Moatswi and Another v Fencing Centre (Pty) Ltd (2004) AHRLR 131 (BwIC 2002)

Gadifele Moatswi and Mmametsi Kgaswane v Fencing Centre (Pty) Ltd

Industrial Court, Gaborone, 7 March 2002

Judge: Ebrahim-Carstens

Previously reported: 2002 (1) BLR 262 (IC)

Women's employment terminated on the basis of their sex

Work (termination of employment, 6, 7; fair procedure, 7, 8, 38-40)

Interpretation (international standards, 6, 12, 20-24)

Equality, non-discrimination (discrimination on the grounds of sex, 10, 13, 28, 37, 38-40; direct discrimination, 15; indirect discrimination, 16; permissible discrimination 29-31, 34-36)

Ebrahim-Carstens J

[1.] The applicants in this case, Gadifele Moatswi and Mmametsi Kgaswane, were two of the last in a group of four women to be dismissed by the respondent following a series of dismissals of various groups of women employees on diverse dates. The women were all dismissed on the same written grounds, as were the two applicants who were handed termination letters on 29 November 1999 as follows:

We have realised that all our work in each department is very heavy and is not recommended for women. They cannot load or work late night shift. So we have no alternative but to terminate your service. You are given two (2) weeks notice starting from 29.11.99 to 10.12.99. Thank you. Yours faithfully R Barnes Managing Director

[2.] The respondent's statement of defence as well stipulates as follows:

We have always employed a small number of ladies at our business and we have made a trial to increase the number of female employees. This we did in good faith and they worked for us for some length of time. Unfortunately we discovered that the situation was not suitable - not for the ladies, neither for ourselves. On many occasions we needed extra hands to load trucks and we could not use ladies to do this. Other times we had to work late into the evening to finish a particular order, and we could not allow the ladies to work late being wives and mothers. We have kept the original number of female employees that worked from the beginning of the operation. All new ladies have been given written notice, paid leave and notice pay and paid-off.

[3.] The applicants testified that there were two shifts operational: the first shift was 7 am to 3 pm; and the second shift was from 3 pm to 11 pm. They said they had only ever worked the night shift on one occasion for a week, they had no complaints regarding working night shift. With regard to loading the vehicles, the applicants testified that they were not in the loading section. They said that they weaved and bundled fencing gates and the men would take them for painting and loading. They were never requested to assist with the loading.

[4.] The applicants testified that they were never consulted prior to the termination of their contracts of employment. They were simply handed the termination letters by one Monica who worked in the office. They were never given the option to make the choice between dismissal or

loading and working night shift. They said the employer unilaterally decided that they were unable to work on its own grounds.

[5.] Mr A Mogotsi, the human resources manager, appeared for the respondent. He advised the Court that the respondent was not calling any witnesses or placing any evidence before the Court. He was unfamiliar with the facts as he had only recently joined the company. His instructions were to the effect that the contracts of employment of the women had been terminated for operational reasons when the women were retrenched.

Substantive and procedural fairness

[6.] The employment of a worker shall not be terminated unless there is a valid reason for such termination connected with the capacity or conduct of the worker, or based on the operational requirements of the employer. (See article 4 of the Termination of Employment Convention, ILO Convention 158 of 1982.) Before the employment of a worker is terminated for reasons related to her conduct or performance, she must be provided with an opportunity to defend herself against allegations made. (See article 7 of the aforesaid ILO Convention 158 of 1982.) Furthermore, when an employer contemplates termination for operational reasons of an economic, technological structural or similar nature, the employer must engage in consultations with the workers or the workers representatives. (See article 13 of the Termination of Employment Convention 158 of 1982.)

[7.] This means that there must be a valid reason for the termination of the contract of employment of an employee, and that a fair procedure must be followed prior to such termination.

[8.] On hearing the evidence, Mr Mogotsi readily conceded that the applicants had no say in the decision made by management and that there was no procedural fairness regarding the termination of the contracts of employment of the two applicants. The Court accepts that there was no hearing or consultation prior to the termination of the contracts of employment. The termination of the applicants' contracts of employment was therefore procedurally unfair.

[9.] Even though the respondent did not follow the correct procedure, was it justified in terminating the contracts of employment of the applicants for the reasons stated in the

termination letters and the respondent's statement of defence? Since there is no evidence from the respondent, the findings and determination of this Court are based solely on the evidence of the applicants and the documentary evidence before the Court. From this, it appears that the respondent dismissed the applicants for reasons of alleged incapacity related to their gender and / or for operational reasons. The respondent contends that the termination was necessitated for operational reasons on the grounds that 'the situation was not suitable - nor for the ladies neither for ourselves'.

