



Collaboration Space / UCT Equality Law Database / 2012

MAKOTI v JESUIT REFUGEE SERVICE SOUTH AFRICA

Created by Jenny Erasmus [Administrator], last modified on Jul 29, 2013

YEAR: 2012PLAINTIFF / APPLICANT / APPELLANT: APPLICANT: MMATSHWANA EMMA MAKOTIDEFENDANT / RESPONDENT: RESPONDENT: JESUIT REFUGEE SERVICE SOUTH AFRICACOURT: LABOUR COURTCITATION: (2012) 33 ILJ 1706 (LC)POST / PRIOR ACTION: CCMAJUDGE(S): LAGRANGEGROUND(S) OF DISCRIMINATION: SEXUAL HARASSMENT, GENDERSTATEMENT OF FACTS:

The applicant was a former female employee of the respondent. She was employed on an annual fixed term contract ending in December of each year. The renewal of the contract was dependent on funding as the respondent was a non-profit organisation. She had been in the employ of the respondent since 2004.

In December 208 the applicant was dismissed. She alleged that her dismissal was automatically unfair, alternatively procedural and substantively unfair. In addition she alleged that she "suffered unfair discrimination in terms of section 50(1 (d) and (e) of the Employment Equity Act." The applicant argued that her dismissal was a result of a her "...not acceding to the alleged sexual advances of the respondent's national director at the time..." The alleged perpetrator of the sexual harassment had, prior to this matter being heard, left the employ of the respondent, and was unable to be traced. The applicant alleged that the respondent's former national director had made repeated sexual advances towards her. She had repeatedly rejected such advances. The respondent's code of conduct required that instances of sexual harassment must be reported. Despite the applicant's knowledge of such code she elected not to report the advances. She believed she had control of the situation, and could not have anticipated the consequences thereof. Following the final instance of alleged sexual harassment which she rebuffed the applicant testified that the former national director's behaviour towards her changed.

She was advised in the December of 2008 that her contract would not be renewed due to her poor performance. This was the first occasion in which her alleged poor performance had been raised. Following the termination of her contract the applicant raised the occurrence of the alleged sexual harassment. The respondent did not respond to these allegations, nor did the evidence reflect that the claims were investigated.

ISSUE OF LAW:

Was the applicant dismissed? If so was the dismissal automatically unfair?

Did the facts of the case permit an award of damages under the Employment Equity Act 55 of 1998 (EEA)?

DECISION, RATIO AND OUTCOME (including minority judgment):

The court found that the applicant had been dismissed due to her rejection of the formal national director's sexual advances, and such dismissal was automatically unfair. As a result of her automatically unfair dismissal the applicant was awarded compensation in terms of the Labour Relations Act 66 of 1995 (LRA). No compensation was awarded in terms of s 50(2) of the EEA.

The court found that on the facts the applicant had a reasonable expectation to have her contract of employment renewed. For 4 consecutive years her contract had been renewed. At no time was a performance assessment a pre-requisite for the renewal. There was no evidence presented that the applicant could have construed as evidencing the possibility of the non-renewal of her contract. As such the failure to renew the contract amounted to a dismissal in terms of s 186(1) of the LRA.

The dismissal was held to be automatically unfair. The court accepted the applicant's account of the alleged sexual harassment. The applicant's rejection of such advances "was the proximate cause of her dismissal." The court accepted the applicant's rationale for not reporting the sexual harassment as and when it occurred. A fellow colleague was able to corroborate instances of sexual harassment which the applicant had conveyed to her. The evidence reflected that following the last instance of sexual harassment and the applicant's rejection of such advances, the former national director's interaction and behaviour changed towards the applicant. The court noted that the former national director had failed to advise her of a vacancy for which she was suitable, and he had co-signed the letter stating that her non-renewal was due to her poor performance. The issue of poor performance was only brought to the applicant's attention prior to the renewal of her contract, and there were no attempts to rectify the alleged poor performance - facts such as the latter suggested an element of bad faith underlying the basis of the applicant's dismissal. No evidence was presented by the respondent to prove the alleged poor performance of the applicant. The evidence reflected that the former national director's opinion played a decisive role in the non-renewal of the applicant's contract. The most plausible explanation for the applicant's dismissal was her rejection of the former national director's sexual advances. Accordingly the applicant was unfairly discriminated against within the meaning of s 187 (1)(f) of the LRA, read with s 6 (3) of the EEA.

In assessing the applicant's relief the court noted that the applicant had secured new employment within two months of her dismissal. In assessing the amount of compensation for an automatically unfair dismissal, the court referred to the Labour Court decision of *Christian v Colliers Properties* - the extent of actual financial loss due to an automatically unfair dismissal does not limit the award of compensation. The court further considered that the respondent was reliant on donor funding and its role in servicing a vulnerable section of the community. It noted the respondent's failure to address the allegations of sexual harassment prior to litigation. Accordingly the applicant was awarded eight months remuneration as compensation for her automatically unfair dismissal.

The respondent was held to not be liable for a claim of damages in respect of s 50(2) of the EEA. While the court did not condone the actions of the former national director, and despite acknowledging the applicant's rationale for not reporting the sexual harassment as and when it occurred, it regarded it as "unduly onerous" to impose such a compensatory order in respect of sexual harassment "when it [the respondent] could not have reasonably anticipated the director's actions, nor could it be said that it had any opportunity to address his conduct at the time."

The respondent was ordered to pay the applicant's costs.

LINK TO FULL DECISION: <http://www.saflii.org/za/cases/ZALCJHB/2011/122.html>

LABELS: