IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, CAPE TOWN

Reportable

Case no: CA 4/17

In the matter between:

TDF NETWORK AFRICA (PTY) LTD **Appellant**

and

DEIDRE BEVERLEY FARIS **Respondent**

Heard: **20 September 2018**

Delivered: **05 November 2018**

Summary: unfair discrimination on religious ground –Employee, Adventist believer refusing to work on Saturdays because her religion prohibits work on Sabbath day – employer dismissing employee for incapacity- employee contending that reason for dismissal was because of her religion thus automatically unfair – Labour Court finding dismissal automatically unfair and substantively unfair

Appeal limited to the automatically unfair dispute as Labour Court not having jurisdiction to entertain fairness of dismissal in the absence of a consent by parties.

Court finding that employee dismissed and discriminated against for complying with and practising the tenets of her religion. The enquiry is whether the discrimination is fair, rationally connected to a legitimate purpose and does not unduly impair or impact on employee's dignity.

Held that:

The test for whether a requirement is inherent or inescapable in the performance of the job is essentially a proportionality enquiry…In general, the requirement must be rationally connected to the performance of the job. This means that the requirement should have been adopted in a genuine and good faith belief that it was necessary to the fulfilment of a legitimate work-related purpose and must be reasonably necessary to the accomplishment of that purpose. In addition, the employer bears the burden of proving that it is impossible to accommodate the individual employee without imposing undue hardship or insurmountable operational difficulty. Further that, there is no evidence that the employer suffered any hardship at all by employee being absent. She did not attend stock takes for 12 months and there is no indication at all that her absence impacted on the TFD's ability to get the stock takes done. Her presence was not reasonably necessary for the accomplishment of the main purpose.

An employment practice that penalises an employee for practising her religion is a palpable invasion of her dignity in that it supposes that her religion is not worthy of protection or respect. It is a form of intolerant compulsion to yield to an instruction at odds with sincerely held beliefs on pain of losing employment. The employee is forced to make an unenviable choice between conscience and livelihood. The employer has a duty to reasonably accommodate an employee's religious freedom unless it is impossible to do so without causing itself undue hardship. It is not enough that it may have a legitimate commercial rationale. The duty of reasonable accommodation imposed on the employer is one of modification or adjustment to a job or the working environment that will enable an employee operating under the constraining tenets of her religion to continue to participate or advance in employment.

As regard the amount of compensation, court limiting the compensation to12 months as the double compensation by the Labour Court unfair. Appeal partially upheld mainly on the amount of court- Labour's compensation.

Coram: Davis JA, Murphy and Kathree-Setiloane AJJA

JUDGMENT

MURPHY AJA

[1] The appellant, TFD Network Africa (Pty) Ltd ("TFD") appeals against the judgment of the Labour Court (Mooki AJ) holding *inter alia* that the dismissal of the respondent Ms. Deidre Faris ("Faris") was automatically unfair on grounds of religious discrimination and awarding her compensation.

[2] Faris was employed by TFD in 2011 as part of its graduate management training programme. TFD conducts business as a logistics and transport service provider and offers a warehousing and distribution service. The warehouse normally holds substantial amounts of customer stock and stock taking is required over weekends on a monthly basis. The dismissal of Faris arose from her refusal to work on Saturdays on account of her being a Seventh Day Adventist ("Adventist'), a religion in which Saturday, the seventh day, is the holy Sabbath. Adventists are required to observe the Sabbath between sundown on Friday and sundown on Saturday evening during which time they are ordinarily not permitted to work and must dedicate themselves to spiritual and religious matters.

[3] Faris testified that she was only interviewed telephonically and in the course of the interviews, informed TFD that she was an Adventist and could not work on the Sabbath.

[4] TFD maintains that there was an actual on site interview with the respondent in October 2011 in which she was told that she would be required to perform weekend work and to which she indicated she had no problem. TFD claims it would not have employed Faris if it had been aware that she could not work on weekends, as it was an operational requirement of the job that she participate in stock-taking on Saturdays.

