Reportable

IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT CAPE TOWN CASE NO. C 334/2005

In the matter between:

M. WALLACE Applicant

and

DR. PIETER DU TOIT Respondent

JUDGMENT

PILLEMER, AJ:

1] The Respondent and his wife are both working professionals. He is an attorney. His wife does freelance work in the publishing industry, working from home. Her job entails the need to attend meetings, to travel and she frequently has to meet

tight deadlines. In January 2002 the Respondent employed the Applicant as an au pair. He and his wife required assistance with the day-care of their then 3 year old daughter on weekday afternoons. Applicant had completed a course in child care in 1993, as a 20 year old, and had since then worked as a child minder. She was well qualified, experienced and came with good references. She heard of the job by word of mouth, put in an application and was interviewed for the position by the Respondent and his wife. The Applicant was thereafter employed to provide child care, intellectual stimulation, companionship and guidance as well as transport to extra-mural afternoon activities for the Respondent's young child. Applicant was remunerated by way of a monthly salary and also received a petrol allowance.

2] The parties got on well with each other and the employment relationship flourished. The Applicant's hours of work were initially from 2 p.m. to 5 p.m. each week day. Some two years into the contract, after a second child was born to the Respondents, Applicant's responsibilities increased and she was

employed to work for an additional five mornings every month and came in earlier some afternoons to prepare lunch for the children. She had an excellent relationship both with the children and with her employers, who had only praise for the way she related to the children and did her job. They were all obviously very fond of her and she of them.

3] At the time Applicant commenced her employment with the Respondent she was single and had no immediate intention of having children of her own. This topic was broached expressly during her initial interview by the Respondent and, as was borne out by the events that followed, this feature was particularly important to him. Respondent believes that the child minder assisting with bringing up his children must not have children of her own because in his judgment this would inevitably affect the devotion she would provide to his children. He explained his attitude saying that such a person would not be able to put his children first and would not be as flexible as a person without parenting responsibilities. He held this view dogmatically and

was unwavering in his support of it.

4] Even though the Respondent is an attorney he chose to handle this contract on an extremely loose informal basis that had unlawful elements. Nothing was put in writing even after the Applicant asked if she could have a written contract which request he fobbed off. He did not register the Applicant for UIF. He failed to effect her registration with or make payment to the revenue authorities in respect of PAYE. For this he must be admonished. As an officer of the court and indeed as an ordinary citizen he should respect and comply with the labour and revenue laws. His default has had as its result that the Applicant was not able to turn to the UIF Fund when she lost her job. He was also obliged as an employer to register and if Applicant earned more than the threshold to pay the requisite PAYE to SARS. His failure to deal properly with these aspects is a form of exploitation, rendering the employee more dependent and vulnerable, which is relevant in relation to the assessment of compensation dealt with later in this judgment. Respondent undertook to

remunerate Applicant by making a direct deposit into her banking account each month of the agreed monthly remuneration without any deductions plus the agreed petrol allowance. Applicant was also paid a “thirteenth cheque” i.e. she was paid double in December each year. Applicant’s salary increased over time and for the last two months of her employment Respondent paid R4,500 into her account plus R250 for the petrol allowance. This was an increase on the R4,000 per month she had been earning in the previous year. There was some dispute in the evidence with regard to whether or not the final salary was R4,000 or R4,500 per month. The parties had reached agreement on the figure at the pre-trial conference. It was recorded as one of the common cause facts before the trial commenced that the salary was R4,500 per month without any deductions. It was common cause at the trial that that amount was in fact paid for the last month of the Applicant’s employment. Respondent, when he testified, simply said that because he had “had a good month” he paid her more money in February 2005 and then said that he had no recollection as to

whether or not he had also paid that amount the previous month, but did not dispute Applicant's evidence that he had. It seems to me that the appropriate figure is R4,500 per month for a thirteenth month year. This is also relevant in relation to the computation of compensation which I will deal with later in this judgment.

5] The Applicant fell pregnant in 2004 expecting to deliver a child in May 2005. She informed Respondent's wife in September 2004 who in turn told the Respondent a little while later. Respondent's attitude was that the employment contract had to come to an end. Respondent spoke to the Applicant, congratulating her on her pregnancy, but at the same time told her that, because of her pregnancy, she would have to go and that he considered the suitable date for her to leave to be December of 2005. He secured her agreement not to mention the fact that she was pregnant to his children and he tendered to pay Applicant on termination of her employment R12,000, at that time an amount equal to three months salary. The Respondent was not able to find

a replacement au pair until March 2005 and asked Applicant to return in January 2005 which she did and then again during January asked if she would be willing to continue until the end of February which she also readily agreed to do. Applicant says that in January she was asked whether she would prefer to end at the end of January or the end of February and she chose the latter date because she needed the money. She explained that the meeting when this took place was extremely emotional for her and she broke down and cried.

