

**IN THE LABOUR COURT OF SOUTH AFRICA
HELD AT CAPE TOWN**

Case Number: C 122/98

In the matter between

BEVERLEY WHITEHEAD

Applicant

and

WOOLWORTHS (PTY) LTD

Respondent

JUDGMENT

WAGLAY A J

- 1 This is an application in terms of which the Applicant claims compensation on the grounds that she was dismissed and that such dismissal constituted an automatic unfair dismissal as contemplated by s 187(1)(e) of the Labour Relations Act (hereinafter the “Act”) or alternatively on the grounds of an unfair labour practice under item 2(1)(a) of Schedule 7 to the Act.
- 2 The Applicant alleges, in the first instance that she was offered a permanent position as a “Human Resources Generalist” with the Respondent which offer she accepted and subsequent to the conclusion of the agreement Respondent repudiated the contract of employment thereby effecting a dismissal which dismissal was unfair. In the alternative Applicant alleges that she was unfairly

discriminated against as an applicant for employment on grounds of her pregnancy and that in the circumstances she has been a victim of an unfair labour practise.

UNFAIR DISMISSAL

3 s187 (1)(e) upon which the Applicant relies for her principal claim provides that:

“(1) 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

(a) ...

(b) ...

(c) ...

(d) ...

(e) the employee’s pregnancy, intended pregnancy, or any reason related to her pregnancy;

(f) ... ”

4 In terms of this section a dismissal of an employee for any “reason related to her pregnancy” constitutes an automatically unfair dismissal. The Applicant therefore needs to satisfy this court that she was an employee as contemplated by the Act and that she was dismissed.

5 In order to qualify as an employee it is not sufficient for the Applicant to satisfy this court that a contract of employment was in fact concluded. The coming into being of a contract between the parties may give rise to a contractual claim but does not confer the status of an employee or employer upon the parties as provided for in the Act.

6 s 213, the Definition section of the Act defines “employee” for purpose of s 187 to mean:

“(a) any person, excluding an independent contractor, who works for another person or for the state and who receives, or is entitled to receive, any remuneration; and

(b) any other person who in any manner assists in carrying on or conducting the business of an employer,

and “employed” and “employment” have meanings corresponding to that of “employee”;

7 In terms of the definition a person is only an employee when such person actually works for another person. The employee must therefore have rendered a service to another which services are not that of an independent contractor. In addition to working for another the employee must also “receive” or be “entitled to receive” remuneration. The remuneration referred to must correspondingly mean remuneration for work done or tendered to be

done. In the circumstances where an offer of employment is made to another and the offer is accepted a contract of employment may come into existence but the parties to that contract do not enjoy the protection of the Act until such time as the offeree actually commences her performance or at least tenders performance in terms of the contract.

- 8 In the present matter if I have to accept the evidence of the Applicant as unchallenged, the evidence establishes that on 17 December 1997 and after Applicant was interviewed by Inskip, the head of the IT Service department of the Respondent she was satisfied that all that was required to obtain the permanent position of H. R. Generalist was for Inskip to make a final decision. The message left for the Applicant by Inskip on her telephone on 19 December 1997 stating that he “wanted to finalise the paper work” according to her confirmed that a contract of employment had in fact been concluded.

- 9 During a telephonic conversation between the Applicant and Inskip on 23 December 1997 Inskip according to the Applicant withdrew the permanent position offer and offered Applicant a fixed term contract for 5 months. The reason for withdrawing the offer as communicated to her by Inskip was because of her pregnancy. The withdrawal of the offer by Inskip on behalf of the Respondent according to the Applicant constituted a breach of contract which breach Applicant argues constitutes an unfair dismissal as contemplated

by s 186(a) read with s 187(1)(e) of the Act.

10

11 For purposes of this judgment I do not need to decide upon whether or not a contract of employment had in fact been concluded because even if I find that a proper contract had been concluded between the parties, Applicant's argument that a breach of such contract amounted to a dismissal cannot be tenable. This is so because the Applicant did not work for, nor was she entitled to receive any remuneration from, the Respondent prior to 23 December 1997 being the date of the alleged breach.

12 Had the Applicant prior to being informed that the offer is withdrawn (here I am relying purely on the testimony of the Applicant despite such testimony being challenged by the Respondent) tendered her services to the Respondent and the Respondent refused to accept such tender then perhaps the Applicant may have had a claim for a dismissal because the word "work" in the definition section of the Act, is broad enough, I believe, to encompass a tender. The tender must however be made before a contract is repudiated for an Applicant to succeed in her claim of being dismissed.