[5] Faris reported for duty on 14 January 2012 to finalise her appointment, and was given an employment contract which was explained to her by Suzelle

Stander ("Stander"), the human resources officer at the time. Faris testified that she told Stander that she was an Adventist and could not work on weekends. She said that Stander referred her to the warehouse manager, Hilton Jordaan ("Jordaan") to whom she also disclosed her position who then agreed not to roster her to work on weekends.

[6] Both Stander and Jordaan denied this version. Stander testified that she went through the employment contract with Faris and specifically explained that she would be required to attend stock taking over some weekends. Stander added that she would not have referred Faris to Jordaan in any event, as Faris would report to Mr. Jurie Smith and such issues would have to be considered by him. Jordaan testified that other than being introduced to Faris that day, there was no discussion with her about her religion or rostering of work over weekends

[7] Faris signed her written contract of employment on 20 January 2012, and commenced work at the end January 2012. Clause 3.3 of the employment contract reads:

> 'By signing this contract, you undertake and agree to perform such overtime duties as may be reasonably required of you from time to time, provided this does not exceed the limitations laid down in relevant legislation.'

[8] Given the large amounts of stock TFD carries for its customers, it is a business requirement that a "wall to wall" stock take be conducted once a month. The stock take is conducted by all the managers of TFD from the end of the business day on a Friday through into Saturday afternoon. All managers are rostered on a separate stock take roster, over and above the normal working shift, and managers are paid overtime for this work.

[9] Faris testified that she was never rostered to attend a stock take for the entire period of her employment from January 2012 until her dismissal in December 2012. Jordaan, who was responsible for compiling the roster testified that Faris was indeed rostered to attend all the stock takes, along with the other managers. Smith testified that he saw Faris' name on the March, April and July 2012 rosters with her name unmarked as she was not in attendance.

None of the rosters were tendered as evidence at the hearing. It is not disputed that there was a stock take every month and that Faris did not attend any of them. The propositions that Faris failed to disclose her religious status and was acting in defiance of the rosters are not supported by any documentary evidence and are disaffirmed by the fact that no disciplinary action was taken against her in that regard during the entire 12 months of her employment.

[10] Smith testified that in March 2012, he checked the roster and found that Faris did not attend. He asked her about it and she explained she had "personal commitments", but said nothing about her religion. He stated that being a manager, he accepted her explanation and did not pursue the issue further. Faris did not dispute this testimony, saying she could not remember.

[11] When Faris did not attend the April 2012 stock take, Smith confronted her on 23 April 2012. She told him that she was an Adventist and that her religion prohibited her from working on Saturdays before sunset. He told her that she was required to attend the stock takes and that he could not make an exception for her. In response, Faris wrote to Felicia Landsberg ("Landsberg") who was involved in her recruitment seeking her assistance in procuring special accommodation.

[12] After Faris failed to attend the June and July 2012 stock takes, she was again confronted by Smith on 30 July 2012 in a management meeting and was instructed to attend the stock takes. She told him that her religion prohibited her from working the weekend. Faris became emotional in the meeting after Smith allegedly said he did not give a "fuck" about her religion, and if he instructed someone to be at work they were expected to be at work. Faris further testified that during the meeting, Jordaan said that Faris was in fact not rostered to work and Smith stated that Jordaan did not have authority to do this. Later that day, Faris explained to Smith in his office that she could not work on Saturdays because of her religion. There is some difference about how Smith re-acted, but in the final analysis, it is clear that he was unwilling to make an exception just for her. However, he denied that he made any derogatory statement about her religion as Faris alleged.

[13] Smith confirmed that he discussed the matter with Faris and explained to her, using the example of Muslims and Eid, that he could not accommodate her, as all managers were obliged to attend stock takes.

[14] The matter was escalated to the human resources department and a meeting was then held on 22 August 2012 attended by Faris, Smith, Christiaan Serfontein ("Serfontein"), a human resources administrator. Smith and Serfontein explained why attending stock takes is necessary in terms of its policy and urged Faris to comply. It was explained that the stock take requirement applied to all managers, no matter what their background or beliefs. The parties discussed suggestions on how to resolve the issue. Faris persisted with her contention that she is not permitted work on Saturdays. She did not dispute the operational necessity for managers having to attend the weekend stock takes but remained adamant that she personally could not compromise her religious beliefs.

