

Sneller Verbatim/MB

IN THE LABOUR COURT OF SOUTH AFRICA

BRAAMFONTEIN

CASE NO: J895/00

2001-06-17

In the matter between

LENNOX N GARANE

Applicant

and

PLANACT

Respondent

J U D G M E N T

Delivered on 18 June 2001

REVELAS J:

1. The applicant was dismissed from the respondent's employ after he had been found guilty of misconduct at a disciplinary inquiry held by the respondent. The notice calling upon the applicant to attend a disciplinary hearing, formulates the misconduct charge as follows:

"The Bloemfontein Local Council has brought to my attention a letter you had sent to them informing them of your withdrawal as project leader of the "Building Communities/Council Relations for Co-operative Governments" project, a copy of which has been sent to me. The letter in question was faxed to them on 3 November 1999.

The tone and character of your letter in my mind constitutes a serious violation of organisational discipline. Under such you are charged with the following misconduct:

- **breach of organisational discipline:**
- **intentionally negligently undermining the credibility and integrity of the**

organisation and board of directors.

will be calling a

disciplinary hearing with a view to seeking the appropriate disciplinary action including a dismissal."

2.It is common cause that the applicant wrote a rather emotional letter to the Bloemfontein Local Council resigning as project leader from the Council's project referred to above. In this letter reference is made of the fact that the applicant was involved in an accident in his own uninsured vehicle. He expressed in the letter, his great unhappiness and dismay with the manner in which the respondent responded to his financial position, which had become precarious as a result of the accident. He felt that the respondent should have compensated him for his losses.

3.After his dismissal, the applicant referred a dispute to the Commission for Conciliation, Mediation and Arbitration, ("the CCMA"), where conciliation failed and the applicant referred his dispute to the Labour Court for adjudication.

4.The applicant's case is that the dismissal was automatically unfair, as he had the right to write the letter in question and to express himself in the manner in which he did therein. The applicant relies on Section 187(1)(d) read with Section 5(2)(c)(v) of the Labour Relations Act 66 of 1995, ("the act") in support of this contention.

5.The respondent raised a point *in limine*, that the applicant has incorrectly categorised his dismissal dispute as one that is automatically unfair and that the dispute should be dealt with by the CCMA in terms of Section 191(5)(a) of the Act, as the reason for his dismissal was for misconduct.

6.I am informed by the respondent's counsel, Mr Buirsky, that when the matter had previously come before a CCMA commissioner for arbitration, but that

the hearing collapsed due to a technical reason. The certificate of outcome signed by the commissioner of the CCMA who dealt with the matter, refers to an **"alleged unfair dismissal for misconduct"**. I therefore assume that at the CCMA, the view that the Labour Court should adjudicate the matter, as opposed to it being arbitrated, did not prevail.

7.The question that I need to decide is, whether or not the matter should be dealt with by this Court, for want of jurisdiction, or whether the matter should be referred to the CCMA.

8.This enquiry necessitates reference to the sections relied upon by the applicant.

9.Section 187(1)(d) of the Act reads:

"A dismissal is automatically unfair if the employer in dismissing the employee acts contrary to Section 5 or if the reason for the dismissal is (b) that the employee took action or indicated an intention to take action against the employer by -

(i) exercising any right *conferred* by this act [my emphasis];

(ii) participating in proceedings in terms of this act.

10.The relevant portion of section 5 (section 5(2)(c)(v) of the Act on which the applicant seeks to rely, provides as follows:

"Without limiting the general protection conferred by sub-section (1), no person may do or threaten to do any of the following -

(c) prejudice an employee or a person seeking employment because of past, present or anticipated -

(v) disclosure of information that the employee is lawfully entitled or required to give to another person."

11.Firstly, the meaning of **"rights conferred by this act"** needs to be examined. In *Brassey's Commentary on the Labour Relations Act*, at A29 the learned author describes **"rights conferred by this act"** as those

that, typically, would be the right to participate in the formation of and other activities of a trade union. (Section 4) The right to represent employees as trade union representatives (Section 14) or in a workplace forum (Chapter V of the Act), and to invoke the dispute resolution process of the Act. The list is not exhaustive.

12. Section 5(2)(c)(v) deals with the disclosure of information. This information generally relates to collective issues as between employers and trade unions. The information referred to therein is in the nature of information as envisaged, but not limited to, by Section 16 (collective bargaining) and Section 142 (powers of commissioners), Section 89(3) (information to workplace forum) of the Act.

13. In my view, the right to disclosure of information envisaged in these sections do not confer a right to write letters or complaining about an employer's behaviour to a third party. Such a right is clearly not protected by Section 5(2)(c)(v).

14. On the facts of this case it is also not a conferred right as envisaged by Section 187(1)(d). Writing a letter of complaint to a third party also does not include participation in proceedings in terms of the Act. The reason for the alleged unfair dismissal falls squarely within the concept of misconduct. That is apparent from the nature of the charges levelled against the applicant.

15. It may very well be that there is merit in the applicant's contention, that he was unfairly dismissed and it may be that dismissal was not the appropriate sanction, but this Court does not have the necessary jurisdiction to hear the matter.

16. Section 157(5) of the Act limit, the Labour Court's jurisdiction.

17. The sub-section stipulates as follows:

"Except as provided for in Section 158(2) the Labour Court does not have jurisdiction to adjudicate an unresolved dispute if this act requires the dispute to

be resolved through arbitration."

Section 158(2) of the Act provides for a procedure where:

"The Court may with the consent of the parties and if it is expedient to do so, continue the proceedings with the court sitting as an arbitrator."

18. The respondent has not consented to continue with the proceedings for the Labour Court sitting as an arbitrator. No evidence has been lead and since the issue is raised as a *point in limine*, Section 158(2) is also not applicable.

19. In terms of Section 191(5)(a) of the Act, if the dismissal was for alleged misconduct, the CCMA should arbitrate the dispute if conciliation fails.

20. In *South American Motor Industry Employers Association and Another v Numsa and Others* [1997] 9 1157 (LAC) Myburgh J P, at 1160 held that:

"Except as provided for by Section 158(2) the Labour Court cannot assume nor can parties by agreement confer jurisdiction on the labour court to determine a dispute which falls to be resolved by the commission by conciliation or arbitration. Therefore if the dispute is about misconduct it has to be arbitrated by the CCMA and not adjudicated by the labour court."

21. The true substance of the dispute in this matter is about an alleged unfair dismissal for misconduct. Consequently I should make an order to the effect that the matter be referred to the CCMA.

22. In my view costs should follow the result in this matter. The applicant persisted in his view that the matter should be heard by the Labour Court without advancing any good grounds why it should and he has claimed amounts for damages which this Court is not in a position to award.

23. Consequently I make the following order:

1. The matter is referred to the CCMA to be arbitrated.
2. The applicant is to pay the respondent's costs of this application.

E. Revelas