13 In this matter Applicant made no tender prior to the repudiation of the contract, in fact she could not do so as her employment was only required to commence on 12 January 1998. In the circumstances Applicant cannot claim

to be dismissed as she failed to qualify as an employee as provided for in s 187(1)(e) of the Act.

14

15 I must add that I find that the definition of an employee in the Act totally unsatisfactory. The definition should have included conferring the status of an employee and employer on the parties on the finalisation of a contract of employment even if such contract of employment was only to take effect at some future date. I say this because if one of the parties repudiates the contract for reason not valid in law why should the innocent party only have recourse to the ordinary Court on the basis of a breach of contract and not be given the protection provided for in the Act. This is particularly important as the amount of compensation the innocent party would receive, depending upon the forum it is obliged to approach, is substantially different.

16 Notwithstanding my unhappiness, based on the clear wording of the Act and for reasons stated earlier Applicants claim for unfair dismissal must fail.

UNFAIR DISCRIMINATION

17 Turning then to Applicant's alternative claim that she was a victim of an unfair labour practice as contemplated by item 2 (1)(a) of schedule 7 to the Act in that she was discriminated against because of her pregnancy, item 2(1)(a) read together with item 2(2)(a) of Schedule 7 to the Act provides:

"2 RESIDUAL UNFAIR LABOUR PRACTICES

(1) For the purposes of this item, an unfair labour practice means any unfair act or omission that arises between an employer and an employee, involving –

(a) the unfair discrimination, either directly or indirectly, against an employee on any arbitrary ground, including, but not limited to race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, political opinion, culture, language, marital status or family responsibility;

(b) ...

(c) ...

(d) ...

(2) For the purposes of sub - item (1)(a) --

(a) 'employee' includes an applicant for employment;

(b) ...

(c) ...

18 It is not disputed that the Applicant was an “applicant for employment” and thus an employee for purposes of item 2(1)(a). In terms of this item for discrimination to constitute an unfair labour practise it must be unfair and based on an arbitrary ground. Although the Act lists grounds which are to be regarded as arbitrary this list is not intended to be exhaustive as the wording of the item states “ ... *including, but not limited to ...* ”. This item therefore foresees that they may well be other grounds which could constitute unfair discrimination on an arbitrary ground.

19 In matters relating to discrimination the party claiming to be discriminated against is simply required to establish that he/she was discriminated against. The Respondent then has the evidentiary burden to satisfy that the discrimination was not unfair on any arbitrary ground. See Leonard Dinger Employee Representative Council v Leonard Dinger (Pty) Ltd & others (1998) 19 ILJ 285 (LC) and Kadiaka v Amalgamated Beverage Industries (1999) 20 ILJ 373 (LC)

20 Respondent does not dispute that there was discrimination but denies that it unfairly discriminated against the Applicant on an arbitrary ground.

21 Respondent's argument is as follows:

- (i) There was no differential in treatment accorded specifically and only against the Applicant or someone in position similar to her as the reason for the discrimination was the requirement of uninterrupted job continuity which requirement applied equally to any applicant for the position advertised; and
- (ii) That uninterrupted job continuity was rationally and commercially supportable.

22 In support of its first submission Respondent led evidence to the effect that the position of H. R. Generalist carried with it a distinct need for uninterrupted continuity of employment that is that the incumbent was required to remain

uninterruptedly in that post for at least 12 months. The reason for such continuity was the merger between the Respondent's IT division and an external company. The merger resulted in the need for the post for which Applicant was solicited. This position was a key one because with the merger approximately 100 people had to be integrated into the existing IT division of the Respondent. There were staff related policies that required to be updated and brought into line with Respondent's policies. Coupled with that there was an extremely high staff loss in that division and a number of issues relating to retention of staff as well as developing a new range of strategies and operational policies and procedures was needed to be addressed as a matter of urgency and more importantly for the Respondent to be in a position to address these issues effectively it required the incumbent to remain in the post for a period of at least 12 months to give credibility to the process and to ensure its success.

23 None of the evidence recorded in paragraph [20] above was challenged by the Applicant. Respondent relies on this evidence to justify the requirement of uninterrupted job continuity as not being a requirement based on any arbitrary ground upon which it sought to discriminate. According to the Respondent that while it was correct that pregnant women would be excluded from being appointed to the position in question any other applicant who could not fulfill the requirement of uninterrupted job continuity for a period of at least 12

months would likewise be excluded.

24 The problem with the above argument is that it presupposes that if there are facts upon which an employer relies upon to arrive at a decision to discriminate against an applicant for a job, this Court is bound to accept such a decision. While the facts remain unchallenged and therefore for the Court to accept, a decision based on the facts remain open for the Court to determine. This is so because the Labour Court is not simply a Court of Law but a Court of Law and Equity and as such is entitled not only to look at the justification for the actions of the parties before it but also the reasonableness thereof.