[15] A second meeting was held on 29 August 2012. Once more, it was explained to Faris that the stock take requirements could not be changed for one person, and all managers had to attend the stock take. Faris again stated that she understood this but added that she could not compromise on her religious convictions. It was suggested that she attend church on Saturday and then come to work afterwards, but she refused this.

[16] In his testimony before the Labour Court, Smith explained his attitude as follows:

> 'I then explain to her that, unfortunately, the nature of our business it's a requirement that we do a stock count over a weekend, we can't move the stock take to a Sunday, due to the fact that we change shifts on a Sunday and we start packing on a Sunday night at seven o'clock again, and that, because there's 260 people that work at this facility, it's unfortunate that I cannot give into one religion, because then I, if I discriminate against the other guys' religion, I'm going to have a problem, because I've got people from all religions working at this facility, and it is unfortunate that we have to (indistinct) that I can't accommodate any specific person.'

[17] Referring to the encounter after the meeting of 30 July 2012, Smith elaborated:

> 'After everybody left, she came back to my office and discussed me (sic) – because of what I said, that everybody needs to attend the stock count, and she came back and said but she can't because of her religion. And I explained to her that I, unfortunately, as much as I would love to assist, I cannot give her the opportunity to – or give her off, not to attend the stock count, because of the different religions that work for us, and that it's imperative that the management should attend the stock count, because that's part of the graduate training programme as well. I need to train her to become a manager, and it's part of our succession planning.'

[18] Under cross-examination, Smith explained his concerns about succession planning raised in the meeting with Serfontein as follows:

> 'I discussed with Christian the fact of what's the position, or what's the requirement from the graduates, and what's the reason being that we want her to attend the stock count, and the reasons for them attending the stock count, as it is a long-term goal of ours to bring the guys through the ranks and train them…So we do it as part of our succession planning, bring these guys through the ranks. And that if I can't train her in all the aspects of being a manager there, it's worthless to me if I can't do that, because then we failed in our graduate programme.'

[19] He continued later:

> '[I]t's a long-term goal and it's a long term succession planning, and that that's required of that position, to be able to do that, and I cannot train people if they're not prepared to come to work on a Saturday to do the stock count, because there's no other time that I can do it, except for over a weekend where we do sock count. There's no other time we can do stock count, because I can't stop the business to count stock.'

[20] He concluded his rationale as follows:

> '[H]ow can she ever manage any of these departments if she hasn't got the experience, if she doesn't have the know-how how to do it? And how can she manage her people by not being present at the stock count…..for this

graduate programme, and the long-term goal of this graduate programme is to train these people to have them set-up as the next managers in this business.'

[21] Incapacity proceedings were then initiated and after a hearing Faris was dismissed for incapacity on 20 December 2012. As mentioned, Faris was never disciplined for allegedly failing to disclose her religious status at the time of her recruitment or for failing to report for Saturday work in accordance with the roster.

[22] After conciliation, the Commission for Conciliation, Mediation and Arbitration ("the CCMA") issued a certificate of outcome on 5 March 2013 declaring that the dispute concerning "an alleged unfair discrimination based on religious grounds" remained unresolved and noted that the dispute could be referred to the Labour Court. In her statement of case, Faris contended that her dismissal was procedurally and substantively unfair, automatically unfair and that she was unfairly discriminated against by TFD on the basis of her religion and belief.

[23] TFD in its answering statement contended that Faris had been dismissed for incapacity and that in terms of section 191(5) of the Labour Relations Act[1] ("the LRA") the Labour Court had no jurisdiction to enquire into the fairness of any dismissal based on incapacity, though it accepted that the court could determine whether the dismissal was automatically unfair. The fairness of dismissals on grounds of incapacity is to be determined by the CCMA or bargaining councils with jurisdiction. Despite the objection, the Labour Court determined the fairness of the dismissal for incapacity and concluded it was substantively and procedurally unfair. It also concluded that the dismissal was automatically unfair. The approach was erroneous. Once it found the dismissal to have been automatically unfair, the Labour Court should not have considered whether the dismissal was substantively and procedurally unfair as well. It is only when a dismissal is not automatically unfair that the fairness of such dismissal based on considerations of substance and process can be considered and then the parties must consent to the Labour Court assuming

[1] Act 66 of 1995.

the role of arbitrator. In terms of section 158(2) of the LRA, the Labour Court may only determine an incapacity dismissal with the consent of the parties and if it is expedient to do so. TFD did not consent in this case. Accordingly, the dismissal issue must be limited in this appeal to determining whether the dismissal was automatically unfair.

[24] Section 187(1)(f) of the LRA renders a dismissal automatically unfair if:

> '… the reason for the dismissal is that the employer … unfairly discriminated against an employee, directly or indirectly, on any arbitrary ground, including, but not limited to race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, political opinion, culture, language, marital status or family responsibility.'

[25] The automatically unfair dismissal claim, in this case, is founded on Faris' religion. She carries the evidentiary burden to show that her religion was the true or real or dominant reason for her dismissal and that a sufficient nexus exists between her dismissal and her religion. TFD does not dispute that Faris is an Adventist, but has disputed whether it is one of the tenets of the religion that Adventists may not work at all on the Sabbath. It pertinently required this tenet of the religion to be proved at trial, and in the pre-trial minute called on Faris to provide expert evidence in this regard.

[26] In *SACWU and Others v Afrox Ltd,*[2] when dealing with an automatic unfair dismissal in terms of section 187(1)(a) of the LRA – dismissal for participation in a protected strike - this court said the following:

> 'The enquiry into the reason for the dismissal is an objective one, where the employer's motive for the dismissal will merely be one of a number of factors to be considered. This issue (the reason for the dismissal) is essentially one of causation and I can see no reason why the usual twofold approach to causation, applied in other fields of law, should not also be utilized here ... The first step is to determine *factual* causation: was participation or support, or intended participation or support, of the protected strike a *sine qua non* (or prerequisite) for the dismissal? Put another way, would the dismissal have occurred if there was no participation or support of the strike? If the answer is

[2] (1999) 20 ILJ 1718 (LAC) para 30

yes, then the dismissal was not automatically unfair. If the answer is no, that does not immediately render the dismissal automatically unfair; the next issue is one of *legal* causation, namely whether such participation or conduct was the 'main' or 'dominant', or 'proximate', or 'most likely' cause of the dismissal. There are no hard and fast rules to determine the question of legal causation.'

[27] Section 187 of the LRA imposes an evidential burden upon the employee to produce evidence which is sufficient to raise a credible possibility that an automatically unfair dismissal has taken place. It then behoves the employer to prove the contrary by producing evidence to show that the reason for the dismissal did not fall within the circumstances envisaged in section 187 for constituting an automatically unfair dismissal.[3]

[28] TFD submits that the most dominant reason for the dismissal of the respondent was not her religion, but her refusal to work on Saturdays. It has always required all its managers, no matter who they were or what their background was, to attend stock takes once a month from Friday to Saturday. Moreover, the contract of employment specifically makes provision for such overtime work, which Faris agreed to when commencing employment, despite her religion. Thus, it argued, religion was not the *sine qua non*. The refusal to do the stock take was the dominant reason for the dismissal, and not Faris' personal convictions that underlay it. Her religion, therefore, TFD contends, played no role in the motivation to dismiss her.

[29] TFD also argued that Faris failed to prove that the tenets of her religion absolutely forbid work on Saturdays. As mentioned, TFD specifically placed this in dispute. No expert evidence was tendered. The mere *ipse dixit* of Faris, TFD submitted, was insufficient to prove the tenets of her religion. At the very least, it was necessary to call a pastor of the church to establish that it was impossible for her to obtain a special dispensation to work on a Saturday once a month. She accordingly failed to prove that her religion *per se* prohibited her from working on a Saturday. Her personal views of what her religion required of her are insufficient.

[3] *Kroukam v SA Airlink (Pty) Ltd* (2005) 26 *ILJ* 2153 (LAC).

[30] Faris conceded in her testimony that exceptions are made for doctors or nurses or persons doing essential service work. However, she made it clear that stock taking did not fall into the exceptional humanitarian category. Her decision not to work on a Saturday was one of faith and conscience-based not only upon the tenets of the Adventist faith but also her subjective understanding of the tenets. She elected as a matter of conscience not to seek a special dispensation from her church as she considered it inappropriate to do so.

[31] TFD's contentions are not sustainable. Firstly, the dismissal would not have occurred if Faris had not been an Adventist. Had she not been an Adventist she would have willingly worked on a Saturday. The evidence suggests that her work performance was exemplary in all other respects. It is disingenuous to argue that her non-availability on Saturdays was the reason for her dismissal without having regard to the underlying reason for her non-availability. But for her religion, she could have worked on a Saturday and would not have been dismissed. Her religion was the dominant and proximate reason for her dismissal.

[32] The tenets of the Adventist religion are notorious or at least readily ascertainable. They can be obtained from sources of indisputable authority. And it is permissible for a court tasked by the LRA to do equity and advance social justice in expeditious dispute resolution, to take judicial notice of notorious facts of a sociological or religious nature by consulting works of reference.[4] According to the website Christianity.com, Adventists may not partake of secular labour on Saturdays, with exceptions made for emergency humanitarian work. It hardly needs saying that stock taking in pursuit of profit does not fit the mould of the category of exception.

[33] The argument that Faris ought to have sought exemption from her church, and the suggestion that the tenet was not central to the Adventist religion because adherence to it was voluntary, amounts to a call to restrict the scope of the right to freedom of religion. It is at least doubtful that an exemption for

[4] *Consolidated Diamond Mines of South West Africa Ltd v Administrator of South West Africa* 1958 (4) SA 572 (A) 609

non-humanitarian work was possible, but even were it possible, such conflicted with Faris' conscience and her subjective interpretation of her religious duties. There are adherents to a religious creed who may not be obliged to observe a certain practice but feel that it is central to their identity that they do so. They too are entitled to protection in our constitutional order.[5] The weight to be given to the consideration of whether a practice is a central tenet of the religion and the nature of the enquiry was examined by the Constitutional Court in *MEC for Education, KwaZulu-Natal v Pillay*[6] where it held:

> 'A necessary element of freedom and of dignity of any individual is an 'entitlement to respect for the unique set of ends that the individual pursues.' One of those ends is the voluntary religious and cultural practices in which we participate. That we choose voluntarily rather than through a feeling of obligation only enhances the significance of a practice to our autonomy, our identity and our dignity…The protection of voluntary as well as obligatory practices also conforms to the Constitution's commitment to affirming diversity. It is a commitment that is totally in accord with this nation's decisive break from its history of intolerance and exclusion. Differentiating between mandatory and voluntary practices does not celebrate or affirm diversity, it simply permits it. That falls short of our constitutional project which not only affirms diversity, but promotes and celebrates it.'

[34] That is not to say that the objective centrality of the tenet to the particular religion is not relevant. As will appear later, centrality has particular relevance to any limitation analysis justifying the proportional restriction of the right and whether reasonable accommodation is possible. Centrality must be judged with reference only to how important the belief or practice is to the applicant's religious identity. This permits consideration of a range of evidence including evidence of the objective centrality of the practice to the religious community at large. But that evidence is relevant only in so far as it helps answer the primary enquiry of subjective centrality. I will return to this issue when evaluating the legality and fairness of TFD's operational requirement.

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[5] *MEC for Education, KwaZulu-Natal v Pillay* 2008 (1) SA 474 (CC) paras 86-88
[6] 2008 (1) SA 474 (CC) paras 63-66

[35] In conclusion then, there is no doubt that Faris was dismissed and discriminated against for complying with and practising the tenets of her religion. The decisive enquiry in this appeal is whether the discrimination is fair, rationally connected to a legitimate purpose and does not unduly impair or impact on Faris' dignity. In the context of the LRA, the fairness enquiry coincides in most respects with the determination of whether the discriminatory job requirement falls within the exemption in section 187(2)(a) of the LRA, which provides specifically that, despite section 187(1)(f), a dismissal may be fair if the reason for the dismissal is based on an inherent requirement of the particular job. Relevant considerations in regard to fairness and the inherent requirements of the job include the position of the victim of the discrimination in society, the purpose sought to be achieved by the discrimination, the extent to which rights or interests of the victim of the discrimination have been affected, whether the discrimination has impaired the human dignity of the victim, and whether less restrictive means are available to achieve the purpose of the discrimination.[7]

