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# A dismissal arising out of a failure to work overtime for religious reasons may be found to be automatically unfair

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## ISSUE

Whether the dismissal of an employee who refused to work contractually agreed upon days due to the tenets of her religious convictions was automatically unfair?

## SUMMARY

An employer who seeks to dismiss an employee for refusing to work on normal work mandated days where the employee's refusal is based on her religious beliefs must proceed with caution. Where the employee is dismissed it may give rise to an automatically unfair dismissal claim. This will be the case where the employee's religious belief is found to be the dominant reason for her dismissal.

## COURT'S DECISION

In the case of *TFD Network Africa (Pty) Ltd v Faris* CA4/17 (LAC), the Labour Appeal Court (the "LAC") had to consider the above issue.

Ms. Deidre Faris ("Faris") was employed by the appellant, TFD Network Africa (Pty) Ltd ("TFD"), as a part of its graduate management training programme. Faris was a member of the Seventh Day Adventist faith ("Adventist"). In terms of her religious beliefs, Saturdays are the holy Sabbath. Faris observed the Sabbath between sundown on Friday and sundown on Saturday. During such period Faris was prohibited from performing any work in accordance with the tenets of her religious beliefs. TFD allocated Saturdays for stock taking as normal business operations and did not allow it to be done during the week or on Sundays. All managers where required to participate in stock taking and it formed part of their training.

Due to the commitment to her faith, Faris was unable and unwilling to attend stock takes. When TFD confronted her about her absence, Faris acknowledged the importance of stock taking but explained that she was unwilling to compromise on her religious convictions. Faris proposed alternative working arrangements to attend to the stock takes but TFD did not meaningfully engage with Faris in this regard. TFD subsequently dismissed Faris for incapacity. Faris referred an unfair dismissal dispute to the Commission for Conciliation, Mediation and Arbitration (the "CCMA").

The matter remained unresolved at the CCMA and Faris referred the matter to the Labour Court.

The Labour Court found Faris' dismissal to be automatically unfair for substantive and procedural reasons. The Court awarded her compensation.

TFD appealed to the LAC, arguing that the reason for Faris' dismissal was the operational necessity that work be performed on a Saturday. In fact, Faris had agreed in her contract of employment to work overtime duties as may be reasonably required from time to time. Notwithstanding the fact that she was informed she had to work on Saturdays, Faris refused to do so. The reason for her dismissal was therefore not her religious beliefs.

In determining whether the dismissal was automatically unfair or not, the LAC had regard to section 187(1)(f) of the Labour Relations Act (the "LRA") which states that a dismissal will be **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 being 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." (emphasis added) The LAC took judicial notice of the tenets of the Adventist religion that no labour may be done on the Sabbath aside from emergency humanitarian work. The LAC then found that Faris had discharged the burden of showing that the dominant reason for her dismissal was her religion. Essentially, had it not been for her religion, she would have been available to work on Saturdays and would not have been dismissed. TFD could offer no compelling evidence rebutting this finding. Faris therefore succeeded in the first step of her claim by showing that the **reason** for her dismissal was discriminatory.

The LAC had to then consider whether the discrimination was fair. In order to do so the LAC had to consider whether any defence, in terms of section 187(2) of the LRA, was available to TFD. One such defence was whether the requirement to work on a Saturday was an 'inherent requirement of the job' (section 187(2)(a) of the LRA). The test to establish whether a task is an inherent requirement of the job is one of proportionality. This entails a two-step analysis. Firstly, the required task must be rationally connected to the performance of the job and be reasonably necessary to the accomplishment of that purpose. In other words, it must be necessary to the fulfilment of a work-related purpose. Secondly, even if a rational connection is found to be present, the employer has to prove that it would be impossible to accommodate the employee without imposing undue hardship on its business.

TFD thus had to prove not only that the stock taking was an inherent requirement of Faris' job but also that it was impossible to accommodate Faris without incurring any undue hardship. The LAC held that Faris had not done stock taking for the 12 months she was employed at TFD and that no sufficient evidence was provided to show that the business was significantly impacted by her inability to do so.

The employer has a duty to attempt to accommodate the employee, and despite Faris providing several suggestions as to how this could be done, TFD did not offer any meaningful engagement. For these reasons, and having regard to the particular facts of the matter, the LAC found that the dismissal was automatically unfair and awarded Faris the equivalent of twelve months' compensation for her dismissal.

## IMPORTANCE OF THIS CASE

This case highlights that employers should apply caution when electing to dismiss an employee where such dismissal **may** give rise to a claim of unfair discrimination. Where an employee discharges the onus of showing that the main reason for his/her dismissal related to an arbitrary ground and thus constituted discrimination the employer will have the onus of showing that while discriminatory, the conduct was nonetheless fair. This onus is not easily discharged.

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