IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG

CASE NO: JS270/06

In the matter between:

MARIE-LOUISE DE BEER

Applicant

and

S.A. EXPORT CONNECTION CC t/a GLOBAL PAWS

Respondent

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JUDGMENT

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FRANCIS J

Introduction

1. The applicant was employed by the respondent as a travel consultant. She fell pregnant and agreed with the respondent to return to work a month after she had given birth. She gave birth to twins who suffered from colic. Two to three days before the applicant was required to return to work, she requested that she be given a further one month off to stay with her twins at home. The respondent was prepared to grant her an extra two weeks that the applicant refused to accept. Her services were terminated

on 31 October 2005. She then referred a dispute to the CCMA and contended that her dismissal was automatically unfair in terms of section 187(1)(e) of the Labour Relations Act 66 of 1995 (the LRA).

2. The referral was opposed by the respondent.

The evidence led

3. Three witnesses testified in these proceedings. They were Michelle Ward (Ward)- the managing member of the respondent, the applicant and her fiancé Willie Fouche (Fouche). There was not a huge difference in their evidence save in some minor respects so repeating their evidence in great detail is not necessary.

4. The evidence led can be summarised as follows. The respondent is a small business that had three to four employees in 2005. The applicant was employed on a three-month contract by the respondent in October 2004. At the end of January 2005 she was offered permanent employment by the respondent that she accepted. Two weeks after she had been made a permanent employee, the applicant announced to the respondent that she was pregnant. Her sister, who is still employed by the respondent was also pregnant. The respondent had no difficulty with her sister's pregnancy since this was a planned pregnancy. The respondent was concerned about the developments as it meant that 70% of its employees would be on maternity leave. The applicant was a minor at the time so a meeting was called by the respondent. Present at the meeting that took place in February 2005 was the applicant, Fouche, her parents, Ward, the applicant's sister and her brother-in-law. The purpose of the meeting was to make arrangements to ensure that the respondent would survive. An

agreement was reached that the applicant's sister would take four months maternity leave. The applicant would return to work a month after she had given birth. Her mother would be the day care mother for her baby. The applicant's version supported by her fiancé is that it was also agreed at the meeting that should either she or her baby not be well other arrangements would have to be made. This was disputed by the respondent. The applicant version is also that she was initially threatened with dismissal. This version was however not put to the respondent's witness when she testified.

5. The applicant went on maternity leave on 23 September 2005 and gave birth to twins on 28 September 2005. In terms of the agreement, she was required to have returned to work on 1 November 2005. After two weeks, the twins started to cry day and night and she took them to a doctor who confirmed that they were colic that is a crying disorder. They were battling with feeding. Her mother helped her with the twins. She and her mother could both not handle their crying and could not cope. Two to three days before the applicant was required to return to work, she approached Ward and told her that she needed more time to be with her twins and requested to be given an additional maternity month leave. She told Ward that the arrangement with her mother had changed and she could no longer look after the twins. Ward was prepared to give her two weeks as opposed to a month. The applicant refused and told Ward that this was unacceptable to her. The applicant's services were terminated on 31 October 2005 and she was given a letter to that effect. The applicant would have returned to work within a month since she was healthy but could not do so because of the twins. In December 2005 the applicant was given a letter by a doctor

who confirmed that she was fine and that the twins were colic. Her sister was due to return from maternity leave in January 2006. The applicant was replaced with another employee in January 2006. The person who had replaced her did not work long for the respondent. Six months after the applicant had been dismissed, she saw an advertisement in a newspaper where her position was advertised. She made enquiries about whether she could not be re-employed. She was told that too many things had taken place and she could not be re-employed again. Ward said that the situation was created by the applicant's pregnancy and her not returning after a month had created an impossible situation for the respondent.

6. The applicant found employment with AGS Fraser on 1 June 2006 and is earning R6 000.00 a month before deductions. She was earning R3 000.00 per month at the respondent.

The parties contentions

7. Mr van der Westhuysen, who appeared for the applicant, contended that her dismissal was automatically unfair in terms of section 187(1)(e) of the LRA in that her dismissal was a reason related to her pregnancy. The respondent was liable to pay the applicant compensation equivalent to 24 months remuneration. The provisions of sections 25 and 26 of the Basic Conditions of Employment Act 75 of 1997 (the BCEA) were also applicable. The applicant was entitled to costs although there was no specific prayer for costs in the statement of claim.

8. Mr Kruger, who appeared for the respondent, contended that there was no evidence

before this Court that showed that the reason for the applicant's dismissal was directly linked to her pregnancy. The phrase "any reason related to her pregnancy" related only to the mother and not her children. This would be where the applicant had complications as a result of the birth like internal bleeding and needed time to recuperate. The illness of a baby cannot be a reason related to her pregnancy. The applicant was dismissed for misconduct because she had refused to return to work after the birth of her twins in terms of the agreement concluded in February 2005. If she were dismissed before she went on maternity leave the respondent would have no defence. He contended that he had no submissions to make about the respondent's failure to comply with the provisions of the BCEA dealing with the length of maternity leave. The claim should be dismissed. He contended that if it were found that the dismissal was automatically unfair, the applicant should only be compensated for the period that she was unemployed which was from 1 November 2005 to 31 May 2006 in an amount of R21 000.00.

Analysis of the evidence and arguments raised

9. Section 187(1)(e) of the LRA provides as follows:

"A dismissal is automatically unfair if the employer, in dismissing the employee, acts contrary to section 5 or, if the reason for the dismissal is the employee's pregnancy, intended pregnancy, or any reason related to her pregnancy".

10. Section 187(1)(e) of the LRA must be seen as part of social legislation passed for the specific protection of women and to put them on an equal footing with men. I have no doubt that it is often a considerable burden to an employer to have to make the

necessary arrangements to keep a woman's job open for her while she is absent from work to have a baby, but this is a price that has to be paid as part of the social and legal recognition of the equal status of women in the workplace. If an employer dismisses a woman because she is pregnant and is not prepared to make the arrangements to cover her temporary absence from work the dismissal would be automatically be unfair.

11. A dismissal will not in my view escape being automatically unfair by the argument that the woman is being dismissed not because of her pregnancy, but because of her unavailability for work that results from her pregnancy. No more can the employer argue that the reason is economic, citing the extra expenses that it must incur to provide temporary cover for an absent employee.

12. The protection contained in section 187(1)(e) of the LRA is also granted to an employee against dismissal for any reason related to her pregnancy. It cannot be argued, for example, that a dismissal escapes these provisions because the reason is not pregnancy but the absence from work that her pregnancy occasions. The dismissal is also unfair not only when pregnancy or any reason connected with the pregnancy is the reason for the dismissal, but also when the woman is dismissed for reasons connected with the exercise of her rights in respect of maternity leave

13. The issue that needs to be decided by this Court is whether the applicant was dismissed for any reason related to her pregnancy in terms of section 187(1)(e) of the LRA. It was held in *Kroukam v SA Airlink (Pty) Ltd* [2005] 1172 LAC that section

187 of the LRA imposes an evidential burden upon the employee to produce evidence which is sufficient to raise a credible possibility that an automatically unfair dismissal has taken place. It then behoves the employer to prove to the contrary, i.e. is to produce evidence to show that the reason for the dismissal did not fall within the circumstances envisaged in section 187 of the LRA for constituting an automatically unfair dismissal. In my view, the onus to prove that the dismissal was not automatically unfair rest on the employer. The applicant must adduce some evidence to raise the issue whether the dismissal is for a reason related to pregnancy. Once this is done, the respondent must refute this in the course of establishing a fair reason.

14. This Court must in deciding the issue give meaning to what is meant with "any reason related to her pregnancy". In other words does it cover the situation like in the present one where the twins who were colic can be said to be a reason related to her pregnancy. The respondent as is customary in these type of cases denied that the applicant's dismissal was a reason related to her pregnancy.

15. The respondent's version is that the applicant's dismissal was not for a reason related to her pregnancy. She was dismissed because she had committed misconduct in that she had not returned to work as agreed upon at the February 2005 meeting. It is common cause that the applicant went on maternity leave on 23 September 2005 and gave birth to twins on 28 September 2005. The twins were colic. She was required to return to work a month after having given birth that would have been on 1 November 2005. She admitted that after she had given birth she was healthy to return to work. Had her babies not been sick, she would have returned to work. She had requested to

remain at home for a further month which request was rejected. She turned down an extra two weeks. The respondent refused and told her that if she did not report for work after she was given a further two weeks off, she would be dismissed. She was then handed a letter dated 31 October 2005 that reads as follows:

"Dear Marie

You joined Global Paws on a 3 month contract on 25 October 2004. At the completion of the contract period on 25 January 2005 we offered to convert your temporary contract to a fixed term contract, which you accepted. One a week after this you notified us that you were pregnant, a fact which you clearly knew prior to accepting the new position.

You were aware that your sister, who is in the employ of Global Paws, was pregnant; you were also aware that this pregnancy had been discussed and planned for well in advance. Global Paws, is a small company and you understood that to have both sisters off at exactly the same time for any extended period, would make it practically impossible for the company to operate efficiently, yet you accepted the new position with this knowledge.

As you were still a minor, it was decided to involve your parents, your partner, as well as your sister and her husband, who both work for Global Paws, in the decision making process as to how the company could survive having 75% of it's office staff on leave for an extended period. A meeting of all the parties concerned was held, at our offices at which we outlined the very fragile position the company would find itself in.

Your mother, father, your partner and yourself all advised that you understood and accepted the company's potentially precarious position, and as a result of these

consultations you agreed to waive your rights of maternity leave as contained in the Basic Conditions of Employment Act and contracted to take one month's maternity leave only, after the birth and that thereafter you would make suitable arrangements for the care of your offspring and you would return to work. It was undertaken and the company would manage for this one month period and this arrangement was consented to by all parties concerned.

At the end of the agreed one month maternity leave period, we were notified that you did not intend to return to work but that you were going to take additional maternity leave. In order to attempt to accommodate you, we offered to let you take an additional 2 weeks leave, but this you advised would not be an acceptable amount of time. Unfortunately due to our operational requirements, we could not consent to further extend the contracted leave period.

Taking into account your conduct, your length of service, your breach of your contractual arrangement and the impossible operation position you have put our company in, we feel that we have no option but to terminate your services and employ a replacement person. As agreed at the time of your commencing your maternity leave, your final days leave should have been 31 October, we therefore view this to be your last working day."

17. It is clear from the evidence led and the contents of the dismissal letter that the respondent was concerned about the impact the applicant and her sister's pregnancy would have on its business. It is a small business. Her sister's pregnancy was planned and she was given four months maternity leave. The applicant's pregnancy was unplanned and she was only given a month's maternity leave. The respondent

seeks to rely on an agreement concluded with the applicant in February 2005.

18. It is clear from the evidence led that the applicant was punished for having fallen pregnant, which pregnancy was unplanned unlike that of her sister. The punishment for this was that she was only given a month's maternity leave. The agreement that the applicant is relying falls foul of the provisions of the BCEA. Section 25 of the BCEA deals with maternity leave and provides as follows:

"(1) An employee is entitled to at least four consecutive months' maternity leave.

(2) An employee may commence maternity leave -

(a) at any time from four weeks before the expected date of birth, unless otherwise agreed; or

(b) on a date from which a medical practitioner or a midwife certifies that it is necessary for the employee's health or that of her unborn child.

(3) No employee may work for six weeks after the birth of her child, unless a medical practitioner or midwife certifies that she is fit to do so.

(4) An employee who has a miscarriage during the third trimester of pregnancy or bears a stillborn child is entitled to maternity leave for six weeks after the miscarriage or stillbirth, whether or not the employee had commenced maternity leave at the time of the miscarriage or stillbirth".

19. Section 26 of the BCEA deals with protection of employees before and after birth of a child. It reads as follows:

"(1) No employer may require or permit a pregnant employee or an employee who is nursing her child to perform work that is hazardous to her health or the

health of her child.

(2) During an employee's pregnancy, and for a period of six months after the birth of her child, her employer must offer her suitable, alternative employment on terms and conditions that are no less favourable than her ordinary terms and conditions of employment, if -

(a) the employee is required to perform night work, as defined in section 17(1) or her work poses a danger to her health or safety or that of her child; and

(b) it is practicable for the employer to do so."

20. Section 5 of the BCEA provides that the BCEA or anything done under it takes precedence over any agreement, whether entered before or after the commencement of the BCEA. The agreement that the respondent is relying on is not more favourable to the applicant in that it only gives her a month's maternity leave and offends section 4 of the BCEA.

21. The applicant was entitled to have taken four months maternity leave in terms of the BCEA. The agreement that the respondent seeks to rely is contrary to the provisions of the BCEA and is therefore null and void and unenforceable.

22. It is clear from the dismissal letter that the applicant's dismissal is stated to be because she had failed to report for work on 31 October 2005 that was in terms of the agreement that she had concluded with the respondent. Had the applicant been allowed to use her full four months maternity leave in terms of the BCEA, she would

not have been dismissed and she could have spent time with her colic twins. Her dismissal is clearly a reason related to her pregnancy. The irony of the matter is that a replacement was only found for the applicant in January 2006. Had she been granted the extension up to November 2005 there would not have been a need for this matter to have been brought to court. The impression that I gained from Ward's testimony is that because it was December 2005 there was no need for a replacement then.

