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IN THE LABOUR COURT OF SOUTH AFRICA
BRAAMFONTEIN

2005-03-11 CASE NO: JR613/02

In the matter between

SHARON VAN WYK Applicant

and

INDEPENDENT NEWSPAPERS GAUTENG

(PTY) LTD First Respondent
CCMA Second Respondent
TIMOTHY BOYCE N.O. Third Respondent

EX TEMPORE J U D G M E N T

REVELAS, J:

[1] This is an application for the review of an arbitration award made by the third respondent ("the arbitrator") wherein he found that the dismissal by the first respondent ("ING") was procedurally and substantively fair.

[2] The applicant had been in the employ of ING since 1 December 1991 and at the time of her dismissal she held the position chief sub-editor. The applicant was dismissed by ING after shw was found guilty of the following charges which were levelled against her:

"1. Gross misconduct in that you on 10 May 2001, sent an e-mail to staff and management containing allegations which are of a malicious nature with the intention of undermining the authority of senior management.

2. Gross misconduct in that you in an e-mail dated 11 May 2001 made derogatory statements about the editor and deputy chief editor of the Pretoria News."

[3] The facts and circumstances which gave rise to the aforesaid charges are briefly the following:

On 10 May 2001 the applicant, while on night duty and in the process of trying to get the morning newspaper out, had a heated discussion with the editor (Mr Fynn), the deputy editor (Ms Green), Ms Val Boje (a chief sub-editor and the applicant's senior) and Mr Meyerowitz (a back desk editor).

[4] The subject of the discussion was that the newspaper was late for the delivery trucks that morning. The applicant believed that the problem was attributed to understaffing and various other problems in the workplace. She decided to address an e-mail to the managing director of ING, Mr Nazeem Howa, who is based in Johannesburg. He also gave evidence at the arbitration hearing. He said that prior to the applicant sending him this e-mail, he could not put a face to her name. This e-mail was also circulated to members of six members of ING management.

[5] In the first e-mail to Mr Howa the applicant sets out her frustrations at work and general problems in the workplace and attempts to set out what the causes of most of the problems were. The first e-mail also dealt with the lateness of the paper that morning but more importantly, it contained a serious attack on Mr Howa, the managing director. The offensive part of the e-mail, with reference to Mr Howa, reads as follows:

> "I would therefore respectfully advise you that the reason the Pretoria News is late this morning is because you, and none of your number cruchers and pseudo-newspaper men in the Star building care a toss about us and what we go through to make you look good".

[6] The second e-mail was addressed to Ms Val Boje, the applicant's superior. It is common cause that the two of them are very close friends and that the e-mail was not forwarded by the applicant or Ms Boje to anyone else. However, this e-mail came to the attention of Mr Fynn when it landed on his desk in an unmarked envelope. He testified he did not regard the e-mail as private since it was company property. In this e-mail the applicant gave vent to all her feelings and frustrations at work and did not mince her words. Her reference in this e-mail to the editor (Mr Fynn) and his deputy (Ms Green) as that "arse hole" and "his overbearing cohort", respectively, gave the most offence. These descriptions, no doubt, were the ones which gave rise to the

second charge. Mr Fynn stated that he felt "rotten" and "betrayed" when he read how he was being referred to in the e-mail.

[7] On 17 May 2001, the applicant was notified of a disciplinary hearing that was to take place regarding the two e-mails. On 22 May 2001, she apologised profusely to Mr Fynn and Mr Howa. She offered her "deep and sincere" apologies. Mr Howa did not respond and Mr Fynn noted her apology. She had also asked them for forgiving her for her wrongdoings. None of them seemed prepared to forgive her and in a quite cynical vein, Mr Howa regarded her apologies as an attempt to circumvent the disciplinary process.

[8] Both Mr Fynn and Mr Howa gave evidence to the effect that the trust relationship between the applicant and her employer had been broken down by the e-mails. Mr Fynn said that he could no longer work with the applicant. Here I may just mention that at the time of the applicant's dismissal, Mr Fynn was transferred to Cape Town. He also worked with the applicant just prior to and during her disciplinary hearing, since she was never suspended.

[9] Mr Francis, who chaired the disciplinary enquiry, also found the trust relationship between the applicant and ING had been broken down. During the arbitration hearing it was also raised that Mr Francis travelled from Pretoria to Johannesburg to the disciplinary in the same vehicle as the prosecutor in the enquiry. The applicant perceived there to be some basis on his part, particularly since he frequently during the hearing, referred to himself in the plural as "we". The arbitrator dismissed her perception as without foundation as no concrete evidence was produced to support her contentions. The arbitrator made a finding based on the evidence before him and I am unable to find that his observations were irrational.

[10] Apart from the applicant, the following witnesses testified on her behalf: Mr Clive Bawden, the deputy editor of the Pretoria; Mr Mark Stansfield, an assistant editor at the same paper and Ms Boje and Ms Marion Ashley. None of these witnesses called on behalf of the applicant, approved of her actions and were largely very critical thereof, except for Ms Ashley. The general tenure of their evidence was that she should not have been dismissed.

[11] The applicant felt very strongly that dismissal was too harsh a sanction for sending the first e-mail. She conceded that she should

have been disciplined, and as she put it, she expected a "good dressing down". In respect of the second e-mail it was argued on her behalf that the arbitrator should not have admitted the second e-mail as evidence, because of its very private nature.

[12] The arbitrator found that the applicant had acted without malice but irrationally and displayed bad judgment. I am in respectful agreement with these findings. He found further that she decided to "take a stand" regardless of the consequences and that both Mr Howa and Mr Fynn had every right to feel insulted by the first e-mail. He observed that the applicant ought to have been aware that the second e-mail would be read by people other than Ms Boje, and that it was not surprising that this was precisely what had occurred. Here I might just mention that when Ms Boje received the e-mail, two of the applicant's colleagues were standing behind Ms Boje and had read the e-mail with her. The two e-mails were sent within a short time of each other and had the same theme. The arbitrator found that the argument that the second e-mail was inadmissible was without substance as it had been sent to a communal computer which was the property of ING. He also found that the sole challenge to the procedure followed prior to her dismissal, related to the ostensible bias of the chairperson and that there was no evidence before the arbitrator to indicate that there was any merit. He further found that ING had not acted unfairly or unreasonably in the imposing of the sanction of dismissal and that it the dismissal was substantively and procedurally fair.

[13] Insofar as the review application was concerned, the applicant relied on the Monitoring Prohibition Act, No 127 of 1992 ("the MP Act") and it was argued in terms of that Act it was prohibited for the arbitrator to have any regard to the e-mail. I was also referred to the matter of *Lotter v Arlow and Another* 2002 (6) SA 60 TPD. In the that decision Bertelsman J held that:

> **"The court's role was to prevent an abuse of the process through improper or unlawful practices by disallowing evidence obtained in violation of the law, good morals, ethics or the public interests. Since the advent of the constitution, the court was obliged to uphold its principles and foundational values. Each citizen had a right to protection against violation of his or her fundamental rights. As a matter of public policy and in upholding the constitutional rights of the respondents the court had to act against the unwarranted intrusion into the private sphere of individuals."**

[14] In that particular matter a certain individual wanted to prepare a valuation of a Mercedes Benz vehicle which belonged to a person who was sequestrated. He did so in the absence of the owner of the car, by persuading a domestic servant to give him access. The court regarded his evidence pertaining to the evaluation as -

> **"clearly obtained in violation of the respondents' constitutional rights to privacy. He entered their premises by stealth and fully appreciated the 'sensitivity' of his unlawful actions (Act 63A(2)(b))."**

[15] The argument on the MP Act was not raised before the arbitrator. The respondents ING's Information Technology Usage Policy provides that all information stored on the system utilised by ING belong to ING. The second e-mail was sent from a computer belonging to ING to another computer belonging to ING. The second e-mail dealt partly with work issues and was not marked as private and or confidential and the conduct of the applicant surrounding this incident was that she was aware that persons other than Ms Boje could have seen the e-mail. She disseminated the first e-mail to six other persons. That the second e-mail was regarded by her as so very private, is improbable. However, once Mr Fynn was in possession of the e-mail, the applicant went to him and told him that he did not have her permission to have the e-mail.

[16] The arbitrator dealt with the question of privacy as follows in this award, and I quote from his award:

> **"The second e-mail was intended to be read by Boje only, but what was intended was not what happened. What happened was that the second e-mail came to the attention of other people and, in particular, to Fynn. Bearing in mind the medium of communication that was not surprising and the**

employee ought to have been aware that the second e-mail could have been read by others. The second e-mail was sent to a communal 'appleman' which is the property of the employer and the employee's argument that this e-mail should be ruled inadmissible is without substance."

[17] I am unable to accept that the applicant in this matter may rely on the MP Act. I have already mentioned it was not raised before the arbitrator and I do not believe it was unlawful to read it. The policy referred to, also cautions employees not to assume that the e-mails will not be read by other persons. Yet in the same policy the respondent endeavours to ensure privacy. In the opening paragraph of this policy the author refers to -

"Respectful intellectual labour and creativity is vital to media discourse and enterprise. This principle applies to works of all journalists and publishers in all media. It encompasses respect for the right to acknowledgement, the right to privacy and the right to determine the full manner in terms of publication and distribution. Because electronic information is volatile and easy to reproduce, respect for the work and personal expression of others is especially critical in computer environments. Violations of authorial integrity, including plagiarism, invasion of privacy, unauthorised access and trade secrets and copyrights violations would be grounds for disciplinary actions against employees."

[18] In my view, the question of the privacy of the e-mail may be important when one has regard to the sanction imposed. I wish to quote from the arbitrator's award, what he had to say about the sanction in this matter:

"Although the sanction of dismissal in the circumstances of this case was harsh, I am unable to say that in imposing this sanction, the employer acted unfairly or unreasonably. The

employee is clearly a competent sub-editor who is intelligent and talented and it is regrettable that her impulsive behaviour caused her to be dismissed. Having said that, however, the employee disregarded the consequences of her actions when she decided to 'take a stand'. It is trite that the employer sets the standard and the employer decides on the sanctions to be imposed for non-compliance therewith. If the employer with regard to the aforegoing acts fairly and reasonably, then I am precluded from interfering with same."

[19] I considered whether, should along with the applicant's clean record and long service record, the privacy of the e-mail might not constitute an extenuating circumstance, which could perhaps render dismissal inappropriate.

[20] Mr Fynn wanted to read the second e-mail. He asked for it from Ms Boje and she said she would think about giving it to him. He then obtained it in rather clandestine circumstances. But even if this second e-mail should have been disregarded or should not have been read by Mr Fynn, the point is he still did read it. The first e-mails existence is also significant in this regard. In my view, it is a very serious misconduct, when a senior employee challenges the managing director of a newspaper for the inept manner in which he manages his newspaper. She also deliberately shared this opinion with others. Mr Howa did not even work in the same office as her. He did not quite know who the e-mail came from when he first received it. It is an aggressive e-mail. It is a declaration of animosity. In this letter the applicant opened a collision course with her employer. The first e-mail, on its own calls for a dismissal.

[21] I have also taken into account, that the arbitrator did not mention in his award, and that is that Mr Stansfield gave evidence to the effect that the sub-editor's department was a volatile environment where members of staff used very strong language and this was common throughout the newspaper industry. Mr Stansfield said he understood and sympathised with the sentiments of the applicant in her e-mail to Mr Howa. He did not expect that the language used in the e-mail would result in a disciplinary hearing and rather believed it would receive attention from the managing director, whom he knew well and had worked with closely before taking up his position at the Pretoria News. Mr Stansfield said he had hoped when he read the e-mail, that the managing director would feel compelled to address the working conditions at the Pretoria News.

[22] Mr Stansfield's gave his opinion. In my view, there are few

employers that would welcome criticism couched in this style, and regard it as an invitation to address problems in the workplace. If that was the applicant's intention this e-mail was certainly not the way to go about it. A polite letter would have sufficed. Then there was also evidence that the applicant was a person who had the tendency to "leap before she looked". This evidence was led by Mr Bawden, who was very sympathetic to the applicant's plight. However, the fact that the applicant has a volatile temper and addresses people in a very straightforward manner, is no reason why her employer should tolerate this kind of behaviour. Very few employers would tolerate this type of behaviour from their subordinates. It is not open to me, in a review application to interfere with the arbitrator's findings in this regard. It was not demonstrated that the arbitrator came to a conclusion which was irrational and disconnected to the evidence that was before him.

[23] The evidence in my view was dealt with by the arbitrator in a way which does not warrant scrutiny on the level argued for on behalf of the applicant. It is an arbitration award that is immune to review.

In the circumstances the application is dismissed with costs.

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E.REVELAS

REPORTABLE

DATE OF HEARING: 11 MARCH

DATE OF JUDGMENT: 11 MARCH 2005

ON BEHALF OF THE APPLICANT: Bowman Gilfillan Inc.
ON BEHALF OF THE RESPONDENT: Webber Wentzel Bowens