[10.] The Court finds that the respondent is skirting the issue as there is no evidence to support the contention that the terminations were based on the operational requirements of the respondent. In the absence of any testimony from the respondent, the Court finds that there is nothing to justify that the situation was economically or otherwise not suitable for the company. In the circumstances, the Court rejects outright the submission that the applicants were retrenched. The applicants were dismissed for their alleged incapacity or disability to perform the loading of the trucks and to work late night shifts simply because they are females.

Discrimination

[11.] The respondent avers that the termination of the contracts of employment was not mala fide and was necessary on the grounds of the incapacity or disability of the applicants because of their gender. Mr Kesiilwe on behalf of the applicants submitted that this was tantamount to discrimination because the applicants had been discriminated against on the basis of their gender.

[12.] In days of yore, in terms of the common law principle of freedom of contract, an employer was free to employ or refuse to employ anyone for whatever reason he wished, including reasons based on the sex or race of that person. Such a proposition nowadays is no longer considered good dogma and offends most people's sense of fairness. The law has intervened to exclude the employer from exercising these common law rights. Much of the impetus for the change in legislation in this area derives from international law. The Universal Declaration of Human Rights 1948 stated that everyone is entitled to the same rights and freedoms 'without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or status'. Such statements are reiterated in international conventions and treaties, the ILO conventions and the domestic legislation of many states. Section 3 of Botswana's Constitution confers the fundamental rights and freedom on every person regardless of race, place of origin, political opinions, colour, creed or sex.

[13.] Discrimination means affording different treatment to different persons whereby persons of a particular description are subjected to disabilities or restrictions to which others are not made subject to; or are accorded privileges or advantages which are not accorded to other persons (see section 15 of the Constitution of Botswana and the case of Attorney-General v Dow [1992] BLR 119, CA (Full Bench). The Dow case settled the issue that the fundamental rights expressly conferred by section 3 of our Constitution could not be abridged by section 15 merely because the word 'sex' was omitted from the definition of 'discrimination' in section 15.

[14.] Discrimination is also described as '[t]o fail to treat other human beings as individuals. It is to assign to them characteristics which are generalised assumptions about groups of people' (see Bourne & Whitmore Race and Sex Discrimination (1993)).

[15.] In most legislation, a distinction is made between direct and indirect discrimination. Direct discrimination is the most blatant form of discrimination, and occurs where a differentiation or distinction is clearly and expressly based on one or more listed grounds. It is generally intentional or explicit (de jure); for example, a job advertisement which specifies 'men only'. It occurs where an employer treats a woman less favourably than a man in the same position simply because she is a woman. It is not always based on one ground; direct discrimination may be based on sex, marital status and family responsibility. For example, discrimination was said to be unfair where a policy provided that female teachers were not entitled to housing subsidies unless their spouses were permanently and medically unfit for employment. This exclusion, since the policy did not apply to male teachers, was said to be based on sex and marital status: See the case of Association of Professional Teachers v Minister of Education (1995) 16 ILJ 1048 (IC).

[16.] Indirect discrimination is harder to identify. It occurs where an employer applies a rule which ostensibly applies neutrally to all employees; but the application of the rule has a disproportionate negative effect on one group. It may occur by way of occupational segregation whereby women are concentrated in sectors which are 'traditionally' female and that are less well paid. It may occur by way of the provision of a 'head of household' allowance or benefit, when 'head of household' is defined as men in the relevant legislation or policy. It may manifest when ostensibly neutral criteria are required for a vacancy or promotion. For example, in Dothard v Rawlinson 433 US 321 (1977) an American court held that Ms Rawlinson was unfairly indirectly discriminated against by the Alabama Board of Corrections which required applicants for the post of prison guard to be five feet two inches tall and 120 pounds heavy, when she failed to meet the weight requirement. Evidence produced in court showed that the combined height and weight requirement excluded 41,3% of the female population to only 1% of the male population. In other words, considerably more women than men were excluded from applying for the post.