25 The first issue that this court needs to determine is whether the condition of uninterrupted job continuity which obviously discriminates against pregnant women was based on an arbitrary ground. The test that the Court must apply in making a determination is not what was the subjective opinion of the Respondent based on the factual position with which it is confronted but taking into account the factual position can the condition placed by the Respondent be objectively justifiable.

26 On the evidence presented I find no objectively justifiable reason why the requirement of uninterrupted job continuity for a period of 12 months was a necessary requirement for the position. While I do not propose to determine

the number of enquiries the Court may need to make in determining whether or not the discrimination complained of is based on an arbitrary ground a good yardstick to measure whether or not discrimination is based on an arbitrary ground is to determine whether the discrimination is such that it can be sustained irrespective of the happening or non happening of any unforeseen event.

27 In the matter before me to be satisfied that the requirement of uninterrupted job continuity to be valid and not to be based on an arbitrary ground I need to be satisfied that the incumbent would, no matter what fate befalls him or her continue with his/her employment uninterrupted for at least 12 months. No employer can receive any guarantee that an incumbent will remain in its employ for a uninterrupted period of anytime. In the absence of such guarantee I am satisfied that to place such a requirement can be no more than a decision arrived at on an arbitrary ground.

28 Not only is the requirement of uninterrupted job continuity for a period of at least 12 months not objectively justifiable I cannot find such a condition to be reasonable. Imagine for a moment that the incumbent who has satisfied the Respondent that he is able to remain in its employ for the uninterrupted period of 12 months, renders exceptional services for a period of 6 months, and is then involved in an accident or is taken unexpectedly ill and is unable to

perform his duties for a period of 2 months. What happens in that case? Does the Respondent dismiss him? Does the Respondent continue to employ the incumbent after he has recuperated? Do either of these options not make nonsense of the requirement of uninterrupted job continuity? To simply suggest that at the time the offer of employment is made there must be no encumbrance upon the incumbent to satisfy the condition, defeats the very object of that condition. Furthermore Respondent has not led any evidence to show that once offered employment the incumbent will not be allowed to resign from his position without any contractual penalty being imposed upon him or some other punitive condition. This would mean that there is no hindrance on the incumbent to leave the Respondent's employ if he so desires, before the expiry of the 12 month period. If the need for uninterrupted job continuity was of such grave importance I have no doubt that some impediment would have been placed upon the incumbent from being free to sell his labour wherever he pleases. That there was no impediment gives credence to the belief that the discrimination based on the condition of uninterrupted job continuity was nothing other than discrimination which was unfair and based on an arbitrary ground.

29 Respondents argument however goes further it states that not only must the discrimination be seen against the background of the facts presented but also whether or not the Respondent's need for uninterrupted job continuity can be

justified on a commercial rationale.

30 According to Respondent its decision was commercially justifiable as an employer's entitlement to discriminate if there is an economic rationale falls within the purview of the not all exhaustive definition of item 2(1)(a) of schedule 7 to the Act as long as it is not, as held by Seady A J in the Dingler matter "reprehensible in terms of society's prevailing norms". This argument can be easily dispensed with. If profitability is to dictate whether or not discrimination is unfair it would negate the very essence for the need of a Bill of Rights.

31 We live in a Constitutional State with an entrenched Bill of Rights and as such there is a duty upon this Court to give effect to the rights enshrined in the Bill of Rights and as Seady A J correctly pointed out in Dingler that item 2 (1) (a) must be evaluated against the background of the South African Constitution.

32 Seen against this background the fairness or unfairness of the discrimination cannot be measured against the profitability or for that matter efficiency of a business enterprise.

33 Respondent further argued that the requirement of uninterrupted job continuity

was not an arbitrary ground on which the Respondent unfairly discriminated against the Applicant because it was the inherent requirement for the position to which Applicant applied.

34 This argument of Respondent was based on item 2(2)(c) of Schedule 7 to the Act which provides

“(2) For the purposes of sub- item (1)(a) --

(a) ...

(b) ...

(c) any discrimination based on an inherent requirement of the particular job does not constitute an unfair discrimination. ”

35 This sub - item qualifies item 2(1)(a) in that discrimination which can be justified on the basis that it is an indispensable requirement for a particular job then such discrimination cannot be held to be unfair.

