

SOUTH AFRICA / JUDGMENT

**Monawu v JDG Trading (Pty) Ltd t/a
Hi-Fi Corporation (JS613/08) [2014]
ZALCJHB 503 (8 December 2014)
[2014] ZALCJHB 503**

COURT

Labour Court Johannesburg

BEFORE

Lagrange

CASE / FILE NUMBER

JS613/08

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REPUBLIC OF SOUTH AFRICA

The Labour Court of South Africa,

In Johannesburg

Case no: JS 613/08

DATE: 08 DECEMBER 2014

Of Interest to Other Judges

In the matter between:

Lerato Portia Monawu.....Applicant

And

JDG TRADING (PTY) LTD T/A Hi-Fi Corporation.....Respondent

Delivered: 08 December 2014

Summary: (s 187(1) (e) – alleged dismissal for a reason related to pregnancy – necessary connection between reason for dismissal and pregnancy related condition not established – claim dismissed. Alternative claim of unfair dismissal for misconduct - unauthorised absenteeism referred to CCMA under s 158(2)(b) of LRA)

Judgment

LAGRANGE, J

Introduction

- [1] This matter concerns a claim by the applicant, Ms P Monawu, about her alleged automatically dismissal on account of a reason relating to her pregnancy in terms of s 187(1)
- (e) of the Labour Relations Act, 66 of 1995 ('the LRA'). The employer, Hi Fi Corporation, claims it dismissed Monawu, who worked as an administrative assistant for unauthorised absenteeism and not on account of her pregnancy or a pregnancy related reason. In the alternative, the applicant claimed that her dismissal for misconduct was substantively unfair, in the event that the Court found it had jurisdiction to determine this alternative claim. The parties did not agree that the Court could consider this claim if it did not find the applicant's dismissal automatically unfair.
- [2] The applicant asked for the maximum payment of compensation of two years' salary if she were successful.
- [3] Both parties were legally represented. The applicant testified herself. Ms P Neerachand, the respondent's HR manager, and Mr J Mothilal, the relevant branch manager at the time testified for the respondent.

Common Cause fact

- [4] The facts set out below were either common cause at the start of proceedings or emerged as common cause issues during the course of evidence being led.
- [5] The applicant, Ms LP Monawu ('Monawu') was dismissed on 29 May 2008 having started work in June 2005. The reason given for her dismissal was an authorised absenteeism.
- [6] The applicant was absent from work from 15 to 20 May 2008.
- [7] A telegram was sent by the firm to the applicant at 10:47 on 20 May 2008, to the address 3956, Rietvallei, Ext 213, Kagiso, 1754. It read:

"You have been absent from work from 15+05+2008 to 20+05+2008 and failed to contact us regarding your whereabouts and intensions. Please contact Jody Mothilal on 011768677 2 x 21+05+ sign 2008, by no later than 12 p.m. to notify us of your whereabouts or intentions. Failure to do so will result in your absence being viewed as an absconding."
- [8] Another telegram with the same content, except for referring to Monawu's failure to respond to the first telegram, was despatched on 21 May 2008 and a final one summoning her to a disciplinary enquiry on 27 May 2008 on account of her absenteeism was transmitted for delivery late on 22 May 2008.
- [9] The telegrams were received at the address provided by Monawu to the company as her address.
- [10] The applicant was pregnant at the time of her dismissal and the respondent was aware of this.

- [11] The maternity leave policy of the employer provided that the employee with at least one year's service was entitled to 6 months maternity leave, commencing one month before the expected date of birth and paid at a rate of one third of the employees monthly salary.

The material evidence

- [12] Monawu said she had difficulties with her pregnancy towards the end of 2007 and was in and out of work as a result. She claimed that one 'Sydney', whom she referred to as the service manager, and one 'Hoosain', the assistant branch manager, were aware of her condition.

