

Gumede and Crimson Clover 17 (Pty) Ltd t/a Island Hotel (2017) 38 ILJ 702 (CCMA)

Award

Pillay, Commissioner:

Details of hearing and representation

[1] This arbitration hearing was set down for 11 December 2015 at the offices of the CCMA in Durban. The dispute remained part-heard and was concluded on 27 January 2016.

[2] The applicant, KhayelihleGumede, appeared in person and was unrepresented. The respondent was represented by MohilRamgovind, the operations manager.

Issue to be decided

[3] Whether the applicant was unfairly discriminated against by the respondent, and if so decided, to determine the appropriate relief to award.

Background to the issue

[4] The applicant commenced employment with the respondent in August 2011 and his services were terminated in September 2015. He was not employed for a few months in 2013 and was re-employed in October 2013. His period of service at the respondent was therefore broken.

[5] At the time of his alleged dismissal he was employed as a barman and earned R2,500 per month.

[6] I shall not deal with the issue of the alleged unfair dismissal because the applicant referred a separate dispute regarding that matter.

Survey of evidence and argument

Applicant's evidence

[7] The applicant testified under oath and the relevant aspects of his evidence are summarised below:

7.1 The applicant was consistently sworn at by the management. He was called a fat pig, told that he was stinking, and was asked 'how he could live with himself'.

7.2 On Monday, 14 September 2015, Messrs Ramgovind and Naidoo went to the applicant's room, which he shared with three other employees. They told the applicant that his clothes were stinking and that he should remove the clothes from the room. The applicant placed the clothes in a washing basket and left it outside the room.

7.3 The applicant was told that he was not required to work for the next five days and that he should return to work on Sunday 20 September 2015. The applicant left

his clothes behind and went to his home in Stanger. The applicant was not paid for the periods that he did not work.

7.4 The applicant returned to work on 20 September 2015 and his colleagues informed him that his clothes were kept in the gym. He went to the receiving area to fetch the gym key and met Mr Ramgovind who told him that his clothes were filthy and stinking and asked, 'How could you live with yourself?' The applicant was instructed to go to the cash-up area to meet Veni, the HR manager.

7.5 Veni gave the applicant a letter that stated that the applicant was untidy, unclean and did not follow the rules of the respondent. The letter also indicated that the applicant was dismissed with immediate effect. The applicant refused to sign the letter and Veni told him that she would arrange a meeting between the applicant and management but she did not revert to the applicant thereafter.

7.6 Ramgovind consistently swore at the applicant and used various vulgar terms towards him. The applicant disputed that the swearing was general and not directed specifically at him.

7.7 The room that the applicant and other workers occupied did have a bad odour but it was because the water from the shower flowed onto the mat. Further, the paint was peeling off and the room therefore had to be renovated.

7.8 The applicant sought compensation as relief.

Respondent's evidence

[8] Mr Ramgovind testified on behalf of the respondent and his evidence under oath is summarised below:

8.1 The applicant was reprimanded many times in respect of his attire, conduct, hygiene and cleanliness.

8.2 The customers complained to Ramgovind that the applicant was smelly and untidy and they did not want to be served by him. The name of one specific customer was Roland Gerhard, who was a regular patron.

8.3 Ramgovind informed the applicant of the complaint the following day but he did not give the name of the complainant to the applicant. Ramgovind initially indicated that the applicant should have known who the complainant was but subsequently indicated that he did not want to embarrass the applicant by mentioning the name of the complainant.

8.4 The applicant lived on the premises and therefore should have had a bath twice per day as he handled food and beverages. This was not done by the applicant. He did not request permission to go back to his room to bath when he perspired. The witness conceded that there were two air conditioners in the bar in which the applicant worked. He indicated that the air conditioners were not working for a long time and that they were not very effective when the door to the bar was open.

8.5 The applicant was notified of the bad odour on many occasions during cash-ups. He was advised to wash his takkies and not to wear over-powering deodorants. During cross-examination Ramgovind explained that the applicant did not actually wear deodorant, and he advised the applicant to wear deodorant, but not over-powering ones, as it would affect the aroma of food.

8.6 When Ramgovind joined the respondent in January 2013, the applicant was not in the employ of the respondent. He was thereafter employed on a casual basis.

8.7 On 20 September 2015, the applicant returned to work after a week of 'being off'. The witness met the applicant and asked him to see the HR manager. Ramgovind, the HR manager and the applicant met in the cash-up office. The purpose of the meeting was to explain to the applicant why the respondent could not allow the applicant to continue working and that the applicant could return when he 'got his act together' in respect of the respondent's code of conduct and the applicant's personal hygiene. The applicant was given a letter which stated as follows:

*'To: KhayaGumede
Re: Code of conduct and personal hygiene*

You have been warned on many occasions regarding code of conduct with customers and guests that you serve and interact with at the Island Hotel and it has been brought to the attention of all the managers that you have disrespected some of the patrons.

This has resulted in the customers/guests not returning to Island Hotel especially those that you annoyed and are paying guests at our hotel.

Another important issue is that the customers and staff at the hotel find your personal hygiene to be affecting them. You have been given accommodation on condition that you keep the place clean and tidy at all times as you share the room with others. You have failed to do so.

It seems that you do not wash your clothes but leave them in a heap lying around and wear the same clothes that have a bad odour. It has also been discovered that the room which you share with other staff members had to be cleaned, painted and aired due to you leaving your dirty laundry lying around causing the room to have a bad odour and it was found that you lack neatness and keep the place very untidy.

You are requested to remove all your dirty belongings and improve on your conduct and personal hygiene.'

8.8 The witness added that when they visited the applicant's room they found bits of food lying under the beds, etc. The room was shared with other employees therefore Ramgovind could not be sure exactly who threw the bits of food on the floor. The clothes heaped on the floor had a bad odour but he could not be certain to whom the bundle of clothes belonged.

8.9 Some of the clothes did belong to the applicant as they were kept in a basket in the gym when the applicant was off.

8.10 It was not true that the bad odour in the room emanated from the water seeping out of the shower onto the mats. The odour was caused by the smelly takkies, dirty clothes and the food under the beds. This led Ramgovind to explain to the applicant that he should be neat and keep the place clean.

8.11 On 20 September 2015, Ramgovind confirmed with the applicant that he understood the contents of the letter. The applicant was instructed to remove his clothes from the gym as the living quarters were being renovated by the respondent. The applicant was informed that the respondent would call him and tell him when he should return to work.

8.12 The applicant was not dismissed by the respondent and he was free to return to work. The witness conceded that no other employee was given a letter similar to the letter referred to in para 8.7 above.

Analysis of evidence and argument

[9] It is the applicant's case that the conduct of Mr Ramgovind, in calling him unclean, smelly, untidy and having a bad odour, constituted unfair discrimination. Although not clearly articulated by the applicant, it was evident that he believed that this constituted discrimination on an arbitrary ground.

[10] The respondent denied unfairly discriminating against the applicant. It was the respondent's case that the applicant lacked good personal hygiene, which was a requirement as the applicant served food and beverages to patrons.

[11] Based on Ramgovind's evidence and the letter issued by the respondent to the applicant, I have no doubt that the respondent regarded the applicant as a person of poor personal hygiene, dirty and smelly. The respondent was not merely articulating the complaint from Roland Gerhard.

[12] In any event, it is doubtful whether Mr Gerhard did actually state that he did not want to be served by the applicant. Mr Gerhard was not called to testify and the applicant indicated that he had the telephone number of Mr Gerhard on his mobile phone and he was always handsomely tipped by Mr Gerhard (up to R200) for his service. It is unlikely that a person who is unhappy with the service would give a gratuity or tip of R200 to the person providing the service. I am inclined to agree with the applicant on this point.

[13] By the respondent's own admission, the room occupied by the applicant was occupied by other employees as well. The respondent did not know whose clothes were heaped on the floor or who was responsible for the bits of food that caused the bad odour, but the respondent blamed the applicant. None of the other employees were given a letter that alleged poor hygiene on their part.

[14] The respondent seemed to suggest that perspiring whilst on duty was offensive and that the applicant should have requested time off to go to his room and shower. The applicant indicated that he jogged on the beach in the mornings and he had a shower thereafter. He used deodorant after he showered and thereafter went to work. He did not believe that he smelled or was unhygienic in any way. The bar had two air conditioners and therefore he did not perspire whilst on duty.

[15] On the issue of the room being dirty, it was not disputed that the applicant and others had to remove their belongings as the respondent needed to renovate the room. The letter issued to the applicant stated, inter alia, that 'the room which you share with other staff members had to be cleaned, painted and aired due to you leaving your dirty laundry lying around causing the room to have a bad odour and it was found that you lack neatness and keep the place very untidy'. I do not believe that dirty laundry in a room warrants repainting. It is more probable that the paint was peeling off hence the room had to be repainted, which accords with the applicant's version. Further, it is not uncommon for water to seep out of a shower and wet mats would cause a bad odour that necessitated the airing of the room. I therefore find the applicant's version more probable. The respondent's version was contradictory in that the letter stated that the clothes belonged to the applicant whilst the oral evidence was that Ramgovind was not sure whether the clothes belonged to the applicant or one of the others.

[16] I have no doubt that the treatment meted out to the applicant was insulting and offended his dignity as a human being. It is deeply humiliating for any person to be called unclean, smelly and untidy.

[17] In order to prove unfair discrimination on an arbitrary ground, s 11(2) of the Employment Equity Act 55 of 1998 (EEA) provides as follows:

'If unfair discrimination is alleged on an arbitrary ground, the complainant must prove, on a balance of probabilities, that —

- (a) the conduct complained of is not rational;
- (b) the conduct complained of amounts to discrimination; and
- (c) the discrimination is unfair.'

[18] On the issue of the rationality of the respondent's conduct towards the applicant, I believe that the respondent's conduct was irrational as the untidiness in the room was attributed to the applicant only. Other employees shared the accommodation with the applicant but were absolved of liability although the respondent was unable to determine who was responsible for the untidiness. The respondent failed to provide a rational explanation for not issuing similar letters to the other employees that shared the room.

[19] Even if the air conditioning in the bar was defective or ineffective, I do not believe that having two showers per day would prevent the applicant from perspiring. The humidity in Durban is generally very high and unless there is effective air conditioning, a person may perspire a few minutes after taking a shower. The suggestion that perspiring whilst on duty was unhygienic is not rational. Having disposable towels to dry oneself should be sufficient. In any event, the applicant's evidence was that the air conditioners worked well and that he did not perspire. Besides making a general statement that the applicant perspired, the respondent

was not able to provide specific dates, times or instances where the applicant perspired and caused prejudice to the respondent.

[20] The respondent also complained about the applicant's attire and conduct towards customers. If the respondent believed that the applicant breached the respondent's code of conduct, the respondent could have disciplined the applicant in terms of its disciplinary policy. There is no rational explanation for the respondent's failure to charge the applicant in terms of its disciplinary code. Instead it decided to insult and humiliate the applicant by referring to him as unclean, dirty and smelly.

[21] On the issue of whether the conduct of the respondent constituted discrimination, it is noted that discrimination is not defined in the EEA. I am therefore guided by the definition of discrimination in s 1 of the Promotion of Equality and the Prevention of Unfair Discrimination Act 4 of 2000 (PEPUDA). Both the EEA and PEPUDA emanate from, and provide content to, s 9 of the Constitution of the Republic of South Africa. I therefore believe that it would be appropriate to be guided by the definition in PEPUDA, which provides that 'discrimination' means as follows: 'Any act or omission, including a policy, law, rule, practice, condition or situation which directly or indirectly —

- (a) imposes burdens, obligations or disadvantage on; or,
 - (b) withholds benefits, opportunities or advantages from,
- any person on one or more of the prohibited grounds.'

[22] The humiliation and indignity of being called unclean or smelly clearly imposes a burden on the applicant and disadvantages him when compared to the other employees that shared the room with him. The letter issued to the applicant states that: 'You have been given accommodation on condition that you keep the place clean and tidy at all times as you share the room with others. You have failed to do so.' This allegation suggests that the applicant was inconsiderate towards his roommates in failing to keep the room clean. Strangely though, the roommates were not called to give evidence on whether the applicant was unclean or whether they were offended by having him as a roommate.

[23] The grounds on which unfair discrimination is prohibited are listed in s 6(1) of the EEA, as amended, and include 'race, gender, sex, ... or any other arbitrary ground'. I believe that the applicant was being victimised by the respondent on arbitrary grounds, being allegations of perspiring whilst on duty, having a bad body odour, and having poor personal hygiene. These are judgmental statements that undoubtedly impaired the dignity of the applicant and demeaned his worth as a human being.

[24] The other employees that shared the room with the applicant were not judged in a similar manner by the respondent. There is no evidence that their perspiration, body odour or personal hygiene were measured by the respondent. The issuing of the offensive letter to the applicant and the derogatory remarks directed towards him constituted arbitrary action against the applicant. I therefore find that the conduct of the respondent constituted discrimination in terms of the definition above.

[25] The next enquiry is whether the discrimination was unfair.

[26] As explained above, the applicant shared the room with other employees, none of whom were treated in the same manner. They were not issued with letters suggesting that they were unclean or that they practiced poor personal hygiene. Judging the applicant adversely on the basis of perspiration and body odour is discriminatory and, as none of the others were subjected to the same treatment, such discrimination was unfair towards the applicant. Besides, the respondent failed to prove that the applicant practised poor personal hygiene or that management could justifiably arrive at such a conclusion.

[27] In terms of s 11 of the EEA, I believe that the applicant has proved, on a balance of probability, that the respondent unfairly discriminated against him.

[28] Section 60 of the EEA on 'Liability of Employers' provides as follows:

'(1) If it is alleged that an employee, while at work, contravened a provision of this Act, or engaged in any conduct that, if engaged in by the employee's 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 that provision.

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

In the present matter the letter that was issued to the applicant was issued on the respondent's letterhead by the respondent's HR manager. Mr Ramgovind, the operations manager, confirmed that he reprimanded the applicant on many occasions due to the applicant being unhygienic. I therefore believe that the respondent must be held accountable for the unfair discrimination perpetrated against the applicant by Mr Ramgovind, one of its most senior employees.

[29] Insofar as relief is concerned, the applicant requested compensation as relief for the unfair discrimination and I am enjoined to grant compensation that is just and equitable in the circumstances. I believe that compensation of R15,000 would be just and equitable for the following reasons:

29.1 The applicant has pursued a separate claim related to unfair dismissal.

29.2 Unfair discrimination and prejudice are evils that must be eradicated from our society and respect for human dignity must be restored.

29.3 I have no doubt that the applicant felt deeply offended as his worth as a human being was deliberately demeaned by the respondent.

Award

[30] In the circumstances I make the following award:

30.1 The respondent, Crimson Clover 17 (Pty) Ltd t/a Island Hotel, unfairly discriminated against the applicant, KhayelihleGumede.

30.2 The respondent, Crimson Clover 17 (Pty) Ltd t/a Island Hotel, is ordered to pay the applicant, KhayelihleGumede, an amount of R15,000 as compensation for the unfair discrimination.

30.3 The abovementioned amount is to be paid to the applicant within 14 days of the respondent being informed of this award.

30.4 There is no order as to costs.