

IN THE LABOUR COURT OF SOUTH AFRICA

REPORTABLE

HELD AT CAPE TOWN

CASE NO: C323/2004

In the matter between:

AMARALL CHRISTIAN

Applicant

and

COLLIERS PROPERTIES

Respondent

JUDGMENT

The Applicant claims that her dismissal from the Respondent's employ was automatically unfair on the grounds specified in Section 187(1)(f) of the Labour Relations Act, No 66 of 1995 as amended. She claims that she was dismissed in circumstances amounting to sexual harassment. She seeks an order for compensation in terms of Section 194 of the Labour Relations Act, as well as an order for payment of damages in terms of Section 50(1)(e) of the Employment Equity Act, No 55 of 1998.

It is first necessary to deal with a procedural aspect. The Applicant's Statement of Claim was served on the Respondent by telefax. The telefax number to which the Statement of Claim was transmitted differed from that given on the Statement of Claim as the Respondent's telefax number. There was no explanation for this discrepancy. There was, moreover, no proof on the papers before me that the telefax number in question was in fact that of the Respondent. Rule 4(1)(iv) provides that a document may be served "*by faxing a copy of the document to the person, if the person has a fax number*". Any litigant wishing to bring himself within the ambit of this rule must show that the number to which the documents were faxed was the fax number of

“the person”, ie the intended recipient. If the document is faxed to some other fax number, proper service has not been effected. There is, therefore, an inherent danger and shortcoming in the particular Rules - a shortcoming which does not exist, for example, in litigation in the courts of civil jurisdiction where service is effected by the Sheriff, and proved by a service return reflecting the full details of such service.

In my view, and save where the circumstances are exceptional, a party wishing to rely on service in the manner indicated in Rule 4(1)(iv) must place before the court satisfactory proof that the fax number used is indeed that of the opposing party. This may take the form of a letterhead, card, marketing brochure or, if appropriate, an excerpt from the telephone directory containing the relevant information. In the absence of such independent verification of the fax number, I have grave doubts as to whether there is proper compliance with the provisions of Rule 4(1)(iv). I might add that these comments are equally applicable to the sending of documents by registered post, in terms of Rule 4(1)(vii).

Fortunately, by the time the matter was heard, the Applicant in the instant matter was represented by an attorney, who provided an affidavit with sufficient detail to reliably establish that the number to which the Statement of Claim was faxed was the Respondent's number.

Applicant, a twenty three year old matriculant, had held various administrative and clerical positions on a contract basis, before she made application to the Respondent for a secretarial position which had been advertised in the press. She attended an interview and was employed with effect from 21 June 2004. Her salary was agreed at R2 000,00 per month. She spent the first two days of her employment doing receptionist and typing work, and spent the morning of 23 June 2004 filing documentation. During this period no criticism was levelled by any of her co-workers, at the manner in which she performed any of her duties.

On the morning of 23 June 2004 she went into the office of the Respondent's manager, Mr Collier, to discuss and clarify certain other of her conditions of employment. She sat facing him across his desk. In the course of the conversation he asked her whether she had a boyfriend, and how long she and her boyfriend had been involved with one another. From there he proceeded to suggest that she accompany him one evening to supper and drinks. She replied that she would do this if her boyfriend was also invited. The conversation then took a somewhat inappropriate turn with Mr Collier asking what she would do if he asked her to sit on his lap. Her reply to this was that she did not need to sit on his lap, as there were chairs on which to sit.

At this point, Mr Collier got up and moved around the desk. The Applicant initially thought that he was going to switch on a television set in the corner of the office, but then realised that this was not so. She thereupon stood up, and turned to find him standing at the door, holding the door handle. Mr Collier came towards the Applicant, and kissed her on the neck. She pushed him away from her, and left the office.

At about 14h00 that same day she returned to the office to discuss and voice her displeasure at the incident that had occurred. Mr Collier was not particularly sympathetic, indicating that he did not understand her difficulty and that it was not a situation of him having thrown her on top of the table. He then gave her an ultimatum, namely that before she left work that afternoon she had to indicate to him whether she was "*out or in*". She interpreted this to mean that she had to tell Mr Collier whether she was prepared to accept his advances or not. This is a fair interpretation on the conversation that occurred - the utterance occurred in the course of a discussion concerning what had transpired that morning. The request that she must tell him whether she was "*out or in*" could not have meant that she should decide whether she wanted to be employed or not - she had already been appointed three days earlier. It was probably intended to ascertain how she would in future react to further amorous advances.