[36] TFD submits that it is an inherent requirement of the job to require a manager to do a stock take once a month over a weekend, where a stock take is essential to its operations. In *Department of Correctional Services and Another v Police and Prisons Civil Rights Union and Others,*[8] the SCA stated:

> 'An inherent requirement of a job has been interpreted to mean "'a permanent attribute or quality forming an . . . essential element . . . and an indispensable attribute which must relate in an inescapable way to the performing of a job."'

[37] The test for whether a requirement is inherent or inescapable in the performance of the job is essentially a proportionality enquiry. Considering the exceptional nature of the defence, the requirement must be strictly construed. A mere legitimate commercial rationale will not be enough. In general, the requirement must be rationally connected to the performance of the job. This means that the requirement should have been adopted in a genuine and good faith belief that it was necessary to the fulfilment of a legitimate work-related

[7] *Department of Correctional Services and Another v Police and Prisons Civil Rights Union and Others* (2013) 34 ILJ 1375 (SCA) at para 21.
[8] (2013) 34 ILJ 1375 (SCA) at para 23.

purpose and must be reasonably necessary to the accomplishment of that purpose.

[38] However, even if that is shown, the enquiry does not end there. In addition, the employer bears the burden of proving that it is impossible to accommodate the individual employee without imposing undue hardship or insurmountable operational difficulty.[9] In *SA Clothing and Textile Workers Union and Others v Berg River Textiles - A Division of Seardel Group Trading (Pty),*[10] the Labour Court correctly and succinctly put it as follows:

> 'In particular, the employer must establish that it has taken reasonable steps to accommodate the employee's religious convictions. Ultimately the principle of proportionality must be applied. Thus an employer may not insist on the employee obeying a workplace rule where that refusal would have little or no consequence to the business.'

[39] TFD maintains that the weekend stock take once a month achieved a proper, if not critical, operational purpose at its business. TFD carries stock of substantial value in a warehouse and obviously must conduct regular stock takes. A full stock takes over a weekend once a month, when normal weekly business operations have ceased, is necessary for the efficient running of the business. The stock take is designed also to provide an opportunity to exercise supervision and control over the personnel normally working in the warehouse. It, accordingly, requires managerial involvement. It is also intended to provide managerial training. Stock takes once a month over a weekend are thus an essential component of a manager's job.

[40] TFD contends further that the limitation of Faris's rights in achieving these legitimate commercial purposes was minimal. Faris was free to exercise her religious beliefs in all other respects at all other times except for the 12 days of the year when she could be reasonably expected to compromise by getting special dispensation from her church, which would not be disproportionately onerous. In its view, her dignity and her position in society were not unjustifiably affected.

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[9] See *British Columbia (Public Service Relations Commission) v BCGEU* 176 DLR (4th).
[10] (2012) 33 ILJ 972 (LC) at para 38.6.

[41] Moreover, TFD contended there was a danger of opening the floodgates to other employees who might similarly seek exemption from Saturday work for family or other reasons.

[42] TFD relied on the decision of the Labour Court in *Food and Allied Workers Union and Others v Rainbow Chicken Farms (Rainbow Chickens)*,[11] concerning Muslims who refused to work on Eid. The applicants, in that case, contended that their dismissal for refusing to work on Eid was an automatically unfair dismissal based on their religion. The court held:

> 'The individual applicants were not discriminated against unfairly, as envisaged by s 187 of the Act. All employees of the respondent were required to work on Eid, which is not a public holiday. …. The applicants' legal representative, Mr *Conradie*, referred me to American cases where it was held that an employer's refusal to permit an employee to celebrate his or her religion constituted unfair discrimination. I would agree with the aforesaid proposition, where it was established that a particular employer permitted only some employees to take a day off to celebrate their religion, whereas others were not permitted, provided that the granting of such permission does not have the result that no work can be done because of the religious holiday of one or more employees.
>
> In this case, Christmas (a public holiday) is not a working day for any employee of the respondent. If all the butchers are given the day off on Eid, no work could be done on Eid, and all the respondent's employees would have to take that day off and be paid, irrespective of whether they belong to the Islamic faith or not. This, of course, is the case as well, insofar as Christmas is concerned. Christmas, however, is a public holiday, and Eid is not. The individual applicants were specifically employed because they are Muslims. It was an operational requirement. Consequently, I do not believe that the respondent's conduct, by not consenting to giving the butchers the day off on Eid, amounts to unfair discrimination as envisaged by s 187(1)*(f)* of the Act.'

TFD submitted that what holds true for Muslims should hold equally true for Adventists.

[11] (2000) 21 ILJ 615 (LC) 20-21.

[43] Although it is undeniable that the overtime requirement pursued a legitimate commercial rationale adopted in a genuine belief that it was necessary for the fulfilment of a legitimate work-related purpose, TFD's justification ultimately does not withstand scrutiny. In particular, I am not persuaded that it was impossible to achieve the object of the stock takes without reasonably accommodating Faris. Her situation was very different to that of the Muslim employees in the *Rainbow Chickens* case. In that case, had the affected employees all been allowed to take leave, the factory would have closed and the employer would have suffered undue hardship. By contrast, there is no evidence that the employer suffered any hardship at all by Faris being absent. She did not attend stock takes for 12 months and there is no indication at all that her absence impacted on the TFD's ability to get the stock takes done. Her presence was not reasonably necessary for the accomplishment of the main purpose.

[44] The real rationale for insisting on Faris' attendance at stock takes appears most clearly from Smith's testimony. He had a rigid policy from which he did not want to depart by making an exception. If he accommodated Faris, he feared he would be expected to accommodate others. But his apprehension is not valid - the only persons likely to require accommodation on the grounds of observing the Sabbath on a Saturday would be Adventists and Orthodox Jews. The evidence reveals that Faris was the only employee at TFD who required accommodation on such grounds. The floodgates argument, in the circumstances of this case, is misplaced, unfounded and lacking in a rational basis.

[45] Likewise, the submission that the requirement did not impact upon the dignity of Faris fails to comprehend the intrinsic link between the tolerant observance of religious freedom and dignity. These values are not mutually exclusive but enhance and reinforce each other.[12] As stated earlier, some adherents to a religious creed observe a certain practice because they feel it is central to their identity to do so.[13] TFD seems indifferent to or not to understand that important precept of our constitutional dispensation. Without question, an

[12] *MEC for Education, KwaZulu-Natal v Pillay* 2008 (1) SA 474 (CC) at paras 63
[13] *MEC for Education, KwaZulu-Natal v Pillay* 2008 (1) SA 474 (CC) at paras 86-88

employment practice that penalises an employee for practising her religion is a palpable invasion of her dignity in that it supposes that her religion is not worthy of protection or respect. It is a form of intolerant compulsion to yield to an instruction at odds with sincerely held beliefs on pain of losing employment. The employee is forced to make an unenviable choice between conscience and livelihood. In such a situation, the dictates of fairness and our constitutional values oblige the employer to exert considerable effort in seeking reasonable accommodation.

[46] The only possible legitimate rationale justifying the non-accommodation of Faris is that her attendance was an essential part of her managerial training. She needed to gain hands-on experience in the stock take process in order to work as a manager. The question then is whether it was not possible to reasonably accommodate her in this respect without imposing undue hardship on TFD.

[47] The record shows that Faris made various suggestions about how she could be accommodated. She offered to work on Saturdays after sunset; she was willing to work on Sundays; and she was available to work night-shift or early shifts or longer hours on the Thursday before the stock take and in the first part of the stock taking process commencing on the Friday in order to assist prepare for the Saturday. Some of these proposals were not practical solutions as the stock take needed to finish on the Saturday evening. However, there is no clear evidence of any meaningful engagement about possible alternative means of Faris acquiring the know-how and insight into the stock taking process sufficient for her to carry out her managerial functions. She clearly believed she could acquire the supervisory know how even if she was not in attendance throughout the monthly stock take.

