

Ngwabe and Imvula Quality Protection (Pty) Ltd (2017) 38 ILJ 724 (CCMA)

Judgment

Jenkin, Commissioner:

Details of hearing and representation

[1] In this case, Sithembiso Patrick Ngwabe (the applicant) alleged that he had been unfairly discriminated against by Imvula Quality Protection (Pty) Ltd (the respondent) on the grounds of disability. The arbitration was held in Pietermaritzburg on 11 October 2016. The applicant was present and represented himself. The respondent was represented by Mr K KShinga, the human resources manager.

[2] The applicant gave evidence, as did Ms Nokululeko Kunene, an administration officer employed by the respondent.

Issue to be decided

[3] Is the respondent liable for the alleged unfair discrimination visited on the applicant by its operations manager, Jason Munsamy. If so, what is the appropriate remedy?

Background to the issue

[4] It is common cause, alternatively it was undisputed, that:

4.1 The applicant is employed by the respondent as a sector manager. His duties include deploying security guards at their sites. He happens to have only one eye.

4.2 The respondent is a Durban based security company which also has guarding contracts in and around Pietermaritzburg.

4.3 Some time ago, Mrs Moodley, the managing director, created a management 'WhatsApp' chat group for members of management to use to communicate with one another about work matters. The applicant is a member of this Pietermaritzburg chat group and therefore has sight of messages sent out by the various members of the group.

4.4 On 29 June 2016, in response to a message put out to the group by Mrs Moodley, Jason Munsamy (one of the respondent's operations managers) called/described the applicant as 'one eye'.

4.5 The applicant took offence to being so described, instead of being referred to by name. He showed the message from Munsamy to other workers. On 4 July 2016 the applicant lodged an internal grievance against Munsamy. The respondent convened a grievance meeting on 15 July 2016 which was attended by K KShinga (HR manager), J Munsamy, N Kunene (admin officer) and the applicant. At that meeting, Munsamy apologised to the applicant and admitted that he was wrong in doing what he did. The applicant refused to accept Munsamy's apology.

4.6 On 18 July 2016, following the grievance meeting, Shinga issued Munsamy with a written warning for his conduct (making improper remarks).

4.7 The applicant referred a dispute to the CCMA on 15 August 2016 claiming that he had been subjected to unfair discrimination.

[5] The applicant's main contentions were that:

5.1 He performs his work diligently, has been in the respondent's service since 2001, and does not request any assistance due to his disability.

5.2 He was hurt by Munsamy calling him 'one eye' and is to this day traumatised by it. Munsamy has made a mockery of him to other workers.

5.3 He wants Munsamy or the respondent to compensate him in the amount of R500,000. He will not forgive Munsamy.

[6] The respondent's main contentions were that:

6.1 The respondent has a policy in respect of unfair discrimination and does not condone discriminatory conduct.

6.2 Munsamy's utterance was not malicious. He was describing the applicant to Mrs Moodley, as she does not know the applicant by name.

6.3 Munsamy has apologised to the applicant and has been disciplined for his conduct. The respondent has taken the appropriate action in the circumstances. There is no basis for the applicant's claim.

Analysis

[7] Chapter 2 of the Employment Equity Act 55 of 1998 (the EEA) prohibits unfair discrimination in the workplace. Sections 5 and 6 are of particular relevance. Section 6(1) in broad terms provides that no person may unfairly discriminate, directly or indirectly, against an employee, in any employment policy or practice, on a listed or arbitrary ground.

[8] Section 11 of the EEA sets out the burden of proof arising from disputes of alleged unfair discrimination. Where unfair discrimination is alleged on a ground listed in s 6(1), as is this case, the employer against which the allegation is made must prove, on a balance of probabilities, that such discrimination did not take place as alleged, or is rational and not unfair, or is otherwise justifiable.

[9] Section 60 deals with the liability of employers for contraventions of provisions of the EEA and provides, inter alia, that employers can be held liable for the conduct of employees whose conduct contravenes a provision of the EEA, if the employer fails to take the necessary steps to eliminate such conduct.

[10] From the evidence of what is largely a common cause set of facts, I am not convinced that Munsamy's conduct, by referring to the applicant as 'one eye' to identify him for Ms Moodley, or as a joke in bad taste, constitutes unfair discrimination in its generally accepted sense (unfavourable treatment based on prejudice) or in any employment practice/policy, or that it has led to an impairment of his fundamental human dignity.

[11] While Munsamy's conduct was undoubtedly insensitive and inappropriate and justified sanction by the respondent, the applicant's subjective sense of indignation cannot, in my view, attract an award of compensation in the amount of R500,000 or any other amount. His personal trauma arose primarily as a result of his own actions in broadcasting the slight to other workers.

[12] On the evidence of Kunene, admitted by the applicant, and the unchallenged minutes of the grievance meeting presented by her, Munsamy twice offered what appears to be a genuine apology to the applicant. Whether he accepted it or not is beside the point.

[13] Even if it can be construed that Munsamy's conduct contained a mild form of discrimination, by convening a grievance hearing and issuing Munsamy with a written warning, the respondent has, in my view, taken the necessary steps to eliminate the conduct complained of and can therefore not be held liable for it.

Award

[14] The applicant's claim for compensation from the respondent, for the alleged act of unfair discrimination visited on him by operations manager, Jason Munsamy, is dismissed.