



THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

JUDGMENT

NOT REPORTABLE

Case no: C465/2016

In the matter between:

ANDRE BARENDSE

Applicant

and

MOSSEL BAY MUNICIPALITY

First

Respondent

HARRY HILL N.O. (MUNICIPAL MANAGER)

Second

Respondent

Heard: 17 May 2017

Delivered: 18 October 2017

JUDGMENT

RABKIN-NAICKER J

- [1] This is an application for condonation for the late filing of a statement of claim. The statement of claim was filed 6 days late. The first respondent opposes the application for condonation on the ground that there are no prospects of the applicant succeeding with his cause of action based on the Protected Disclosures Act (PDA). The matter was referred to the court from the bargaining council because it is founded on an allegation of an automatically unfair dismissal as envisaged in section 187(1)(h) of the LRA.
- [2] The first respondent submits that the reason for the dismissal was because the applicant failed to obey a lawful and reasonable instruction from a person who had the authority to give it. Further because of gross insubordination and a failure to refrain from rude, abusive, insolent, provocative, intimidatory or aggressive behaviour to a fellow employee and gross insubordination arising from an email he wrote dated 26 June 2015.
- [3] Essentially I am asked to consider whether the email which was translated from Afrikaans for the benefit of the Court, could amount to a Protected Disclosure. It was written by applicant to the Labour Relations Officer of the First Respondent concerning charges which were laid against a colleague of applicant's in the I.T. Department. It reads as follows:

"Sure, Gordi. I help where I can. (Ek help graag waar ek kan.)

My view of the complaints against Mr Fraser is that the charges were not measured against his character or against the work which he did.

A short while ago a statement was also made that IT was evaluated 2 out of 5. We then did a survey to establish where the dissatisfied parties were and to our own surprise, were rated between 4 and 5 out of 5 with the single person who rates us a 1.

We then sent out another e-mail in which we invited the dissatisfied person to come forward but that person didn't pitch.

Therefore (DWS) from directorate/municipal office unfounded accusations came that IT isn't working correctly, although the investigation shows that IT keeps people very happy.

It therefore creates an interesting, unfounded BIAS based on which the following complaints do not reveal any relationship with reality.

The following trend was when the charges against Mr Fraser in that he was castigated as being negligent and that he did not comply with a Facebook instruction and that he lied about it.

I myself then made an interesting 'honeypot' statement on Facebook, upon which our director then reacted in debate, which proves that you do not show any interest in the facts and do not wish to judge Mr Fraser on the merits of the matter, but that you act strategically in order to undermine him. Therefore (DWS) the attack is dynamic, not based on any facts or damage.

*If we then look at the recording in which the MM (municipal manager) admitted that she was not capable of understanding Facebook (bevoeg) (9 March 2015), and that the Facebook charge was lodged against Mr Fraser after he showed her that then the charge sheet reads as a lie. I quote: 'CHARGE 1, The contravention of rule 1.2.4 of the disciplinary procedure and code collective agreement being the failure to lawfully comply with a lawful and reasonable instruction which was given to you by a person with the necessary authority (bevoegdheid) and to comply with that..'.
LABOUR COURT*

My commentary:

- 1. Mr Fraser showed her beforehand, and Facebooks independent date stamp proves that his story, rather than her (that of the MM) is true.*
- 2. Facebook marketing is not an IT function. I understand Harry Hill, with a similar Facebook background, since 2007 should have received the instruction. He is the strategic public interface.*

3. *The instruction is not reasonably executable (uitvoerbaar) with or without a budget, and there is not a payment structure in place with which we could pay Facebook. Therefore (dws) the project would never have worked.*

4. *Dr Gratz herself in the 9 march 2015 (communication) admitted that she was not capable of making Facebook calls (judgments). In that meeting she questioned the editing principles of the page and made no mention (statement) that she had not visited the webpage or Yulande. Therefore she had at that stage not known the page was done and does not doubt his evidence on 9 March. How can she be seen as capable (bevoegt) during the disciplinary hearing? You are busy lying.*

Then there is naturally the obvious white elephant in the room The Facebook page was made (gedoen) on time and dates stamped by Facebook itself!

Mr Fraser is attacked without any grounds and a false charge sheet, including false evidence, has been created against him and that from the disciplinary office of the Municipality!!! This shows (reveals –dui op) serious abuse of the law (misbruik van die reg), to bring malicious and unfounded charges against Mr Fraser.

Lastly, you charge him with the fact that he did not work during his leave and that the budget dropped on the ground during his absence. This in my opinion reveals that Mr Fraser is a victim of the municipality's incapacity. Therefore his shoes cannot be filled in his absence.

The fact that the directors ignored the risk and the disciplinary office created false charges against him, reveal irrational and irresponsible management.

To come with smoke and mirror tactics, to abuse the legal system, to hide other people's incompetence and misconceptions, as well as attacking a reasonably good worker's career (loopbaan) indicates an unhealthy application of the law.

Regards, Andre Barendse"

- [4] The above letter accuses the HR department and the Municipal Manager of lying; alleges the charge sheet against Mr Fraser is false; the evidence against him is false; and the disciplinary charges are malicious and unfounded. The applicant

characterises this as serious abuse of the law and the legal system. In his claim he relies on the said letter being a Protected Disclosure that he made with reason to believe that the information it concerned shows or tends to show that a miscarriage of justice has occurred, is occurring or is likely to occur.¹

- [5] Mr Stelzner for the respondents referred the Court to various case law inter alia dealing with whether the subject matter of a disclosure in terms of the PDA related to 'improprieties' or irregular conduct, whether a disclosure was no more than a subjectively held opinion or an accusation; whether a disclosure was made in good faith i.e. without ulterior motive, revenge or malice.
- [6] The Court is expected to decide on whether there is any merit to the claim under the PDA, and thus if it can grant condonation for the late filing of the statement of claim, without hearing any evidence. This in a situation where the statement of claim was only 6 days late. In this Court's view, while such a course may be less costly and time consuming, it risks depriving the applicant of his access to justice and a due hearing by the Court. The trial Court is the proper forum to make findings in this matter rather than this Court coming to conclusions based on the content of the email without more ado. I therefore make the following order:

Order

The application for condonation is granted with costs.

H. Rabkin-Naicker

Judge of the Labour Court

¹ Section 3 (1) (c) of the PDA

Appearances:

Applicant: M. Garcia instructed by DP Bezuidenhout Attorneys

First Respondent: R. Stelzner SC instructed by Cilliers Odendaal SC

LABOUR COURT