Discrimination based on religion

Adherents to certain religions are reluctant to work on their sabbath or other holy days. In some cases they refuse to do so. But what if such a refusal clashes with the employer's operational needs?

Our labour legislation affords employees protection against discrimination on several grounds, including religion. This protection has at its foundation the constitutional protection of a person's dignity. However, all constitutional rights have their limitations. These limitations are often tested in the workplace, as happened in the case of ***TDF Network Africa (Pty) Ltd vs Faris (2018)***, which found its way to the Labour Appeal Court (LAC).

The facts

The employee (Faris) had been employed by the company as part of its graduate management training programme. According to the company it required Faris to attend stock taking once per month on a Saturday. Faris refused to attend on the basis of her faith as a Seventh-Day Adventist. Seventh-Day Adventists are required to observe the sabbath between sundown on Friday and sundown on Saturday, during which time they are ordinarily not permitted to work and must dedicate themselves to spiritual and religious matters.

There were several interactions between Faris and the company. Faris requested the company to accommodate her. She proposed alternatives, which included her willingness to work after sunset on a Saturday and on a Sunday. The company was not willing to make an exception for her and expected her to obtain a special dispensation from her church to allow her to work on a Saturday. Faris was not prepared to do so. When Faris persisted with her refusal to work on a Saturday, an 'incapacity' hearing was scheduled and she was dismissed. She disputed her dismissal on the basis that it was 'automatically unfair'.

Labour Court

The Labour Court (LC) found that Faris had been unfairly dismissed and awarded her 12 months' remuneration as compensation, as well as a further R60 000 for the unfair discrimination. The company appealed to the Labour Appeal Court (LAC).

Inherent requirement of the job

There was no doubt that Faris had been dismissed for complying with and practising the tenets of her religion. It was for the company to prove that the dismissal had not been unfair. To do so they would have to show that requiring Faris to work on a Saturday was an inherent requirement of the job. The LAC stressed that the requirement must be strictly construed. It set the bar rather high by stating *"… 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 purpose and must be reasonably necessary to the accomplishment of that purpose … In*

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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."

The LAC could find no indication that her absence impacted on the company's ability to get the stock takes done. The company could still achieve the main purpose without her, as they had done for the greatest part of the year before she was dismissed.

Reasonable accommodation

However, the company also argued that stocktaking was considered essential as part of management training and there was no other time provide Faris with this training. Faris believed it was possible to acquire the knowledge at other times and that she could still have assumed a supervisory role had the company made some attempt to accommodate her. The LAC stated that more is required of an employer than to expect the employee to come up with solutions. 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. The Court concluded that the company had not done enough to accommodate Faris.

What about other religions?

The company argued that there was a danger of opening the floodgates to other employees who might seek exemption from Saturday work for family or other reasons. The company relied on the decision of the Labour Court in ***Food and Allied Workers Union and Others v Rainbow Chicken Farms (2000)***, concerning Muslims who refused to work on Eid. In that case the court found that the company's insistence that employees should work on Eid had not amounted to unfair discrimination. However, the LAC in the ***TFD Network Africa-case*** pointed out that *"Faris' 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".* The LAC concluded that the floodgates argument was *"misplaced, unfounded and lacking in a rational basis"*.

Outcome

The LAC concluded that the company had failed to prove that the dismissal was fair based on an inherent requirement of the job. Faris' dismissal had therefore been automatically unfair. The LAC upheld the award of 12 months' remuneration as compensation, notwithstanding the fact that Faris found work six months after her dismissal. However, the LAC discarded the additional R60000 that the LC had awarded on the basis that it was unduly onerous.

Lessons

What can we learn from this case? The first and most important lesson is that our courts take religious freedom and other constitutional rights and freedoms very seriously. It goes beyond mere tolerance. Employers must show that they are genuine in their efforts to reasonably accommodate these rights and freedoms. The second lesson is that circumstances can differ significantly and that each case needs to be treated in accordance with its own merits. This is often a fine balancing act.

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