

IN THE LABOUR COURT OF SOUTH AFRICA

(HELD AT JOHANNESBURG)

CASE NO: JS 232/09

In the matter between

VICTOR BIGGAR

Applicant

and

**CITY CITY OF JOHANNESBURG,
EMERGENCY MANAGEMENT
SERVICES**

Respondent

JUDGMENT

LAGRANGE, J

Introduction

1. This is a matter which is brought as an unfair discrimination claim in terms of sections 6 (1) and (3) of the Employment Equity Act 55 of 1998 ('the EEA'). The matter was enrolled for default judgment on the unopposed roll.

2. It is regrettable the employer chose not to defend this action and the matter had to be decided on a default basis. The allegations are of a serious nature and implicate the City of Johannesburg in being derelict in its responsibility to try and eliminate racist conduct by its employees in the workplace. The employer's failure to engage in the dispute, apart from suggesting it is indifferent to the outcome also makes it more difficult for the court to craft an appropriate remedy to adequately address the issue. It is particularly unfortunate when the matter at hand, like this one, concerns important constitutional principles such as the rights to equality and dignity. It is also a matter of great concern that the employer in question is an organ of state, which is accused of neglecting to uphold such values in the workplace.

Factual issues

3. The applicant claims that during his time at the fire station he and his family have been exposed to severe racism, which, in his own words he describes as being "... *so bad it almost feels like a religion*". The racism he complains of has been directed at him and his family not by the employer itself but by certain white colleagues and their families living in the same fire station complex. However, the applicant complains that despite his efforts to bring matters to the attention of his employer, the problem has not been adequately addressed by the employer. The most detailed exposition of his litany of complaints in this regard is set out in a letter written by the applicant to the Human Rights Commissioner on 14 February 2007.

History of the matter

4. When the applicant was first employed at the fire station, his station commander was Mr.

Clark. After the applicant's family relocated from Durban to the Brixton fire station, his children were subjected to various forms of racial abuse by the children of his white colleagues who also resided in the complex. Thus, for example, when the applicant's went swimming in the communal pool, some white residents brought dogs to the pool and even threw the dogs into the pool to scare the children. This harassment continued even after the applicant complained to Mr. Clark about it.

5. Mr Clark's successor as station commander was Mr. G. J. Lues. It appears that the harassment of the applicant's family in the complex persisted. At some point the applicant's wife reported matters to the director of operations, Mr. D Tembe. According to the applicant, Tembe did reprimand his white colleagues by warning them that if they or their children did not stop their behaviour he would suspend them and they could possibly be dismissed. He also reportedly instructed Mr. Lues that whatever happened at the fire station was his responsibility and he had to sort matters out. This seems to have been the high watermark of preventative action taken by the employer. During Lues's term of office a petition was launched by the applicant's white colleagues seeking to have him removed from the station. An inquiry into the grievance was chaired by Mr. Kay of the employer's Labour Relations section. According to the applicant, the complaint by his colleagues was dismissed. Subsequently, Lues was transferred elsewhere.
6. The next station commander was Mr. Gqiba, who was still in charge of the station at the time this matter was referred to court. It appears that the pattern of abuse by some of the white residents towards the applicant's family and towards other black residents in the complex continued. In another incident which is also illustrative of the prevailing environment towards black residents, a wife of a white colleague had to be restrained by a court order to

keep away from a flat occupied by a black female traffic officer who had moved into the complex. Verbal racial abuse hurled at the applicant's wife by the same person caused his wife to open an intimidation case against the woman at the Brixton police station.

7. After a year-end function in December 2006, the applicant's wife was assaulted by one Mr. Venter, a colleague of the applicant. Venter's sister, who happens to be married to another colleague also residing in the Brixton complex, also participated in the attack on the applicant's wife. Following this incident, the applicant's wife fled to the fire station where the applicant was on duty at the time. He then escorted her back to their residence. On the way there they were confronted by Venter who directed racist insults and threats at them. The applicant decided to go back to the police station to report the incident. He also complained to his station commander, who in turn sent out the standby station commander, Mr. Malan. Malan found the applicant at his residence and advised him to return to work or he would discipline him for absconding. Initially, the applicant was not prepared to leave his family alone at their residence, but he was eventually persuaded to go back to his duties.
8. The following day another clash occurred when the applicant was entertaining guests at his flat. The applicant's version is that one of his colleagues drew a firearm and another made threats with racist overtones, after which a van of armed white individuals arrived at the premises. This prompted the applicant to call on other friends of his own to support him in the event of any confrontation.
9. Malan was again sent to the station and told the applicant his visitors must leave. Later, when Malan reported the incident to Gciba, he blamed the applicant for what had happened, despite having previously confided in the applicant that he viewed the applicant's white colleagues as the cause of the problem.

10. A meeting was called by the station commander to address the matter. The applicant was not happy that two of his white colleagues attended the meeting, but none of the people who had been present at his flat were asked to attend. The applicant suggested that the station commander refer the matter to his superior. Gciba refused to do this because someone else had previously complained that he could not manage the station.
11. It appears that nothing was resolved, because a more serious incident took place early in January 2007. According to the applicant, it began with another instance of violent harassment this time directed at his son. Subsequently, a violent clash ensued between the applicant, two of his sons and two of his white colleagues. The applicant alleges he was beaten by one of his colleagues with a sjambok, but defended himself with a knife which resulted in a minor injury being inflicted on Venter. Soon after this incident, the applicant requested to be transferred to the Disaster Management Department of the respondent. The applicant claims he has a qualification in the field of Disaster Management, which made such a transfer feasible. Nothing came of this request.
12. Arising from the incident in January, the applicant was charged with fighting with colleagues and of bringing the reputation of the employer into disrepute. Neither of this two white colleagues who were participants in the fracas were charged even though on the face of it it would have been reasonable to expect they would have been. The applicant also referred to a separate incident in 2005 when two of his white colleagues were involved in a fight in full view of other employees but no disciplinary action was taken against them.
13. The applicant was only charged with misconduct in October 2007, some nine months after the event. Before the disciplinary enquiry was held he and his sons were put on trial facing criminal charges relating to the same incident. Ultimately, in November 2007, they were acquitted of all charges. In passing, it is noteworthy that the magistrate expressed his outrage that an incident of the kind described could take place at the fire station premises, and was highly critical of both the applicant's and his white accusers' conduct.

14. The applicant's disciplinary enquiry was held during March 2008. At the end of the enquiry he was found guilty on the charge of fighting with colleagues and issued with a warning. In February 2008, shortly before the enquiry began, the applicant referred a complaint to the Human Rights Commission relating to the abusive treatment he and his family had suffered at the hands of his colleagues. It appears that nothing concrete resulted from this referral. On 6 March 2008, the applicant referred two disputes to the South African Local Government Bargaining Council. The first dispute was an unfair labour practices dispute over the failure of the employer to promote him to its Disaster Management department despite many requests to do so and despite his competence in that field. The second dispute concerned a complaint of unfair discrimination arising from the racist harassment by his fellow employees which the employer had failed to eliminate.

Analysis

15. It is an unavoidable and undesirable feature of a default judgment that the matter has to be decided on the evidence presented by one party only. Be that as it may, I am faced with a situation where the employer has chosen not to defend its actions and consequently the matter falls to be decided solely on the applicant's account of his experiences at the Brixton Fire Station complex.

16. Section 6 of the Employment Equity Act number 55 of 1998 ('the EEA') provides that:

“(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,...

(3) 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 subsection (1).”

17. On the evidence available, there can be little doubt that the applicant and his family were the direct objects of sustained racial harassment at the hands of his fellow employees at the residential premises provided by the employer. The harassment of the applicant’s family was also indirectly affected him. Section 60 of the EEA states:

"(1) If it is alleged that an employee, while at work, contravened any provision of this act, or engaged in any conduct that, if engaged in by that employees employer, would constitute a contravention of a provision of this act, the alleged conduct must immediately be brought to the attention of the employer.

(2) The employer must consult all relevant parties and must take the necessary steps to eliminate the alleged conduct and comply with the provisions of this act.

(3) If the employer fails to take the necessary steps referred to in subsection (2), and it is proved that the employee has contravened the relevant provision, the employer must be deemed also to have contravened the provision.

(4) Despite subsection (3), an employee is not liable for the conduct of an employee if that employer is able to prove that he did all that was reasonably practicable to ensure that the employee was not act in contravention of this act."

(emphasis added)

18. This is not the type of case in which it is necessary to first determine whether there was discrimination and secondly whether it was unfair. The conduct the applicant complained of

was overtly racist in character and could never be fair.

19. It cannot be said the employer took no steps to try and address the racial hostility which manifested itself in the residential quarters at the station. On the applicant's own account, a warning was issued to two of his antagonists and initially senior staff did attend to matters when incidents occurred. However, the respondent did not follow through on any of these initiatives to try to achieve a lasting solution, and it is remarkable that no disciplinary action was ever instituted against the perpetrators of the racial abuse directed towards the applicant and his family. The only reasonable conclusion that can be drawn is that the employer was essentially reluctant to deal with the real issues and matters were allowed to fester unresolved. When the employer did take more forceful action by initiating disciplinary steps arising from the fracas in January 2007, it did so by selectively instituting an enquiry into the applicant's conduct alone. The employer's inconclusive and ad hoc responses to such a systematic pattern of racial harassment cannot be considered adequate in the circumstances. Also, its mysteriously one-sided approach to the incident in January 2007 was unjustifiable, especially when the proceedings were only held at a time when it should have been well aware of the trial magistrate's findings which portrayed the applicant's white accusers in an equally bad light.

20. In short, the employer did not take all necessary steps to eliminate the racial abuse that was being perpetrated by some of its employees at its residential premises and it cannot be said that it did everything that was reasonably practicable to prevent the continued harassment. It might be argued that, in the strict sense, the harassment by the applicant's fellow employees did not take place when they were at work. However, in my view, it would be an extraordinarily narrow interpretation of the provisions of section 6 of the EEA if it were to exclude conduct between fellow employees committed at the common residential premises provided by the employer and attached to their workplace merely because they were not on duty at the time the particular incidents occurred. It would also mean that whereas an employer would be entitled to take disciplinary action against an employee for such discriminatory misconduct taking place outside the strict confines of the workplace and having a bearing on the employment relationship, an employee who was the target of such

unfair discrimination would not have a remedy where the employer decides not to act. Such an anomaly could not have been intended in my view, especially where the wrong is one affecting an employee's constitutional rights to dignity and equality

21. It should be noted that the labour courts have long acknowledged that disciplinary action may be taken against an employee for conduct committed outside the workplace if it has a bearing on the employment relationship.¹ In this instance, the animosity directed towards the applicant by some of his colleagues could not have boded well for their working relationship in emergency situations.

22. The fact that the employer warned the perpetrators about the conduct and took disciplinary action against the applicant in relation to the January fracas, which both took place at the residential premises, demonstrates that it understood it was entitled to take action against them as employees. The very presence of those individuals as residents at the fire station complex is directly linked to their employment as emergency fire personnel. It cannot be credibly argued that, as resident employees, their conduct on those premises whilst off duty was beyond the remit of the employer's disciplinary powers, especially where such conduct clearly could have repercussions for the working relationship. I am also satisfied that the residential circumstances of the alleged perpetrators and the applicant were so closely linked to their employment as emergency fire personnel that for all intents and purposes they remained at the workplace when they were off duty at their residences on the employer's premises situated at the fire station. In the circumstances of this case, it would be artificial to

1 See *Hoescht (Pty) Ltd v Chemical Workers Industrial Union* (1993) 14 ILJ 1449 (LAC) at 1459B-I and the cases cited thereat. See also *Mould v Roopa NO & Others* (2002) 23 ILJ 2076 (LC) at 2087, par [49], and *National Education Health & Allied Workers Union obo Barnes v Department of Foreign Affairs* (2001) 22 ILJ 1292 (BCA)

treat the relevant individuals' conduct towards each other at their residential quarters as conduct which did not occur while at work, because of the close relationship between the workplace and the residential arrangements which applied to them.

Remedy

23. Section 50 (2) of the Employment Equity Act provides *inter alia* that:

"If the Labour court decides that an employee has been unfairly discriminated against, the court may make any appropriate order that is just and equitable in circumstances, including-

(a) payment of compensation by the employer to that employee;

(b) payment of damages by the employer to that employee;

(c) an order directing the employer to take steps to prevent the same unfair discrimination or a ;..."

(emphasis added)

This provision makes it clear that the ambit of the type of relief the court can award is wide and the listed remedies are not mutually exclusive, nor are other unspecified forms of relief excluded provided they are appropriate, just and equitable.

24. The primary relief that the applicant seeks in this matter is to be transferred to another department, which presumably would result in him moving from the premises at Brixton fire station, though he also seeks compensation. His attempts to persuade his employer to implement such a transfer have to date been unsuccessful. It is not apparent from the evidence before me why it has not been possible to transfer the applicant to the Disaster Management Department of the respondent. Equally it is not clear what specific post the applicant might be suitably qualified for. If such a transfer took place, and had the effect of the applicant escaping the hostile racist environment he finds himself in, that would resolve the applicant's personal problem. In another sense though it would avoid dealing with the root cause of the problem by removing the victim of harassment rather than dealing with his antagonists. It would not provide any assurance that other black residents of the Brixton fire station premises would not become the targets of similar acts of racial hostility. The applicant provided evidence that he was not alone in being targeted by racist colleagues: at least one other black resident was compelled to take legal action to halt harassment by other residents.
25. In the circumstances, it seems that a combination of different remedies with different aims might alleviate the situation. A more tailored remedy, which might be more appropriate is difficult to devise because of the lack of detailed evidence on matters such as the existence of suitable alternative posts which the applicant might be capable of filling. Nonetheless, the employer ought to take more proactive steps to place the applicant in another appropriate post in a different department. Secondly, the employer must take more decisive measures to eliminate acts of racial harassment between employees residing on its premises. There is no reason why the employer's disciplinary code should not be adequate to deal with instances of racial harassment. What appears to be lacking is the will to follow through in giving effect to

the code. Accordingly, it seems that some degree of compulsion is required which impels the employer to initiate an investigation and, if necessary, take disciplinary action when circumstances indicating racial hostility arise. Regarding the question of compensation, I accept that the applicant suffered the racial hostility of his colleagues over an extended period of time and some kind of compensation for the past negative impact on his dignity caused by the systematic racial harassment would be appropriate. Likewise some compensation is justified for the employer's partial approach to initiating disciplinary measures against him alone and not against the two white colleagues who were involved in the fracas. This must be balanced against the fact that the employer did take some action on an ad hoc basis

26. The applicant's narrative of events prior to 2006 is not specific as to dates when certain harassment took place which might have been directed more at the applicant's children than at him as such, but it is fair to say on the evidence that the applicant was the object, directly and indirectly, of racially hostile acts in 2006 and 2007. In the circumstances, it seems that a payment of compensation in the form of a *solatium* of one month's remuneration for each year during which such actions occurred would be appropriate.
27. To facilitate a more proactive and decisive approach by the employer to the problem of racial harassment, I believe that an investigation by the station manager must be conducted as a matter of course whenever there is a complaint of conduct of a racially discriminatory nature directed by one employee against another. Any investigation of this nature ought to include a recommendation whether or not disciplinary action should be instituted against any employee and, in the event that no disciplinary action is recommended, the reason for such a recommendation should be provided to the complainant in writing. Moreover, any instance of alleged violence or threatened violence between employees ought to be the subject of a formal disciplinary enquiry in which all those allegedly participating should be charged.
28. In order to try and curb racial hostility at the employer's residential premises at the station, the employer might also examine the conditions under which employees are entitled to occupy residential accommodation and the conduct which is expected of tenants and their co-

habitants. However, as it is unclear to what extent conditions governing the tenancy of emergency fire personnel are set out in the resident employees' contracts of employment as opposed to being set out in separate lease agreements, there is an insufficient factual basis for the court to issue any binding directive in this regard.

Costs

29. The applicant's grievances should have been addressed with greater seriousness and purpose by the employer. It should not have been necessary for the applicant to bring this matter to court in order to achieve a resolution of the dispute. If the respondent accepted it had no defence for its inaction to place before the court, it ought to have tried to settle the matter with the applicant. In the circumstances, he has been compelled to incur unnecessary legal costs and notwithstanding the ongoing relationship between him and his employer I see no reason why he should be prejudiced in this regard.

Order

30. In summary, I find that the respondent unfairly discriminated against the applicant in failing to take adequate steps to prevent him being subjected to racial harassment by certain colleagues who were also accommodated in residential premises at the fire station. The employer also unfairly discriminated against him when it only took disciplinary measures against him for fighting with other employees but failed to charge his white colleagues who were also involved.

31. Accordingly, an order is made in the following terms:

31.1. The respondent is ordered, within 14 days of the date of this judgment, -

31.1.1. to pay the applicant an amount of two month's salary at his current rate of earnings for failing to take necessary and reasonably practicable steps to prevent the applicant being subjected to racial harassment by colleagues in 2006 and 2007, and

31.2. to pay the applicant one month's salary at his current rate of earnings for unfairly discriminating against him in taking disciplinary action against him alone, without charging the white complainants, arising from a fight between the applicant and other employees which occurred in January 2007.

31.3. The respondent is further directed –

31.3.1. to review all currently vacant posts for which the applicant is qualified, to which he might be transferred on the same or equivalent remuneration package to that which he presently receives, and to offer him an opportunity to apply for such posts;

31.3.2.to investigate any new complaint of alleged racial harassment involving its employees arising at its premises at Brixton Fire Station and to initiate disciplinary action against any alleged perpetrator if justified, provided that if no disciplinary enquiry is initiated the employer must provide the complainant with written reasons for not doing so, and

31.3.3.in the event of any alleged violence occurring between employees at its premises at Brixton fire station, to institute disciplinary proceedings against all those who are alleged to have taken part in the violence.

31.4.The respondent must pay the applicant's costs on an attorney and own client scale.

31.5.In the event that the parties cannot agree on the applicant's current rate of earnings, any party may refer the matter back to this court for determination.



ROBERT LAGRANGE

JUDGE OF THE LABOUR COURT

Date of hearing : 24 February 2010

Date of judgment: 10 February 2011

Appearances:

For the Applicant: G Wilks instructed by Bezuidenhout Van Zyl Attorneys

Unopposed