[17.] In the famous, or infamous, English case of Peake v Automotive Products [1979] QB 233, it was suggested that trivial differences in treatment are not discriminatory. In that case a Mr Peake claimed discrimination on the grounds that the women in the factory left five minutes earlier than the men. The employer rationalised that the women would be trampled in the rush if they did not leave at a different time to the men. The English Court of Appeal appeared to require a hostile motive on the part of the employer. The Court held that there was no discrimination on three grounds: Firstly, rules for safety and good administration could not be discriminatory. Secondly, 'it would be very wrong if this statute were thought to obliterate the differences between men and women and to do away with the chivalry and courtesy which we expect mankind to give to womankind'. Thirdly, on the grounds of the de minimis principle; ie that the difference in treatment (five minutes less work per day), was de minimis.

[18.] Later critics of the Peake judgment found that the first reason was unsuitable since it suggested that motive was a valid consideration in deciding whether discrimination had occurred. This was clearly against the legislation current at the time. The second reason advanced wipes out the whole purpose of anti-discriminatory provisions. In the subsequent judgment of Ministry of Defence v Jeremiah (1980) ICR 13, Denning MR admitted he may have gone too far in the Peake decision but still supported the decision on the grounds of the de minimis principle.

[19.] In the Jeremiah case, the male applicants were employed in an ordinance factory where working voluntary overtime necessitated working in very dirty conditions in the 'colour bursting shop' where paint shells used in artillery practice were produced. Women did not have to do this partly because it was thought that such conditions would affect their hair. The Court of Appeal upheld the men's claim for unfair discrimination. The aforesaid decisions were of course based on the current sex discrimination legislation existing in England at the time.

[20.] Although Botswana has ratified two ILO anti-discrimination conventions and is a party to the Convention on the Elimination of all forms of Discrimination Against Women (CEDAW), there is no specialised domestic sex discrimination legislation in Botswana. In the United Kingdom, the Sex Discrimination Act 1986 and the Equal Pay Act provide a code to prevent discrimination, and EC Directives require the implementation of the principle of equal treatment for men and women in all aspects of employment. In South Africa the Labour Relations Act, the Employment Equity Act and the Constitution, all prohibit direct and indirect discrimination.

[21.] On 5 June 1997, Botswana ratified the ILO Equal Remuneration Convention 100 of 1951,

and the Discrimination (Employment and Occupation) Convention 111 of 1958.

[22.] The former prohibits wage discrimination based on sex, race, creed, etc; whilst the latter prohibits any form of discrimination in employment practices or occupations on the grounds of sex, race, creed etc. These conventions have not yet been incorporated into our domestic labour legislation (but see section 23 of the Employment Act discussed below). Convention 111 at article 8 states that it 'shall be binding only upon those members of the International Labour Organisation whose ratifications have been registered with the Director-General'.

[23.] In the case of Attorney-General v Dow, supra at 171, the Court, per Aguda JA said as follows:

If an international convention, agreement treaty, protocol, or obligation has been incorporated into domestic law, there seems to me to be no problem since such convention, agreement, and so on will be treated as part of the domestic law for purposes of adjudication in a domestic court. If it has merely been signed but not incorporated into domestic law, a domestic court must accept the position that the legislature or the executive will not act contrary to the undertaking given on behalf of the country by the executive in the convention, agreement, treaty, protocol or other obligation. However where the country has not in terms become party to an international convention, agreement, treaty, protocol or obligation it may only serve as an aid to the interpretation of a domestic law, or the construction of the Constitution if such international convention, agreement, treaty, protocol, etc purports to or by necessary implication, creates an international regime within international law recognised by the vast majority of states ...

[24.] Botswana being a member of the International Labour Organisation, and the Industrial Court, being a court of equity, the Court follows international labour standards and applies the conventions and recommendations of the ILO. It also looks to other jurisdictions for guidance on matters.

Termination on the grounds of gender

[25.] In the Discrimination (Employment and Occupation) Convention 111, the terms 'employment' and 'occupation' include access to vocational training, access to employment and to particular occupations, and terms and conditions of employment. 'Terms and conditions' of

employment includes protection from discrimination in respect of termination of employment - see article 1(3) of Convention 111.

[26.] Article 5 of the ILO's Termination of Employment Convention 158 of 1982 stipulates as follows:

The following, inter alia, shall not constitute valid reasons for termination: (a) union membership or participation in union activities outside working hours or, with the consent of the employer, within working hours; (b) seeking office as, or acting or having acted in the capacity of, a worker's representative; (c) the filing of a complaint or the participation in proceedings against an employer involving alleged violation of laws or regulations or recourse to competent administrative authorities; (d) race, colour, sex, marital status, family responsibilities, pregnancy, religion, political opinion, national extraction or social origin; (e) absence from work during maternity leave.