36 This provision of the Act only excuses discrimination based on “an inherent requirement of the particular job”. This implies that the job itself must have some indispensable attribute. This indispensable attribute however must relate in an inescapable way to the performing of the job required. Getting a job done within a prescribed period could well be an inherent job requirement, but to succeed on this ground a party relying thereon must satisfy the Court that

time was of the essence. In this matter no evidence to this effect was led. While the Respondent did satisfy me that it needed to address its various problems as a matter of urgency this is not sufficient. Period of time can only be an inherent requirement of the job if there is some contract that needed to be performed within a prescribed period. The fact that time was not of the essence in this matter is further evidenced by the fact that Respondent was quite prepared to continue its search for a H. R. Generalist had it not found the present incumbent suitable for the post during the period when Applicant amongst others were being interviewed.

37 What is more crucial when one speaks of the inherent job requirement is that the requirement must be so inherent that if not met an applicant would simply not qualify for the post. That this was not so in this case was clearly established. Mr Inskip, the only witness for the Respondent conceded that had the Respondent not secured any other applicant for the post, he would have employed the Applicant. This he later qualified to mean that he would not have employed the Applicant permanently to the post but that he would have considered other ways to secure her services. In fact the Respondent did offer the Applicant employment not on a permanent basis but on a fixed term contract until such time as the Applicant would have, had she obtained permanent employment with Respondent, gone on maternity leave.

38 What is interesting was that Applicant was offered the fixed term contract before the Respondent had finally decided upon employing Mr Young in the post for which Applicant was solicited by the Respondent.

39 In any event the concept of inherent job requirement implies that the indispensable attribute must be job related. To suggest that the requirement as in this case, of uninterrupted job continuity is an inherent job requirement is to distort the very concept. If the job can be performed without the requirement, as it can in this case, than it cannot be said that the requirement is inherent and therefore protected under item 2(2)(c) of Schedule 7 to the Act.

40 In the circumstances and for the reasons stated above I am satisfied that the Applicant was unfairly discriminated against by the Respondent as provided by item 2(1)(a) of Schedule 7 to the Act.

COMPENSATION

41 Inskip for the Respondent conceded that had Applicant been appointed to the post she would have earned about R 300 000.00 per annum. Applicant in fact seeks compensation in that amount. Respondent argued that item 4 of Schedule 7 empowers this court to grant compensation but that the compensation that the Court may grant is not in any way related to the

compensation the Court is obliged to grant under s 194 of the Act which relate to unfair dismissal. For guidance as to what amount of compensation this Court should order the Respondent to pay I must, so Respondent argues, rely on judgments which dealt with s 46(9) of the old Labour Relations Act as the wording of item 4 of the present Act follow closely the wording of the said s 46(9).

42 The Labour Appeal Court sitting in terms of the old Act in the matter of Ferodo (Pty) Ltd v De ruter (1993) ILJ held, in computing the amount of compensation that must be ordered in favour of an employee who was a victim of unfair labour practice, that:

- “(a) there must be evidence before the Court of actual financial loss suffered by the person claiming compensation;*
- (b) there must be proof that the loss was caused by the unfair labour practice;*
- (c) the loss must be foreseeable, ie not too remote or speculative;*
- (d) the award must endeavour to place the applicant in monetary terms in the position which he would have been had the unfair labour practice not been committed;*
- (e) in making the award the court must be guided by what is reasonable and fair in the circumstances. It should not be calculated to punish the party;*
- (f) there is a duty on the employee (if he is seeking compensation) to mitigate his damages by taking all reasonable steps to acquire alternative employment;*
- (g) any benefit which the applicant receives eg by way of a severance package*

must be taken into account.”

43 Allied to the above decision in the matter Robecor v Dwandt (1995) 16 ILJ 1519, the Labour Appeal Court also sitting in terms of the old Labour Relations Act added that regard should also be had to the period within which an applicant for compensation secured alternative employment.

44 The fact that item 4 may mirror s 46(9) of the old Act does not mean that I am bound to the principles as laid down by the Labour Appeal Court sitting in terms of the old Act. The present Labour Act ushered in a new labour dispensation and when interpreting this Act although reliance can be placed on the judgment of the Labour Appeal Court as well as the decisions of the Industrial Court I am not bound by or obliged to follow those decisions . I am even less inclined to follow any principles laid down by the Labour Appeal Court with regard to compensation awards decided on the basis of the old Act particularly in matters such as the present where in terms of the old Act the Applicant would not have had any remedy whatsoever.

45 Item 4 of Schedule 7 to the Act empowers this court to order compensation in disputes about unfair labour practices. There is no limit prescribed to the amount of compensation I may order nor is there any basis set out in the Act upon which I may calculate an appropriate compensation. It is therefore left to this Court to decide what principles it would apply in determining the

compensation. The only condition being is that the Court must be satisfied that the compensation ordered is fair and reasonable.

