Alarming rise of racial insults in the workplace

By Johnny Goldberg and Grant Wilkinson

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Recently, there has been an unsettling rise in the instances of racial slander in the workplace.

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For example, ex-DJ Sasha Martinengo was fired - with immediate effect - from his position at Hot 91.9 for calling the leader of the EFF, Julius Malema, a "monkey". Velaphi Khumalo - employee of the Gauteng Sports, Arts, Culture and Recreation - made the comment that whites in South Africa need to be dealt with like Hitler handled the Jews in Nazi Germany. This comment of his has been seen as hate speech and he is facing a disciplinary enquiry. The action taken by those in a superior position to these individuals is well documented in the media. However, is this the norm in terms of dealing with cases of racial insults?

Hot 91.9 FM's Sasha Martinengo fired for calling Malema the m-word

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The two recent cases below show the approaches that our courts have adopted towards instances of racially provoked commentary.

Rustenburg Platinum Mine v SAEWA obo Bester and Others (17 May 2018)

In this case, it is shown that it can be a dismissible offence for an employee to use racial statements about their employers.

Facts of the case

A senior training officer was dismissed for insubordination and making derogatory remarks: it was held that he used the words “swart man” when he addressed a grievance. The employee addressed his complaints in emails to the chief safety officer who assigned the parking bays.

The employer's evidence was that the employee had stormed into a management meeting and - while raising his voice - said "verwyder daardie swart man se voertuig". The employee disputed this. A Commissioner held that his dismissal was substantively and procedurally unfair. The employee was awarded retrospective reinstatement and compensation to the value of R191,834. It was found that - on a balance of probabilities - the employee had used the term "swart man" to describe someone he had never met however the Commissioner found that this was not be a racial remark as it was describing an attribute of a person.

The Labour Court took note of evidence which showed a memorandum was issued within the workplace that stipulated that abusive or derogatory language would not be tolerated. Thus the employee had knowledge of the rule. On review the undisputed evidence confirmed a zero-tolerance rule for racial remarks. The Labour Court found that the dismissal was fair in the circumstances (serious misconduct). The award was set aside.

How just one derogatory word can get you fired...

Jonathan Goldberg 4 Jun 2018

On appeal, the Labour Appeal Court had to determine if using the words "swart man" was derogatory and if – objectively - it was a breach of the employer's rules. The Labour Appeal Court found that the use of the words in the context could not be said to be intended to be a racial remark. The Court noted that the LC had failed to recognise the impact of apartheid and racial segregation that has left society with a racially charged state of affairs.

The test was if, objectively, the words were capable of bearing a meaning that was deemed to be a racial remark. The Court noted the employee was dishonest in denying that he had made the statement and the other witnesses were consistent in their version that this did occur. The Court held that the employee had not separated himself from the apartheid past and that an acknowledgement of wrong doing by the employee would have gone a long way in rehabilitation.

The Court found that the dismissal was appropriate in the circumstances. The appeal was dismissed and there was no order as to costs.

Shoprite Checkers (Pty) Ltd v Samka and others - (2018)

This case shows that, in cases of racial slander, the extent to which the employer has a responsibility to protect its staff from customers who abuse them verbally.

Facts of the case

The employee claimed that she had been discriminated against, on the grounds of race, by being bullied, victimised and

harassed by the staff of the store at which she worked as a customer had called her a "stupid k****". A CCMA Commissioner rejected the employee's claim that she had been harassed by staff because of her race. Instead it was found that the employer had failed to investigate the customer's racist comment, for which the employer was liable, properly. The employer was ordered to pay the employee compensation of R75,000. The employer appealed against the award. The employee cross-appealed against the findings that she had not also been discriminated against by bullying and harassment.

The Court accepted that the words used by the customer constituted one of the worst racist insults. However, the question was if the employer could be held liable for the utterances of one of its customers. The Court held that it could not. The Employment Equity Act (EEA) provides that if an employee discriminates against a colleague while at work, the employer may be held liable if it does not take steps to eliminate the racist conduct. It was clear to the Court that section 60 of the EEA applies only to conduct by an employee of the defendant employer. The Court added that the employee had remedies under the common law or other statutes.

Turning to the cross-appeal, the Court noted the Commissioner had accepted that the employee had been bullied and harassed by colleagues, but that this conduct was not motivated by the employee's race. Although harassment is declared as a form of discrimination by the EEA, it must still be based on one of the listed or analogous grounds, which the employee had failed to prove.

The appeal was upheld and the cross-appeal was dismissed.

Given South Africa’s racially clouded history, hate speech needs to be dealt with in an extremely serious manner. The Prevention and Combating of Hate Crimes and Hate Speech Bill is government’s contribution to the fight against hate speech.

ABOUT THE AUTHOR

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