6] On termination of her employment the Applicant was paid the R12,000 as promised.

7] The Applicant was not aware of her rights under the Labour Relations Act, 1995 and although she was disgruntled and, as she said, she felt hurt having tried her best for many years and when she really needed the job found herself jobless and had on one occasion become extremely emotional, she nonetheless stoically and quietly accepted Respondent's decisions and the money he paid to

her, as one would expect she might do in this kind of exploitative situation. Once she took advice after her dismissal she said she realised that she had a remedy for the unfair treatment she felt she had received and on advice referred the dispute to the CCMA for conciliation and when that failed to this Court for determination.

8] The Respondent and the Applicant both testified at the trial. Respondent's wife elected not to do so. The Respondent said that when the Applicant was interviewed in late 2001 the question of her starting a family was discussed and he claimed that he made it clear to her that if she had children of her own then he would not regard her as being qualified for the job. He went so far as to say that it was a term of the contract, argued by his counsel as being akin to a resolutive condition, that should the Applicant fall pregnant, which would inevitably lead to her becoming a mother and having children of her own, then the employment contract would *ipso facto* terminate. The Respondent said that he had been consistent in this attitude throughout and when he

spoke to the Applicant about the fact of her pregnancy after congratulating her, had pointed out that the relationship would have to end because she was having a child. The Respondent said that the Applicant had accepted the position but conceded that on one occasion had become particularly emotional and in response he had asked her what she wanted, meaning how much money she felt would be fair. It was put to him that her answer was that she needed the job and income. He conceded that she might have said these things but said he could not recollect. He said that Applicant did not ask him for more money and had she done so he would have readily considered her request.

9] The Respondent explained that he kept most of his personal contractual relationships informal and so there was nothing sinister in the lack of formality. He went so far as to say that even his present articled clerk did not have written contract of employment, which it seems to me is odd, unlawful and, I am sure, inaccurate. Respondent tended when giving his evidence to exaggerate to make a point and then

tone down the exaggeration in the next breath. Respondent gave the impression of someone who has a relatively easy-going nature and prefers to deal with matters loosely on an informal basis as and when they arise rather than having written contracts governing these relationships. I believe that he tries to be fair and to do what he considers just.

10] The Applicant flatly denied that there was a term in her contract of employment that it would terminate if she became a mother. She readily conceded that the Respondent had asked questions when she was interviewed to elicit her marital status and intentions in relation to having a family of her own and she explained that at that time she had truthfully told him that she was single and had no intention of having children. She had no idea how long the contractual relationship would endure and she claimed that it was never put to her and she had never agreed that the contract would automatically come to an end if she ever fell pregnant. She could see no reason why her pregnancy or motherhood would affect her ability to do her job properly and responsibly.

11] Applicant testified that when she informed the Respondent's wife that she had fallen pregnant she found her reaction upsetting. The Respondent's wife told her that Respondent would disapprove and had very strong views on the topic - Applicant understanding that it was pregnancy out of wedlock rather than her pregnancy *per se* that he found objectionable. There was a risk that it might not have been a normal pregnancy and Respondent's wife told the Applicant that she would not inform the Respondent until the Applicant knew for certain that it was a normal pregnancy and that she intended having the child. Once the Respondent was informed he congratulated Applicant and then said that she would have to go and spoke about her leaving a few months later in December 2004. Applicant said she had discussed things again with the Respondent's wife during December and that she had enquired about arrangements Applicant could make for the care of her new born child that would enable her to continue fulfilling her duties as an au pair. These discussions led her to believe or at the very least

hope that the Respondent's attitude had softened and that her employment would simply continue. Her hopes were dashed when the Respondent made it clear by the end of December that she would definitely have to go, but she was asked whether she would be willing work for the month of January. She agreed and then in January was given the option, she said, of bringing the contract to an end in January or working a further month until 28 February 2005. Applicant said she conducted herself with proper decorum on most occasions apart from the one occasion in January 2005 when she became extremely emotional. It was plain that she did not wish to leave and believed that she would be able to properly perform the functions she was performing after she had given birth to her own child. She had people upon whom she could rely to assist her with child care and she felt she would be able to cope like other working mothers. She complained that she was never given an opportunity to put this to test.

12] Against this background the Applicant seeks compensation from the Respondent in terms of section 194(3) of the Labour

Relations Act alleging that she was dismissed and that the reason for her dismissal related to her pregnancy and thus was automatically unfair in terms of Section 187(1)(e) of the Act.

13] In addition Applicant claims damages under Section 50(1)(e) of the Employment Equity Act, 1998 which empowers the Labour Court to award damages in cases involving discrimination on grounds of pregnancy in breach of the prohibition against this in section 6 of the Act. This remedy has been held to be available in addition to the remedy of compensation payable under the Labour Relations Act. (see Christian v Colliers Properties [2005] 26 ILJ 234 (LC); Ntsabo v Real Security CC [2003] 24 ILJ 2341 (LC)).

14] The Respondent's defence to the compensation claim under the Labour Relations Act was that there had been no dismissal but rather a consensual termination. It was contended that the contract provided a mechanism for its own termination and that had simply occurred.

15] Respondent's major difficulty with this defence, quite apart from whether or not a contract embodying a term that it would terminate on the pregnancy of the employee can be enforced since *prima facie* at least the term appears to be contra *bonos mores* and unconstitutional, is the fact that Respondent elected to be loose in the arrangement and not record it in writing. He could easily have recorded the contractual terms in a letter of appointment. He obviously had the professional skills to do this but deliberately chose not to even after being asked by the Applicant for a written contract. The consequences of a contract having the terms alleged by the Respondent are so far reaching and unusual judged against current societal norms that it seems to me, having regard to Respondent's general demeanour of being someone who prefers to deal with matters loosely and not cause offence if that is possible, that his strong personal world view that is out of kilter with societal values as expressed in the Constitution and our Labour legislation was probably never expressly and fully spelt out. He must have appreciated that it would cause offence and impair dignity if he was to say outright to a young

female employee that if she fell pregnant she would there and then and for that reason alone lose her job. There would also have been little reason for him to be so forthright once he was assured that Applicant was unmarried and had no intention to have children. I accept that there was in a sense an understanding between the parties that the person he was going to employ would be single and have no immediate intention of starting a family, but it is going too far to infer from that that it was a term of the employment contract that if such a person was employed for a number of years she could never ever start a family without risk of triggering a resolutive condition that would end her employment and that all questions of whether or not she would be able to continue to perform properly were irrelevant. The Applicant of course denies there was such a contractual term. In my view the probabilities strongly favour her evidence on this central issue.

16] The Respondent elected to bring the contract to an end. The common cause facts as set out in the pre-trial conference minute provide that "during January 2005 Respondent informed the Applicant that her services would be terminated

on 28 February 2005." The evidence on this topic also evidences a termination by the Respondent of the contract. The fact that the Applicant accepted and in that sense agreed to that termination, even though she would have preferred to remain on in employment, does not change the nature of the act from one of dismissal to one of consensual termination. I am satisfied that a dismissal as defined in section 186(1)(a) of the Labour Relations Act has been proven and that the reason for the dismissal related to the Applicant's pregnancy. The evidence made this plain and it was agreed as one of the common cause facts in the pre-trial minute.

17] It follows that such a dismissal is automatically unfair in terms of section 187(1)(e). The Respondent's justification that this was an inherent requirement of the job, even if it was sustainable, which in my view it is not, cannot in law provide a legal justification. The section is clear. A dismissal where the reason is related to the pregnancy of the employee is automatically unfair and cannot be justified.

18] The court must of course take into account that the

workplace is the Respondent's home and must respect the right of the Respondent and his wife to hold family values and world view that may not accord with the current societal norms as expressed in the Labour Relations Act. This is clearly not a case where a court would have awarded reinstatement if that had been sought because Respondent's right to choose the value system in his own home must be respected even if it is a value system that does not accord with the values enshrined in the constitution or embodied in the Labour Relations Act. This too is a relevant factor when deciding on the *quantum* of compensation payable.

19] It is plain that there has also been unfair discrimination in terms of section 6(1) of the Employment Equity Act since it certainly cannot be said that there is an inherent requirement of the job of au pair that the incumbent must not be pregnant nor a parent. This is the kind of generalisation or stereotyping that evidences the unfairness of the discrimination. The focus must be on whether the impact of the discrimination was unfair. (See President of the RSA and others v Hugo 1997(4) SA 1 (CC) at para [111]). In my assessment it certainly is unfair not to consider whether the Applicant would be able to

continue to fulfil her job function as a child minder properly and to simply presume that she could not when this is not at all self evident. This decision falls foul of section 6 of the Act. It therefore follows that the Respondent has breached the prohibition in section 6(1) of the Act and that the right to claim damages has been established. In determining the appropriate measure of damages I must bear in mind that the award should not be minimal as that would tend to trivialise 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 supra at 240).

