



REPUBLIC OF SOUTH AFRICA

Not reportable

THE LABOUR COURT OF SOUTH AFRICA
HELD AT CAPE TOWN

Case no: C 73/2015

In the matter between:

FAIDA WENTZEL

First Applicant

and

HARDING TREND SALES (PTY) LTD

First Respondent

Heard: 24 March 2017

Delivered: 05 September 2017

Summary: (Unfair discrimination – alleged remark – gender discrimination – alleged offensive remark not proven)

JUDGMENT

LAGRANGE J

- [1] Regrettably this judgment was finalised in March but owing to an administrative error in email communications, was never handed down and it is only now that the problem has come to light, hence the delay.
- [2] In this matter, the applicant is claiming that she was the victim of unfair discrimination based on her gender because the representative of the respondent made a certain statement in a meeting on 23 October 2014 which was convened to discuss her absenteeism and treatment following an injury at work some months previously.
- [3] The alleged remark made was that "we want a man to do your job".
- [4] For the sake of context a brief background is necessary, the facts of which are not disputed. The applicant had suffered in April 2014 as a result of which it was necessary for her to receive physiotherapy over an extended period of time. The absenteeism resulting from her treatment was a matter of concern and a meeting was held to discuss it in mid-May 2014. At the meeting, the applicants condition and treatment were discussed. It was contended by the applicant that at this meeting the representative of the employer's organisation, Mr Howard, had told her that her pattern of absence on account of illness could lead to her retrenchment. He denied making such remark and said that the outcome of that meeting had simply been that her absenteeism would continue to be and that it was merely an informal counselling meeting.
- [5] It was further common cause that before the next meeting in October, the applicants leave applications had been reviewed in the light of medical certificates she was able to produce showing her ongoing treatment for her injury and leave which had been designated as ordinary leave was redesignated as sick leave. The applicant was unhappy with this redesignation of the leave because she felt it resulted from her injury at work. At some stage before the meeting in October the applicant had also requested assistance in loading and packing because of her injury, but the sales manager had refused this request because the company at that stage could not the additional expense of another staff member at a time when retrenchments were taking place. There is some inconsistency about whether the issue of assistance was also discussed at the meeting

of 23 October, but on the balance of the evidence it seems that this issue came up again on that occasion.

- [6] The meeting on 23 October was also convened to deal with the applicant's ongoing absenteeism. In fact, Howard said he was asked to conduct an incapacity hearing but when the meeting got underway he turned it into another counselling session about the applicant's condition and absenteeism. The outcome of the meeting according to Howard was the same as the first meeting namely that her absence would continue to be monitored.
- [7] It was common cause that the applicant was employed as a field marketer and that the gender composition of the employees occupying field marketer or merchandising positions was 60% male and 40% female. It is also common cause that the applicant still performs the same duties though she mentioned in her evidence that she is also performing merchandise duties currently. It was not the applicant's case and neither was there evidence that the respondent took any concrete step to prejudice her on the basis that she had asked for assistance or that it wanted to replace her with a male employee. Similarly, the applicant did not complain of any prejudice subsequent to the meeting of 23 October 2014 which she might have suffered as a result of referring her claim of unfair discrimination to the CCMA and to this court
- [8] The applicant's representative, *Mr Z Parker*, correctly pointed out that the applicant's version and that of the three witnesses of the respondent as to whether the offensive remark was made at the meeting of 23 October 2014 are mutually exclusive. Consequently he argued that the credibility of the witnesses must be assessed. In this regard he pointed out some minor inconsistencies in the evidence of the three respondents witnesses, but conceded that they did not, on the face of it, appear to be dishonest. He also suggested that it would be unsurprising if they had agreed that the remark had been made.
- [9] The respondent's representative *Mr C De Kock* argued that the probabilities weighed heavily in favour of the respondent's version. Amongst the factors favouring their version on the probabilities are:

- 9.1 The evidence that the respondent had not invoked any formal procedures such as an incapacity hearing to deal with the applicant's absenteeism as a result of her injury, but had pursued a consultative approach.
- 9.2 Howard's own approach had been to scale down the formal status of the meetings in May and October two more informal consultative proceedings.
- 9.3 Even though the sales manager had declined to employ someone to assist the applicant, Mr A Jaffer, the regional sales manager to whom the applicant reported at the time, testified that he had approached the store where the applicant worked to assist her with packing and a commitment had been made to help her when possible. This attempt to assist the applicant was not disputed.
- 9.4 The applicant said that she did not challenge the alleged comment at the meeting when it was made because she was so stunned at the time, but did raise it with Jaffer immediately after the meeting.
- 9.5 It was put to Jaffer that the applicant had approached him immediately after the meeting and asked him if he had heard Howard making the offensive remark. He had denied that she had raised it with him immediately after the meeting but stated that she only raised it during the course of a normal stock meeting at her store about a week later. He had told her that he didn't hear Howard making the remark but that if she felt strongly about the issue she should take it further. However, when the applicant testified she went much further. She claimed that Jaffer had actually said that he had heard the remark and had agreed with her that the company was discriminating against her and encouraged her to pursue the matter. She also stated that a week later he had simply denied hearing the statement. This obviously critical aspect of her version was never put to Jaffer. It was also never part of her pleaded case.
- 9.6 It was common cause that the applicant was not happy with the fact that the respondent had declined to employ someone to assist her, and on a balance of the evidence it would appear that this matter had

already been dealt with before the meeting on 23 October, but was raised again at the meeting. What this points to is that the applicant remained dissatisfied about this issue and still felt aggrieved by it. However, she denied any suggestion that it was this issue which had prompted her to make the accusation against Howard.

9.7 Howard, as the employer's organisation representative, was not in a position to speak on behalf of the respondent without a mandate. It was not himself who decided that the respondent would not employ someone to assist the applicant but the sales manager of the respondent. Both Jaffer and Ms A Bouwers, currently the respondent's customer services manager, had agreed that they would not have allowed such a comment to pass if it had been made.

[10] The onus of proving that the remark was made rests on the applicant. Given the general tenor of both the meetings in May and October 2014, the alleged remark seems completely inconsistent with the approach adopted by the respondent and Howard towards the applicant's situation and with the outcome of both meetings. Further, nothing about the gender composition of the merchandising and marketing staff suggests that the respondent would have been trying to replace the applicant with a male employee. Further, to this day the applicant remains in the same position she held then.

[11] I am also disinclined to accept the applicant's attempt to suggest that Jaffer both agreed that the remark had been made and that he concurred with her that she was being discriminated against when this was never directly put to him in evidence. I also note that the version that followed had allegedly said the applicant could face retrenchment during the meeting in May was also not part of her pleaded case. These factors do not reflect well on the applicant's credibility in my view. While the applicant did contend that she would never have taken up this complaint if it were not true, there was evidence that she remained disgruntled about the respondent's failure to appoint someone to assist her and this might have been a factor prompting her to try and elevate her unhappiness with the situation to another level.

- [12] In the circumstances I am satisfied that on a balance of probabilities, the applicant has failed to prove that the remark was made and accordingly has not established a primary factual basis for a claim of discrimination.
- [13] I accept that the parties have an ongoing relationship and that aside from this matter the relationship appears to remain a harmonious one. In the circumstances reluctant to make a cost award against the applicant and the respondent did not press this issue in argument.

Order

- [14] The applicant's unfair discrimination claim is dismissed.
- [15] No order is made as to costs.


J^r Lagrange J

Judge of the Labour Court of South Africa

APPEARANCES

APPLICANT:

Z Parker of Parker Attorneys

RESPONDENT:

C De Kock instructed by C K Attorneys