

**IN THE LABOUR APPEAL COURT OF SOUTH AFRICA
HELD AT JOHANNESBURG**

CASE NO. DA 14/05

In the matter between

TRIDENT STEEL (PTY) LIMITED

APPELLANT

AND

**METAL AND ENGINEERING INDUSTRIES
BARGAINING COUNCIL**

FIRST RESPONDENT

R LYSTER N.O.

SECOND RESPONDENT

C TITHER

THIRD RESPONDENT

JUDGMENT

JAPPIE AJA

[1] The appellant, Trident Steel (Pty) Ltd, appeals against the judgment of Ngcamu AJ sitting in the Labour Court, in which judgment that court dismissed an application for the review of an arbitration award issued by the second respondent, R. Lyster, in which he found that the dismissal of the third respondent, Caron Tither, by the appellant was unfair and ordered her reinstatement into her former position in the appellant's employment.

[2] The witnesses who testified before the second respondent were Mr Johan Nel, the director of the Durban branch of the appellant and the third respondent. The facts are largely common cause.

- [3] In March 2000 the third respondent was employed by the appellant as a telesales assistant. The position was a full-day position, and involved the use of a computer and the handling of sales via the telephone. Approximately some six months after commencing with her employment, the third respondent developed severe neck pain. It was in nearly that the appellant was made aware of the third respondent's condition.
- [4] According to Nel, when the third respondent's condition appeared to worsen, he recommended that she should consult a physiotherapist. Other medical practitioners were also consulted amongst whom was a surgeon, Dr Golek. The consensus of the doctors was that the third respondent's work station caused the problem which was further aggravated by her working on a computer for a full day. The appellant attempted to address the problem by (i) providing the third respondent with a new chair, (ii) by making adjustment were made to the computer, (iii) by making headset for the third respondent so that the third she would not have to cradle the telephone in her neck while typing.
- [5] When none of these measures referred above appeared to be effective, the appellant allowed the third respondent to work half a day for approximately six months to assist her in her recuperation. This was a temporary measure and it assisted in alleviating the third respondent's discomfort to a large extent. According to Nel it became clear that the

third respondent could not do a full day's work. The third respondent had taken all her sick leave and. In addition to this, the appellant had allowed her sixty seven (67) instances of half-day leave from January to June 2003.

[6] In May 2003 Nel discussed the situation with the third respondent who made it clear that she could not do a full days work. Nel informed her that the appellant did not have a half day job for her. As her job involved telesales customers did not only phone in the morning to order steel, but did so in the course of the afternoon as well. All the other positions with the appellant were for full day jobs. The third respondent made it clear that she could only work for half a day and that she could not cope "working a full day at a computer".

[7] The third respondent then made an application to the company's insurers (Sage Life) to ascertain whether she could be medically boarded. This proved unsuccessful as the insurers took the view that on the medical information the third respondent did not have a valid disability which would have entitled her to be medically boarded.

[8] The third respondent in her evidence said that she had many discussions with Nel and that he had always been kind and supportive to her. She confirmed that she had taken far more than sixty seven (67) half days off.

She had worked continuously on a half a day basis from January until June. She testified that the half a day arrangement did not really help her and that she was never 100%. Towards the end of May she was advised that the appellant could not have her working half a day any more. On the 21st May 2003 Nel wrote to the head office of the appellant explaining the third respondent's position. Attached to this was a letter from the third respondent in which she made it clear that she considered the alternative of a half a day position as the only solution.

[9] On the 27th June, the appellant wrote to the third respondent informing her that it had done everything in its power to assist her. The letter listed all the instances in which the appellant had assisted the third respondent with regard to time off for specialist assessment and therapy. The letter concluded by saying that there was no half-day position available and that, as she was employed on a full day basis and because of her inability to perform her contractual duties, her services were terminated.

[10] The third respondent further testified that, as the position of a receptionist did not require her to use a computer, she could have done this job. Under cross-examination she was asked whether she would have taken the receptionist job with a lower salary. She responded by saying that she would have negotiated with the appellant concerning this and that she been prepared to do sales in the morning and the work of a reception in

the afternoon. She conceded that she did not suggest this to the appellant. When it was pointed out to her that the receptionist's job was not vacant, she did not dispute this but went on to say that Nel had always been understanding and that the appellant had been fair in doing as much as possible in regard to her health.

[11] It was common cause that after the third respondent had been dismissed, the receptionist applied for and was appointed to the position previously occupied by the third respondent. A temporary receptionist was then employed. At no stage had it been considered that the third respondent could perform a dual role as a salesperson in the morning and as a receptionist in the afternoon.

[12] In his assessment of the issues before him, the second respondent made reference to clause 10 of the Code of Good Practice (schedule 8 of the LRA) and based on this he concluded that although the appellant had been supportive and sympathetic to the third respondent it had not made sufficient attempts to investigate the extent to which the third respondent's duties might be adopted or the availability of suitable alternative work.

[13] As the third respondent's suggestion that she be moved to the vacant post of a receptionist had not been considered and had it been suggested, the possibility was there that the third respondent would have accepted

that offer. In consequence of the a foregoing, the second respondent determined:-

“In these particular circumstances, I feel that, in spite of its generally reasonable approach, the respondents (appellants) failure to even consider or put forward the possibility of the shared receptionist position, was unreasonable and unfair, and I make an order re-instating the applicant (the third respondent) into her former position, as a full sales assistant, such reinstatement to be with effect from 16th February 2004, from 16 December 2004 ie a maximum of two month remuneration shall be payable to the applicant (third respondent).”

