Testing differential treatment

By Lauren Salt and Donovan Lindhorst

6 Nov 2018

In the recent case of *Impala Platinum Ltd v Jonase and Others*, the Labour Court (LC) dealt with an appeal against an unfair discrimination award, brought in terms of section 10(8) of the Employment Equity Act, 1998 (EEA). This followed an arbitration award by the Commission for Conciliation, Mediation and Arbitration (CCMA), which found that two pregnant employees had been unfairly discriminated against by Impala Platinum Limited (company).

© Noriko Cooper – 123RF.com

The situation transpired during a strike at one of the company's mines. The complainants were two of a number of employees who became pregnant, as the Association of Mineworkers and Construction Union (AMCU) put it, "due to the strike". There were 21 employees, all of whom worked underground, who had become pregnant during this time. It goes without saying that an underground mineshaft is not a suitable environment for pregnant mine workers. The company had a policy in place to deal with such situations. The policy provided that it would attempt to place pregnant employees working underground in suitable alternative employment on the surface, where reasonably practicable, in order to prevent any risk to the health and safety of either the pregnant employees or their unborn child(ren).

The two complainants were amongst those moved to the surface and for whom the company could not find alternative employment. Of the 21 pregnant employees, only two had the requisite skills for the available administrative posts. The remaining employees were told to take their four months' paid maternity leave with the option of unpaid maternity leave for up to six months. While the company was seeking alternative positions, the two complainants were moved to the AMCU offices on full pay for three months, despite them not doing any work for the company.

The two complainants then referred a dispute to the CCMA alleging unfair discrimination in terms of section 10 of the EEA, stating that they "...want to be treated fair like other pregnant employees". The conciliation failed and the two referred to the dispute to arbitration.

The commissioner found:

"It is clear from the evidence provided that the applicants were indeed discriminated against. The truth of the matter is that the duty is on the employer to provide employees with a safe working environment, however, that does not mean that employees should be prejudiced or be disadvantaged in the process. I agree with the employer that it is risky to allow pregnant employees to work underground but I disagree with the fact that an employer can direct employees to take unpaid leave where it is unable to secure an alternative. I am of the view that the employer's failure to find alternatives was unfair to employees and that constitutes discrimination as the sole reason for the failure is the employees' pregnancy. The employer is actually saying those who fell pregnant would do that at their own peril as there is no guarantee that an alternative will be found, and that cannot be condoned."

The commissioner found that the applicants were treated differently from other pregnant employees, concluding that the differentiation amounted to unfair discrimination. In addition, the commissioner found that the maternity policy is unfair as it discriminates against pregnant employees and that the Company had a responsibility to find alternative employment for the complainants, or to pay them.

The company appealed, contending that the commissioner erred in:

- finding that discrimination had been established;
- granting relief outside of her remit; and
- finding the company's failure to secure suitable alternative employment for the two complainants was per se unfair discrimination.

The complainants had complained they had been treated differently from other pregnant employees, yet the commissioner simply found that the Company had discriminated against them because they were pregnant. This complaint was negated by their comparator, being other pregnant women. The LC found that the treatment of some pregnant women compared to other pregnant women simply cannot constitute discrimination based on pregnancy.

It was the lack of requisite skills that resulted in certain pregnant women being treated differently to other pregnant women, but those women were not treated differently by virtue of their pregnancy. The two complainants submitted that the true complaint was not about the alleged unfair treatment of certain women within the category of pregnant women, rather it was about the discriminatory treatment of pregnant women as opposed to employees who were not pregnant. The LC rejected this submission, stating that it was simply not borne out by the documents, evidence, arguments and facts that were before the commissioner.

In addition, the LC found that the complainants never complained about the fairness of the policy in relation to pregnant employees and that the commissioner had no power to strike down the policy, as it was not part of the complaint before her.

With regard to finding suitable alternative employment, if the Company cannot find such, the maternity policy becomes operative. As there were no suitable alternative positions available for the two complainants, there was no further duty on the Company to create non-existent positions for them. The LC found the Company acted lawfully, rationally and in accordance with its own policy.

The appeal was upheld and the arbitration awards were set aside.

Employers should not be shy to include provisions for suitable alternative employment for pregnant women in their policies, or to provide for situations where no suitable alternative is reasonably possible, such as those contemplated in this case. Employers should take pains to ensure however, that the differential treatment of these employees does not inherently discriminate against them.

ABOUT THE AUTHOR

Lauren Salt is a senior associate, and Donovan Lindhorst, a candidate attorney, in the Employment & Compensation Practice at Baker McKenzie Johannesburg.