[27.] The aforesaid article 5 is incorporated into our Employment Act although it is more encompassing and wider than section 23 of our Act which provides as follows:

Notwithstanding anything contained in a contract of employment, an employer shall not terminate the contract of employment on the grounds of (a) the employee's membership of a registered trade union or participation in any activities connected with a registered trade union outside working hours or, with the consent of the employer, within working hours; (b) the employee seeking office as or acting or having acted in the capacity of an employees' representative; (c) the employee making, in good faith, a complaint or participating in proceedings against the employer involving the alleged violation of any law; or (d) the employee's race, tribe, place of origin, national extraction, social origin, marital status, political opinions, sex, colour or creed.

Fair or unfair discrimination?

[28.] In the instant case, the respondent is therefore in violation of section 23(d) of the Employment Act because the terminations were based on the sex or gender of the applicants. The respondent has attempted to justify the terminations on the basis that the nature of the work required was such that it was not suitable for women. It also is the respondent's rather

paternalistic contention that their exclusion from loading and from working late was for the own good of the women.

[29.] Not all forms of discrimination are unfair. In some countries, affirmative action policies in line with the purposes of the legislation will not be unfair. See also article 5(2) of Convention 111. In other instances an employer may raise the defence that discrimination is justified by the inherent requirements of the job: see the case of Whitehead v Woolworths (2000) 21 ILJ 571 (LAC).

[30.] There is no doubt that in day to day life, a job may need to be held by a member of a particular sex, for example that of toilet attendants. As Grogan puts it:

The word 'inherent' suggests that the possession of a particular personal characteristic (eg being male or female, speaking a particular language, or being free of a disability) must be necessary for effectively carrying out the duties attached to a particular position.

See Workplace Law (6th ed) at 226. Article 1(2) of ILO Convention 111 states that: 'Any distinction, exclusion or preference in respect of a particular job based on the inherent requirements thereof shall not be deemed to be discrimination'.

[31.] The English legislation too recognises that in some cases a job must be done by a particular sex and that this would provide a defence to an employer. These 'genuine occupational qualifications' are found in section 7 of the Sex Discrimination Act and in these situations sex or gender is deemed to be a necessary requirement for the job. Even in these situations, where the essential nature of the job calls for a man for reasons of physiology, strength and stamina are excluded as criteria (see section 7 of the Sex Discrimination Act). This Act, for purposes of establishing whether discrimination relates to inherent requirements or jobs, includes criteria which relate to the authenticity of the job, the need to preserve privacy and decency, and the nature of the establishment where the work is done.

[32.] In the English case of Batasha v Say (1977) IRLR 6, a woman was turned down for a job as a cave guide because 'it was a man's job'. It was held that an act of discrimination had been committed. In the later case of Greig v Community Industries (1979) IRLR 158 the applicant was withdrawn from a painting and decorating work experience scheme for 'her own good' when the

only other girl left. It was held that the motive behind the action was irrelevant and that the applicant had suffered discrimination. In the case of Skyrail Oceanic v Coleman (1981) IRLR 398 a woman was dismissed when she became engaged to an employee of a rival firm. Between them, the two employers decided that given that the woman's husband would be the bread winner, she should be the one to loose the job. The English Court of Appeal held that the reason for her dismissal was primarily an assumption based on her sex and that she had therefore suffered discrimination.

[33.] Women in Botswana have come a long way from being drawers of water and hewers of wood. A cursory glance at our Parliament, the private business sector, the professions, any construction site or roadside trench digging are proof of that legacy.

[34.] However, in Botswana too it is recognised that a regulation or rule of law which provides for women alone is not necessarily discriminatory on the ground of sex: see the Court of Appeal decision of Students' Representative Council of Molepopole College of Education v Attorney-General [1995] BLR 178, CA.

[35.] In the Dow case too it was recognised that whilst discrimination based on sex is repugnant to sections 3 and 15 of the Constitution; there might be a need to regulate the lives or affairs of one gender in a manner which was inapplicable to the other.

