REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Reportable

Case no: JS 879 / 2012

In the matter between:

KONGKO LOUIS MAKAU **Applicant**

and

DEPARTMENT OF EDUCATION LIMPOPO PROVINCE **Respondent**

Heard: **13 August 2013**

Delivered: **20 September 2013**

Summary: Discrimination in terms of the Employment Equity Act – compensation for discrimination – principles stated

Discrimination – application of Section 60 of the Employment Equity Act – principles stated

Discrimination – conduct that constitutes discrimination – claim partly successful

Compensation – determination of appropriate amount for general damages – principles stated

JUDGMENT

SNYMAN, AJ

Introduction

[1] This matter came before me as an application for default judgment following a statement of claim filed with the Labour Court on 25 October 2012 which remained unopposed. The applicant applied for default judgment on 14 November 2012 but in terms of a Court directive this matter was to be determined following a hearing in open Court.

[2] Considering the allegations made in the statement of claim, it is a pity the respondent party did not engage in this matter. This is the kind of situation that cries out for an employer to at least come and offer an explanation. It seems endemic in the public sector that employers are confronted with this kind of situation but then simply offer no explanation or defense against the same.[1] It seems a case of ignoring the issue and hopefully it goes away. With the applicant, however, persisting with this matter and having testified in Court, I will determine this matter on the basis of the applicant's evidence.

Factual matrix

[3] The applicant was employed by the respondent as the principal of the Mabogopedi Secondary School since 1998. On 12 March 2002, he applied for a transfer, based on a contention that he was 'finding it difficult' to execute his responsibilities. No particulars as what was the cause of these 'difficulties' were, however, provided or conveyed to the respondent. It appears this transfer request was ignored by the respondent.

[4] On 29 August 2003, the applicant then made application to the respondent to be

[1] See for example *Biggar v City of Johannesburg* (2011) 32 ILJ 1665 (LC) at para 2.

placed in the EAP (employee assistance program) for counselling on work related matters. Unfortunately, on the evidence before me, no particulars were provided of what these work related matters were and what the applicant required counselling on. It also appears no motivation was submitted to the respondent for this request.

[5] According to the applicant, because his EAP application was never dealt with by the respondent, he felt prejudiced and discriminated against. The applicant submitted that because of the lack of support from the respondent, he then suffered psychologically, emotionally and physically and this had a negative impact on his family.

[6] In the documentary evidence submitted by the applicant, there was a letter by one N R Leshiba, the acting circuit manager in the respondent at the time, dealing with the applicant's transfer request and indicating that his services were needed at the Mabogopedi School and that he would remain appointed there as principal. This letter was dated 1 February 2007.

[7] Also of importance, in determining this matter, is a further letter dated 25 May 2010 by one M P Molapisi ("Molapisi"), the then acting circuit manager in the respondent, recording that the applicant was seeking a transfer due to personal circumstances of the applicant, being that he had relocated to Centurion with his family and children, who were staying in Centurion full time. It was recorded that these personal considerations affected his productivity at work. The respondent recommended a transfer. It appeared from this letter that there was a difficulty with available vacancies and a transfer could not be affected.

[8] The applicant stated that towards the end of 2010, he then became ill and was placed on sick leave for two weeks from end November and ending on 10 December 2010. The applicant stated that his sick leave documents were misplaced by the respondent, resulting in proceedings against him for being

absent without leave. It, however, appears from a letter by Molapisi to the applicant dated 15 December 2010 that not only an issue about his absence is raised but also a number of complaints with regard to the manner in which the applicant was managing the school was referred to. The applicant again applied on 12 January 2011 to be admitted to the EAP process.

[9] On 30 May 2011, the applicant then applied for special leave. This application was motivated, on the document forming part of the evidence, by what the applicant called 'work related' matters. The concerns raised by the applicant were relating to operational issues at the school and expectations by the respondent and with regard to the performance of the school. The applicant asked for an interim replacement principal pending the search for an alternative position in which he could be placed by way of transfer. It appears that the request for special leave by the applicant was primarily related to him wanting a transfer. At this stage, Molapisi, on 27 June 2011, asked the district senior manager of the respondent for intervention to resolve the matter.

[10] The applicant also made an allegation about being informed in June 2011 that someone wanted to harm him and complained that the respondent did nothing about this but there is no particularity provided of this mere and bald allegation or even what the applicant expected the respondent to do about this.

[11] The applicant was booked off work in June 2011 following admission to the Vista Clinic and was then booked off work until 29 October 2011 due to depression. The applicant applied for temporary incapacity leave as a result of this as well.

[12] On 14 October 2011, finally, the applicant then prepared and submitted a comprehensive and properly motivated request to be placed on EAP. The applicant referred to a number of incidents at the school which the applicant contended was intended to undermine and harass him. I do not intend to repeat all these contentions in this judgment and will just highlight a few salient points.

