EMPLOYMENT

IN THIS ISSUE

DEFAMATION IN THE WORKPLACE: DAMAGES FOR INSULTING LANGUAGE

WHEN IS AN EMPLOYEE THE EXCEPTION TO THE RULE?

DEFAMATION IN THE WORKPLACE: DAMAGES FOR INSULTING LANGUAGE

The South Gauteng High Court awarded a human resource manager R50 000 in damages, plus legal costs, after she was called a 'liar' and an 'unintelligent white girl'. In *Nadia van der Westhuizen v Morgan Motlogelwa Ntshabelele* (case 2014/27063, judgment handed down 23 March 2015) the court upheld her claim for damages and agreed that she suffered damage to her reputation as a result of the defamatory remarks made by the defendant.

The defendant was retrenched by the employer. The plaintiff was tasked to finalise the retrenchment and secure the return of the employer's property in possession of the defendant. The defendant uttered the defamatory remarks in the presence of fellow employees, including the plaintiff. The defendant later made further utterances that the court held were *per se* defamatory. The defendent did not oppose the application and did thus not suggest that his statements were unintentional or that he had a valid defence for raising the remarks (such as that the statements were true and in the public interest).

The court confirmed the general principles applicable to defamation. "A statement is defamatory of a plaintiff if it is likely to injure the good esteem in which he or she is held by the reasonable average person to whom it has been published. It includes not only statements that expose a person to hatred, contempt or ridicule, but also statements that are likely to humiliate or belittle the plaintiff; which tend to make him or her look foolish, ridiculous or absurd or which render the plaintiff less worthy of respect by his or her peers."

The court may exercise discretion in awarding damages. Relevant factors for the court to consider include the seriousness of the defamatory statements, falseness, nature and extent of the publication of the statement, malice, rank or social status, the absence of an apology, motive and the general conduct of the defendant. The court also considered the fact that the derogatory statement had racial undertones. It confirmed that "… the use of racially derogatory language is regarded by right-minded members of South African society as reprehensible." Nevertheless, the court agreed with previous cautions issued to state that overly large sums should not be awarded in damages so as to avoid promoting or encouraging litigation of this nature.

The lesson from this case is that employers and employees ought to take care in making statements that could be defamatory. Making such statements in the workplace does not present a defence to the wrongdoer. Whilst it may be tempting to lash out at a company representative, be it CEO, line manager or HR representative, employees should refrain from making statements that are untrue, hurtful or otherwise defamatory. Such wrongful statements should neither be made in the workplace or in public, including public platforms like social media (such as Facebook and Twitter) or during an after-hours drinks session at the local pub. Although the courts are reluctant to award significant sums in defamation cases, even an amount of R50 000 could balloon into a more significant sum when taking the plaintiff's legal costs into account.

Johan Botes

WHEN IS AN EMPLOYEE THE EXCEPTION TO THE RULE?

The recent judgment of *Jordex Agencies v Gugubele N.O* [2015] ZALC JHB 87 involved the dismissal of an employee, Joan Msimango (Employee), who left the workplace early in order to catch the last bus home. The employer, Jordex Agencies (Employer), dismissed the Employee because the Employee's early departure contravened its timekeeping rule.

The Employer had recently changed its working hours from 07h30 to 16h30, to 08h00 to 17h00. The reason for the change was to accommodate certain categories of staff, namely the couriers who often returned to the workplace after 16h30 to drop off goods. Employees were required to strictly adhere to the new working hours.

The Employee was a cleaner and had, for the previous four years prior to the change, left earlier than other employees in order to catch her bus home.

At arbitration, the Commissioner found that the rule, being the strict adherence to the new working hours, was unreasonable. After considering the facts of the matter, the Commissioner was not convinced that the Employee decided to leave work early unexpectedly. Moreover, the Commissioner was not convinced that accommodating the Employee would detriment the Employer's operations or work progress. The Commissioner accordingly concluded that the dismissal was substantively and procedurally unfair and ordered the reinstatement of the Employee.

The Employer instituted review proceedings in the Labour Court to review and set aside the arbitration award. In its review application, the Employer submitted that it could not tailor-make its employees' work times to their individual needs and the Employer required the whole workforce to work the same hours.

The Employer's main point of contention was against the Commissioner's finding that a change of working hours, without accommodating the Employee's particular circumstances, was unreasonable. The Employer based its argument on *SAPU and Another v National Commissioner of the South African Police Service and Another* [2006] 1 BLLR 42 (LC), where it was held that an employer is entitled to regulate its own work practices.

However, the Court also pointed out that this freedom is not unfettered, stating that an employer's power to regulate work practices is not without boundaries. The Court went on to explain that a commissioner should pay due regard to the specific needs and circumstances of employees, including family obligations and transport arrangements.

In applying the above parameters to the facts at hand, the Court concluded that the Employer's service delivery was not affected by the Employee's early departure. Further, the Employer failed to take into account the employees personal circumstances and transport arrangements therefore forcing the Employee to breach the rule. In consideration of this, the Court held that the Commissioner's decision could not be faulted as being unreasonable because it was one that a reasonable decision maker would have made on the evidence before her. Consequently, the review application did not succeed.

Employers are well-advised to properly consider the circumstances which may warrant breaches of their workplace rules. Being cognisant of such situations will serve to curb subsequent challenges to the reasonableness of the rules themselves.

Lauren Salt and Motheo Mfikoe

THE XXI WORLD CONGRESS OF THE INTERNATIONAL SOCIETY FOR LABOUR AND SOCIAL SECURITY LAW IS TAKING PLACE IN CAPE TOWN FROM 15 TO 18 SEPTEMBER 2015, HOSTED BY THE SOUTH AFRICAN SOCIETY FOR LABOUR LAW (SASLAW) AND PROUDLY SPONSORED BY CLIFFE DEKKER HOFMEYR AND DLA PIPER AFRICA.

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