[36.] Per Amissah JP at 195 of SRC Molpopole v Attorney-General, supra:

But when such a situation occurs, the law or regulation under consideration must be reasonable and fair, made for the benefit of the welfare of the gender, without prejudice to the other; it must not be punitive to the gender in question. As I said earlier, the bare statement by the party responsible for the enactment of the legislation or regulation that it is for the benefit of the person affected is not sufficient for acceptance or endorsement by the Court. The law or regulation must be examined.

[37.] In the matter of Tsumake and Others v Fencing Centre (IC 8/2001), unreported, dated 12 October 2001, the Judge President of the Industrial Court, Legwaila JP at p 3 of the typed judgment states as follows:

The respondent may well have had the best of intentions. But in law those intentions leading to the employer's unilateral decision on what is good for

women count as patronage, if not male chauvinism. Employees, irrespective of sex, have to be consulted on what is or is not good for them on matters of gainful employment. To deprive any employee of a source of livelihood on the ground that one is being helpful to the employee can hardly be a welcome gesture.

[38.] The respondent in this case has failed to place any evidence before the Court that there were any constraints on the women performing the functions at the required hours, and apparently reserved for the sole preserve of the male gender. Moreover, the applicants were not even consulted on any inherent difficulties that may have existed in relation to the performance of these functions by females.

[39.] The applicants lost their employment on the respondents unilateral assumption and say so that the situation was 'not suitable' for them. This was an unfair and unreasonable assumption which was highly prejudicial to the applicants since they ultimately lost their jobs.

[40.] In all circumstances, the Court finds that the respondent's unilateral assumption was not a valid reason for the termination of the contracts of employment of the two applicants. The reasons advanced by the respondent for the dismissal of the applicants were discriminatory and do not amount to a valid reason. A termination of employment on the grounds of gender or sex is contrary to the provisions of section 23 of the Employment Act as being automatically without just cause. The termination of the applicants' contracts of employment was therefore substantively unfair.

Compensation

[41.] Having found that the dismissal of the two applicants was both procedurally and substantively unfair, they are entitled to compensation in terms of the Trade Disputes Act (Cap 48:02). Section 24(2) of the Trade Disputes Act permits and empowers the Court to take various factors into account in determining the amount of compensation. The Court will set out each

factor and the impact thereof on the assessment of compensation for each applicant.

(a) 'The actual and future loss likely to be suffered by an employee as a result of a wrongful dismissal': The first applicant testified that there were not many employers in Ramotswa and despite diligent search she has been unable to find any employment since her dismissal. The second applicant has found a part-time job cleaning a shop in the mornings. Both applicants have suffered loss of earnings.

(b) 'The age of employee': According to their testimony the applicants are 37 and 55 years old respectively.

(c) 'The prospects of the employee in finding other equivalent employment': The applicants are unqualified and live in Ramotswa which is designated as a village. Together with their advancing age, the prospects of future permanent employment are dim.

(d) 'The circumstances of the dismissal': This factor together with the

previous three is in favour of the applicants as the respondent failed to comply with the substantive and procedural fairness requirements.

(e) This factor concerns the reinstatement of the employee and is not relevant here.

(f) Whether or not there has been any contravention of the terms of any collective agreement or of any law relating to employment by the employer or the employee': This factor also again operates in favour of the applicants since respondent was in direct violation of section 23 of the Employment Act.

(g) 'The employer's ability to pay': There is no evidence before the Court that the respondent is in any financial difficulty to make payment of any award of compensation that may be granted.

[42.] In view of the fact that all the aforesaid relevant factors operate in favour of the applicants, the Court finds that the maximum award of six months' monetary wages as compensation to each applicant is appropriate. Both applicants were earning the sum of P 342.00 per month. They are therefore awarded the sum of P 2 052 compensation each (P 342 x 6).

Determination

[43.] On the premises the Court makes the following determination:

1.The termination of the contracts of employment of the applicants Gadifele Moatswi and Mmametsi Kgaswe by the respondent on 10 December 1999, on the grounds of their gender was discriminatory, contrary to section 23 of the Employment Act, and substantively unfair.

2.The termination of the contracts of employment of the two applicants was also procedurally unfair.

3.In terms of section 24(1) of the Trade Disputes Act, the respondent is hereby directed to pay to each of the applicants the amount of P 2 052 (P 342 x 6), being six months' monetary wages, as compensation.

4.The respondent is hereby further directed to pay the aforesaid sum to each of the applicants through the office of the registrar of this Court on or before Friday 29 March 2002.

5.There is no order as to costs.