46

47 With regard to the principle applicable I see no reason why I should not follow the ratio of Johnson and Johnson (Pty) Ltd v Chemical Workers Industrial Union (1999) 20 ILJ 89 (LAC). Although this matter dealt with s 194 of the Act which dealt with unfair dismissal the principle that compensation should not be based on patrimonial or actual loss is I believe also applicable in matters relating to unfair labour practice as provided for in Schedule 7 to the Act.

48 I have considered Respondent's argument that the decision in Johnson and Johnson related specifically to the wording of s 194 of the Act and since a similar section does not exist as an item in Schedule 7 it should not be relied upon. Although this argument is not without merit I am not satisfied that I am obliged to consider patrimonial or actual loss in determining the amount of compensation I may order. Notwithstanding that Schedule 7 does not have provisions similar to s 194 of the Act I see no reason why an employee who is a victim of an unfair labour practice must have her compensation calculated on actual loss suffered whilst a victim of an unfair dismissal not. The difference that would apply to an unfair dismissal as opposed to an unfair labour practice is the amount of compensation. In matters of unfair dismissal once the Court

or the arbitration has decided that compensation should be granted it is obliged to grant at least the full amount as provided for by s 194(1) whereas in an unfair labour practice the Court or the arbitrator must grant such amount as it considers to be fair and reasonable.

49

50 In determining what is a fair and reasonable amount of compensation, this court must take into account whether if at all the employee secured alternative employment or whether or not the employee was offered an alternative employment as well as whether or not the employee has secured any other income from the time that the unfair labour practice was perpetrated upon her to the time that the matter was finally heard in Court. This must not be taken into account for purposes of calculating any financial loss but to determine what amount would be reasonable to order in the employee's favour. Consideration should also be given to the actions of the employer as well as the nature of the unfair labour practice.

51 In the present matter I am satisfied that the Applicant did secure income in the amount of little over R 60 000.00 since the date on which she was advised that she was not successful for the position to which she was invited to apply. I have also taken into account that there has been no desire on the part of the Applicant to seek employment in earnest also the fact that the Applicant was offered a fixed term contract by the Respondent.

52 Furthermore for purposes of calculating compensation I am entitled to have regard to the evidence of the Respondent. Respondent's evidence that it honestly held the belief that uninterrupted job continuity was a pre-requisite for the position to which Applicant had been solicited to apply I find unsatisfactory. Had it been a pre-requisite I believe the Respondent would have so stated in its advertisements which were handed in as exhibits. In addition and as stated earlier, the fact that Respondent did not seek to include some penalty upon an incumbent for failing to fulfill the requirement of uninterrupted job continuity for a period of at least 12 months reinforces my view that Respondent did not honestly believe that uninterrupted job continuity was a pre-requisite for the position in question.

53 More importantly Inskip for the Respondent, in his evidence admitted that he did not inform the Applicant, when being advised on 17 December 1997 that she was pregnant and would require to go on maternity leave within 5 months of commencing her employment, that pregnancy was a bar against being successful to the position. His evidence that he did not think this was necessary because they were also discussing other possibilities I find unacceptable because even if they were discussing other possibilities he should have, had the requirement of uninterrupted job continuity been a pre-requisite, informed the Applicant that she did not qualify for the permanent

post. His evidence in this respect is even more suspect when one considers that the interview with the Applicant on that day ended with Inskip informing the Applicant that he still had other candidates to interview. Why, if Applicant was not a contender to the permanent position and possibilities other than a permanent position for the Applicant were being considered was there a need to inform the Applicant that they still have other candidates to be considered for the permanent post.

54 For reasons stated above I believe that a fair and reasonable amount of compensation would be for Respondent to pay to the Applicant an amount equal to two - thirds of what the Applicant would have earned over a 12 month period had she not been discriminated against and offered the position to which she was invited to apply.

55 In the result I find that the Respondent committed an unfair labour practice as contemplated by item 2(1)(a) of Schedule 7 to the Act and is accordingly ordered to pay the Applicant compensation in the amount of R 200 000.00 (two hundred thousand rands) plus the costs of this application.

B WAGLAY
Acting Judge of the Labour Court.

SIGNED AND DATED THIS 28th DAY OF May 1999.

DATE OF HEARING: 27 April 1999.

DATE OF JUDGMENT: 28 May 1999.

For the Applicant: H. C. Nieuwoudt of Jan S. De Villiers and son.

For the Respondent: Adv. A. E. Franklin instructed by Perrott, Van
Niekerk and Woodhouse Inc.