



Collaboration Space / UCT Equality Law Database / 2011

# BIGGAR v CITY OF JOHANNESBURG, EMERGENCY MANAGEMENT SERVICES

Created by Jenny Erasmus [Administrator], last modified on Jul 18, 2013



YEAR: 2011

PLAINTIFF / APPLICANT / APPELLANT: APPLICANT: VICTOR BIGGAR

DEFENDANT / RESPONDENT: RESPONDENT: CITY OF JOHANNESBURG, EMERGENCY MANAGEMENT SERVICES

COURT: LABOUR COURT

CITATION: (2011) 6 BLLR 557 (LC)

POST / PRIOR ACTION:

JUDGE(S): LAGRANGE

GROUND(S) OF DISCRIMINATION: RACE

## STATEMENT OF FACTS:

The applicant was a black employee of the respondent. The applicant and his family lived in a fire station residential complex near the fire station with other colleagues and their families. On several occasions the applicant reported to the respondent cases of racial harassment against him and his family by his white colleagues and their families. In one instances the perpetrators were reprimanded by the respondent's director of operation. In no instances was any action taken against the perpetrators. In some instances the harassment was of a violent nature. In January 2007 a violent fight enraptured following the violent harassment of the applicant's son by the applicant's white colleagues. One of the white colleagues incurred a minor knife injury inflicted by the applicant. The applicant alleged he was defending himself as the injured colleague had beaten him with a sjambok. From the facts it appears all instances of racial harassment occurred within the complex. Following the fight the applicant requested a transfer to which the respondent did not respond. The evidence did not shed light as to why the applicant was not transferred.

Following the 2007 fight, the applicant was charged by the respondent with fighting with his colleagues and "bringing the reputation of the employer into disrepute." No charges were brought against the white employers involved in the fight. He was later also charged with misconduct. Following a disciplinary hearing he was charged with fighting with his colleagues. He was issued with a warning. Prior to the disciplinary hearing criminal charges were brought against the applicant and his sons involved in the 2007 fight. They were acquitted of all charges and the magistrate noted and criticized the conduct of the respondent and the white colleagues.

The applicant alleges that the respondent in failing to take adequate steps to prevent him from being subject to racial harassment by certain employees within the fire station complex constitutes unfair discrimination in terms of 6 (1) of the Employment Equity Act 55 of 1998 ("EEA"). The applicant sought an order that he be transferred to another department, and that he be compensated.

The respondent failed to defend the action and the matter was enrolled as a default judgment on the unopposed role. Accordingly the court relied on the evidence relayed by the applicant. The court noted its dismay at the respondent's failure to engage in the dispute.

## ISSUE OF LAW:

Whether an employee is responsible for the actions of its employees outside of working hours but within the confines of a communal living area provided by the employer?

Whether the employer failed to take adequate steps to address the racial harassment of the applicant?

## DECISION, RATIO AND OUTCOME (including minority judgment):

The court noted ss 6(1) and (3) and 60 of the EEA.

The court accepted that based on the applicant's evidence that the complained of conduct amounted to unfair racial discrimination. The respondent had unfairly discrimination against the applicant by failing to take the necessary steps to prevent the applicant from being the victim of racial harassment by certain employees who resided in the same living complex at the work premises of the respondent.

#### *Respondent's Conduct*

It was found that the respondent's action in addressing the applicant complaints was ad hoc and inconclusive. The respondent failed to take action that would permanently counter, prevent or alleviate the discriminatory conduct. The respondent's conduct reflected a one-sided approach in that it only pursued charges against the applicant following the 2007 fight.

#### *Conduct of employees occurring within the communal living complex outside of working hours*

Despite the harassment occurring outside of the actual workplace and outside of working hours, the court held the employer was responsible for conduct of its employees committed at the "common residential premises provided by the employer and attached to their workplace..." To find otherwise would be an "extraordinary narrow interpretation" of s 6 of the EEA. It noted that the labour courts have acknowledged that an employer can pursue disciplinary action against an employee "for conduct committed outside the workplace if it has a bearing on the employment relationship." On the facts the hostile relationship between the applicant and the white colleagues could adversely affect their working relationship in emergency situations. The residents of the employees in the communal complex was directly linked to their employment relationship. The respondent's action against the applicant reflected its knowledge that it was permitted to take action and deal with disputes within the complex. The court found the the communal living arrangements was so closely linked to their employment that the complex was an extension of the workplace despite the employees being off duty. Therefore the conduct of the relevant employees were regarded as being conducted as if occurred within the actual work premises. Accordingly the respondent was responsible for taking the necessary steps to address the applicant complaints, which its failed to do.

#### *Remedy*

The court referred to s 50(2) of the EEA.

The court found it appropriate to formulate a tailored order. It noted the difficulties in its approach due to the respondent's neglect to defend the matter. It noted that its order must compel the respondent's adherence to its established procedures in dealing with grievances of such a nature. Furthermore the applicant was entitled to compensation for the prolonged racial discrimination and the respondent's selective disciplinary action.

It ordered:-

- one month's remuneration per year that the applicant was subjected to racial discrimination - namely for 2006 and 2007;
- one month's remuneration for the respondent's selective disciplinary action against the applicant;
- that the respondent investigate a suitable post to which to transfer the applicant;
- that the respondent investigate any new complaint of alleged sexual harassment within the concerned complex, and initiate the necessary disciplinary action against all alleged perpetrators;
- that the respondent institute disciplinary action against all employees involved in violent conduct; and
- the respondent to pay the applicant's costs.

LINK TO FULL DECISION:     <http://www.saflii.org/za/cases/ZALCJHB/2011/5.html>

LABELS: