REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

JUDGMENT

Case No. C39/2012
(Not reportable)

In the matter between:

JOSEPH CHUKWUEMEKA ANYANWU First Applicant

JULIAN CHUKWUEMEKA ANYANWU Second Applicant

and

15-ON-ORANGE HOTEL (PTY) LTD Respondent

Heard: 11 February 2013

Delivered: 16 May 2013

Summary: Unfair discrimination claims in terms of the Employment Equity Act as well as automatically unfair dismissal claim in terms of Section 187(1)(f) of the Labour Relations Act. Application for absolution from the instance from Respondent. Application granted.

JUDGMENT

Introduction

1. The applicants claimed that the respondent, through the conduct of its employees and by the respondent's failure to resolve their various grievances, have unfairly discriminated against the applicants and that one of the respondents' manager, Werner Geere,

harassed them through serious racial abuse, which harassment respondent, despite the grievances, have failed to stop. In addition, the first applicant claimed that his dismissal for insubordination by the respondent is automatically unfair as envisaged by Section 187 of the Labour Relations Act[1] and that the real reason for the first applicant's dismissal is that the respondent unfairly discriminated against the first applicant on the basis of race, ethnic or social origin, culture or any other arbitrary ground.

2. In the pre-trial minute, the respondent raised various in limine points including one to the effect that the respondent was not the employer of the applicants but that they were in fact employed by 15 On Orange Hotel (Pty) Ltd. At the commencement of the trial, the parties resolved all the limine points. The applicants conceded that their employer was in fact 15 On Orange Hotel (Pty) Ltd and not the Respondent. For the remainder of this judgment, any reference to the employer of the applicants is a reference to 15 On Orange Hotel (Pty) Ltd.

3. Although not clearly stated in the pleadings, during argument on behalf of both parties, it became clear that the applicants' first claim is grounded in Section 10 (read with Sections 5, 6 and 9) of the Employment Equity Act[2] and that the first applicant's automatically unfair dismissal claim is grounded in Section 187(1)(f) of the LRA.

4. Both applicants , together with 2 other witnesses, gave oral evidence at the trial and at the conclusion thereof, the employer applied for absolution from the instance.

Evidence summary

5. Applicants are Nigerian nationals and were employed as waiters by the employer. At the commencement of their employment in December 2009 the applicants did not have work permits. InFebruary 2010 the applicants stopped working in order to apply for the

[1]Act 66 of 1995 ("LRA")

[2]Act 55 of 1998 ("the EEA")

necessary work permits. Their applications for work permits were supported by the employer and were successful. They received their work permits in June 2010.They resumed employment with the employer with effect from 14 June 2010.

6. The applicants' unhappiness with their employer started in January 2010 when twoincidents occurred involving the first applicant. The first related to the first applicant claiming that a fellow trainee supervisor, AntheaVisser, grabbed and pulled his shirt in front of guests who he was serving at the time. When he spoke to the duty manager about the incident, the duty manager told him that he perceived negative energy from the first applicant and that the first applicant should go outside of the building. He then complained to the general manager, who in turn told him to inform the food and beverage manager Mr Werner Geere(a central figure in the evidence of the applicants and hereinafter referred to as "Geere"), but nothing was done. The second incident was when a fellow employee, Jeremiah, grabbed the first applicant under his collar by his neck, choked the first applicant, lifted him off the ground against the wall and when he released him, the first applicant fell to the floor. This thefirst applicant stated he reported to Geere. Geere had a discussion with both Jeremiah and the first applicant in his office at which point Jeremiah admitted to Geere that he choked the first applicant. The first applicant perceived Geere as taking the side of Jeremiah although first applicant conceded in cross-examination that he shook Jeremiah's hand as an indication that the incident was resolved. None of these incidences were recorded in the pleadings nor in any grievance submitted to the employer.

The first grievance

7. After obtaining their work permits and reporting for duty in June 2010, applicants did not receive any contracts of employment from the employer nor any payslips.They received their remuneration in cash. Applicants received no retirement benefits nor were any contributions made to the Unemployment Insurance Fund on behalf of the applicants by the employer. Applicants were unhappy about the situation.It was only in September 2010

when the second applicant was designated as a runner (an assistant waiter), that they prepared a first written grievance for their employer ("the first grievance"). On the morning of 20 September 2010, the supervisor made the work allocation plan known and the second applicant discovered that he was designated as a runner for that day. After enquiring from the supervisor why that was so, he was informed that Geere instructed the supervisor to use the second applicant as a runner. The second applicant then confronted Geere. Geere who confirmed to him that he requested the supervisor to designate the second applicant as a runner but that it would only be for a week because the second applicant did not have a permanent contract with the employer. After a week passed, both applicants were again designated as runners and not waiters.When they confronted Geere about this they were informed that the employer was doing them a favour by giving them a job. Although addressed to the general manager, the first grievance was handed to Geere when the second applicant attended for duty on the morning of 27 September 2010. The applicants received no response to their first grievance.

The second grievance

8. Soon after the first grievance another grievance followed on 28 September 2010 ("second grievance"). At a briefing meeting prior to the commencement of a banqueting function, the assistant food and beverage manager, Howard, designated and used the second applicant as a runner whereas a trainee waiter, Jason, was designated as a waiter for that function. The next morning when the first applicant started his shift, he was also designated as a runner for that day and the supervisor informed him it was in accordance with Geere'sinstructions.A written grievance was filed with the employer. It was addressed to the general manager but was in the end given to Geere. When the applicants went to the general manager about their complaints, he informed them that he would have a word with Geere. Neither the general manager nor Geere responded. The applicants, in their evidence, indicated that assistant waiters (or runners) do not share in any tips on the tables that they were required to clean and set. It is only waiters that received the tips

provided to them by customers.These tips were not shared with the assistant waiters (or runners). In the result, their income was severely affected because they could not rely on the tips provided by customers to supplement their fixed monthly salary received from the employer. Another way their income was affected was when the duty manager made the allocation of the tables in such a way that the popular tables or sections in the restaurant were not allocated to them, but to other waiters. The duty managersets out the floor plan every morning during a briefing with staff, which plan contained the parts of the restaurant the particular waiter was responsible for.

The third grievance

9. In October 2010, the applicants were requested to re-apply for their positions and provide their applications to Geere, which they did. They were not interviewed for the positions and simply just continued working. On 2 December 2010, the second applicant filed a grievance, headed "Grievance 3", wherein he complained about not being allocated a table prepared by him for a group of 20 people, which was then served by another waiter. He complained that in doing so, the gratuity that he was potentially going to earn went to the other waiter.When he confronted Howard about this, he was informed that it was because he was casual staff and other staff were permanent. He claimed that the waiter earned a R1,000.00tip from that table on that evening and that the treatment was unfair and was calculated to frustrate both applicants financially. Although addressed to the Chief Operations Officer, the third grievance was given to Geere. The second applicant received no response to his grievance.

The fourth grievance

10. On the morning of 2 December 2010, the first applicant and Howard had an altercation. The first applicant claims that guests requested him to quickly prepare their food because they were getting ready to catch a flight. While he was repeating the order to the chefs in the kitchen and busy preparing the toast, he was instructed by Howard to clean the toast

machine and toast area. When he indicated to Howard that he was busy with an urgent order, Howard informed him that he would bring insubordination charges against him. First applicant also claimed that Howard informed him that first applicant should resign if he was unhappy. Howard eventually laid a complaint against the first applicant and he was charged with insubordination. On 3 December 2010, the first applicant received his notice to appear at a disciplinary enquiry. The disciplinary enquiry took place on 10 December 2010 and he was provided with a written warning. In his written ruling, the chairperson of the enquiry stated that *"if the employee believes that instruction is unreasonable, he should execute the instruction and afterwards lodge a complaint."* The first applicant also filed a written grievance in respect of this incident on 6 December 2010. In cross-examination the first application stated that in his view the instruction from Howard was not reasonable and that is why he did not obey it.

11. On 2 March 2011, both applicants were charged with insubordination for refusing to serve a banqueting table on 1 March 2011. On this day, the applicants and another waiter, Nicholas, had an issue with gratuities that they claimed were not paid to them by the employer. When the three of them raised it with Geere, Geere informed them that he will deal with it later and they should wait for him at the hostess' area. Geere apparently called Nicholas to his office and the first applicant claimed that he overheard a conversation between Geere and Nicholas in Geere's office where Geere informed Nicholas to stay clear of the applicants. Nicholas went on to serve the banqueting table whereas the applicants did not. In his evidence, the first applicant claimed that he did not refuse to serve the banqueting table whilst querying the issue concerning the gratuity. It was pointed out to first applicant that in the statement of claim applicants stated the following, *"First and second applicants indicated that these gratuities are charged to the guests but never make its way to the waiters who actually attended to the tables. First and second applicants as well as the other waiter, Nicholas, refused to serve the table until they were advised by the food and beverage manager as to how the gratuity would be addressed, which the food and beverage manager refused to do."* When invited to comment, the first

applicant maintained that the applicants never refused and that the applicants' attorney must explain the contents of the paragraph in the statement of claim.

12. It was further pointed out to the first applicant that in the minutes of the disciplinary enquiry of 4 March 2011, it clearly states that the applicants were *"not going to serve the table"* and accordingly refused to serve the tables. The first applicant's only response to this was that the disciplinary minutes were not prepared by the first applicant and it was prepared by the employer.

13. At the disciplinary hearing, the applicants were found guilty of insubordination with the chairperson finding that *"the employee was issued with a reasonable instruction and his reason for refusing was unjustified and unreasonable. I am therefore finding the employee guilty of insubordination."*The first applicant was issued with a final written warning valid for 12 months for insubordination and the second applicant was issued with a written warning valid for 6 months for insubordination.

The first CCMA dispute

14. On 6 December 2010, the applicants filed an unfair labour practice dispute with the CCMA. Where asked in Form 7.11 to summarise the facts in dispute, they indicated *"demotion, change of contract, humiliation and dehumanisation."* They also requested that the result they wanted from the conciliation was to get their *"job back and justice"*. The CCMA dispute was settled by agreement and the parties agreed that the applicants would be provided with a permanent contract and would be allowed membership of the applicable retirement fund. It was further agreed that should the applicants qualify for the December bonus, they would be paid the bonus by the end of February the following year, that payslips would be provided to the applicants and they would be registered for UIF. Also, the shift roster would be allocated fairly amongst variable shift employees and that the applicants would be remunerated at the rate of R20 per hour. It was further agreed for all of the above to be back-dated to 14 June 2010.According to the evidence provided by

both applicants, all of the above were implemented by the employer, save that after further discussions between the parties regarding the rate of R20 per hour,this rate was reduced by agreement between the parties to R17 per hour. The employer was also informed by the CCMA that the term "casual" is an offensive term and should not be used by management.

15. In cross-examination the first applicant conceded that this settlement agreement resolved all issues that preceded it. Applicants also confirmed that after the settlement of their dispute they had a meeting with Geere to clear the air . At this meeting they, together with Geere, agreed to respect one another and to put all differences aside.

The second CCMA dispute

16. On 11 March 2011, the applicants filed a second dispute with the CCMA for conciliation. They described the dispute as unfair discrimination, Section 10 of the EEA. Where asked to summarise the facts in dispute in Form 7.11 they stated that, *"We are a target and have been maltreated so as to get rid of us."* They claimed the dispute arose on 1 March 2011. The applicants also filed an unfair labour practice dispute challenging their written warnings. Both these disputes were settled on 7 April 2011. In respect of the unfair labour practice dispute, it was agreed that the first applicant's final written warning would be reduced to 8 months, expiring on 4 November 2011 and the second applicant's written warning would be reduced to a period of 4 months. A settlement agreement was concluded between the parties. In respect of the unfair discrimination dispute, it was agreed that a meeting would be convened with Geere in order to resolve their differences. The first applicant confirmed in his cross-examination that he and the second applicant had a sit down with Geere in order to resolve the unfair discrimination dispute. At this meeting with Geere, they all agreed to *"put the past behind them (sic)".* The applicants agreed with Geere that they would no longer go to the CCMA on the basis that he will treat them right.Geere stated that it was better to be positive and for them to resolve their differences in order to keep the CCMA out.

28 September 2011 incident

17. The applicants claim that despite their sit down with Geere where they agreed to resolve their differences and put the past behind them, Geere started watching them with *"hawk's eyes"* and he was always watching what they were doing.

18. During a briefing session with staff on 28 September 2011, first applicant claimed that he dropped his apron while standing and listening to the briefing session. Second applicant indicated to first applicant that his apron was on the floor and that he had to pick it up. The briefing session was conducted by a trainee manager, Cheraleen Muller. She informed the applicants that they should not disrupt the briefing session and asked why they were disrespecting her during the meeting. When the first applicant tried to explain, Muller apparently walked out of the briefing session. One of the trainee waiters, William Harm, swore at the applicants and stated *"You m----f----, you should f---- keep quiet."*The second applicant took exception to the swearing.As Harm was leaving second applicant confronted him and told him that he was still a trainee and should not swear. Muller, in the meantime, went to call Geere and he came out to where they were meeting and called everybody together. He instructed the first applicant to go back to the restaurant. First applicant claims that Geere did not know that he was on a break after finishing his shift and that Geere did not give him a chance to explain. As it was the end of his shift, first applicant did not go to the restaurant as instructed by Geereand left work.

19. In cross-examination, first applicant was asked why he did not explain to Geere that his shift had finished. He stated that Geere did not give him an opportunity to explain . When it was put to him that he did not follow the instruction, first applicant's response was that it was not a reasonable instruction because he was on a break and his shift had ended.

Grievance 4

20. The applicants filed a fourth grievance with the respondent wherein they recounted what had occurred on 28 September 2011 during the briefing session. In the grievance, they

also raised an issue that apparently occurred in May when a manager, Shakiel, referred to the applicants as *"f---- Nigerians"*. The second applicant indicated that they had a misunderstanding with Shakiel in May.When Shakiel started calling them *"f---- Nigerians"* he said to Shakiel that he should not use those words. He indicated that Shakiel used the "F" word a lot and at all times he told him not to use it. At the same time of preparing the grievance, the applicants also filed an unfair discrimination dispute with the CCMA. The second applicant claimed that when he took the written grievance to Geere, he saw that Geere had the applicants' CCMA referral form and Geere asked them why they went to the CCMA again. Geerethen produced a disciplinary hearing notice and asked the second applicant to give it to the first applicant. The first applicant was charged with gross insubordination for refusing *"to obey a direct instruction."* A second charge was added relating to first applicant's alleged *"unacceptable and disrespectful behaviour"* for the incident that occurred on 28 September 2011. A third charge of negligence was added on the basis that first applicant *"left his area of responsibility without authorisation."* The first applicant was found guilty of gross insubordination and the chairperson determined that if the first applicant was frustrated with the company, *"the correct avenue is to file a grievance which he has done. This does not give him the right to blatantly refuse to comply with reasonable instructions. At the time of the incident, he was on a final written warning and must have appreciated the potential consequences of his conduct."* The recommendation of the chairperson was that the first applicant be summarily dismissed.

Further in limine points

21. At the commencement of the trial, one of the in limine points raised by the respondent was that the applicants were not entitled to rely on all or some of the events that occurred prior to the incident of 28 September 2011.This was due to the fact that they were either settled at the CCMA in terms of the various settlement agreements reached between the parties or they occurred outside of the 6-month time period within which a party is entitled to refer an unfair discrimination dispute in terms of Section 10(2) of the EEA.Accordingly, in the

absence of the applicants showing good cause to the CCMA for the late referral as contemplated by Section 10(3) of the EEA, the events that occurred outside of the 6-month period should not be taken into account.

22. As indicated above, at the commencement of the trial, the parties agreed that all the in limine points were settled. Mr May, who acted on behalf of the applicants, indicated that the applicants would not be relying on the events that occurred prior to 28 September 2011 for the substantive relief set out in the statement of claim, but would simply refer to them as background to show the history of differentiation. Mr May indicated that the applicants' case relates and is founded on the last incident that happened on 28 September 2011.

Condonation application

23. An unopposed condonation application for the late filing of the respondent's reply to the applicants' statement of claim was made by the respondent. I do not intend to go into great detail about the application, save to point out that the response was 42 days late.The reason for the lateness was that the applicants' statement of claim was not faxed to the employer's fax number, but was instead faxed to the respondent's fax number. It was pointed out in the application that the applicants, when they filed all their various disputes at the CCMA, used the fax number of the employer and not that of the respondent.It was therefore strange for the statement of claim to be faxed to the number of the respondent and not that of the employer.

24. The applicants did not oppose the condonation application.It was clear from what was put in front of me that the incorrect fax number was used for serving the statement of claim on the employer. After considering the contents of the application and the submissions of Mr Bell, who acted on behalf of the respondent, the condonation application was granted in light of the adequate explanation for the delay even though the degree of lateness was long.

Applicable Legal Principles

Absolution from the instance

25. In the matter of *Ntombikayise Ethel Nombakuse v Department of Transport and Public Works: Western Cape Provincial Government*[3], Steenkamp J stated the following:

"The test for absolution

This court summarised the test for granting absolution from the instance by reference to the applicable authorities in Mouton vs Boy Burger (Edems) Bpk (1)(2011) 32 ILJ 2703 (LC). In brief, it is whether there is evidence on which a court, applying its mind reasonably to the applicant's evidence, could or might find for her (see also Claude Neon Lights (SA) Ltd vs Daniel 1976 (4) SA 403 (A) at 409G; Oosthuizenvs Standard General VersekeringsMaatskappyBpk 1981 (1) SA 1032 (A) at 1035H - 1036A; Minister of Safety and Security vsMadisha& Others (2009) 30 ILJ 591 (LC); Molelevs South African Treno& Another (Labour Appeal Court) JA34/2010, unreported, 28 June 2012 para [13]. This implies that the applicant has to make a prima facie case (De Klerk vs ABSA Bank Limited & Others 2003 (4) SA 315 (SCA) 323A-G; Gordon Lloyd Page & Associates vs Rivera & Another 2001 (1) SA 88 (SCA) 92G-H).

In the case of an inference, the test at the end of the applicant's case is as follows: the court will refuse the application for absolution from the instance unless it is satisfied that no reasonable court could draw the inference for which the applicant contends. The court is not required to weigh up different possible inferences but merely to determine whether one of the reasonable inferences is in favour of the plaintiff (Erasmus Superior Court Practice (service 39, 2012) B1-292 and authorities there cited).

[3](Case No. C890/10) [2012] ZALCCT 32 (25 July 2012), paras 22 to 24

In cases where discrimination is alleged, the question of onus plays a significant role. In Boy Burger the claim was one of automatically unfair dismissal in terms of Section 187 (1) of the LRA; in this case, the applicant claims unfair discrimination in terms of Sections 6 and 10 of the EEA."

26. The approach to be adopted is also contained in *Gordon Lloyd Page & Associates vs Rivera & Another*[4] where Harmse J stated the following:

"This implies that a plaintiff has to make out a prima facie case - in the sense that there is evidence relating to all the elements of the claim - to survive absolution because without such evidence no court could find for the plaintiff …"

27. In light of the aforementioned authorities, the question is whether the applicants have provided this Court with evidence on which the Court, after applying itself reasonably to that evidence, could or may find in favour of the applicants' claim that the employer has unfairly discriminated against the applicants in terms of Section 6 of the EEA. Insofar as the first applicant's second claim is concerned, I will consider whether the dismissal of the first applicant for insubordination was automatically unfair because the employer unfairly discriminated against the first applicant on the basis of race, ethnic or social origin, cultural or any other arbitrary ground in terms of Section 187(1)(f) of the LRA.

28. It is however important to first deal with the legal principles relating to a claim as founded in Section 6 of the EEA and Section 187(1)(f) of the LRA. I first deal with the legal principles in respect of Section 6 of the EEA.

Discrimination in terms of the EEA

29. Section 6(1) of the EEA states the following:

"(1) No person may unfairly discriminate, directly or indirectly, against an employee, in any employment policy or practice, on one or more grounds, including race, gender, sex, pregnancy, marital status, family responsibility, ethnic or social

[4] 2001 1 SA 88 (SCA) at 2

origin, colour, sexual orientation, age, disability, religion, HIV status, conscience, belief, political opinion, culture, language and birth.

(2) It is not unfair to discriminate …

(3) Harassment of an employee is a form of unfair discrimination and is prohibited on any one, or combination of grounds of unfair discrimination listed in sub-section 1."

30. Section 6(3) of the EEA states the following:

"Harassment of an employee is a form of unfair discrimination and is prohibited on any one, or a combination of grounds of unfair discrimination listed in sub-section (1)."

31. In the case of *IMATU and Another v City of Cape Town*[5], Murphy AJ (as he then was), in dealing with a discrimination case concerning Section 6(1) of the EEA, stated the following:

"The approach to unfair discrimination to be followed by our courts has been spelt out in Harksen v Lane N.O. & Others 1998 (1) SA 300 (CC). Although the Harksen decision concerned the claim under Section 9 of the Constitution (the equality clause), there is no reason why the same or similar approach should not be followed under the EEA.

The Harksen approach contains a specific methodology for determining discrimination cases. The first enquiry is whether the provision differentiates between people or categories of people. If so, does the differentiation bear a rational connection to a legitimate governmental purpose? If it does not, then there is a violation of the guarantee of equality. Even if it does bear a rational connection, it might nevertheless amount to discrimination. The second leg of the enquiry asks whether the differentiation amounts to unfair discrimination. This requires a two-staged analysis. Firstly, does the differentiation

[5][2005] 10 BLLR 1084 (LC) at paras 80 and 81

amount to "discrimination"? If it is on a specified ground, then discrimination will have been established. If it is not on a specified ground, then whether or not there was discrimination would depend upon whether, objectively, the ground was based on attributes and characteristics which had the potential to impair the fundamental human dignity of persons as human beings or to affect them adversely in a comparably serious manner. Secondly, if the differentiation amounted to "discrimination", did it amount to "unfair discrimination"? If it is found to have been on a specified ground, unfairness will be presumed under the Bill or Rights by virtue of the provisions of Section 9(5) of the Constitution, which transfers the onus to prove unfairness to the complainant who alleges discrimination on analogous grounds. As I read Section 11 of the EEA, no similar transfer of onus arises under the EEA. In other words, whether the ground is specified or not the onus remains on the respondent throughout to prove fairness once discrimination is shown. In the context of the EEA, Section 6(2)(b) also permits justification on the basis of an inherent requirement of a job, in which event the discrimination is deemed not to be unfair. The onus in this respect is also on the employer."

32. As the IMATU case clearly points out, the first step in the enquiry is whether there was a differentiation between people or categories of people by the employer in a policy or practice. The second leg of the enquiry is to determine whether the differentiation, once shown, amounts to unfair discrimination. In order to determine whether it amounts to unfair discrimination, the two-stage approach indicated by the IMATU decision is called for.

33. Mr May, on behalf of the applicants stated in argument that the applicants' claim under the EEA is premised on harassment.The harassment by the respondent, so he argued, was through the conduct of Geere and others. The prohibited ground upon which the harassment took place, so Mr May argued, is on the basis of race, ethnic or social origin and/or colour.

34. In argument, Mr May went much further than what is stated in the statement of case and the signed and agreed to pre-trial minute.Mr May stated that the alleged discrimination of the applicants was also motivated by retribution or punishment because the applicants exercised their statutory rights conferred by the LRA. His contention was that by challenging the alleged unfair treatment that they received from the employer they were targeted by the employer, were victimised and ultimately harassed. Put differently, Mr May's proposition was that the exercise by the applicants of their statutory rights against the employer should be considered an analogous ground. Mr May failed to indicate which of the listed grounds the "exercise of the statutory rights ground" is analogous to.

35. The question is therefore whether the exercise of their statutory rights in the LRA can be considered as an unlisted ground or unspecified ground? If so, whether the alleged harassment of the applicants on this "unspecified ground" amounts to unfair discrimination? As indicated above, Mr May failed to indicate to this court which of the listed grounds, individually or together, this "unspecified ground" is analogous to.

36. As stated in IMATU referred to above, if the alleged discrimination is based on a ground not specified in Section 6(1) of the EEA, it would then be an unspecified or unlisted ground. To qualify as an unlisted or unspecified ground, it must be analogous to the grounds listed in Section 6(1) of the EEA[6].The unspecified ground must be *"based on attributes or characteristics which have the potential to impair the fundamental dignity of persons as human beings, or to affect them adversely in a comparably serious manner"*[7]. What was also stated in Harksen[8] is that, *"what the specified grounds have in common is that they have been used (or misused), in the past (both in South Africa and elsewhere) to characterise, marginaliseand often oppress persons who have had, or who have been associated with, these attributes or characteristics. These grounds have the potential,*

[6]Harksenvs Lane N.O. & Others 1998 (1) SA 300 (CC) para 46

[7]Harksen, para 46

[8]Harksen, para 49

when manipulated, to demean persons in their inherent humanity and dignity. There is often a complex relationship between these grounds. In some cases they relate to immutable biological attributes or characteristics, in some to the associational life of humans, and in some to the intellectual, expressive and religious dimensions of humanity and in some cases to a combination of one or more of these features …"

Evaluation/Analysis

37. In order to establish whether the applicants have crossed this hurdle - and thus, whether the burden of proof remains on the respondent to show that the discrimination is fair in terms of Section 6 of EEA or, as the case may be, Section 187(1)(f) of the LRA - I shall evaluate and analise the evidence that was led by the applicants and the alleged grounds they rely on in turn.

38. For the purposes of this evaluation and analysis I shall look at the applicants' case and evidence as a whole and not just the events that occurred on 28 September 2011, notwithstanding the concession made by Mr May that the events prior to 28 September 2011 were for background purposes only and the event on 28 September 2011 forms the basis for the substantive relief that the applicants are seeking in the statement of case.

Was there evidence of discrimination in terms of Section 6 of the EEA?

The first and second grievances

39. The first grievance came about as a result of the fact that the applicants were used as assistant waiters (runners) instead of waiters. It was common cause that they were waiters, which was the position they applied for and which they occupied before September 2010 when they were unilaterally designated as runners. The applicants claim that Geere, when confronted with this, simply said to them that he was doing them a favour by giving them a job. Although in the written grievance they claimed that they were *"intimidated, marginalised, humiliated and dehumanised by the food and beverage*

manager and other fellow staff", it appears that their unhappiness concerned their unilateral demotion from waiters to assistant waiters. There was no mention that the reason for their unilateral demotion was on the basis of any of the listed grounds in Section 6 of the EEA or Section 187(1)(f) of the LRA. In fact, on the evidence,Geere originally informed the applicants that they would only be runners for a week. Instead, they were runners far beyond this period. It was only because of this extended period that the grievance was filed. The applicants would have been happy had they been runners for only a week as Geere originally indicated to them.

40. The second grievance concerned the second applicant first being told that he would be a waiter at a specific function and, when he attended, was told to be an assistant waiter. He claimed that a trainee waiter was instead used as a waiter whereas he was demoted to an assistant waiter. Commenting on the situation in their second written grievance the applicants felt that their *"employment (was) becoming intolerable and unbearable."* When they took their grievance to the general manager of the employer, he informed them that he would have a word with Geere. Neither he nor Geere responded to their grievance. Although in the evidence applicants stated that when they were used as assistant waiters their income was detrimentally affected, there was never any suggestion by the applicants that the reasons for them being used as assistant waiters was a result of any of the listed grounds in Section 6 of the EEA or Section 187(1)(f) of the LRA.

The third and fourth grievances

41. The third grievance related to the second applicant not being allocated a table prepared by him for a group of 20 people and, as a result, losing out on the gratuity earned by another waiter who in the end attended to that table. In communicating how this affected them, all that the second applicant stated was that it was done *"in a constructive way in order to frustrate us financially so that at the end of the day, we will work more and achieve little or nothing."*

42. The fourth grievance came about because the second applicant refused to adhere to an instruction from Geere given to him while he was attending urgently to guests who requested him to do so because they were catching a flight. He refused to clean the toast machine and toast area despite an instruction from the assistant food and beverage manager, Howard, to do so. He was charged at the disciplinary hearing and found guilty of insubordination and given a final written warning valid for 12 months.