[14] The appellant thereafter, sought to have the second respondent's award reviewed and set aside by the Labour Court. The application was heard by Ngcamu A J in the Labour Court who dismissed the application. In his judgment, Ngcamu A J concluded:

“[9] The failure by the applicant to consider moving the respondent to the receptionist is an indication that an alternative was not considered.”

[12] It was further submitted that the commissioner reinstated the respondent to her position, knowing that she could not do the job. It is not correct that the respondent could not do her job or her function. The point is that she could not fulfill the functions if performing the same functions the whole day but she could fulfill her functions if working on the computer half a day. The second part of the day could be adapted. The award gives the applicant an opportunity to consider what it had failed to do.”

[15] The appellant sought and was refused leave to appeal by the court a quo. The appellant petitioned this court, and was then granted leave to appeal.

[16] Before this court, the thrust of the argument by counsel who appeared for the appellant was that both the second respondent and the court a quo had erred in concluding that the appellant's failure to consider moving the third respondent to the position of the receptionist was unfair. It was argued that both the second respondent and the court a quo failed to note that the position of the receptionist only became available after the third respondent had been dismissed. It was further argued that the receptionist position was simply not considered since it was a different job with entirely different specifications. Furthermore, the salary paid to the receptionist was less than half of that paid to a sales assistant.

[17] The attorney, who appeared for the third respondent argued that on all the evidence the appellant had failed to investigate alternative positions for the third respondent notwithstanding the fact that she had specifically advised of her willingness to perform any other job function. I need to point out immediately that this suggestion that the appellant had advised the third respondent that she was willing to do any job is not born out by the evidence on the record.

[18] He further argued that at the very least, the failure to have considered an adaptation of her duties or work circumstances to accommodate her disability as required in terms of the Code of Good Practice relating to

dismissal is a procedural irregularity justifying the conclusion that dismissal was procedurally unfair. He further argued that on the evidence no good reason was advanced for the appellant's failure to consider the possibility of a shared position between the third respondent and the receptionist. By this it is understood that what was being suggested is that the third respondent would perform the duties of a telesales person in the morning, and in the afternoon she would swap with the receptionist and perform the duties of the receptionist while the receptionist would perform her duties as a telesales person.

- [19] In essence, the appeal involves a consideration of the question whether it can be said that the appellant had complied with s 10 (1) of the Code of Good Practice: Dismissal and in particular with that part of the code which provides:-

"In cases of permanent incapacity, the employer should ascertain the possibility of securing alternative employment, or adapting the duties or work circumstances of the employee to accommodate the employee's disability."

- [20] The following facts are common cause:-

- a) the third respondent had been employed on a full time basis as a sales assistant;
- b) that she developed an incapacity which caused her to be unable to perform her duties for a full day; and was in a position only to work on a half day basis

- c) the appellant, for a period of at least six months attempted to find a solution for her condition with the intention of retaining her in its employment. There were no half day positions available with the appellant.
- d) There were no half day position available with the appellant; and
- e) the position of receptionist at the time when the third respondent was in the employ of the appellant was already filled.

[21] It had been clear from the above that the only basis upon which it could be suggested that the appellant acted unfairly in dismissing the third respondent is that the appellant should have considered effecting the following arrangement namely; the third respondent would do her work in the morning and , in the afternoon, she would work as a receptionist while the receptionist would do the job in the afternoon.

[22] I do not think that the second respondent's findings based on a job swap can be allowed to stand. In a case such as this an employer's obligation to try and accommodate the employee does not require the employer to do more than what can reasonably be expected from it in the circumstances. If the employer is shown to have acted reasonably to try and accommodate the employee, it can be said that it has discharged its obligations.

[23] In this case the third respondent conceded that the appellant had tried very hard to help her. There were discussions between the appellant and the third respondent as to how her difficulty could be addressed. The appellant did all it could to alleviate the third respondent's condition. The third respondent was free to make any suggestion to the appellant that she considered would be of assistance to her in the circumstances. Had she suggested to the appellant that she could do the job of a sales assistant in the morning and that of a receptionist being consulted as well. Without the consent of the receptionist this suggestion could not be implemented.

[24] As the third respondent did not make this suggestion I do not see why it should be said that the appellant acted unreasonably in not suggesting it itself. There is nothing in evidence which gives the indication that the receptionist would have agreed to this suggestion.

[25] In my view appellant acted reasonably throughout the entire period. I cannot find any acceptable basis for the second respondent to have found that there was unfairness in the appellant's conduct in this regard.

[26] Having come to this conclusion it follows, that had the second respondent properly applied his mind to all the information before him he could not

have come to this conclusion that the appellant had acted unfairly in terminating the third respondent's employment. The Court a quo had erred in adopting the same approach as the commissioner and its refusal to review and set aside the arbitration award is to be interfered with.

[27] With regard to the costs, I am of the view that it would accord with the requirement of the law and fairness not award any costs on appeal.

The order is as follows:-

1. The appeal is upheld.
2. The decision of the Labour Court is set aside and in its place is substituted the following-;
 - a. the review succeeds
 - b. the decision of the second respondent is set aside
 - c. in its place is substituted a determination that the dismissal of the employee was fair.

Jappie AJA

I agree

Zondo JP

I agree

Khampepe AJA

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