



ARBITRATION AWARD

Case Number: RFBC 35099

Commissioner: Leon Pillay

Date of Award: 31 August 2015

In the **ARBITRATION** between

Lynn Robertson

(Union/Applicant)

and

Value Logistics

(Respondent)

Union/Applicant's representative: D. Caro- Attorney

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DETAILS OF HEARING AND REPRESENTATION

1. This arbitration hearing was heard on the 17th of July 2015 and the 21st of August 2015 at the offices of the NBCRFLI in Durban.
2. The applicant, Lynn Robertson, appeared in person and was represented by Dean Caro, an attorney. The respondent, Value Logistice was represented by Ms. Ruth Sibisi, the HR Manager of the respondent.

ISSUE TO BE DECIDED

3. Whether the dismissal of the applicant was unfair, and if so decided, to determine the appropriate relief to award.

PRELIMINARY ISSUES

4. The first issue raised by the respondent was that the applicant's referral (Form 7.11) was defective because it was signed by the attorney and not the applicant. After it was pointed out to the respondent that there was nothing improper in the applicant's attorney signing the referral on behalf of the applicant, the point was not pursued.
5. The applicant thereafter applied for legal representation. After hearing arguments, legal representation was granted for the following reasons:
 - (i) The applicant had no formal qualifications besides her matriculation certificate and absolutely no prior experience in disciplinary or arbitration proceedings, or any knowledge of IR-related matters. The respondent's representative was a HR manager and therefore would have the requisite knowledge and skills in respect of disciplinary hearings and IR-related matters, including arbitration proceedings. Although she did not have any legal training, the comparative abilities of the parties favour the granting of legal representation.
 - (ii) The respondent intended calling 5 witnesses and each would have had to be cross-examined in a coherent manner. It is unlikely that the applicant would be able to cross examine witnesses coherently.
 - (iii) The law in respect of misconduct related to comments made on social media is still developing.
 - (iv) Applicant intended arguing unfairness in respect of the severity of the sanction. Legal arguments were therefore necessary

BACKGROUND TO THE ISSUE & FACTS THAT ARE NOT IN DISPUTE

6. The applicant was employed by the respondent as a Customer Relations Manager at the time of her dismissal. She commenced employment at the respondent on the 1st of October 1994 and her employment was terminated on the 29th of April 2015. The applicant earned R47 594-00 per month at the time of her dismissal.
7. Prior to the applicant's dismissal, the respondent was in consultation with the applicant about the possible dismissal of the applicant owing to the operational requirements of the respondent.
8. Ms. Jill Whittle printed a letter, ie, the s189(3) notice (pages 32-35 of Bundle A) and gave it to Ms Ruth Sibisi on the 10th of April 2015. Ms Sibisi, at a meeting with the applicant on the 10th of April 2015, issued the letter to the applicant and explained each of the clauses to the applicant. The applicant was very surprised and upset at the prospect of being retrenched.
9. Ms. Sibisi spent much time motivating the applicant and considering possible alternatives. She did however indicate to the applicant that she did not see an alternative to retrenchment at that stage.
10. The applicant disclosed to Ruth that she (applicant) was diagnosed with cancer and since her husband was a pensioner, she was concerned about her medical aid. The applicant was also concerned about her future because she had 5 years to go before retirement.
11. Ruth Sibisi had a second consultation meeting with the applicant on the 17th of April 2015. Owing to the applicant's questions on the 10th of April 2015, Ruth presented the applicant with the details of the retrenchment package. The applicant was assured that the reason for the retrenchment was the respondent's operational requirement and not the applicant's illness. Ruth also offered the applicant the option of leaving immediately if the applicant so desired. The applicant indicated that she would consider that option and revert to Ruth.
12. On the 17th of April 2015, the applicant was on face book with some of her friends (ex-employees of the respondent) and posted the following comment:
"Amazing ladies, I have been retrenched by Jill Whittle and Ci. 20 yeRs and now good bye, no prior notification."
13. The posting was also seen by some of the current employees of the respondent and the applicant received various messages of support. The next day the applicant removed the posting from face book
14. It was the respondent's case that the applicant was guilty of gross misconduct for posting the abovementioned message on face book. The respondent alleged that the comments on face book,
 - (i) defamed the character of a senior employee, ie Jill Whittle;
 - (ii) deliberately provided information that was untrue or misleading;

- (iii) caused disruption in the workplace; and
 - (iv) brought the respondent's name into disrepute in a public forum.
15. It was the applicant's case that she believed that she was being retrenched and that Jill was involved in the matter. She subsequently accepted that Jill was not involved in the retrenchment and that she should not have posted the message on face book. She was very upset at that time and regrets what was done. The day after the posting she removed the posting from face book hence there was no serious damage caused by the posting.

SURVEY OF EVIDENCE AND ARGUMENT

16. The respondent submitted a bundle of documents, which was paginated from page 1 to page 96 and the applicant's bundle was paginated from page 1 to page 26. The hearing was digitally recorded hence I shall summarise only the evidence used to arrive at my finding

The Respondent's Evidence

17. Ruth Sibisi, Jill Whittle, Celeste Vermeulen, Eugene van Niekerk and Paul Linnetts testified under oath on behalf of the respondent. Further to the facts reflected above the relevant aspects of their testimony are summarized below. Much of the respondent's evidence related to the applicant's negative attitude towards the respondent on various occasions. This however was not the reason for the applicant's dismissal. The dismissal of the applicant was based on the face book comments made by the applicant on the 17th of April 2015. Page 8 of the respondent's bundle clearly states the reason for the applicant's dismissal. I have therefore disregarded the evidence related the applicant's alleged negativity unless it was related to the face book comments made on the 17th of April 2015.
- 17.1. On the 10th of April 2015, the applicant requested information regarding her package hence such information was provided to the applicant on the 17th of April 2015. It was not a *fait accompli* that the applicant would be retrenched. Although there were no alternative positions at the time of the consultations, the consultations were not concluded and anything could have happened. It is possible that the applicant could have been retained.
- 17.2. Ruth Sibisi discussed the section 189(3) letter with the applicant clause-by-clause hence it should have been clear to the applicant that the process was continuing. Therefore the applicant was aware that she was not dismissed at that time. Despite being aware that she was not dismissed, the applicant stated as a fact, that she was dismissed. This comment was intended to damage the reputation of the respondent and cause disruption in the workplace.

- 17.3. The respondent acknowledged the applicant's request for the second meeting to be held on the 23rd of April 2015 but due to the fact that the meeting was already scheduled by the respondent, it was not possible for it to be rescheduled.
- 17.4. The meeting proceeded on the 17th of April and in addition to proposed retrenchment package figures, Ruth informed the applicant that there were complaints about the applicant's negativity which caused disruptions in the business of the respondent. These complaints also reached the office of the CEO. Ruth informed the applicant that they could discuss the option of the applicant leaving the respondent immediately but continued negativity whilst in the employ of the respondent was unacceptable as it adversely affected the business of the respondent.
- 17.5. Ruth requested the applicant not to discuss the retrenchment with others and that it should be confidential.
- 17.6. Ruth was aware that the applicant was diagnosed with cancer of the throat but assured the applicant that her illness was not the reason for her dismissal.
- 17.7. The evidence of Jill Whittle was that she was not aware of the proposed retrenchment of the applicant until she printed the Section 189(3) notice for Ruth on the 10th of April 2015.
- 17.8. Jill heard that the applicant believed that she was involved in the retrenchment. She therefore attempted to speak to the applicant on the 13th of April 2015 but the applicant was very rude to her. The applicant did not give Jill an opportunity to explain her side of the story. The applicant raised her voice at Jill and told her to leave the applicant's office, (f. off) .
- 17.9. It was common knowledge in the department that the applicant was being retrenched. The impact of the department was negative and employees were scared of talking to each other.
- 17.10. Subsequently, Jill saw the applicant's posting on face book and was furious. Her name was brought into disrepute by the applicant's false comments on face book. People in the department were uneasy and others believed that they may also lose their jobs.
- 17.11. Since the applicant's departure, the atmosphere in the department has become harmonious.
- 17.12. The applicant did apologise to Jill at the disciplinary hearing but Jill did not accept the apology.