The applicant contended that he was being made out to be a liar when this was not the case. The applicant stated that he was receiving no support from the school governing body and that this body was in fact opposed to him and he gave examples of this in the document. The applicant also stated that there was a demand by various parties that the school be transformed and it was made clear that this transformation did not include the applicant. There seemed to be consensus between all parties, including the applicant, that it was in the best interest of the school that he be transferred and the applicant complained that nothing was being done about this. The applicant specifically referred to a number of instances where he was being undermined. The applicant also referred to two instances where there were abortive attempts to discipline him. According to the applicant, the trust relationship between himself and the authorities at the school had collapsed. As I have said, the submissions by the applicant were detailed and extensive and required to be fully ventilated and addressed by the respondent in order to properly determine the EAP application of the applicant.

[13] This is unfortunately not what happened. Rather than address the issues raised by the applicant in the EAP application, the respondent sought to find him guilty on 10 November 2011 for negligence for failing to ensure that all the grade 12 learners were properly registered for the 2011 NSC examination and for allowing unauthorised subject changes of grade 12 learners. From the evidence, it does not appear that any due process preceded this finding of negligence or on what this guilty finding was based. The applicant denied the charges in writing at the time. This denial of the charges was promptly followed by an accusation in writing to the applicant on 23 November 2011 by Molapisi relating to alleged mismanagement at the school by the applicant. In this accusation by Molapisi, a number of specific accusations were levelled at the applicant, which included some of the very issues raised by the applicant in his EAP request of 14 October 2011 which he wanted addressed. The applicant was further accused by Molapisi

of not following lawful instructions, not consulting with stakeholders and deliberate defiance. It was indicated that disciplinary action against the applicant was intended.

[14] On 29 November 2011, the applicant lodged a formal grievance against the treatment meted out to him by Molapisi. The applicant provided substantial detail in this grievance which he wanted discussed and addressed. The applicant again referred in his grievance to his detailed EAP request filed on 14 October 2011 which had still not been addressed. Nothing happened with regard to this grievance nor the EAP request, and the respondent, simply put, seemed to just ignore the same. The applicant then asked on 26 January 2012 to meet with the head of department at the respondent to deal with all these outstanding issues he had raised. No response was even received to this request for a meeting. The applicant filed numerous requests for documents relating to the allegations levelled against him and despite in the end being promised these documents, the documents were never provided.

[15] It was clear that after 14 October 2011, none of the applicant's concerns were being dealt with. He was in effect ignored. All the issues he raised remained unresolved. His psychological state deteriorated to the extent that it was becoming intolerable. Medical reports to this effect were submitted to the respondent in April and May 2012. No response was received and once again, nothing happened.

[16] The only response in fact forthcoming from the respondent was on 17 July 2012, when the applicant received a virtually identical complaint from Molapisi to that received on 23 November 2011 and in respect of which the applicant filed a grievance. Again, the applicant was threatened with disciplinary action for, in essence, the same issues without the grievance and EAP request even being considered.

[17] On 7 August 2012, the applicant referred a dispute to the CCMA. In this referral, the applicant described the dispute as an unfair labour practice dispute. It was, however, clear that the nature of the dispute concerned allegations of discrimination against the respondent by the applicant and on 12 September 2012 and following conciliation, the CCMA issued a certificate of failure to settle based on an unfair discrimination dispute. The respondent did not even attend at the conciliation.

[18] The applicant then engaged an attorney who in turn engaged the respondent. Letters of demand by the applicant's attorneys to the respondent were sent in August 2012 and March 2013 and these letters once again went unanswered. This is significant, because these letters make specific reference to the applicant being unfairly discriminated against and calls on the respondent to become involved in the proceedings to try and resolve the same. The respondent did not avail itself of this last opportunity to try and resolve the matter and the applicant proceeded with his application to Court.

[19] Despite all of the above events, the applicant is still currently employed by the respondent. The applicant has been paid his full remuneration at the respondent to date, so the applicant has suffered no patrimonial loss insofar as it concerns his remuneration as employee of the respondent.

[20] The applicant, in his statement of case filed with the Labour Court, has asked for declaratory orders relating to his unresolved grievance, harassment, accommodation into the EAP program and relocation to another post. The applicant has also asked for damages of R150 000.00.

<u>The issue of discrimination</u>

[21] When presenting his case in Court, the applicant stated that the basis of his discrimination claim was that he was harassed, victimised and subjected to

arbitrary treatment by the respondent. This was also the case made out by the applicant in his statement of claim. He contended that all this took place because of the issues he had initially raised and, after that, because he had become ill. From a legal perspective, the applicant has based his claim on section 6 of the Employment Equity Act[2] ("EEA") as read with sections 50 and 60 thereof.

[22] Section 6(1) of the EEA reads:

> 'No person may unfairly discriminate, directly or indirectly, against an employee, in any employment policy or practice, on one or more grounds, including race, gender, sex, pregnancy, marital status, family responsibility, ethnic or social origin, colour, sexual orientation, age, disability, religion, HIV status, conscience, belief, political opinion, culture, language and birth.'

[23] In this matter, the applicant does not rely on any of the specific grounds as listed in section 6(1) of the EEA. Instead, the applicant has sought to rely on what can generally be termed to be an unspecified ground. The applicant has defined these unspecified grounds in his statement of claim as 'incessant harassment and constant unfair treatment'. This is founded on the treatment and conduct referred to above.

[24] In assessing whether a particular law or Act amounts to discrimination, the Court in *Harksen v Lane NO and Others*[3] said the following:

> '(i) Does the differentiation amount to "discrimination"? If it is on a specified ground, then discrimination will have been established. If it is not on a specified ground, then whether or not there is discrimination will depend upon whether, objectively, the ground is based on attributes and characteristics which have the potential to impair the fundamental human

[2] Act 55 of 1998
[3] 1998 (1) SA 300 (CC) at para 53; see also *Union of Refugee Women and Others v Director: Private Security Industry Regulatory Authority and Others* 2007 (4) SA 395 (CC); (2007) 28 ILJ 537 (CC) at para 34.

dignity of persons as human beings or to affect them adversely in a comparably serious manner.

(ii) If the differentiation amounts to "discrimination" does it amount to "unfair discrimination"? If it has been found to have been on a specified ground, then unfairness will be presumed. If on an unspecified ground, unfairness will have to be established by the complainant. The test of unfairness focuses primarily on the impact of the discrimination on the complainant and others in his or her situation.'

The same reasoning should apply in the current matter. For the applicant to succeed with his claim, the applicant would have to show that the incessant harassment and unfair treatment he complains of would have the potential to impair his fundamental human dignity or would affect him adversely in a comparably serious manner. Once the applicant has shown this to be the case, then the applicant would have shown that discrimination exists, and he must then also show that this discrimination is unfair, in the context of its impact on the applicant and his particular situation.

[25] The applicant has the onus to prove the above provisions. The applicant cannot simply make allegations and in the absence of a contrary case by the respondent assume that it will be accepted that discrimination exists and this discrimination is unfair. The applicant must still make out a proper case before the Court, even if this case is brought on a default basis. In *Matjhabeng Municipality v Mothupi NO and Others,*[4] the Court said:

'It is clear from the foregoing paragraphs that a litigant who founds a cause of action on unfair discrimination based on an unlisted ground bears the onus to establish the discrimination and to prove that such discrimination is unfair.'

[4] (2011) 32 ILJ 2154 (LC) at para 40; See also *Chizunza v MTN (Pty) Ltd and Others* (2008) 29 ILJ 2919 (LC).

[26] Similarly, in *Farhana v Open Learning Systems Education Trust,*[5] the Court held as follows:

> 'In the case of *Harksen v Lane NO and Others* 1998 (1) SA 300 (CC), the court held that where discrimination is based on some other ground, the complainant must establish unfairness. Furthermore, the court in the case of *Ntai and Others v SA Breweries Ltd* (2001) 22 ILJ 214 (LC), warned against the practice of simply alleging discrimination on 'arbitrary' conduct by the employer, without specifying the grounds for that allegation. In the case of *Mothoa v SA Police Service and Others* (2007) 28 ILJ 2019 (LC), the court held that where an employee complains about discrimination on an unlisted ground, he/she must provide evidence that the act complained of affected his/her dignity; injured feelings are insufficient to prove a claim of discrimination.'

I agree with this reasoning, which is clearly in line with what I have already said above.

[27] What is the applicant then required to prove? In dealing with an allegation of discrimination in the context of the illness of an employee which caused victimisation and harassment by the employer of the employee, the Court in *New Way Motor and Diesel Engineering (Pty) Ltd v Marsland*[6] phrased the enquiry to be as thus:

> 'Expressed differently, the question can be posed thus: did the conduct of the appellant impair the dignity of the respondent; that is did the conduct of the appellant objectively analysed on the ground of the characteristics of the respondent, in this case depression, have the potential to impair the fundamental human dignity of respondent?'

[5] (2011) 32 ILJ 2128 (LC) at para 25.
[6] (2009) 30 ILJ 2875 (LAC) at para 25.

[28] I also wish to make reference to *Mangena and Others v Fila SA (Pty) Ltd and Others*[7] where the Court said the following with specific reference to the EEA:

> '…. Section 6 of the Act prohibits unfair discrimination in any employment policy or practice, on any of the grounds listed in s 6(1) or on any analogous ground, if an applicant is able to show that the ground is based on attributes or characteristics that have the potential to impair the fundamental human dignity of persons or to affect them in a comparably serious manner. (See *Harksen v Lane NO and Others* 1998 (1) SA 300 (CC) at 325A.) 'Employment policy or practice' is defined by s 1 of the EEA to include remuneration, employment benefits and terms and conditions of employment.'

[29] The judgment in *Lewis v Media24 Ltd*[8] is quite useful and apposite in respect of the issue of what needs to be proven to succeed in a discrimination claim. The Court said the following:[9]

> 'The concept of discrimination is made up of three issues: differential treatment; the listed or analogous grounds; and the basis of, or reason for, the treatment….
>
> The first issue concerns the difference in treatment. There must be a difference in treatment in which the employee is less favourably treated than others. In some instances, this may require a comparison between the victim and a comparator - the so-called 'similarly situated employee'. In other instances, it may be evident that the employee is treated differently from others precisely because of the targeted nature of the treatment, for example sexual harassment or trade union victimization. In this case, the applicant contends that he was subject to three forms of differential treatment: harassment; the failure to accommodate his observance of Shabbat, and the termination of his employment.'

