the workplace.

SOURCE:
https://www.cliffedekkerhofmeyr.com/en/news/publications/2016/employment/employment-alert-3-october-no-place-for-racism-in-the-workplace.html

HOW DOES EQUAL PAY LEGISLATION WORK IN SOUTH AFRICA?

EQUAL PAY FOR EQUAL WORK – HOW IS WORK COMPARED?
The principle of equal pay applies to work that is the same, substantially the same or of equal value (referred to as work of equal value), when compared to an appropriate comparator of the same employer. In essence, where comparable work is of equal value, employees rendering such comparable work should not be paid unequal pay, based on a prohibited ground of discrimination, such as race/gender.

SECTION 6(1) OF THE EMPLOYMENT EQUITY ACT, NO 55 OF 1998 (EEA)
An employer is not permitted to unfairly discriminate against any employee on any of the following listed grounds: race, gender, sex, pregnancy, marital status, family responsibility, ethnic or social origin, colour, sexual orientation, age, disability, religion and HIV status, conscience, belief, political opinion, culture, language and birth.

In terms of s6(2)(a) of the EEA, an employer may discriminate if the discrimination is based on:
inherent requirement of the job; or affirmative action.

EQUAL PAY UNDER THE EEA SECTION 6(4) OF THE EEA, AS FROM 1 AUGUST 2014, NOW READS AS FOLLOWS:
"A difference in terms and conditions of employment between employees of the same employer performing the same or substantially the same work or work of equal value that is directly or indirectly based on any one or more of the grounds listed in subsection (1) or on any other arbitrary ground is unfair discrimination."

Section 6(4) now emphasises the requirement of equal pay and prohibits differentiation in terms and conditions of employment, including employment policies and practices, amongst employees who work for the same employer and who fall within the category of work that is the same, substantially the same or work of equal value, if that differentiation is based on a prohibited ground. A differentiation as envisaged in s6(4) constitutes unfair discrimination if it is directly or indirectly based on one or more of the listed grounds set out in s6(1) or any other arbitrary ground.

THE COMPARATOR
An employee who seeks to prove that she is being unfairly discriminated against in respect of remuneration must compare her position to that of another employee. She needs to prove that they work for the same employer, perform the same or substantially the same work or that such work is of equal value as envisaged in the amended EEA.

THE PROCESS TO ASSESS UNFAIR DISCRIMINATION
In the context of pay differentials in the workplace, employers are tasked with the duty to eliminate any unfair discrimination. Employers must adopt measures to eradicate differences in terms and conditions of employment, including remuneration of employees who perform work of equal value if those differences are directly or indirectly based on a listed ground or any arbitrary ground. In the process of the employer ensuring that employees are not paid differently, the employer is to ensure, for instance, that pay differentials are not due to race, gender and disability.

An employee who makes his bed must lie in it - continued

The CC agreed with the LAC's approach and noted that such agreements should be enforced especially in circumstances where the agreement is "for the benefit of the party seeking to escape the consequences of his own conduct – namely the employee who had no defence whatsoever to his act of misrepresentation. Accordingly, the CC held that the parties must be bound in these circumstances.

Importantly, the CC held further that even if the clause itself was to be declared invalid, the employee's claim would still fail as "he concluded an enforceable agreement that finally settled his dispute with his employer."

This case confirms that the use of waiver clauses by employers which restrict access to the CCMA or courts remain lawful and that parties may settle their disputes on such terms which are agreeable to them. However, employers should still be mindful that the use of such clauses are not immune from further investigation and that employers should always consider the position of the employee relative to the employer and the specific circumstances of the case.

SOURCE:
https://www.cliffedekkerhofmeyr.com/en/news/publications/2016/employment/employment-alert-26-september-an-employee-who-makes-his-bed-must-lie-in-it.html

HOW DOES EQUAL PAY LEGISLATION WORK IN SOUTH AFRICA? - continued

The Regulations provide for a systematic approach in assessing whether an employee has a legitimate equal pay claim and whether the employer has a justifiable defence for pay differentials.

Regulation 6 provides a list of objective criteria to assess whether work is of equal value.

JUSTIFICATION FOR DIFFERENCES IN REMUNERATION
Regulation 7 contains grounds to justify differences in remuneration. Provided that the difference in terms and conditions of employment is 'fair and rational', the employer can differentiate between employees by taking into account one or more of the following factors:

- seniority and length of service;
- qualifications, ability, competence or potential;
- performance, quantity and/or quality of work (provided that employees are subject to the same performance evaluation system which is consistently applied);
- demotion due to operational requirements;
- temporary employment for purposes of gaining experience and/or training (internships, learner ships);
- shortage of relevant skill or the market value in a particular job classification; and
- any other relevant factor that is not discriminatory.

If an employer relies on one or more of the above factors to justify a differentiation in terms and conditions of employment, the employer must ensure that the differentiation is not biased against any employee or group of employees. The employer must also ensure that the differentiation is applied in a proportionate manner.

BURDEN OF PROOF IN TERMS OF SECTION 11, THERE ARE TWO POSSIBILITIES:

- if the alleged discrimination is based on one of the grounds listed in s6(1) of the Act, the burden falls on the employer to prove, on a balance of probabilities, that such alleged discrimination did not take place. Alternatively, if it is found that the discrimination did take place, the employer will need to show that the differentiation was rational and not unfair or otherwise unjustifiable;

or

- if the alleged discrimination is based on an 'arbitrary ground', the burden of proving the claim would fall on the employee. The complainant would be required to prove, on a balance of probabilities, that the conduct of the employer was not rational, amounted to discrimination and that the discrimination was unfair.

SOURCE: www.cliffedekkerhofmeyr.com