43. It is indicative that neither in the grievance that was submitted nor the minutes of the disciplinary hearing did the first applicant claim that the disciplinary proceedings were instituted because of any of the grounds listed in Section 6 of the EEA. I accept the first applicant's evidence that the minutes of the disciplinary hearing may not be a true reflection of what happened at the proceedings because it was prepared by the employer. In my view, it would at least have made mention of any discrimination that the first applicant may have felt at the time, which he clearly did not. In any event, the first applicant's version set out in the disciplinary form is consistent with the version he provided in his evidence in chief and as set out in the third grievance.

44. Even on 6 December 2010 when the applicant's filed their first CCMA dispute and claimed that an unfair labour practice was committed by the employer, the complaint was that they were demoted and that there was a change of contract. They added in the form where the dispute was summarised the words *"humiliation"* and *"dehumanization"*. It was clear from the settlement agreement concluded in respect of this dispute however, that it related mainly to the fact that they felt entitled to a permanent contract, which they were given in terms of the settlement agreement. In the settlement agreement, the parties also agreed that the applicants would be given membership of the pension fund, would be paid bonuses if they qualified, would be paid a certain salary rate (later further varied between the parties by agreement) and would be registered for UIF. It is very apparent that neither of the applicants, even at this stage, complained that the conduct of the employer that

formed the basis of the dispute that was referred was as a result of any one of the listed grounds (or an unlisted ground for that matter) in Section 6 of the EEA.

45. The second dispute to the CCMA was preceded by another disciplinary hearing where both applicants faced charges of insubordination for refusing to serve a banqueting table on 1 March 2011. It is common cause that the applicants, together with another waiter, demanded that Geere sort out a query they had with regard to gratuities. Although the first applicant denied in cross-examination that they refused to serve the table, the statement of case as well as the minutes of the disciplinary hearing confirm that the applicants refused to serve the banqueting table unless Geere sorted out their concern in respect of the gratuity. In my view, first applicant's version that he and the second applicant never refused to serve the table is improbable in light of the admission made in the statement of case and supported by the minutes of the disciplinary hearing. In any event, both applicants were found guilty and were given written warnings. These written warnings form the subject matter of an unfair labour practice dispute filed by the applicants and which were later settled between the parties to the effect that the periods for the written warnings were reduced. If the applicants felt that there was a valid basis for refusing to adhere to the instruction from Geere, they would not have settled at the CCMA for a lesser period in respect of the written warnings.

46. Together with the unfair labour practice dispute mentioned above, the applicant's also filed an unfair discrimination dispute on 11 March 2011. In this dispute, they claimed that they were targeted and have been maltreated in order that the employer was allegedly trying to *"get rid of [them]"*. This dispute was also settled between the parties on the basis that they would meet with Geere and try and resolve their differences. This meeting did take place. The first applicant confirmed in cross examination that it was agreed at this meeting for all parties to put the past behind them. What is very significant about this dispute is that, although it was filed as an unfair discrimination dispute in terms of Section 10 of the EEA, no discrimination on any of the listed grounds in Section 6 was spelt out in the referral

form. Neither does it appear from the settlement agreement that any of those grounds were canvassed between the parties. It is indicative that the facts of the dispute as indicated on the referral form was simply the applicants' belief that the employer was trying to*"get rid of them (sic)"*.

47. It appears to me that since the start of their employment in December 2009 whenever there was an altercation between the applicants and Geere or any of the other employees, they felt that there was an attempt to get rid of them. This is however not borne out by the evidence, particularly if one has regard to the fact that it was the employer who assisted the applicants in obtaining their work permits. In addition, when the applicants pointed out to the employer their various unhappiness concerning their contracts, the contributions to UIF, their participation in the pension fund, etc, all these issues were dealt with by the employer, albeit by way of a settlement agreement at the CCMA. This does not strike me as the conduct of an employer trying to get rid of employees even in circumstances where some of the grievances submitted by the applicants to the employer went unanswered.

48. This brings me to the incident that happened on 28 September 2011. It is common cause that during the briefing session, it was a fellow employee, a trainee waiter, William Harm, that uttered offensive words towards the applicants. In fact, when Harm told them *"you m------ f---, you should f'ing keep quiet"* the applicants were offended by his swearing because he was still a trainee and not for any other reason it seems. This is confirmed in a written grievance which they filed after the incident. Although in this grievance they referred to another incident that happened with another employee, Shakiel, where they were referred to as *"f'ing Nigerians"*, this incident was never raised in any form or manner by the applicants with the employer prior to it just briefly being mentioned in the grievance. In the dispute they referred to the CCMA (which was referred as both an unfair labour practice and an unfair discrimination dispute and was later on just certified as an unfair discrimination dispute), the applicants for the first time refer to *"unfair counseling, discrimination and racism"* on the referral form. After the conciliation of this dispute on 4

October and a certificate issued on 18 October 2011, first applicant was charged with gross insubordination, amongst other charges. As indicated above, first applicant was dismissed after being found guilty of the charge and in light of the previous final written warning of the first applicant. I point out that significantly there was no suggestion in the evidence by the first applicant that the reason for the charges and the disciplinary hearing was a result of any of the grounds listed in Section 6 of the EEA. In fact, first applicant's main contention in these proceedings was that he was not guilty of insubordination notwithstanding that he did not comply with the instruction. In his view, it was not a reasonable instruction because he was on his break at the end of his shift and that's why he could leave without adhering to the instruction. In any event, the undignified behavior that may have been present, if any, was from a fellow employee William Harm which was disciplined afterwards by the employer according to the evidence of the applicants.

