

DISTRIBUTABLE (19)

ELINETH DICK
v
ZIMBABWE REVENUE AUTHORITY

SUPREME COURT OF ZIMBABWE
GWAUNZA JA, GOWORA JA & GUVAVA JA
HARARE, JULY 25 2014

O Mpfu, for the appellant

T Mpfu, for the respondent

GUVAVA JA: This is an appeal against the judgment of the Labour Court handed down on 17 January 2013.

The brief facts of the matter may be summarised as follows. The appellant was employed by the respondent as a manager in its audit department. She was allocated a computer for her use which had an internet facility already installed. The computer and the internet facility were for official use in the course of her employment. On 13 July 2011 she was suspended from employment and on 18 August 2011 after due investigation she was charged in terms of the respondents' Code of Conduct under respondents' most serious category with two offences that is:-

- (i) Wilfully applying a wrong use, or unauthorised purpose, to assets or to property;
or alternatively
- (ii) Carrying out an act which is inconsistent with the express or implied conditions of the contract of employment.

She was found guilty of both charges by both the Disciplinary Grievance Committee and the Appeals Committee and as a result she was dismissed from employment.

Dissatisfied with the penalty of dismissal she appealed to the Labour Court which upheld the dismissal.

The appellant has appealed to this Court on two grounds set out as follows:

1. The court *a quo* erred at law in upholding appellant's dismissal on the basis of an IT policy document which was not part of her contract of employment.
2. The court *a quo* grossly misdirected itself and erred at law in failing to consider relevant issued (*sic*) placed before it. It ought to have considered and made a finding on whether or not appellant's computer could have been hacked in the light of evidence placed before it.

The allegation against the appellant was that on 22 April 2010 she had sent a video clip entitled "work done in the kitchen" via email. It was not in dispute that the video clip contained indecent, obscene and immoral material. It was found that the dissemination of such material was contrary to the IT policy of the respondent which formed part of her contract of employment. The offensive material had been sent from her computer during working hours.

At the hearing Mr *Shava*, for the appellant, abandoned the first ground and proceeded to argue on the second ground. Indeed the decision to abandon the first ground was well advised in view of the fact that paragraph 21 of the appellant's contract of employment specifically incorporated the respondent's office procedures, staff handbook and staff code of conduct. This would obviously include the respondent's IT policy document.

In relation to the second ground of appeal Mr *Shava* submitted that the court *a quo* had misdirected itself and erred at law in failing to make a finding on whether or not the appellant's computer had been hacked in the light of evidence placed before it.

It should be noted that although the appellant argued that someone could have hacked her computer and sent the offensive material, she refused to disclose to the Disciplinary Hearing whether or not the person to whom the offensive material was sent was known to her in spite of being questioned directly by members of the committee.

Mr *Shava* properly conceded, in our view, that the appellant's refusal to answer the question of whether she knew the recipient during the disciplinary hearing conducted by the respondent placed her in considerable difficulty in defending the charges. Although the appellant made the allegation that someone could have hacked her computer she did not place any concrete evidence to support this speculative statement. She did not specify which other persons had access to her computer's password nor did she state that at the time that the offensive email was sent someone other than herself had access to it.

The court *a quo* proceeded to draw an adverse inference from her refusal to answer the question as to whether or not she knew the recipient of the offensive material.

The court stated at p 3 of the judgment as follows:

“During the course of the hearing the appellant was asked whether or not she knew the recipient address and she declined from answering. This raises the question – why did she refuse to answer? This in my view causes this court to draw an adverse inference against the appellant. Thus it can be concluded that appellant did send undesirable material on email during working hours using the respondent's facility”

In our view, the court's reasoning in this regard cannot be faulted. It is supported by the case of *Reserve Bank of Zimbabwe v Granger & Anor* SC 34/2000 where it was held as follows:

“A gross misdirection of facts is either a failure to appreciate a fact at all or a finding of fact that is contrary to the evidence actually presented, or a finding that is without factual basis or based on misrepresentation of facts.”

Taking into account the court’s reasoning there can be no basis for the allegation by the appellant that the decision of the court *a quo* was irrational as it was based on the evidence that was actually presented.

Mr *Mpofu* for the respondent had claimed costs on a higher scale in his heads of argument. However, during the hearing, he took the view that in the light of the appellant’s concessions he would not persist with the claim.

It was therefore the unanimous view of this Court that the appeal was devoid of merit.

Accordingly we made the following order:-

“The appeal be and is hereby dismissed with costs.”

GWAUNZA JA: I agree

GOWORA JA: I agree

Mbidzo, Muchadehama & Makoni, appellant’s legal practitioners

Kantor & Immerman, respondent’s legal practitioners