- [13] Around 13 May 2008, Monawu claimed she sent an SMS to Sydney, who she believed was the branch manager, saying that she was very sick and that her doctor had booked her off. The doctor booked her off until the end of her pregnancy. She was adamant that Sydney was the branch manager and denied that Mothilal was the branch manager or that Hoosain was his assistant. Neerachand testified that Monawu had never mentioned the SMS. Mothilal testified that he was the branch manager at the time and Sidney was a service

technician. The service manager was someone he referred to simply as 'Jeffrey'.

- [14] Monawu said that the first time she thought she had handed in a medical certificate relating to her pregnancy was on 14 May 2008. The only medical document bearing this date is a referral letter from Dr M C Maharaj to another doctor thanking the doctor for seeing Monawu who at that stage was estimated to be 31 weeks pregnant.

- [15] Monawu also claimed that she had faxed doctor's certificate dated 28 May 2008 to the respondent. A fax transmission slip dated 28 May and bearing the time 12:20 5 pm was provided as evidence of this communication. Mothilal said that if he had got it before or during the hearing, it might have explained her whereabouts, but could only speculate about what had happened to the document and that it might have been discarded if it was sent to the service department. However, in any event, it was sent after the enquiry had already taken place. If that had been received before the enquiry "things might have been different" and later he

conceded "it would have been totally different".

- [16] On 28 May 2008 a colleague she worked with by the name of Gladys telephoned and asked Monawu how she was. Monawu told her she was 'not okay'. Gladys confirmed that she had received the medical certificate of the same date. This was the only call she had received from anyone at the firm, which did not contact her once during her absence. Later, under cross-examination, the applicant said it was Gladys who told her that she was dismissed, and when she spoke to Hoosain, she told him that she was not aware

she had been fired.

- [17] Monawu then said she asked to speak to Hoosain and asked if he received the medical letter, but she could not recall what he said except that he told her she had been sent telegrams and she was fired, but that she could appeal. She told him that she would come to work on 1 June if that was in order. Under cross-examination, she said that she first learnt of the telegrams when she spoke to Hoosain.
- [18] On the same day, Monawu said she received four telegrams when she visited her mother, who stayed at 3956 Rietvallei, between Krugersdorp and Randfontein. The telegrams had been thrown under the door of her mother's house, and her mother confirmed receiving "letters" when she asked her about the telegrams and told her she had been fired. Normally her mother would phone when telegrams were received. Previously she had lived at that address but had moved two blocks away after getting married. She did not explain why she had not notified the employer of her change of address, but obviously still considered her mother's house as her own address. Monawu could not explain why, given that she did not dispute she was close to her mother, her mother would not have told her about the letters earlier.
- [19] When Monawu was asked if she had contacted Mothilal as requested in the telegram of 21 May 2008, she said she had not because she was dealing with the branch manager.
- [20] Monawu has had the same cellphone number since 2005. She claimed that it was on in case she needed to phone her parents to go to hospital, and if the employer had either phoned or sent a message to her she would have got it. In particular, she denied receiving any such communication during the time she was absent.
- [21] When Monawu went to work on 1 June 2008, she met Neerachand, who worked at the employer's head office. Neerachand was there to hear her appeal. As she entered the store, Monawu handed in her medical certificates and Neerachand made copies of them. She claims that the medical certificates were the ones dated 14 and 28 to May 2008. Monawu conceded under cross-examination that when the disciplinary enquiry was held on 27 May 2008 in her absence, the chairperson of the enquiry could not have known about the medical

certificate that was only issued and faxed to the company the following day. Mothilal said that when he gave a copy of the outcome

of the disciplinary enquiry, Monawu had said she was ill and he had given her the appeal form.

- [22] Under cross-examination, Monawu claimed that she had mentioned the SMS she said she had sent to Sydney to Neerachand and Sydney was present when she did so. It was put to her under cross-examination that she had been present during the appeal hearing and could have called Sydney in to verify her claim about the SMS but did not. There was no response from Monawu to this question, except to say that she had spoken to Neerachand. Monawu maintained that Sydney was a service manager which was the same as an assistant

manager like Hoosain, and denied he was a technician. Mothilal denied ever being made aware of the alleged SMS to Sydney, but agreed he could not dispute Sydney might have received it.

