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EMPLOYMENT

Enforceability of medical testing as a clause in an employment contract

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Pharmaco Distribution (Pty) Ltd v Weideman (JA104/2015) [2017] ZALCJHB 258 (4 July 2017)

ISSUE

Whether an employer can rely on a clause in an employee's contract of employment in terms of which the employee agrees to undergo medical testing when required by the employer to insist that the employee such undergo medical testing.

Whether the dismissal of the employee for failing to submit to a medical examination in such circumstances is automatically unfair in terms of section 187 (1) (f) of Labour Relations Act 66 of 1995 (as amended) ("the LRA").

FACTS AND COURT'S DECISION

On 1 July 2008, Lize Elizabeth Weideman ("the employee") was employed on a fixed term contract as a pharmacy sales representative by Pharmaco Distribution (PTY) Ltd ("the employer"). The employee suffered from bipolar disorder but the condition did not affect her work performance. The employer regarded the employee as an exceptional worker and subsequently offered the employee permanent employment. During January to October 2009 the employee raised various queries and raised a number of grievances in relation to the calculation and late payment of commission due to her. The employer dismissed the employee's grievances but charged her with insolent and insulting behaviour, wilful refusal to carry out a lawful instruction or to perform her duties, intimidation of fellow employees and damaging the reputation of the employer.

A disciplinary enquiry was held and the employee was found guilty as charged and issued with a final written warning. The employee appealed against the finding and sanction but the employer failed to consider the appeal. Instead, on 20 November 2009, the employer summoned the employee to its head office and suspended her with immediate effect. The employer issued a letter to the employee instructing her to attend a medical examination by a psychiatrist on 24 November 2009. The employer further warned her that failure to attend or attendance coupled with sabotage of the examination would constitute a serious offence and would be dealt with as a disciplinary infraction.

The employer, in issuing this instruction, relied on a clause in the employee's employment contract which provided that the employer could require the employee to undergo medical testing.

It emerged that the employer had never instructed any of its other sales staff to undergo medical testing before. The employee, objected to the employer's instruction claiming it amounted to victimisation and was in response to the grievances she had raised. She also requested the employer to withdraw the demand, failing which she would launch an application to the Labour Court to force the employer to do so.

The employer refused to withdraw the demand.

On 24 November 2009, the employee brought an urgent application in the Labour Court in which she sought an order setting aside her suspension and interdicting the employer from instructing her to attend the medical examination. The application was dismissed. The employee failed to attend the medical examination on 24 November 2009. The employer charged the employee with misconduct, proceeded with a disciplinary enquiry on 2 December 2009, found the employee guilty and dismissed her.

The employee disputed the fairness of her dismissal and referred a dispute to the Commission for Conciliation, Mediation and Arbitration ("the CCMA") and eventually to the Labour Court.

RELEVANT STATUTORY PROVISIONS

Section 7(1) of Employment Equity Act 55 of 1998 (as amended) ("the EEA"), provides that "medical testing of an employee is prohibited unless –

- Legislation permits or requires the testing or
- It is justifiable in light of medical facts, employment conditions, social policy, the fair distribution of employee benefits or the inherent requirements of a job".

The Labour Court held that the ostensible purpose of the medical examination was not to establish whether the employee suffered from an unknown disease that was affecting her ability to work. On the contrary, the employee's condition was known to the employer and it was common cause that her work performance was not affected. In the circumstances the employer had failed to prove that the instruction was not prohibited.

Accordingly, the Court found that the clause in the employment contract which required medical testing was not justifiable in terms of the prohibitions in section 7 of the EEA.

The employer appealed against the Court's judgment. The Labour Appeal Court dismissed the employer's appeal and determined, in addition, that consent was not a justification as contemplated by section 7 of the EEA and this contention had therefore correctly been rejected by the Labour Court.

Section 187(1)(f) of the LRA deals with automatically unfair dismissals and provides that a *"dismissal is automatically unfair if the employer, in dismissing the employee, acts contrary to section 5 or, 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."*

The Labour Court awarded the employee compensation of 12 months' salary and a further award of R15 000 as damages for the unfair discrimination committed against her in terms of section 6 of the EEA. The Labour Appeal Court held that the employee was entitled to 24 months compensation.

IMPORTANCE

Firstly, this case highlights that contractual provisions that seek to introduce medical testing must comply with section 7(1) of EEA.

Secondly, consent is not one of the exceptions contained section 7(1) of the EEA. Therefore, reliance on consent by an employer will not serve as a justification for medical testing in terms of section 7(1).

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