Mr Collier again called her into his office at the end of the day, and enquired whether she had decided on the issue raised. She stated that she was not "*in*". He then enquired why, in that event, he should keep her in his employ. He thereupon picked up an envelope that had been lying on his desk, with her name on it, and handed it to the Applicant. It contained the equivalent of two days' salary. Mr Collier then said that other secretaries had been reporting on the work that she had been doing and that it was clear to him that she was not fit for the job. She was thereupon dismissed.

The above facts indicate, in my view, that she was dismissed because she was not prepared to accept Mr Collier's advances. There had been no complaints about her performance in the days preceding her dismissal, and the raising of the

complaint after she had indicated that she was not prepared to make herself sexually available to Mr Collier, makes it implausible that the concerns he raised about her suitability for the job were genuine ones.

I turn to consider the relief which should be granted to the Applicant.

Following her dismissal, Applicant took certain tranquilising medication for a period of 6 months. She stated in evidence that the entire episode has made her apprehensive in the job interview and recruitment situation, especially where a male is doing the interviewing and recruiting. She has since found employment with a large insurance company, which expires shortly, although she does have the prospect of further work thereafter.

The legislature has decreed that certain categories of dismissal are automatically unfair and has, in Section 194(3), provided for compensation, in the case of such dismissals, considerably in excess of that which may be awarded in the case of other dismissals. The legislature's clear purpose is the eradication of the seven categories of automatically unfair dismissal laid down in Section 187(1) of the Labour Relations Act, and the protection of workers against such dismissal. The compensation which, in terms of the Act, may be awarded in the case of an automatically unfair dismissal obviously have a punitive and preventative element. Employers who subject employees to this form of dismissal face the dire consequences intended by the legislature. I believe that a tribunal, when fixing compensation in the case of an automatically unfair dismissal, should bear these policy considerations in mind and attempt to give effect to them.

The instant matter illustrates precisely the type of situation which the legislature has so firmly set its face against. An employee was sexually victimised and lost her employment as a consequence of such victimisation. It matters not that the employment from which she was dismissed was of short duration. Newly appointed and long established employees are equally vulnerable in situations of sexual harassment, and therefore equally deserving of protection.

The calculating manner in which Mr Collier effected the Applicant's dismissal, in the instant matter, is an aggravating circumstance. His actions were not performed unthinkingly and in the heat of the moment. Having been rebuffed by the Applicant on the morning of 23 June, he did not allow the matter to rest but persisted with his advances in the two conversations that took place that afternoon. When the Applicant made clear that his attentions were not welcome, he dismissed her in a callous manner, and compounded the gravity of the situation by seeking to justify the dismissal on a false pretext.

I view this conduct in a serious light, and can think of no reason why the Applicant should not be awarded the full 24 months compensation for which Section 194(3) provides.

The Applicant brings a separate claim for damages under Section 50(1)(d) and (e) of the Employment Equity Act. That section empowers the court to make “*any appropriate order*” including “*awarding compensation in any circumstances contemplated in this Act*” and “*awarding damages in any circumstances contemplated in this Act*”. The circumstances contemplated in the Act include the prohibition, in Section 6(1), that “*no person may unfairly discriminate, directly and indirectly, against an employee ... on one or more grounds including race, gender, sex, pregnancy ...*”. This falls to be read with the qualification, in Section 6(3), which stipulates that “*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)*”.

Section 50(1) of the Equity Employment Act requires the court to make an order which is appropriate. The determination of appropriate relief requires that the court duly consider various interests, including the need to redress the wrong caused by the infringement, the deterrence of future violations, the dispensation of justice which is fair to all those who might be affected, and the necessity of ensuring that the order can be complied with. (**Hoffmann v South African Airways, (2000) 12 BLLR 1365 (CC)** at para 45; **Fose v Minister of Safety & Security, (1997) 7 BCLR 851 (CC)** at para 38).

In the assessment of damages for compensation resulting from unfair discrimination, useful guidance is to be found in the case of **Alexander v Home Office, (1988) IRLR 190 (CA)**, where the court said the following:

“The objective of an award for unlawful racial discrimination is restitution. For the injury to feelings, for the humiliation, for the insult, it is impossible to say what is restitution and the answer must depend on the experience and good sense of the judge and his assessors. Awards should not be minimal, because this would tend to trivialise or

diminish respect for the public policy to which the Act gives effect. On the other hand, just because it is impossible to assess the monetary value of injured feelings, award should be restrained. To award sums which are generally felt to be excessive does almost as much harm to the policy and the result which it seeks as do nominal awards”.

Our courts should strive to achieve this balance. On the one hand, awards should give effect to the qualities and purposes which underlie the anti-discriminatory measures in the Employment Equity Act. An award should be sufficiently high to deter the defendant and other persons from similar behaviour in the future - **Buthelezi v Poorter, 1975 (4) SA 608 (W) at 617**. On the other hand, awards should not be so exorbitant or excessive that they induce a sense of shock, or lead to a situation where even litigants who have suffered minor consequences as a result of unfair discrimination reap financial benefits far in excess of what could, in any normal economic sense, be regarded as their loss. There is good reason for the conservative approach traditionally adopted by our courts in assessing damages.

There have not been many cases in which our courts have considered the quantum to be awarded in sexual harassment claims. In **Intertech Systems (Pty) Ltd v Sowter, (1997) 18 ILJ 689 (LAC)** an employee had resigned after being employed for 19 months. The evidence before the court showed that she had been harassed in a sustained and continuous manner both in and away from the workplace. She had been subjected to unwanted telephone calls, unwelcome visits to her home, to being followed while driving her car, to attempted and actual physical intrusions upon her person, and to unwelcome declarations of affection towards her. She was awarded R92 088,00 but the award was intended to encompass certain items of special damages, including medical expenses of R36 733,49 which, although incurred, could not for causal reasons be attributed to the employer.

In **Ntsabo v Real Security CC**, (2003) 24 ILJ 2341 (LC), the applicant, a 34 year old mother, had been subjected to sexual harassment by her supervisor for most of the 7 months of her employment. This had consisted of him frequently touching her breasts, buttocks and genital area. There was one incident of simulated intercourse by the supervisor, culminating in him ejaculating on her uniform. As a result of this harassment she had undergone a character change, become intolerant towards her family, developed fears of sleeping alone, experienced nightmares of rape, suffered from regular headaches and loss of appetite, developed an extremely negative self-image and formed suicidal tendencies and acute psychological symptoms. She was awarded R50 000,00 for general damages.

In **Grobler v Naspers Beperk & Another**, (2004) 25 ILJ 439 (C), the plaintiff had, over a 7 month period, been sexually harassed by a trainee manager, one Samuels. Samuels' conduct included attempting to kiss her, touching her, making intimate suggestions to her, following her when she went to the toilet and, on one occasion, getting into her car and attempting to force her, at gunpoint, to have sex with him. He had written numerous intimate letters, asked her to marry him, fondled her and threatened to have her two children killed should she report his harassing activities. She was awarded R150 000,00 as general damages.

These award exhibit a measure of inconsistency, but is appropriate to bear in mind that awards by other courts in comparable cases serve as no more than a guideline (**Van der Berg v Coopers & Lybrand Trust (Pty) Ltd**, 2001 (2) SA 242 (SCA) at 260; **Nydoo v Bengtas**, 1965 (1) SA 1 (A) at 19; **Kenel Union of SA v Park**, 1981 (1) SA 714 (C) at 732). The court is, in each case, required to determine the appropriate amount in the light of the evidence in the circumstances before it, and should not rigidly adopt or apply amounts which other courts have considered appropriate.

It would also be unwise to attempt an exhaustive list of the factors to be taken into account. These would include the duration, extent and frequency of the harassment, the extent to which the acts of harassment are blatant and intrusive, the arrogance and maliciousness attributable to the harassing party, and the consequences to the victim, but these are by no means the only factors which could play a role.

In the instant case, I consider it relevant that a substantial amount is also to be awarded to the Applicant in terms of Section 194 of the Labour Relations Act. The collateral source rule requires that I take into account that the same act of harassment constitutes an automatically unfair dismissal, and a contravention of Section 6 of the Employment Equity Act, and that a separate and substantial sum of compensation is to be paid to the Applicant in respect of the former.

In addition, I take into account that the acts complained of all occurred on the same day and within a short space of time, that the only direct physical advance was Mr Collier's attempt to kiss Applicant on her neck, and that there is no evidence before me of any particularly severe psychological trauma or consequences.

Bearing all of the foregoing in mind, I am of the view that an amount of R10 000,00 would fairly represent the compensation to which the Applicant is entitled in terms of Section 50 of the Employment Equity Act.

The Respondent is accordingly ordered to pay the Applicant:

- [1] The sum of R48 000,00 in terms of Section 194(3) of the Labour Relations Act;
- [2] The sum of R10 000,00 in terms of Section 50 of the Employment Equity Act;
- [3] Interest on the said amounts from date of judgment to date of payment at the rate laid down in the Prescribed Rate of Interest Act;
- [4] The Applicant's costs of suit.

A C OOSTHUIZEN A.J.

DATE OF HEARING: 17-02-2005

DATE OF JUDGMENT: 25-02-05

APPEARANCE

FOR THE APPLICANT: MR K. ALLEN

INTSRUCTED BY: N. ALLEN ATTORNEYS

FOR THE RESPONDENT

NO APPEARANCE