[30] Even if it can be proven that an employee has been subjected to discrimination that is unfair, this does not mean that the employer is by necessary consequence

[7] (2010) 31 ILJ 662 (LC) at para 5.
[8] (2010) 31 ILJ 2416 (LC).
[9] Id at paras 36–37.

liable towards the employee for such discrimination. The EEA requires something more to render the employer liable and this can be found in section 60 of the EEA which 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 that 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.'

[31] What section 60 in effect means is that the discriminatory behaviour that the employee party has been subjected to must have been brought to the attention of a proper functionary at the employer so that the employer has the opportunity to intervene, investigate and determine the issue and if the complaint has merit, take immediate remedying steps to remove the cause of complaint. If the employer despite the cause of complaint having been brought to its attention, then does nothing about it and takes no steps to remove the cause of complaint, then only can the employer be held liable in terms of the EEA for the continuing discrimination, if it in fact continues. It is, therefore, critical that the cause of

complaint must be brought to the attention of a person at the employer that is in the position and authority to initiate a process to deal with the cause of complaint and if appropriate, then cause its removal.

[32] The are two authorities dealing with the issue of sexual harassment as a basis for a discrimination claim which are quite useful in determining how the provisions of section 60 of the EEA would find application and what must be shown to hold the employer liable in terms thereof. The first is *Potgieter v National Commissioner of the SA Police Service and Another,*[10] where the Court held as follows:

> 'An employer will be held liable if it is shown in terms of s 60 of the EEA, that:
>
> (i) The sexual harassment conduct complained of was committed by another employee.
>
> (ii) It was sexual harassment constituting unfair discrimination.
>
> (iii) The sexual harassment took place at the workplace.
>
> (iv) The alleged sexual harassment was immediately brought to the attention of the employer.
>
> (v) The employer was aware of the incident of sexual harassment.
>
> (vi) The employer failed to consult all relevant parties, or take necessary steps to eliminate the conduct or otherwise comply with the provisions of the EEA.
>
> (vii) The employer failed to take all reasonable and practical measures to ensure that employees did not act in contravention of the EEA.'

[10] (2009) 30 ILJ 1322 (LC) at para 46

[33] The second authority is that of *Mokoena and Another v Garden Art Ltd and Another,*[11] where the Court, after having given a similar analyses[12] to that of the judgment in *Potgieter* above, concluded as follows:

> 'It seems to me that where the employer was aware of the sexual harassment and it was brought to its immediate attention and he failed to take steps to eliminate it and a further act of sexual harassment took place, the employer cannot escape liability in terms of s 60 of the EEA. Where there is one incident of sexual harassment, which is brought to the attention of the employer immediately after the incident, an employer will not be held liable in terms of s 60 of the EEA. The aggrieved employee may then have to consider a different basis to hold the employer liable either in terms of common law etc. I do not know how an employer would be able to take reasonable steps to ensure that the employee would not act in contravention of the EEA in the second example that I have given. It would therefore appear to me that s 60 of the EEA really applies where it has been brought to the attention of the employer that sexual harassment has taken place and as a result of the employer's inaction, further sexual harassment takes place, which renders the employer liable.
>
> For the applicants to succeed they must prove that the second respondent's conduct amounts to sexual harassment, that [the first respondent] knew about it, failed to take proper steps to prevent, eliminate or prohibit the sexism and 'genderism' and it is this failure that makes it liable.'

[34] The Court in *Makoti v Jesuit Refugee Service SA*[13] dealt with the issue where an applicant sought but unfortunately unsuccessfully so to resolve the matter herself and then instituted a claim in terms of the EEA and the Court then held as follows:

[11] (2008) 29 ILJ 1196 (LC) at para 42–43.
[12] See para 40 of the judgment.
[13] (2012) 33 ILJ 1706 (LC) at para 66.

> 'While I can understand the applicant's motivation for dealing with the matter herself, thereby avoiding the complication and unpleasantness of involving third parties, once she had done so and consciously decided not to pursue a grievance at the time, it would be unduly onerous now to saddle the respondent with the burden of a compensatory award, when it could not reasonably have anticipated the director's actions, nor could it be said that it had any opportunity to address his conduct at the time. On the facts of this matter, therefore, I do not believe a separate award of compensation for the original acts of sexual harassment would be justified.'

[35] I conclude in this respect with the following apt reference to a *dictum* from the judgment in *Ehlers v Bohler Uddeholm Africa (Pty) Ltd*[14] where the Court said, with specific reference to an EEA claim by an applicant, that '… If she intends to hold the respondent liable for damages in terms of the EEA, she will have to satisfy the requirements of s 60 of the EEA.' The Court concluded:[15]

> 'Section 60 of the EEA deals with liability of employers. The respondent will only be liable if the applicant was able to prove that it brought the discriminatory conduct of the employee to the attention of the respondent and the respondent failed to take all the reasonably practicable steps to ensure that the employees would not act in contravention of the EEA.'

