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REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not reportable

Case no JS 661/12

In the matter between:

T. N. M.

Applicant

and

JOHANNESBURG METROPOLITAN BUS SERVICES

(PTY) LTD

Respondent

Date heard: 6 October 2015

Date delivered: 13 November 2015

JUDGMENT

EVERETT AJ;

Introduction

- [1] The applicant claims that he was unfairly discriminated against on the basis of his HIV status and that his dismissal on the same basis was automatically unfair in terms of section 187(f) of the Labour Relations Act as amended (“the LRA”).

Evidence

- [2] This matter dates back to late 2011 when, sadly, the applicant who had worked for the respondent as a bus driver for a number of years became very ill. His last day at work was at the end of September 2011; he was hospitalized in October 2011 and after his discharge he spent a several months ill at home. During this time an application for disability benefits through the respondent’s retirement fund was submitted, which application required a form to be completed by the applicant for disability (also referred to as the member of the fund), a report to be completed by the applicant’s treating specialist and a further form to be completed by the employer. With the applicant’s consent, his positive HIV status was disclosed by his treating specialist. The completed application was submitted in January 2012.
- [3] In late March 2012, Sanlam advised the respondent that the applicant had been found to be permanently disabled and a lump sum amount to R490 000 was to be paid over to him. The applicant was called in by Human Resources but refused to sign for the funds to be released.
- [4] The applicant claims that at a meeting on 27 March 2012, he was dismissed on the basis of his HIV status and that his dismissal was accordingly automatically unfair in terms of section 187(f) of the Labour Relations Act. He also claimed that he was treated differently on account of his HIV status and that this amounted to unfair discrimination in terms of section 6 of the Employment Equity Act.

- [5] The details of the matter, other than the broad strokes outlined above, were highly contested, for example, who completed the forms, who delivered them, whether the applicant consented to the application or was even aware of it, which meetings he attended, who was present at the meetings and when he was ill.
- [6] The applicant contradicted himself in the course of his evidence. He also contradicted his statement of claim. And in a number of respects his evidence contradicted his witness's evidence – that of his brother. The employer's witnesses, on the other hand, were consistent and they stuck me as honest and reliable.
- [7] It is not necessary to dwell on the details of the evidence and each contradiction. I find that the following are the material facts that emerged from the evidence: The applicant was advised of the option of applying for disability in late 2011. He said he would consider it and early the following year he had the forms collected or delivered from the employer for completion. He and his brother completed certain sections of the member's form and arranged for his specialist to submit a report in compliance with the guidelines for treating specialists. The applicant had the forms delivered to the employer. The forms (the member's section) were incomplete and the HR officer, Ms Maluleka (no relation to the applicant) completed them using information on file and information gained in a telephonic conversation with the applicant. Once the application was approved by Sanlam, the applicant and his family were unhappy with it and the applicant refused to sign release of the funds. The applicant was told that he could not resume duties until he was found fit to do so as he had been declared permanently disabled. The applicant regarded this as a dismissal and in June 2012 he referred an unfair dismissal dispute to the CCMA for conciliation.
- [8] A key issue in dispute was whether the applicant consented to the application for disability. On the one hand the applicant claimed that he had not applied for disability and it was a scheme on the part of the employer to get rid of him due to his HIV status, brought about by the HR officer completing and submitting the forms without his consent. In line with this contention he claimed that the employer

informed him that he could not work for Metropolitan bus as he would infect the other drivers. On the other hand, he claimed that he had applied for temporary disability and he had not understood, nor had it been explained to him, that he was in fact applying for permanent disability, and that this was differential treatment on the basis of his HIV status, amounting to discrimination. This latter version was, in particular, contained in the evidence of the applicant's brother. A third version on the part of the applicant was that, when he completed the forms, he thought he was being given the option of alternative employment in a clerical position.

- [9] The difficulty with the above contentions and the evidence presented in support of them is that they are mutually exclusive. If he applied for disability, albeit thinking that it was for temporary rather than permanent disability, then there is no question that he intended to make the application and the employer cannot in the same breath be accused of fraudulently applying on his behalf and without his knowledge. Nor can it be said that he was being given an alternative position. These contradictory contentions resulted in a number of inconsistencies in the applicant's own evidence and between his evidence and that of his brother.

Application of the law

- [10] The applicant claimed both unfair discrimination and an automatically unfair dismissal. These are related but different claims even if they arise from the same set of facts. Unfair discrimination is claimed in terms of section 6, read with section 10, of the Employment Equity Act whereas an automatically unfair dismissal is claimed in terms of section 187(f) of the Labour Relations Act. Both disputes were referred to the CCMA for conciliation.

- [11] The first question to determine is whether the applicant was treated differently because of his HIV status. Section 6(1) of 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 ... HIV status ... or any other arbitrary ground (my emphasis).

