BROADENING THE RIGHTS OF WOMEN IN THE WORKPLACE: AUTOMATICALLY UNFAIR DISMISSALS AND PREGNANCY

De Beer v SA Export Connection t/a Global Paws 2008 (29) ILJ 347 (LC)

1 Introduction

The employment relationship in the South African context has its origin in our common law. It is true that legislation such as the Labour Relations Act of 1995

(LRA) and the Basic Conditions of Employment Act of 1997 (BCEA) have amended the original application of the employment contract. Section 23 of the Constitution of 1996 has also entrenched certain rights with regard to the employment relationship (eg to fair labour practices in s 23(1)). This said, the interpretation of such legislation by the courts continues to make important contributions to the rights and duties of the parties to an employment relationship and therefore to the existing law. In this judgment the right of female employees to fall pregnant as well as the circumstances surrounding childbirth and maternity leave were discussed. The judgment is of significance because it broadens the rights afforded to women in the workplace in terms of legislation and the common law.

2 Facts

2 1 General

The court had to consider the application of section 187(1)(e) of the LRA which deals with automatically unfair dismissals on the grounds of the employee's pregnancy and more specifically with regards to the phrase "any reason related to her pregnancy". After considering the meaning of the said phrase and the application thereof to the facts in this case the dismissal of the applicant was declared automatically unfair.

2 2 Circumstances leading to the application

When the applicant fell pregnant it was agreed that she would take one month's leave after giving birth. She gave birth to twins who suffered from colic. She requested a further month off to attend to her newborn twins. The company (respondent) was prepared to grant her an extra two weeks, which she declined. Her services were consequently terminated. She approached the Labour Court for relief, contending that her dismissal was automatically unfair in terms of section 187(1)(e) of the LRA. It appeared from the evidence that the respondent was a very small company and that another employee, the applicant's sister, was pregnant at the same time as the applicant. It was agreed that, since the sister's pregnancy was planned, she would be given four months' maternity leave and the applicant would be given only one month (paras 3 4). It also appeared from the evidence that the applicant was healthy enough to return to work after one month but that her newborn twins were not well (para 5). The court also found that the applicant was clearly being punished for having fallen pregnant, which pregnancy, unlike that of her sister, was unplanned (para 18).

3 Decision

3 1 Analysis of section 187(1)(e) of the LRA

The court first considered section 187(1)(e) and held that it must be seen as part of social legislation passed for the specific protection of women and to put them on an equal footing with men (para 10). Francis J added that there was no doubt that it is often a considerable burden on an employer to have to make the necessary arrangements to keep a woman's job open for her while she is absent from work to have a baby, but that this is the price to be paid to further the equal status of women in the workplace (para 10). In the court's view a dismissal will not escape being automatically unfair by the argument that the woman is being dismissed not because of her pregnancy, but because of her unavailability to work

resulting from her pregnancy (para 11). The court stated that, after all, the natural consequence of being pregnant is to give birth (para 23). Employers can no longer argue that the reason is economic, citing the extra expenses that it must incur to provide temporary cover for an absent employee (para 11). In specifically analysing the phrase "related to her pregnancy" the court held that dismissal would be unfair not only when pregnancy or any reason connected with the pregnancy is the reason for the dismissal, but also when the woman is dismissed for reasons connected with the exercise of her rights in respect of maternity leave (para 12).

The court referred to *Kroukam v SA Airlink (Pty) Ltd* 2005 (26) *ILJ* 2153 (LAC) where it was held that section 187 of the LRA imposes an evidential burden of proof on the employee to produce evidence which is sufficient to raise a credible possibility that an automatically unfair dismissal has taken place (para 13). It then behoves the employer to prove the contrary. The court added that the onus to prove the dismissal was not automatically unfair rests on the employer. The applicant merely has to adduce some evidence to raise the issue whether the dismissal was for a reason related to pregnancy. Once this is done, the respondent must refute this in the course of establishing a fair reason for dismissal (para 13).

3 2 Application of the provisions of the BCEA

The court considered the agreement between the parties and found that it fell foul of the provisions of the BCEA. The court specifically referred to sections 25 and 26 of the BCEA which deal with maternity leave (paras 18, 19, 20). It held that in terms of the said sections, the applicant was entitled to have taken four months' maternity leave and that the agreement which the respondent sought to rely on was null and void and unenforceable (para 21). The BCEA also allows the employee to structure the way in which she intends taking maternity leave. Had the applicant been allowed her full four months' maternity leave in terms of the BCEA, she would not have been dismissed and she could have spent time with her colicky twins (para 22). Francis J drew a parallel between the provisions of section 25 of the BCEA where an employee who has a miscarriage or bears a stillborn child and the facts of the present case where the mother was unable to return to work because her babies had colic. Both scenarios result from pregnancy.

3 3 The issue of compensation

After finding the dismissal of the applicant to be automatically unfair (para 26), the court determined the issue of compensation. It is trite law that the maximum compensation to be awarded to an employee whose dismissal is found to be automatically unfair is 24 months' remuneration in terms of s 194(2) of the LRA (para 27). The court frowned upon the employer's conduct and found the treatment of the applicant to be degrading and deeply offensive (para 27). According to Francis J the legislature further deemed it necessary to outlaw dismissals based on pregnancy or any reason related to pregnancy and declared that compensation to be awarded is double the compensation for ordinary dismissals (para 28). This factor must be taken into account when a court considers compensation for automatic unfair dismissals. To award compensation similar to that which is given for ordinary dismissals relating to misconduct or retrenchment would be defeating the purpose of sections 187(1)(e) and 194(2) of the LRA. The court did not agree with the argument that the applicant should only be awarded compensation from the date of her dismissal until the date she found other employment

and found it just and equitable to make and award of R60 000 (the equivalent of 20 months' remuneration (para 30).

4 Comments

4 1 Pregnancy, the right to maternity leave and unfair dismissal

Although the courts have attempted to interpret the phrase "any reason related to her pregnancy", its scope has now been tested in the courts. It is clear from the facts of the case and the manner in which the court came to its final conclusion that automatically unfair dismissals with regard to pregnancy as provided for in section 187(1)(e) are closely linked to the employee's rights in respect of maternity leave as provided for in sections 25 and 26 of the BCEA. In the circumstances of this case, the answer was plain. Every woman is accorded a right to four months' maternity leave, albeit unpaid. The purpose of such leave is clearly to enable the mother to look after the child for that period. While the applicant might not have been entitled to full pay beyond the period for which she had been granted leave, she nonetheless had a right to stay away from work (Jordaan *Juta's annual labour law update* (2008) 12). She could therefore not be dismissed for absenteeism and replaced. Ironically, a replacement was only found for the applicant four months after the birth of her twins. Had she been granted the extension there would have been no need for the matter to end up in court (para 22).

In *Mashava v Cuzen & Woods Attorneys* (2000) 21 *ILJ* (LC) 402) a probationary employee was dismissed on the grounds that she had delayed disclosing the fact of her pregnancy and that the trust relationship had broken down. Since there is no duty on an employee to inform her employer of her pregnancy other than for the purposes of the BCEA, Landman J found that the true reason for the applicant's dismissal was her pregnancy as well as reasons related to her pregnancy and that her dismissal was therefore automatically unfair (para 34). In *Ndlovu v Pather* 2006 *ILJ* 2671 (LC) the court found that the fact that the employee (a domestic worker) had complications with her pregnancy and needed to go to a clinic for check-ups twice a week resulted in her dismissal. She therefore did not resign but was dismissed for reasons related to her pregnancy. Her dismissal was accordingly automatically unfair (para 22). Automatically unfair dismissals with regard to pregnancy can also take the form of constructive dismissal as was the case in *Victor v Finro Cash and Carry* (2000) 21 *ILJ* 2489 (LC) where the employer had reduced the applicant's salary and changed her job after she told him that she was pregnant.

4 2 Discrimination based on pregnancy

Although the court did not directly refer to it, it is clear from the facts of the case and the findings of the court that discrimination on the basis of pregnancy was present. The court declared that even though it had sympathy for the position of the respondent employer in that two of its employees fell pregnant at the same time, its conduct was frowned upon. The court reiterated its disfavour of such discrimination by ordering compensation for 20 months' remuneration (para 28). The rights of women employees not be discriminated against because of pregnancy and maternity leave is enshrined in section 9(3) of the Constitution and section 6(1) of the Employment Equity Act of 1998 (EEA). Such rights are also derived from components of articles 5(d) and (e) of the ILO Convention 158 which deal with termination of employment. The Code of Good Practice on

Pregnancy (GN R1441 in *GG* 19453 of 13 November 1998) also prohibits discrimination on account of pregnancy (s 4.2).

A case for both automatically unfair dismissal and unfair discrimination was argued in *Wallace v Du Toit* 2006 (27) *ILJ* 1754 (LC). According to the employer it had been agreed that the applicant's employment would terminate if she fell pregnant. The court found no proof of this and added that, had such an agreement been entered into, it would have been unconstitutional. Although it cautioned against the duplication of claims, the court nevertheless awarded compensation for automatically unfair dismissal *as well as* damages in terms of the EEA (paras 20–21). When looking at the application of the principles in this case, it can be said with some certainty that the applicant in *De Beer* might have succeeded in a claim for damages on the ground of discrimination as well.

5 Conclusion

It is clear from the interpretations of the court that the facts and circumstances of each case will determine the scope of a woman employee's rights with regard to pregnancy, maternity leave and more specifically "any reason related to her pregnancy". The scope of such rights is given a wide meaning by the courts. What is the extent of these rights and what are the options available to the employer? It is interesting to note the remark made by Kuhlmann *Commentary on the Labour Relations Act* (2002) A8–55 where he notes that a last option of the employer might be to dismiss a pregnant employee and seek to persuade the court that she should be compensated only for the unfair dismissal. This option is according to Kuhlmann available to the employer because dismissal on the grounds of pregnancy is nowhere prohibited in the LRA – it is simply deemed to be automatically unfair (*ibid*). This could, however, leave the employer open to allegations of discrimination and a severe order pertaining to costs as well as the maximum prescribed compensation. As stated in *De Beer* (para 10), the resulting inconvenience to the employer is a price that has to be paid as part of social and legal recognition of the equal status of women in the workplace. Finally, "the purpose of protecting female employees from dismissal for reasons of pregnancy, intended pregnancy or any reason related to her pregnancy, is to ensure as far as possible that female employees are not disadvantaged, as they have traditionally been, by virtue of their being a woman and the child-bearing member of the human race" (*Mashava v Cuzen & Woods Attorneys* 2000 (21) *ILJ* para 14).

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