[36] In the end, and what Section 60 does, is to create a statutory vicarious liability on the part of the employer for discriminatory conduct of its employees. If it was not for this provision, victims of discrimination in an employment environment would have to institute legal proceedings to claim damages as a result of such discrimination against those individual employees in the employment environment that perpetrated such discrimination. This statutory creation, however, does mean that liability against an employer only lies where all the requirements of such section have been fully complied with. In *Piliso v Old*

[14] (2010) 31 ILJ 2383 (LC).
[15] Id at para 49.

Mutual Life Assurance Co (SA) Ltd and Others,[16] the Court said the following in this respect:

> 'In the light of the fact that s 60 of the EEA clearly is intended to create statutory vicarious liability in respect of an employer where its own employee contravened a provision of the EEA, it is apparent that it was a prerequisite that the applicant herein should, as a minimum, have alleged that an employee of the first respondent had contravened a provision of the EEA. In addition, or as a minimum requirement, the applicant bore the onus to prove that such employee of the first respondent had contravened the provision of the EEA. Once these minimum requirements had been met, the deeming provision would kick in and the employer would be deemed to have contravened the particular provision of the EEA.'

[37] Therefore, I conclude that for the applicant to hold the respondent liable pursuant to a claim for damages under the EEA, the applicant would have to prove that the conduct complained of was committed by an employee of the respondent; that such conduct was brought to the attention of a proper and responsible person at the respondent; that the respondent in effect had done nothing about this conduct and to remove the cause of complaint; and finally that such conduct then actually continued despite it having been so reported. If all these requirements are not proven by the applicant, then no liability will accrue to the respondent for any discrimination claim in terms of the EEA by the applicant.

[38] In then applying all the above principles to the current matter, the determination of the applicant's claim can in essence be divided into two parts. The first part relates to all the events preceding 14 October 2011 and the second part all the events as from 14 October 2011 and onwards.

[39] Dealing with the first part of the claim, being the events prior to 14 October 2011, it is my view that if the applicant's claim was only based on such events I would

[16] (2007) 28 ILJ 897 (LC) at para 15.

have dismissed the claim. There are several reasons for this. The first is the complete lack of sufficient particularity as to what any employee in the respondent actually did that was unfair treatment of the applicant or harassment of the applicant for that matter. Even the applicant's purported requests for assistance were vague, bald and unmotivated. There was no indication of, nor any evidentiary substantiation for, any contention of arbitrary conduct on the part of the respondent or any of its employees that could have the potential to impair his fundamental human dignity of the applicant or would affect him adversely in a comparably serious manner. Added to this, for this period, the applicant actually complied with none of the provisions of section 60 of the EEA so as to establish any liability on the part of the respondent in terms of the EEA. The applicant has thus failed to make out a case of both the existence of discrimination and of compliance with section 60 so as to hold the respondent liable for this first period of the applicant's claim, as referred to.

[40] With regard to the second period of the applicant's claim, being the period from 14 October 2011 and onwards, the landscape changes considerably. This change is found in the fact that now, for the first time, the applicant actually applies properly and with the requisite particularity for assistance from his employer, the respondent, to resolve his difficulties. This exists in the form of his detailed and fully motivated EAP request. This request highlights all the issues that he has, the difficulties he faces and proposes what can be done to resolve these problems. This request also sets out the personal difficulties of the applicant and specifically identified persons that were causing the applicant difficulties. In my view, this document of 14 October 2011 properly identified the causes of complaint of the applicant and brought such complaints to the attention of the proper persons at the respondent so that it could be investigated and something be done about it.

[41] This document of 14 October 2011 was then the starting point. What the evidence then showed is that not only was this request and the concerns raised not dealt with by the respondent but the applicant was then subjected to entirely unsatisfactory conduct by the circuit manager, Molapisi. Also of importance is the temporal nexus between the document of 14 October 2011 and the events that followed it. The first of such events was the applicant being found guilty of negligence on 10 November 2011 without any due process or apparent evidence. This was followed by the event of the allegations made against the applicant on 23 November 2011 with regard to his management of the school, his conduct in general and as coupled with the statement that the applicant would be subjected to discipline. These actions seem to be directly related to the detailed request for assistance of 14 October 2011 by the applicant and all the contentions made by him therein, as some or other form of retribution.

[42] The inference that the applicant was now being victimised and harassed because of what he submitted on 14 October 2011 is cemented by further facts. As referred to above, the applicant filed a proper and fully motivated grievance on 29 Novemebr 2011 against Molapisi for the allegations made by him about the applicant and Molapisi's threat of discipline against the applicant which occurred on 23 November 2011. Not only was this grievance never addressed but it was later followed up by exactly the same complaint and threat by Molapisi on 17 July 2012 when the first complaint forming the subject matter of the grievance had not even been addressed. The applicant specifically asked for his grievance to be heard and was ignored. He asked for documents in support of the allegations made against him and was ignored. He referred a dispute to the CCMA and was ignored. I may point out that the respondent did not even arrive at the CCMA.

[43] When the applicant's attorneys came onto the scene in August 2012, they specifically referred the respondent to Section 60 of the EEA and requested that the respondent take positive steps to resolve all the applicant's issues. This was

ignored. The request was repeated in March 2013, again with specific reference to section 60 of the EEA and the actual pending case in this matter and, again, the respondent did not avail itself of this final opportunity to avoid this matter having to come before me for determination.

