

EMPLOYMENT ALERT

20 August 2012

EMPLOYEE DISMISSED FOR BRINGING NON-HALAAL FOOD INTO WORKPLACE: UNFAIR DISCRIMINATION OR LEGITIMATE ENFORCEMENT OF A VALID WORKPLACE RULE?

A fast food outlet made headlines recently when it was ordered to reinstate an employee previously dismissed for bringing non-Halaal food to work.

According to reports, employees were initially entitled to bring outside food onto the premises and to have their lunch in a communal staff room. However, when new management took over, this practice was stopped. The new management explained to the employees that the Restaurant would be serving Halaal food. The requirements for preparing Halaal food are strict, and it is important to minimise the risk of non-Halaal food contaminating Halaal food.

Apparently, the employee in question brought non-Halaal food onto the premises in contravention of the rule. Disciplinary action was instituted against the employee and he was eventually dismissed. The employee's union referred an unfair dismissal dispute to the CCMA. The union representative suggested that the Restaurant's conduct constitutes unfair discrimination on the basis of the employee's religion and culture. The CCMA last week held that the employee was indeed unfairly dismissed and ordered re-instatement. The basis for the CCMA's finding is not known.

Employers have the right to issue lawful and reasonable instructions to its employees. An instruction will be lawful if the conduct requested of the employee is not in itself illegal (for example, an employer cannot instruct an employee to commit theft or to work in contravention of the Basic Conditions of Employment Act). Whether or not an instruction is reasonable will depend on the circumstances. Generally speaking, an instruction is reasonable if it can be justified in relation to the employer's reasonable and necessary operational requirements.

In this case, the rule against bringing outside food onto the premises appears to be eminently reasonable. The purpose of the rule is to protect the integrity of the Halaal

food served. The employer would suffer losses if it was unable to provide Halaal food to its Muslim customers. Furthermore, the employer is not discriminating against non-Muslims employees in favour of Muslim employees. All employees are being treated equally because no employee, regardless of his or her religion, may bring any outside food onto the premises.

The CCMA lacks jurisdiction to find that a dismissal was unfair where the reason for the dismissal is grounded in discrimination. Such dismissals are automatically unfair and within the exclusive jurisdiction of the Labour Court. The Commissioner may well have held that dismissal was too harsh a sanction for the first time violation of the workplace implemented rule.

But what if the Restaurant's rules were stated differently? What if employees were only allowed to bring Halaal food onto the premises, and not non-Halaal food? Would this constitute unfair discrimination based on religion?

In *Harksen v Lane (1998) (1) SA 300 (CC)*, the Constitutional Court held that there is a difference between unfair discrimination on the one hand, and differentiation or 'fair discrimination' on the other. It held that unfair discrimination has 'the potential to impair the fundamental dignity of persons as human beings'. So, for example, if a woman is dismissed for the sole reason that she becomes pregnant, that would fundamentally infringe on her dignity as a woman who has a right to gender equality. However, if an accounting firm is recruiting for new accountants, it may legitimately discriminate against individuals who do not hold accounting degrees. Discrimination like this is not unfair because the reason for the discrimination is a legitimate one and not one which affects someone's fundamental dignity.

continued

In *FAWU v Rainbow Chicken Farms (2000) 21 ILJ 515 LC*, the Labour Court held that, when deciding unfair discrimination claims against employers, a court must have regard to the true reason why the employees in question were treated differently. If they were treated differently for a reason that touches on their fundamental dignity (such as a prejudice against their religious convictions) then that would constitute unfair discrimination. However, if the reason is a valid and reasonable one that is not intended to infringe the employees' dignity, then that kind of discrimination or differentiation may be fair.

It will be interesting to consider the Commissioner's reasoning when the award enters the public arena. The employer may seek to review and set aside the award – this will allow the Labour Court to consider this vexed issue and provide some assistance to employers grappling with workplace rules that may have a discriminatory effect.

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