Applicant's Evidence

18. The applicant testified under oath and the relevant aspects of her evidence are summarized below.
 - 18.1. The applicant had a clean disciplinary record and no counseling was ever given to the applicant for any negativity created in the workplace.

- 18.2. After the respondent purchased Freightpak, the applicant became the Sales Manager and managed all divisions of the respondent. When Jill returned to the respondent she took over the Truck Rental Business
- 18.3. At a meeting in Johannesburg, the applicant was informed that Celeste, who was the applicant's subordinate would take over management of "New Business" and the applicant would be the Client Relations Manager. In that period, the applicant was diagnosed with throat cancer.
- 18.4. The applicant heard about the retrenchment for the first time on the 10th of April 2015 and was devastated because she had 5 years to retirement, had a serious medical condition and her husband was on pension. She was 55 years old and prospects of employment were poor.
- 18.5. She was not informed by Ruth that the matter was confidential. People in the office saw that the applicant was upset and she informed them that she was being retrenched.
- 18.6. The applicant was very upset and could not remember clearly what was said at the meeting on the 10th of April 2015, or if the next meeting date was agreed.
- 18.7. At the meeting of the 17th of April 2015, Ruth did inform the applicant about rumours of negativity and that the applicant could leave with immediate effect. The applicant therefore believed that there were no alternatives and that the decision to retrench her was made.
- 18.8. That evening the applicant was on face book and saw Bernadette and Annette posting messages. Applicant then posted her message. She was not techno savvy and believed that she was only talking to Bernadette and Annette. She only mentioned Jill because Jill was the Branch Manager and her name was mentioned in the retrenchment letter. The applicant believed that Simon was her direct line manager.
- 18.9. There were emails between the applicant and Ruth and the applicant was aware that Ruth was scheduled to meet the applicant on the 17th of April 2015.
- 18.10. Under cross examination the applicant accepted that:
 - 18.10.1 she did inquire why Jill's name appeared in the retrenchment letter but she did not remember the explanation given by Ruth.
 - 18.10.2 Ruth inquired whether the applicant was in a position to drive and she offered to take the applicant home.
 - 18.10.3 On Monday, the 13th of April 2015, the applicant refused to discuss the matter of her retrenchment with Jill or Simon.
 - 18.10.4 The applicant's posting on face book was a rash decision that the applicant regretted. The applicant removed the posting the next day and was not aware of any negative consequences that arose as a result of the posting.

18.10.5 The applicant was remorseful and apologized to Jill at the disciplinary hearing as she was not permitted to communicate with only other employee whilst she was suspended.

18.10.6 The applicant was not aware that others would also see her message and when she received messages from others the next day, she contacted her son and removed the posting.

ANALYSIS OF EVIDENCE AND ARGUMENT

19. In order to prove that the dismissal of the applicant was fair, the respondent is required, in terms of section 188 of the LRA, to have a good reason for the dismissal (substantive fairness) and to have followed a fair procedure (procedural fairness).
20. Most of the facts on which this case can be decided, are common cause.
21. Procedural fairness was not challenged by the applicant.
22. Clearly, the reason for the applicant's dismissal was the comments she posted on Face Book.
23. The respondent attempted in vain to link the applicant's conduct with its own code of conduct and prove that the applicant was guilty of misconduct and that dismissal was an appropriate sanction. They failed to link the face book posting to the code of conduct, however that in itself does not mean that the applicant's conduct was acceptable and that dismissal was not appropriate. The issue is whether the applicant could have been reasonably aware that posting the comments that the applicant posted would constitute serious misconduct and that dismissal could follow.
24. The central issue is whether the comments posted by the applicant in paragraph 12 above, constituted serious misconduct and justified dismissal. In order to answer this question one has to consider the context in which the comments were made.
25. The applicant was being consulted by the respondent in respect of her proposed dismissal on grounds of the respondent's operational requirements. She heard, for the first time on the 10th of April 2015, that retrenchment was contemplated by the respondent. She experienced a wave of emotions as she had throat cancer at that time, her husband was already on pension, the prospect of future employment was poor and she was 55 years old. After 20 years of service to the respondent and a mere 5 years from retirement, she did not expect to be retrenched.
26. It was common cause that the applicant saw the section 189(3) letter for the first time on the 10th of April 2015, ie the day of the meeting. Section 189(3) of the LRA requires the employer to issue a written notice inviting the other consulting party to consult with it and disclose in writing all relevant information, including but not limited to –
 - (a) Reasons for the proposed dismissals;

- (b) The alternatives that the employer considered before proposing the dismissals,
- (c) The number of employees likely to be affected,
- (d) The proposed method for selecting the employees to dismiss
- (e) The time when or period during which the dismissals were likely to occur.
- (f)
- (g)
- (h) .
- (i)
- (j)

27. The reason for the above requirement is that the applicant could prepare for the meeting, seek advice, etc. prior to the meeting and ask the relevant questions at the meeting. The respondent however issued the letter inviting the applicant to the consultation meeting at the meeting itself. It is therefore not surprising that the applicant was totally unprepared for such a meeting. Waves of emotions seemed to surge within her. Thoughts of her health, husband on pension, alternative employment, income, retirement, etc. consumed her and she could not remember what was explained to her. I am not surprised that the applicant cannot remember exactly what happened at the meeting or that each of the clauses in the notice was explained to her.
28. I accept that the respondent did not force the applicant to sign the document at that time and gave her an opportunity to take the document home and to contact Ruth if the applicant had any queries. On the 15th of April 2015, the applicant requested the respondent to hold the next meeting on the 23rd of April 2015, ie. after she received her blood results but the respondent refused and the meeting proceeded on the 17th of April 2015, as scheduled.
29. At the meeting on the 17th of April 2015, Ruth presented the applicant with the figures in respect of the retrenchment package, albeit at the request of the applicant. She also informed the applicant that there were concerns about her negativity and that they could discuss the applicant's immediate departure without any loss of benefits. Applicant was also informed that there were no other positions available for the applicant.
30. Under the circumstances I am not surprised that the applicant believed that the retrenchment was a *fait accompli*. The applicant's version was that she was offered the option of leaving immediately. There was no evidence before me that further meetings were scheduled or that the applicant was informed that a decision on retrenchment was not taken. As a lay person therefore she believed that the decision to retrench her was already made.
31. As mentioned earlier, I do not consider the explanation given by Ruth to the applicant on the 10th of April 2015 as proper explanations owing to the circumstances of the meeting and the applicant's mental state. If the section 189(3) notice was served on the applicant a few days

prior to the meeting, she would not have been so shocked, and explanations would have been meaningful. In any event, the section 189(3) letter was, for most part, a standardized letter and parts of it were not relevant to the applicant. eg. the applicant was the only employee affected but clause 9 deals with selection criteria and 3.1.3 seeks to minimize the potential retrenchments.

32. I accept the applicant's argument that for all intents and purposes the decision to retrench was decided. The argument that she was not retrenched because she had not received a letter of dismissal is a mere technicality.
33. In any event, the comment posted by the applicant on face book was the following:
"Amazing ladies, I have been retrenched by Jill Whittle and Ci. 20 yeRs and now good bye, no prior notification."
34. This seems to me to be more of an expression of the hurt that the applicant felt rather than a broadside attack on the integrity of the respondent. The code of good practice on dismissals for operational requirements states categorically that operational requirements dismissals are "no fault" dismissals. In the same vein the applicant was re-assured by Ruth that the retrenchment had nothing to do with the applicant's illness. How then is the name of the respondent brought into disrepute by the applicant stating that she was being retrenched after 20 years of service. Prior to the 10th of April 2015 there was no notification that the respondent contemplated the retrenchment of the applicant. The face book posting was made on the 17th of April 2015 hence at that time the applicant would have been aware for one week that she was likely to be retrenched. Had the applicant indicated on the posting that she no notification prior to the 10th of April 2015, it would have made the statement factually correct but nothing else would have changed. The offence to the respondent would have been the same. Therefore, the inaccuracy of the statement is of little or no relevance. There was also no evidence that the respondent actually suffered reputational damage owing to the face book comment made by the applicant.
35. On the issue of defamation of a senior manager, it is common cause that Jill Whittle is a senior manager at the respondent. She is the Regional Manager and is responsible for all operations and sales at the Pinetown Branch. It was her evidence that all sales representatives for all divisions reported to her. Although it was factually incorrect that Jill Whittle was responsible or involved in the proposed retrenchment of the respondent, I do not believe that defamed by the mentioning of her name in the face book posting. She was the 'face' of the respondent at that branch. Whether it was Jill Whittle, the CEO of the respondent, or Ruth Sibisi that actually consulted with the applicant and gave effect to the retrenchment, it is the respondent that is ultimately responsible for the retrenchment. The persons are functionaries and would not have acted in their personal capacities and cannot be blamed as individuals for

the unfortunate predicament related to the retrenchment of the applicant. Whilst the statement was untrue, it was not defamatory towards Jill Whittle.

36. Retrenchment is a traumatic event in the working life of any individual and it is not uncommon for workers to suffer from depression and in some instances have been suicidal as well. Support from friends and family is most needed at these times and the applicant's posting on face book was an attempt at receiving support. Whilst it is understandable that the respondent would want to avoid panic amongst other employees by requesting confidentiality from the applicant, it seems unfair that applicant, during such a traumatic time, should be prevented from discussing the matter with her friends or others who could offer support.
37. As mentioned above I do not believe the face book posting was objectively offensive to the respondent but even if it was, I find that dismissal was too harsh a sanction. What the applicant actually needed was counseling, which would have been far more appropriate. I therefore find that the dismissal of the applicant was substantively unfair.
38. The applicant requested reinstatement as relief for the unfair dismissal and I believe that such an order should be granted as it is the primary remedy envisaged by the LRA. Further, it was the respondent's version that the consultation process was not concluded and that retrenchment was not a foregone conclusion
39. In calculating retrospective salary due to the applicant for the period 29 April 2015 to the date of this award, I have used the applicants' basic salary of R47 594-71 per month.
40. The retrospective salary is therefore calculated as follows:
$$R47\ 594-71 \text{ pm} \times 4 \text{ months} = R190\ 378-84.$$

AWARD

41. In the circumstances I make the following award:
 - 41.1. The dismissal of the applicant, Lynn Robertson, by the respondent, Value Logistics, is found to be substantively unfair.
 - 41.2. The respondent is ordered to reinstate the applicant into her position as a Customer Relations Manager, on the same terms and conditions of employment that prevailed prior to her dismissal.
 - 41.3. The applicant is required to report to the premises of the respondent to commence work within 3 days of receiving this award.
 - 41.4. The respondent, Value Logistics, is ordered to pay the applicant retrospective salary amounting to R 190 378-84.
 - 41.5. The abovementioned amount is to be paid to the applicant within 14 days of the respondent being informed of this award.

41.6. There is no order as to costs.

Signature: _____

Commissioner: *Leon Pillay* _____

Sector: _____