[44] I am thus satisfied that the applicant has made out a proper case of both the existence of discrimination and of compliance with section 60 so as to hold the respondent liable, for the second period of the applicant's claim as from 14 October 2011 onwards. As from 14 October 2011 onwards, there was in my view a clear indication and proper substantiation for the contention of arbitrary conduct on the part of the respondent (in particular Molapisi) that could have the potential to impair the applicant's fundamental human dignity or would affect him adversely in a comparably serious manner. I am also satisfied that the respondent was fully aware of all the issues raised by the applicant but the respondent either deliberately did nothing about it or simply ignored it. All this constitutes arbitrary behaviour of the very nature the EEA was designed to protect against.

[45] The applicant's claim is only based on the EEA. In my view, based on what is set out above, this claim must succeed. The next question is what relief the applicant would be entitled to, with such claim having succeeded.

The issue of relief

[46] The powers of the Labour Court with regard to the issue of relief in discrimination claims under the EEA if found in section 50(2),[17] which provides as follows:

> 'If the Labour Court decides that an employee has been unfairly discriminated against, the Court may make any appropriate order that is just and equitable in the circumstances, including-
>
> (a) payment of compensation by the employer to that employee;

[17] This section must also be read with the provisions of section 50(1) of the EEA.

(b) payment of damages by the employer to that employee;

(c) an order directing the employer to take steps to prevent the same unfair discrimination or a similar practice occurring in the future in respect of other employees;

(d) an order directing an employer, other than a designated employer, to comply with Chapter III as if it were a designated employer;

(e) an order directing the removal of the employer's name from the register referred to in section 41; and

(f) the publication of the Court's order.'

[47] It is clear from the provisions of Section 50 of the EEA that the Court has wide ranging powers where it comes to relief. This includes declaratory orders, orders compelling the employer to implement certain measures or take positive steps so as to mitigate or avoid further discrimination and awarding compensation and/or damages. It is, however, when it comes to orders relating to compensation and damages where matters may become complicated. As the Court said in *Hibbert v ARB Electrical Wholesalers (Pty) Ltd*:[18]

> 'That leaves the question of damages. It can still be argued that even if an employee cannot expect compensation under both the LRA and the EEA, he or she might still be entitled to claim damages for the unfair discrimination under the EEA, which unlike the LRA, recognizes such a claim. Accepting that proposition is correct, the employee must still prove his damages. As I understood the applicant this was a matter that could be dealt with in further proceedings as to quantum in the event the court was minded to find the respondent liable to pay damages.
>
> In this case, a fundamental difficulty presents itself which was not an issue in *Evans's* case. In that matter the employer varied an agreed retirement age, so

[18] (2013) 34 ILJ 1190 (LC) at paras 29–30.

> the resulting loss to the applicant clearly would arise from the reasonably foreseeable losses she suffered in consequence of not being employed for the remainder of the period between her actual retirement and the due date of retirement. In this instance, just as the respondent could not establish a normal retirement date applicable to the applicant, the applicant could also not establish what his due retirement date should be, other than by reference to his own financial planning which was premised on a retirement date at age 65. In the absence of a due retirement date, I do not see how it will be possible to determine with any certainty actual damages arising from the applicant's unilateral retirement by the respondent. Accordingly, I cannot hold the respondent liable for damages in this matter. This does not detract from the finding that his retirement in the absence of a normal retirement age being determined for him was unfairly discriminatory.'

[48] In *Makoti v Jesuit Refugee Service SA,*[19] the Court considered a number of factors when deciding on the issue of damages in respect of a claim under the EEA, which factors were (1) that the applicant was able to obtain employment within two months of her dismissal, so that the direct financial loss she suffered was limited to her salary for those months;[20] (2) the respondent did have an opportunity to rectify matters before the litigation started to run its course in earnest but did not;[21] (3) once it became known that the applicant had referred her dispute to the CCMA, the respondent's senior management was not willing to intervene in the matter;[22] and (4) there was no evidence that any internal investigation into the director's alleged conduct was undertaken by the respondent.[23] All of these factors, in my view, constitute similar considerations in the current matter now before me.

[49] The above being said, it is also critical to consider that the applicant must prove

[19] *Makoti v Jesuit Refugee Service SA* (*supra*).
[20] Id at para 57.
[21] Id at para 59.
[22] Id at para 60.
[23] Id at para 61.

damages. In *Bedderson v Sparrow Schools Education Trust*,[24] no damages were awarded in terms of the EEA because no evidence was led to support such the damages claim. For the same reason, damages were not awarded in the judgment of *Ehlers v Bohler Uddeholm Africa (Pty) Ltd.*[25] The same approach was followed in *Wallace v Du Toit*.[26] The point is that where the applicant wishes to claim specific damages such as medical expenses or travelling costs or actual damages flowing from the discrimination, those damages must be properly quantified and proven, preferably on the basis of proper supporting documents where applicable. The Court should not be left to speculate on this.