[48] TFD took an erroneous approach to this matter. It assumed that it was incumbent on Faris to come up with practical solutions which suited its preferred commercial rationale; and when she failed to make suggestions to its liking it was entitled to dismiss her. More is required of an employer. The employer has a duty to reasonably accommodate an employee’s religious freedom unless it is impossible to do so without causing itself undue hardship.

It is not enough that it may have a legitimate commercial rationale. The duty of reasonable accommodation imposed on the employer is one of modification or adjustment to a job or the working environment that will enable an employee operating under the constraining tenets of her religion to continue to participate or advance in employment.

[49] The evidentiary burden of showing undue hardship by non-compliance with the requirement is on the employer. Beyond Smith's say so (that practically stock takes could only take place on a Saturday) there is insufficient evidence showing that Faris could not have obtained the requisite knowledge of the stock taking process by other means or that it was not possible to develop her in other managerial functions and to advance her mainly in that direction. She herself believed it was possible to acquire the knowledge at other times and that she could still have assumed a supervisory role with some measure of accommodation. But there was little inclination to try out her suggestions. Moreover, it is common cause that she performed well in all other aspects of her job, and as already found, her absence did not impede, delay or frustrate the stock taking process.

[50] In the premises, I am persuaded that TFD did not reasonably accommodate Faris. It follows that TFD failed to discharged the evidentiary burden necessary to sustain the defences of fair discrimination or that under section 187(2)(a) of the LRA with the result that the dismissal was automatically unfair as contemplated in section 187(1)(f) of the LRA.

[51] The Labour Court awarded two amounts of compensation. It ordered payment of compensation equivalent to 12 months' remuneration in respect of the unfair dismissal and an amount of R60 000 in respect of unfair discrimination. The court did not adequately set out its reasoning in relation to the latter award but appears to have based it on the alleged derogatory manner in which Smith treated Faris at the meeting of 30 July 2012. The evidence on that score is contested and does not attain the standard required to establish liability under section 60 of the Employment Equity Act[14] which requires there to be discriminatory conduct by an employee towards another employee and

[14] Act 55 of 1998

which is immediately brought to the attention of the employer. This has not been proven. Moreover, the award amounts to double compensation and is unduly punitive. The appeal should succeed to this limited extent. Although, Faris found work six months after her dismissal, the award of 12 months' compensation under section 194(3) of the LRA is a just and equitable award vindicating the unjustifiable infringement of her constitutional rights.

[52] During argument, counsel for Faris disclosed that he had been instructed by Legal Aid and had thus agreed to the usual Legal Aid tariff. He argued however that in the event of the matter being decided in favour of Faris, the court should order that costs of counsel be the ordinary costs of counsel and not be restricted to the Legal Aid tariff. The court is sympathetic to counsel's request. This appeal is a serious and complex matter involving constitutional issues which will impact not just on the parties involved in this appeal but society as a whole. Legal Aid sought the services of outside counsel to provide parity of arms. TFD is a large corporation with substantial financial and legal resources. It may be expected to pay costs commensurate with those of counsel that it employed.

[53] In the result, the following orders are made.

53.1 The appeal succeeds to the limited extent set out in this order.

53.2 The order of the Labour Court is set aside and substituted with the following:

'1. The dismissal of the applicant is declared to have been automatically unfair in terms of section 187(1)(f) of the LRA.

2. The respondent (TFD) is ordered to pay the applicant compensation equivalent to 12 months' remuneration in respect of her dismissal, calculated at the rate of remuneration at the date of her dismissal.

3. The respondent is ordered to pay the costs of the application.'

53.3 The appellant (TFD) is ordered to pay the costs of the appeal including the costs of counsel on the ordinary tariff.

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JR Murphy

Acting Judge of Appeal

I agree

_____

DM Davis

Judge of Appeal

I agree

_____

F Kathree-Setiloane

Acting Judge of Appeal

APPEARANCES:

FOR THE APPELLANT: Mr. Ruben Ortin

Instructed by Snyman Attorneys

FOR THE RESPONDENT: TS Sidaki

Instructed by: Legal Aid Justice Centre Cape Town