[23] She was told that she would get an answer on her appeal which was postponed to 17 June 2008 but she never got a response from Neerachand who chaired the appeal hearing. She denied that Mothilal had given her the outcome of the disciplinary hearing on 28 May 2008, but could not explain how it came to be attached to her statement of claim. Mothilal insisted that he had given it to her when she came to work on 1 June 2008. It was also put to her that Neerachand was also on maternity leave and only returned on 2 June

2008, so she could not have spoken to her or given her the certificates on 1 June 2008. Neerachand confirmed that she had only

returned to work on 2 June and that she only worked on Mondays to Fridays so would not have come in on a Sunday.

[24] Monawu agreed that Neerachand had chaired the appeal hearing, but denied that at the appeal hearing she had told Neerachand she had medical certificates and that Neerachand had advised her to bring them. Neerachand claimed she had given Monawu seven days to bring in the certificates. Monawu was adamant that she had brought them in on 1 June and the person she made arrangements with for the appeal hearing had copied them. It was apparent during the later stage of her cross-examination, that Monawu was less certain that she gave the certificate to Neerachand when she came to work on 1 June 2008.

[25] Although she could not recall anyone complaining about the fact that she was pregnant or that she had any reason to say that the company had a problem with pregnant woman she believed the reason for her dismissal was her pregnancy. Monawu queried why there had been no outcome of the appeal hearing and suggested that she believed it was because the respondent realised that the medical certificates supported her claim as to why she was absent. Although it was not put to Monawu during cross-examination, Neerachand maintained that it was because she had waited for Monawu to provide the medical certificates but they were not forthcoming. Had the certificates been provided, the outcome would probably have been different because there would have been different facts before

her. As far as she was concerned, the dismissal was upheld because of the Monawu's unexplained absence. The company policy was that unexplained absenteeism was treated as abscondment after three days. Mothilal maintained that on the facts, she was dismissed for failing to report to the company about her whereabouts, which had nothing to do with pregnancy. Had she approached the respondent with a document motivating her taking maternity leave earlier that could have been entertained.

[26] Monawu agreed that the employer had previously granted her maternity leave and assisted her in obtaining UIF maternity benefits in 2006. The only reason she could think of why she had been dismissed on this occasion was that the manager was different. Monawu also agreed that prior to May 2008 there had been no issues when she had applied for sick leave,

but could not understand how the company could have dismissed her when she was about to have her child. At the time she returned to work on 1 June 2008, she was visibly pregnant and the expected date of birth was only two months away. Neerachand agreed this was the case, but the issue concerned her absence from work and not her pregnancy. Monawu had said she was not well and was ill, but never provided certificates despite been requested to do so she did not know if the illness was related to Monawu's pregnancy when she considered the appeal.

- [27] Neerachand could not really explain why she did not have notes of the appeal hearing or why there had been no transcript of the disciplinary enquiry held in absentia, but said that she had only been made aware of her involvement in the trial about a fortnight before trial and when she had left the employment of the respondent all the documents were in her company laptop. As far as she could recall she would have made a ruling on the appeal and emailed it to the relevant store and sent the documents to head office for filing, but she could not say what happened in this instance.

Evaluation

- [28] As pointed out in the respondent's heads of argument, two possible approaches have been adopted by the LAC in the case of *Kroukam v SA Airlink (Pty) Ltd*[1] to determine what an employee has to establish in order to succeed with a claim of automatically unfair dismissal. The one approach is that a dismissal will be found to be automatically unfair if the impermissible reason "nevertheless played a significant role in the decision to dismiss" even if the impermissible reason "did not constitute the principal or dominant" reason for the dismissal.[2] On the other approach, the employee must show whether the prohibited reason was "the 'main', or 'dominant', or 'approximate', or 'most likely' cause of the dismissal" to be determined by "what the most probable inference is that can be drawn from the established facts as a cause of the dismissal." [3] It has been suggested that the two approaches are indistinguishable and in *New Way Motor & Diesel Engineering (Pty) Ltd v Marland* [4] the LAC declined to adopt one approach in preference to the other.[5]
- [29] In this case, if I accept that it was a medical condition related to the applicant's pregnancy which resulted in her being absent from work, then in a trite sense it could be said that her dismissal was causally connected to her pregnancy because, if it were not for her pregnancy related condition, she would not have been absent from work and therefore would not have faced disciplinary action and dismissal. However, it is not sufficient that because she was dismissed for unauthorised absence and her pregnancy related condition might have explained her absence, that this means that her condition played a significant role in the decision to dismiss her.
- [30] On the evidence, it is sufficiently clear that even on her own version, the certificate that she relies on to explain her absence owing to her condition was only received by the employer after the disciplinary hearing in absentia had taken place, and after it decided that she should be dismissed for unauthorised absenteeism.