[50] It is trite that the concept of 'damages' would also include what is generally known as 'general damages' which is not necessarily proven damages and/or patrimonial loss that exist in a specified and readily determinable amount. In the case of discrimination claims under the EEA, it is entirely proper and competent for the Labour Court to award general damages. The obvious question then is what should the Court consider in arriving at an appropriate amount to so award. In *Christian v Colliers Properties,*[27] the Court held as follows:

> '…. The determination of appropriate relief requires that the court duly consider various interests, including the need to redress the wrong caused by the infringement, the deterrence of future violations, the dispensation of justice which is fair to all those who might be affected, and the necessity of ensuring that the order can be complied with… On the one hand, awards should give effect to the qualities and purposes which underlie the anti-discriminatory measures in the Employment Equity Act. An award should be sufficiently high to deter the defendant and other persons from similar behaviour in the future - *Buthelezi v Poorter* 1975 (4) SA 608 (W) at 617. On the other hand, awards should not be so exorbitant or excessive that they induce a sense of shock, or lead to a situation

[24] (2010) 31 ILJ 1325 (LC).
[25] *Bedderson v Sparrow Schools Education Trust* above n14.
[26] (2006) 27 ILJ 1754 (LC).
[27] (2005) 26 ILJ 234 (LC) at 240–241.

> where even litigants who have suffered minor consequences as a result of unfair discrimination reap financial benefits far in excess of what could, in any normal economic sense, be regarded as their loss. There is good reason for the conservative approach traditionally adopted by our courts in assessing damages.'

The Court concluded as follows in awarding general damages in the sum of R10 000.00:[28]

> '…. it is appropriate to bear in mind that awards by other courts in comparable cases serve as no more than a guideline (*Van der Berg v Coopers and Lybrand Trust (Pty) Ltd* 2001 (2) I SA 242 (SCA) at 260; *Nydoo v Bengtas* 1965 (1) SA 1 (A) at 19; *Kennel Union of SA v Park* 1981 (1) SA 714 (C) at 732). The court is, in each case, required to determine the appropriate amount in the light of the evidence in the circumstances before it, and should not rigidly adopt or apply amounts which other courts have considered appropriate. It would also be unwise to attempt an exhaustive list of the factors to be taken into account.'

[51] The Court in *Biggar v City of Johannesburg,*[29] awarded general damages of an amount equivalent to one months' salary of the employee and in doing do, reasoned as follows:[30]

> 'Regarding the question of compensation, I accept that the applicant suffered the racial hostility of his colleagues over an extended period of time and some kind of compensation for the past negative impact on his dignity caused by the systematic racial harassment would be appropriate. Likewise some compensation is justified for the employer's partial approach to initiating disciplinary measures against him alone and not against the two white colleagues who were involved in the fracas. This must be balanced against the fact that the employer did take some action on an ad hoc basis.'

[28] Id at 241H – 242A.
[29] (2011) 32 ILJ 1665 (LC).
[30] Id at para 25.

[52] The Court in *Wallace v Du Toit*[31] also dealt the issue of the award of damages in some detail and said the following in awarding a sum of R25 000.00 in general damages:[32]

> '…. In determining the appropriate measure of damages I must bear in mind that the award should not be minimal as that would tend to trivialize or diminish respect for the public policy to which the Act gives effect. On the other hand, because it is impossible to assess the monetary value of injured feelings, awards should be restrained. To award sums which are generally felt to be excessive does as much harm to the policy and the result which it seeks as do nominal awards (see *Alexander v Home Office* [1988] IRLR 190 (CA) quoted with approval in *Christian v Colliers Properties* at 240).
>
> Applicant led no evidence of any significant additional factor in support of her damages claim under the Employment Equity Act. She simply seeks to be compensated for the affront to her inherent dignity as a woman and her feelings of hurt that she suffered by being dismissed for falling pregnant. Landman J in a case involving similar unfair discrimination (*Mashava v Cuzen and Woods Attorneys* (2000) 21 ILJ 402 (LC)) awarded a *solatium* of five months over and above the compensation he awarded for patrimonial loss. The *solatium* element is in effect damages for the *injuria* element of a dismissal premised upon discrimination….'

[53] In *Ntsabo v Real Security CC,*[33] the Court dealt with the issue of damages being awarded as a result of psychological *sequelae*, which is also one of the applicant's contentions in the current matter. The Court said the following:[34]

> 'There were no physical injuries sustained by the applicant. Her damages are based on the pschycological *sequelae* of her experience. It is probable that her *sequelae* will not be permanent though she cannot be expected to forget the

[31] *Wallace v Du Toit* note above n26.
[32] Id at paras 19 – 20.
[33] (2003) 24 ILJ 2341 (LC).
[34] Id at 2382H - 2383A.

> experience completely. Her real problem lies more with the effects of the torrid experience rather than only with the incident itself. The psychological consequences of an attack are often more serious than the physical consequences because the human body has, in most cases, an extremely high degree of ability to repair itself. This is not the case with psychological *sequelae*. By comparison, people with strong stoic characters are few and far between. The applicant suffered psychological consequences. By all accounts they did not rank as the less serious type. Indeed it seems to have been extremely serious. It drove her to consider committing suicide.'