20] 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 & Woods Attorneys [2000] 21 ILJ 402) 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 and in that case Landman J was not asked to make a separate award under the Employment Equity Act. It seems to me that where a *solatium* is claimed or awarded under the ambit of compensation to compensate for the "automatic unfairness" of the dismissal, which in this situation embodied the unfair discrimination, and such claim is made in addition to a claim for damages for unfair discrimination arising out of the same facts then there is a duplication that works unfairly against a Respondent which a court must be careful to avoid. Where the total of the amount fixed is less than 24 months remuneration there is no need to try and disentangle the two causes of action in assessing quantum. The need to do this will only arise if the amount considered fair and reasonable by the court exceeds the cap in section 194(3) of the Labour Relations Act, because since there is no cap under the

Employment Equity Act, what is awarded under each Act then takes on greater significance. I do not intend to award more than 24 months remuneration and so I do not try to disentangle the two causes of action and make a single award in relation to the solatium element under the Labour Relations Act and the damages claim under the Employment Equity Act.

21] I consider that an amount of R25 000.00 would constitute fair *solatium/* damages for the impairment of Applicant's dignity and self-esteem flowing from the discrimination on the grounds of her pregnancy. The figure is also intended to be punitive and embodies the opprobrium of the court and criticism of the Respondent's approach in relation to the dismissal bearing in mind the exploitative features of the contract, but nonetheless balances against that an acceptance that the Respondent has the right to chose what happens in his own home and that he attempted as best he could, having regard to his world view, to be fair towards the Applicant. The amount of damages under this head is thus less than it would have been had Applicant been employed in a different industry and is intended to strike a fair balance on

the facts of this case.

22] To the figure of R25,000 must be added compensation for the patrimonial loss suffered by the Applicant. The Applicant has been out of employment since March 2005, some 12 months, and presumably could have continued working until she gave birth or shortly before she gave birth in May of 2005, when, had she been registered with UIF, could have received portion of her pay while on maternity leave and then returned to work. Applicant explained that although she has looked for employment she has been unable to find anything permanent or comparative with the type of job she lost. She had to turn down one job offer because she did not have the necessary expertise to deal with the child who had a serious allergy to peanuts and had tried her hand at bookkeeping without any success. Partly because of her financial position she had to move with her boyfriend to live with her mother in Johannesburg where he is attending a course. She has been out of work for a year and will probably remain out of work for a little while longer although she has been able to find some occasional work. The Applicant has skills, worked as an au pair for many years before securing employment with the

Respondent and is in my view likely to obtain similar employment again fairly soon. It is impossible to fix the amount of her loss with mathematical precision and it seems to me that compensation based on twelve months remuneration, less the R12,000 she received from the Respondent, would do justice to the case. The petrol allowance was intended largely to cater for the use of the motor vehicle for the Respondent's children who were transported by the Applicant to extra-mural activities and to compensate her for travelling to and from work. It does not seem to me to be fair to take that figure into account in determining the yardstick against which the compensation will be measured. The Applicant earned R4,500 per month over thirteen months and I have used the average monthly figure of R4,875 (R4,500x13/12) as the basis. The compensation therefore is determined at R46,500, made up as to twelve months at R4,875 i.e. R58,500 less R12, 000.

23] The total amount therefore awarded to the Applicant under both heads is R71,500.

24] The employment relationship has obviously come to an end.

The remedy sought was compensation and there is no ongoing relationship. The Applicant was a victim of unfair discrimination and an automatically unfair dismissal and, in all those circumstances, it seems to me proper that she should be indemnified in relation to her legal costs.

25] *Mora* interest should run from the date of the certificate of outcome in the CCMA that the dispute was unresolved i.e. 22 April 2005.

26] The terms of the contract were such that the Applicant earned a figure without deductions and she should be compensated accordingly. Therefore such income tax consequences as flow from this award are to be borne by the Respondent.

27] The Order I make therefore is the following order:

(i) The Respondent is ordered to pay to the Applicant the amount of R71,500 together with interest thereon at the rate of 15.5% per annum calculated from 22 April 2005 to date of payment.

(ii) If income tax is payable on the amount set out in paragraph (i) above then the Respondent is responsible to pay the amount so payable to SARS without recourse to the Applicant for reimbursement of any amount so paid;

(iii) The Respondent is ordered to pay the Applicant's costs.

M. PILLEMER
ACTING JUDGE OF THE LABOUR COURT

Date of Judgment: 27 March 2006

Date of Hearing: 20 March 2006.
Date of Judgment: 27 March 2006.

Appearances
Applicant: J.D. Verster
J D Verster Labour Law Offices
Respondent: W JACOBS
Willem Jacobs and Associates