[31] The only other evidence that might support an inference that the employer was improperly motivated to a lesser or greater extent to dismiss her on account of her pregnancy or her condition relating to her pregnancy is if she had established that the SMS she alleges she sent to Sydney was probably sent and probably was made known to Mothilal, who had initiated the enquiry, or had been revealed in the enquiry itself. The only evidence we have of this SMS is the applicant's own word. I have difficulties in

accepting this at face value, quite apart from the absence of any independent circumstantial evidence confirming such an SMS was sent.

[32] Firstly, I am not persuaded that the person she most probably would have communicated about this was Sydney. Even on her own version, she had to argue that his status as a service manager effectively made him an assistant branch manager. Mothilal, who was the branch manager, disputed Monawu's view of Sydney's status and there was no dispute that there was designated assistant branch manager, referred to only as 'Hoosain'. There was also the applicant's own evidence that when she learnt of her

dismissal in absentia, the person she wanted to speak to at a managerial level was Hoosain and not Sydney.

[33] Further, there is also the evidence of Mothilal that he was never apprised of any SMS sent to Sydney, nor does there seem to be evidence supporting the contention that Monawu drew Neerachand's attention to the SMS. I am satisfied that, on a balance of probabilities Monawu did not send an SMS to Sydney. Even if she had, there is no evidence whatsoever to support an inference

that knowledge of such an SMS or its contents ever went beyond him and therefore could not have informed the decision to dismiss in a way that tainted it with an impermissible reason.

[34] In the circumstances, I am not satisfied the applicant succeeded in showing that her pregnancy or illness related to her pregnancy was a reason for her dismissal, even though it might well have been the reason for her absence from work. Accordingly, her claim for automatically unfair dismissal must fail.

Alternative claim

[35] As mentioned, the applicant claimed in the alternative that her dismissal for misconduct on account of unauthorised absenteeism was unfair. However, in the absence of an agreement between the parties that the Court may sit as an arbitrator on such an alternative claim in terms of s 158(2) (b) of the LRA, the Court is only empowered and is obliged to refer that dispute to the CCMA for arbitration of the alternative claim in terms of 158(2)(a) of the LRA. [6]

[36] The result might well be different in considering if it was substantively and procedurally fair to dismiss the applicant for unauthorised absenteeism.

Costs

[37] This is not a case in which I believe that the applicant was wilfully obstinate in pursuing a claim with no obviously no merit. Further, given the importance of the right she believed she was asserting, it would not be in the interests of justice or fairness to make a cost award against her.

Order

[38] The applicant's claim of automatically unfair dismissal in terms of s 187(1) (e) of the LRA is dismissed.

[39] The applicant's alternative claim of unfair dismissal for misconduct is referred to the CCMA for arbitration.

[40] No order of costs is made.

R LAGRANGE, J

Judge of the Labour Court

APPEARANCES

For the Applicant: N Maharaj of N Maharaj Attorneys

For the First Respondent: H Lee of Snyman Attorneys

[1]

(2005) 26 ILJ 2153 (LAC)

[2] At 2188, par [103], per Zondo JP

[3] At 2206-7, para [26] , per Davis, AJA

[4]

(2009) 30 ILJ 2875

[5] At 2882, para [22].

[6] See Solidarity obo Wehncke v Surf4cars (Pty) Ltd [2014] 7 BLLR 702 (LAC) at 709-710, paras [23]-[26].

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