23 The phrase "any reason related to her pregnancy" should in my view be carefully considered by the Courts. No rigid rules can be given by this Court and each matter should be considered on its own facts. Where an employee like the applicant in this present case is denied the right to go on maternity leave for four months, has a colic child or a child with a condition that needs the nurturing of a mother and is dismissed, it will be impossible for the employer to argue that the condition of the baby and in this case the colic babies are not linked to the pregnancy. After all, the natural consequence of being pregnant is giving birth. An employee who has a miscarriage or bears a stillborn child is entitled to six weeks maternity leave after the miscarriage or stillbirth. I fail to understand why it was contended that the fact that the applicant's babies were colic and that she was unable to return to work as agreed upon it is not a reason related to her pregnancy. The fact is that the applicant was entitled to four months maternity leave. The BCEA allows her to structure how she intends taking the maternity leave. Whether she agreed to work a shorter period does not assist the respondent. The agreement was unlawful. The phrase "any reason" is not only related to pregnancy related health problems but should also include babies who are ill and need nurturing from their mothers.

24. I had asked Mr Kruger whether if the applicant was still feeling ill a month after delivery and she was then dismissed whether the dismissal would be automatically unfair. He responded positively. When asked why it is different when her twins were ill he said that it was not for any reason related to her pregnancy. There is no substance in these submissions.

25. The respondent did not lead any evidence about the misconduct that the applicant is alleged to have committed. No disciplinary enquiry was held nor was the applicant given a charge sheet to appear at a disciplinary enquiry. I am satisfied that the applicant has led sufficient evidence to raise a credible possibility that an automatically unfair dismissal has taken place. The respondent has failed to prove the contrary.

26 The applicant's dismissal is found to be automatically unfair in terms of section 187(1)(e) of the LRA.

27. All that needs to be determined is the issue of compensation. It is trite that the maximum compensation to be awarded to an employee whose dismissal is found to be automatically unfair is 24 months remuneration in terms of section 194(2) of the LRA. Although I have sympathy for the position that the respondent had found itself in after two of its employees fell pregnant at the same time, its conduct is frowned upon. The applicant was punished for having had an unplanned pregnancy. She was only given a month's maternity leave as opposed to four months. The justification for treating her differently from her sister is that the sister's pregnancy was planned and

hers not. I find the treatment of the applicant by the respondent to be degrading and deeply offensive.

28. The legislature had deemed it necessary to outlaw dismissals based on pregnancy or any reason related to pregnancy. The compensation to be awarded is double the compensation for ordinary dismissals. This is a factor that a court must take into account when considering compensation for automatic unfair dismissals. To award compensation similar to that which is given for ordinary dismissals like in misconduct and retrenchment disputes would be defeating the purpose of section 187 and 194(2) of the LRA. When considering compensation the Court must take into account that such dismissals are frowned upon and should deter employers' from automatically unfairly dismissing their employees.

29. Mr Kruger contended that should this Court find that the applicant's dismissal was automatically unfair, the respondent should pay the applicant compensation from the date of her dismissal to the date when she found employment. I do not agree. What Mr Kruger has not taken into account is that compensation in such circumstances should be doubled.

30. I accept that the applicant found employment on 1 June 2006. She is earning more than what she earned at the respondent. She was earning R3 000.00 per month from the respondent. I am of the view that it would be just and equitable to award the applicant compensation of R60 000.00 that is the equivalent of twenty months remuneration.

31. There is no reason why costs should not follow the result.

32. In the circumstances I make the following order:

32.1 The applicant's dismissal by the respondent is found to be automatically unfair in terms of section 187(1)(e) of the Act.

32.2 The respondent is to pay the applicant compensation of R60 000.00 that is the equivalent of 20 months remuneration.

32.3 The respondent is to pay the costs of the application.

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FRANCIS J

JUDGE OF THE LABOUR COURT OF SOUTH AFRICA

FOR APPLICANT	:	ATTORNEY OCKERT VAN DER WESTHUYSEN OF BLAKES MAPHANGA ATTORNEYS
FOR RESPONDENT	:	JOHAN KRUGER EMPLOYERS OF COFESA
DATE OF HEARING	:	23 AUGUST 2007
DATE OF JUDGMENT	:	31 AUGUST 2007