49. In light of what I stated above, the applicants have failed to show that there is any evidence on which this Court could or might find for the applicants relating to all the elements of the claim based on discrimination in terms of Section 6 of the EEA. Put differently, the applicants have failed to make out a prima facie case to survive absolution in respect of the claim related to discrimination in terms of Section 6 of the EEA.

50. I also do not agree with Mr May's proposition that the exercise of a statutory right can be considered as an unspecified ground. Mr May did not indicate which of the listed grounds this unspecified ground is analogous to. In any event, I am of the view that this suggested unspecified ground is not one "based on attributes or characteristics which have the potential to impair the fundamental dignity of persons as human beings, or to affect them adversely in a comparably serious manner". In my view, it further does not have anything in common with the specified grounds in that the specified grounds *"have been used (or misused), in the past (both in South Africa and elsewhere) to characterise, marginalise and often oppress persons who have had, or may have been associated with, these attributes or characteristics."* It therefore does not stand the Harksen test. This does not

suggest that a person may not suffer harassment or victimisation for exercising his/her statutory rights.In such an event, the LRA in Section 187(1)(d) already provides an appropriate remedy to such employee.

First applicant's Section 187(1)(f) claim

51. Section 187(1)(f) of the LRA states the following:

51.1 a dismissal is automatically unfair if the employer, in dismissing the employee, acts contrary to Section 5 or, if the reason for dismissal is:

"(a) …;

(f) *that the employer unfairly discriminated against an employee directly or indirectly on any arbitrary ground, including, but not limited to, race, gender, sex, ethic or social origin, colour, sexual orientation, Aids, disability, religion, conscience, belief, political opinion, culture, language, marital status or family responsibility."*

52. The Labour Appeal Court in the case of *State Information Technology Agency Ltd v Sekgobela*[9] stated the following:

"It is clear that section 192 provides for a twostage process in dismissal disputes. First the employee who alleges that he/she was dismissed must prove that there was in fact dismissal and once the existence of the dismissal is established then the employer must prove that the dismissal was fair. It is clear therefore that the onus to prove the existence of the dismissal lies first on the employee. The word "must" in Section 192 means that the provisions of the section are peremptory.[10] The employee must set out the facts and legal issues which substantiate his assertion that the dismissal occurred. Once the employee

[9][2012] 10 BLLR 1001 (LAC) at paras 13 to 16

[10]CWU v Johnson and Johnson (Pty) Ltd [1997] 9 BLLR 1186 (LC) as cited by D du Toit et al Labour Law Through the Cases (2011, LexisNexis Durban) at 8-103; See also De Beers Consolidated Mines Ltd v CCMA and Others [2000] 9 BLLR 995 (LAC) at para 50

has proved that dismissal did take place, the onus is shifted to the employer who must prove that the dismissal was for a fair reason such as for instance misconduct.

In Kroukam v SA Airlink (Pty) Ltd [2005] 12 BLLR 1172 ((LAC) at paras [27] and [28]), as per Davis AJA (as he then was), this Court held that it is not for an employee to prove the reason for dismissal but to produce evidence sufficient to raise the issue and once this evidentiary burden is discharged, the onus shifts to the employer to prove that the dismissal was for a fair reason. See also Stocks Civil Engineering (Pty) Ltd v Rip N.O.& Another ([2002] 23ILJ 358 (LAC)), a case where the employer contended that the employee had not been dismissed but that the contract of employment was terminated by mutual consent, the court at paragraph 15 held that the arbitrator erred in not considering that there was an onus on the employee to prove that he had been dismissed before there rested an onus on the employer prove that the dismissal was fair.

In cases where it is alleged that the dismissal is automatically unfair, the situation is not much different save that the evidentiary burden to produce evidence that is sufficient to raise a credible possibility that an automatically unfair dismissal has taken place rests on the applicant [employee]. If the applicant succeeds in discharging his evidentiary burden, then the burden to show that the reason for dismissal did not fall within the circumstances envisaged by Section 187(1) of the LRA rests with UNISA (employer). (Maimele v UNISA [2009] ZALC 52 at para [32])

It is evident, therefore, that a mere allegation that the dismissal is not sufficient but the employee must produce evidence that is sufficient to raise a credible possibility that there was an automatically unfair dismissal."

53. In the case of *Mangena and others v Fila South Africa (Pty) Ltd & Others*[11], Van Niekerk J, in dealing with a claim relating to equal pay, said the following,

"Writing in Essential Employment Discrimination Law, Landman suggests that to succeed in an equal pay claim, the claimant must establish thatthe unequal pay is caused by the employer discriminating on impermissible grounds." (at 145)

This suggests that a claimant in an equal pay claim must identify a comparator, and establish that the work done by the chosen comparator is the same or similar work (this calls for a comparison that is not over fastidious in the sense that differences that are infrequent or unimportant are ignored) or where the claim is for one of equal pay for work for equal value, the claimant must establish that the jobs of the comparator and claimant, while different, are of equal value having regard to the required degree of skill, physical and mental effort, responsibility and other relevant factors. Assuming that this is done, the claimant is required to establish a link between the differentiation (being the difference in remuneration for the same work or work of equal value) and a listed or analogous ground. If the causal link is established, Section 11 of the EEA requires the employer to show that the discrimination is not unfair, ieit is for the employer to justify that discrimination that exists.

This court has repeatedly made it clear that it is not sufficient for a claimant to point to a differential in remuneration and claim boldly that a difference may ascribe to race. In Louw v Golden Arrow [2000] 21 ILJ 188 (LC)Landman J, stated:

Discrimination on a particular "ground" means that the ground is the reason for the disparate treatment complained of. The mere existence of disparate treatment of people of, for example, different races is not discrimination on the group of race, unless the difference in race is the reason for the disparate treatment …"

[11][2009] 12 BLLR 1224 (LC), paras 6 and 7

This formulation places a significant burden on an applicant in an equal pay claim. In Ntai& Others v South African Breweries Limited [2001] 22ILJ 214 (LC) [also reported at [2001] 2 BLLR (186) - ED], the court acknowledged the difficulties facing a claimant in these circumstances and expressed the view that the claimant was required only to establish a prima facie case of discrimination, calling on the alleged perpetrator than to justify its actions.But the court reaffirmed that a mere allegation of discrimination will not suffice to establish a prima facie case (at 218(f), referring to Transport and General Workers Union and Another v Bayete Security Holdings [1999] 20 ILF 1117 (LC) [also reported at [1999] 4 BLLR 401 (LC) - ED)]..."

54. In light of the aforementioned authorities, the question remains whether or not the dismissal for gross insubordination of the first applicant is automatically unfair because the reason for the dismissal is one contemplated in Section 187(1)(f). In other words, has the first applicant made out a prima facie case to show that the employer unfairly discriminated against him on the basis of race, ethnic or social origin, culture or on any other arbitrary ground?

Was the reason for the dismissal of the first applicant on one or more of the grounds listed in Section 187(1)(f)?

55. The first applicant's claim under Section 187(1)(f) is confined to the incident that occurred on 28 September 2011, which gave rise to the disciplinary hearing after which hearing he was dismissed. The applicant has to establish a prima facie case therefore that his dismissal was on one of the grounds listed in Section 187(1)(f).

56. Having determined that the applicants have failed to show that there is any evidence on which this Court could or might find for the applicants relating to all the elements of the claim based on discrimination in terms of Section 6 of the EEA, it follows that no evidence exists to support a claim that the employer unfairly discriminated against the first applicant on any ground listed in Section 187(1)(f).

57. Mr May pointed out that Waglay J (as he then was) in the case of *Aaronsvs University of Stellenbosch*[12], stated the following:

"Harassment is not specifically referred to in the [LRA]. It is not one of the listed grounds in Section 187(1)(f) of the [LRA]. However, the grounds listed in Section 187(1)(f) are not exhaustive. Harassment is specifically referred to and defined in the Employment Equity Act 55 of 1998 ("the EEA"). Section 6(3) of the EEA provides that "Harassment of an employee is a form of unfair discrimination as prohibited on any one, or a combination of grounds of unfair discrimination listed in sub-section (1)". The grounds listed in Section 6(1) of the EEA is no different to those listed in Section 187(1)(f) of the [LRA]. Harassment may indeed be a form of unfair discrimination that is recognised under Section 187(1)(f) of the [LRA]. However, an employee claiming harassment must do more than just make the bald allegation; it must clearly set out why the harassment amounts to unfair discrimination. The applicant has not done so."

58. Mr May's proposition, based on the aforementioned authority, is that although Section 187(1)(f) does not mention harassment, it could be a form of unfair discrimination that is recognised under Section 187(1)(f) of the LRA. He argued that the dismissal of the first applicant only came about after the applicant's filed their dispute with the CCMA. When the respondent received the dispute papers, the respondent decided to discipline the first applicant, which resulted in a disciplinary hearing and the applicant's dismissal for gross insubordination. Accordingly, so Mr May argued, the real reason for the dismissal of the first applicant was not as a result of the gross insubordination, but as a result of the first applicant exercising his statutory right to refer disputes to the CCMA. I therefore understand Mr May's argument of the alleged harassment of the first applicant to be the same as the one he contended under Section 6(1) of the EEA.Although the claim in terms of Section 6(1) of the EEA related to the whole period of the first applicant's employment with the respondent, the claim in respect of Section 187(1)(f) only relates to the alleged harassment by the respondent when it instituted the disciplinary proceedings when the first applicant, together with the second applicant, referred the dispute to the CCMA.

59. The problem for Mr May is that, if one accepts the authority of *Arends* that harassment can also be a form of unfair discrimination recognised under Section 187(1)(f) of the LRA, there was no evidence by the first applicant to indicate any form of discrimination on any one of the grounds listed in Section 187(1)(f). The further problem for Mr May is that the

[12](2003) 7 BLLR 704 (LC) [para 18]

harassment the first applicant complained about was apparently as a result of him exercising a statutory right. That being the case, Section 187(1)(d) already provides employees with a remedy in cases where they allege they were dismissed for exercising a right conferred by the LRA or participating in proceedings in terms of the LRA. It being common cause that the claim by the first applicant in the statement of claim is founded on Section 187(1)(f) and not Section 187(1)(b).

Conclusion

60. In all the circumstances therefore, the applicants have not shown that respondent has discriminated against them on one or more of the grounds listed in Section 6(1) of the EEA nor has the first applicant shown that the respondent has discriminated against him on any one or more of the grounds listed in Section 187(1)(f). Hence, the need for the respondent to show that the discrimination was fair does not arise. There is no evidence on which this Court, applying its mind reasonably to the applicants' evidence, could or might find for the applicants.

61. The application for absolution from the instance must therefore succeed.

Costs

62. The applicants have created the impression of honest witnesses who had the bona fide perception that the respondent harassed them in terms of Section 6(1) of the EEA and the first applicant in terms of Section 187(1)(f) of the LRA. As I have indicated above, this perception may have been misplaced if one has regard to the evidence that was led. Having regard to both law and equity, I believe that it is appropriate that there be no order in respect of costs herein.

Order

63. Absolution from the instance is granted. There is no order as to costs.

AJ DEON VISAGIE

Judge of the Labour Court

APPEARANCES

For Applicants: Mr C J May of Adams & May Attorneys

For Respondent: Mr L Bell of C & A Friedlander Inc.