The Court awarded general damages in an amount of R50 000.

[54] In the current matter before me, I invited the applicant to prove actual damages and patrimonial loss by way of evidence, the submission of documents and/or supporting affidavits. I did so because the applicant contended that his claim for R150 000.00 included issues such as travelling costs, costs of treatment for his psychological issues, other medical costs and associated damages to his vehicle. The applicant declined to take up this invitation and avail himself of the opportunity to provide such substantiating evidence. As a result, I have no proper evidence before to me to prove and substantiate any of these damages claimed. The applicant has not even established any quantum where it comes to these damages. The applicant has also not shown any patrimonial loss to exist considering that he at all relevant times remained fully remunerated and employed at the respondent. I, therefore, cannot award the applicant any damages pursuant to his discrimination claim under the EEA other than general damages.

[55] In determining the issue of general damages, I consider that the applicant has only succeeded in establishing a foundation for his discrimination claim as from 14 October 2011 onwards despite seeking to rely on events before that. I also consider, in line with the principles as set out above, that the respondent has had

at least three opportunities to intervene and prevent the litigation from happening, but did not avail itself of such opportunities. I further consider that there is simply no basis or justification for the respondent not to have attended to the applicant's EAP request and grievance submitted. Of particular concern to me is what, in my view, is the entirely unlawful reaction of Molapisi to the applicant's EAP request and grievance and the fact that Molapisi despite the existence of the unresolved grievance still persists with the same kind of conduct. I accept that the applicant has suffered psychological *sequelae* because of the conduct towards him. I am also guided by the authorities referred to and the amounts awarded as general damages therein. I conclude in this regard by saying that I take the necessary care not to be unduly punitive and possibly instil a sense of shock by making an excessive award. In all of these circumstances, I consider it just an equitable to make a general damages award of one month's salary in favour of the applicant. The applicant's salary was confirmed to me in the applicant's evidence to be R34 000,00 per month.

[56] I will next deal with the applicant's claim to be transferred. The Court in *Biggar*[35] was faced with such a claim. The Court declined to entertain this claim, for the following reasons:[36]

> 'The primary relief that the applicant seeks in this matter is to be transferred to another department, which presumably would result in his moving from the premises at Brixton Fire Station, though he also seeks compensation. His attempts to persuade his employer to implement such a transfer have to date been unsuccessful. It is not apparent from the evidence before me why it has not been possible to transfer the applicant to the disaster management department of the respondent. Equally it is not clear what specific post the applicant might be suitably qualified for.'

[35] *Biggar* (*supra*).
[36] Id at para 24.

The same reasoning would, in my view, be directly applicable to the current matter. The applicant's request for an order directing his transfer as part of the relief claimed cannot be entertained. The simple fact is that the applicant has made out no case for such relief. It would be entirely inappropriate to just direct the respondent to transfer the applicant. There is no evidence as to the operational position of the respondent in this respect and whether such a transfer is even feasible or possible. In addition, to order such transfer may negatively impact on other departments[37] and/or bodies, which were not part of these proceedings and it would be fundamentally unfair to burden such parties with the outcome of these proceedings. There is no evidence as to what vacancies may be available to even transfer the applicant to and whether such vacancies are appropriate. The applicant in effect wants the Court to transfer him in a vacuum to whatever post there may be. This I am simply not willing to do. For the applicant to have succeeded with this part of his claim, substantially more specificity was needed as to available appropriate posts which the applicant could properly fill without disruption to other parties and stakeholders.

[57] It is, however, clear from the evidence that the applicant's request to be placed on the EAP program and the grievance that he submitted has not been dealt with. There is no reason placed before me why these issues cannot and should not still be dealt with by the respondent. I shall thus compel the respondent to deal with these issues as part of the powers bestowed upon me by section 50 of the EEA.[38]

[58] As to costs, it must be considered that the applicant was successful in showing unfair discrimination to exist. The respondent also, in my view, had the opportunity to avoid this matter having to come to Court. I consider it appropriate that a costs order be made against the respondent, even though this matter proceeded on a default basis.

[37] For example one of the applicant's transfer requests related to a transfer to Home Affairs.
[38] See for example the judgment in *Biggar* (supra) at paras 25 and 31.

Order

[59] For all of the reasons as set out above, I make the following order:

1. It is declared that the respondent has unfairly discriminated against the applicant as contemplated by the EEA.

2. The respondent is directed to deal with and finally determine the applicant's EAP request dated 14 October 2011, within 60 days of the date of handing down of this judgment.

3. The respondent is directed to deal with and finally determine the applicant's grievance dated 29 November 2011, within 60 days of the date of handing down of this judgment.

4. The respondent is ordered to pay general damages to the applicant in the sum of R34 000.00 which amount shall be paid to the applicant by the respondent within ten days of date of handing down of this judgment.

5. The respondent is ordered to pay the costs of the matter.

_____

Snyman AJ

Acting Judge of the Labour Court

APPEARANCES:

For the Applicant: Mr D W De Villiers of Riki Anderson Attorneys

For the Respondent: None