[12] An employment policy or practice is not defined in the EEA but ILO Convention 111, which South Africa has ratified, describes discrimination as -

(a) any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin, which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation;

[13] The basis on which he claimed unfair discrimination were not clearly set out in the applicant's statement of claim, but it emerged from the evidence that he claimed differential treatment because of his HIV status in four respects:-

1) by being presented with the option of applying for disability without sufficient counseling when he could simply have been given leave while he was ill;

2) because the employer failed to visit him in hospital and send flowers and fruit as it did for other ill employees;

3) the employer tricked him by applying for disability on his behalf which he did not consent to in order to get rid of him; and

4) the employer made his return to work conditional on being declared fit to work whereas other employees who had been sick could simply return to work when their doctor said they were fit to do so and they are not required to undergo a medical examination. This was the same basis on which the applicant rejected an offer of reinstatement made in August 2012.

[14] As regards the first, I accept the employer's evidence that the HR officer who informed him of the option of applying for disability was not aware of his HIV status at the time and it could therefore not have been a basis for differentiation. In any event, applying for disability was clearly presented as an option as he did not even take the forms with him that day.

[15] As regards the second contention, according to the evidence the occupational nurse did in fact visit him. But even if the employer failed to visit and bring flowers,

this is not an employment policy or practice in the meaning of section 6 “which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation”. Visits in hospital and gifts of fruits of flowers are nice touches on the part of an employer, and they demonstrate concern for the sick employee, but they cannot be regarded as practices that, if not done, are discriminatory. In any event, there is no evidence that the reason for not visiting him was his HIV status as this had not been disclosed to the employer at the time he was in hospital (in October) and his status was only disclosed in January 2012 when his treating specialist completed a report for the purposes of the disability application.

[16] As regards the third contention, this contradicts irreconcilably with the first contention and the evidence presented in court. I have found that the applicant was not tricked into applying for permanent disability or that the application was made without his knowledge or consent.

[17] As regards the forth contention, this goes to the essence of the claim of unfair dismissal which is dealt with below. However, I accept the employer’s evidence that it could not allow a bus driver who had been declared permanently disabled (and was still sick at the time, being end of March 2012) to resume his duties driving a bus with responsibility for the safety of members of the public. Similarly, the offer of reinstatement made by the employer in July contained the same condition which was utterly reasonable in the circumstances. In any event, the offer of reinstatement occurred after the applicant referred a dispute to the CCMA claiming he had already been dismissed and as such it cannot found differentiation that he alleges prior to, and giving rise to, his termination of employment.

[18] Section 11 of the EEA provides:

- (1) If unfair discrimination is alleged on a ground listed in section 6(1) the employer against whom the allegation is made must prove, on a balance of probabilities, that such discrimination -
 - (a) did not take place as alleged; or

(b) is rational and not unfair, or is otherwise justifiable.

- [19] Clearly the employer bears the onus of proving, in this case, that unfair discrimination did not take place as alleged. For the reasons given above I am satisfied that the respondent has discharged this onus and discrimination did not take place as alleged.
- [20] I turn now to consider whether the applicant was dismissed. He claimed he was dismissed at the meeting of 27 March 2012 when he refused to sign release of the disability payment and he was told that he could not continue to work as a bus driver because he would infect other passengers. I accept the evidence of the employer that he was in fact told that, having been declared permanently disabled; he could not be allowed to resume duties until he was fit to perform his duties as a bus driver, a position requiring medical fitness due to the responsibility for the lives of members of the public.
- [21] If at the end of March 2012 the applicant had been fit to resume work (which, according to his application for condonation for late referral to conciliation, he was not) he could have taken the necessary steps to show that he was fit to work. He could also have engaged with Sanlam to reverse the decision regarding his disability application and the approved payment. The bottom line is that he was not dismissed, but disallowed from resuming duties due to his successful application for permanent disability benefits. Accordingly, the applicant's claim that he was dismissed fails.
- [22] The applicant did produce a doctor's certificate in July 2012 stating that he was fit to resume his duties. But at that stage the dismissal was already alleged and the employer's failure to allow him to resume duties at that stage, and whether that amounted to dismissal, is not the dispute before me. Even so, in August 2012 the employer made an offer to reinstate him subject to his being declared fit to work after a medical assessment (which offer was with prejudice in terms of Labour Court rule 22A) but this he rejected.

[23] The applicant is now destitute, having lost both his employment and the disability payment. Whether it was because he took poor advice from family members or because he regretted applying for disability, or some other reason it is impossible to discern, he is, sadly, the master of his own misfortune. The applicant was represented pro bono and, misguided as he was in pursuing his claims, I do not believe it would be fair to allow costs to follow the result.

[24] In conclusion the applicant was not unfairly discriminated against on the basis of his HIV status, and he also failed to establish the existence of a dismissal.

Order

[25] I make the following order:

1. The applicant's claim of unfair discrimination is dismissed.
2. The applicant's claim of automatically unfair dismissal is dismissed as he failed to establish the existence of the dismissal.
3. There is no order for costs.

Everett AJ

Acting Judge of the Labour Court of South Africa

APPEARANCES

For the Applicant: Mr N Kubayi.

Instructed by: Noveni Eddy Kubayi Incorporated.

For the Respondent: Ms H Stritjdom.

Instructed by: Helena Strijdom Attorneys.

LABOUR COURT