



REPUBLIC OF SOUTH AFRICA

IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not Reportable

Not of interest to other judges

Case no: J1402/2015

In the matter between

NAGDEE A

APPLICANT

and

EDCON

RESPONDENT

Heard: 26 February 2016

Delivered: 26 February 2016

Summary: Application for condonation – inadequate explanation – application dismissed

EX TEMPORE JUDGMENT

COETZEE AJ

- [1] This is the *ex tempore* judgment in the matter between Ayesha Nagdee versus Edcon; case number J1402/15.
- [2] The applicant referred an alleged automatically unfair dismissal dispute on 27 July 2015 to this Court and simultaneously served a condonation application in respect of the late referral of the dispute. The application for condonation is opposed.

Factual matrix:

- [3] The respondent employed the applicant as a marketing manager from 14 June 2010.
- [4] During February 2013 the applicant fell ill and was later diagnosed with bipolar disorder.
- [5] She was placed on temporary disability as she was temporarily unable to perform her duties and also to enable her to apply for disability benefits.
- [6] During the period March to November 2013 her workload was reduced while alternative employment within the applicant was sought.
- [7] On 5 November 2013 she was served with a notification to attend an incapacity enquiry. The outcome of the enquiry was that the applicant's employment was terminated on notice on 30 November 2013.
- [8] It is this termination that is now in dispute.
- [9] In her statement of claim she alleges she filed grievances which were not attended to. She also states that she was off work for the relevant period due to depression. When she returned, she first worked half days and then full days. She was then placed on temporary disability benefits and after a period returned to work.

[10] She pleaded that on 19 August 2013 she was suspended, pending the disability hearing. The hearing eventually took place and her services were terminated.

[11] She disputes the incapacity that formed the basis for the termination and alleges that the termination was either for filing the grievances or because she suffered from a bipolar disability (which she says is not an incapacity).

[12] She wants the court to decide whether the dismissal was (1) for filing the grievances or (2) for disability and whether the termination constitutes an automatically unfair dismissal.

[13] She states that the dismissal was automatically unfair, firstly because she was dismissed for filing the grievances; and/or secondly because the employer discriminated against her on the basis of health and disability. The disability refers to the bipolar disorder.

The application for condonation:

The degree of lateness:

[14] According to the applicant her referral is approximately nine months late. According to the respondent it is fourteen months late.

[15] In my view, it is correct that the period should be calculated from the date of the issue of the certificate of non-resolution, in which case the delay is fourteen months.

[16] The delay on any account is excessive.

[17] The first period until 20 June 2014 is accounted for in a sense that her case was wrongly referred to the bargaining council, and the bargaining council then ruled that that was not the appropriate forum to deal with the basis of her alleged automatically unfair dismissal.

- [18] That leaves another nine months for further explanation.
- [19] The explanation for the delay during the first period until 20 June, is that of the wrong procedure having been followed on the advice of her legal representatives.
- [20] She explains, amongst others, that on the 31st of July 2014 she was told by her attorney that the matter had to be carefully considered and that at the time it was already almost out of time, and had to be dealt with quickly.
- [21] On 1 of August 2014 her advocate informed her that he was still working on the matter.
- [22] Then followed interchanges on 5 August 2014 and some enquiries between August 2014 and 20 November 2014. All fell silent until January 2015.
- [23] During January 2015 she became concerned. She obtained further legal advice as to what was happening and whether her case was being treated properly.
- [24] On 20 January 2015 she asked for a further update from her advocate.
- [25] On 23 January 2015 her attorney advised her that her advocate had done some research, but she said this she had already been told by her advocate during September 2014.
- [26] From 22 January 2015 to 23 February 2015 she contacted her advocate on WhatsApp on various occasions.
- [27] On 27 January 2015 she terminated her attorney's mandate, which was acknowledged on the 9th of February 2015.
- [28] On 17 February 2015 her attorney told her that she could not get the statement of claim as prepared in draft form by the advocate

from him as he was waiving his fees and therefore he was not prepared to produce the result of what he had done in the matter.

[29] Also on 17 February 2015 she consulted new attorneys who were unable to assist her.

[30] On 18 February 2015 she said she would rather pay for the product instead of him waiving his fees.

[31] On 24 February 2015 she lodged a complaint at the Law Society regarding the conduct of her attorney.

[32] She then waited a month until 24 March 2015 when she contacted her current attorneys of record.

[33] On 1 April 2015 her current attorneys requested from her documents. The next step in the process was only five weeks later on 11 May 2015 when a consultation with counsel was held.

[34] This consultation was followed by further consultations during June 2015 and July 2015 with a final one on 22 July 2015.

[35] We do not have the dates of these consultations between 11 May 2015 and 22 July 2015.

[36] The statement of claim was subsequently filed on 29 July 2015.

[37] The explanation covers most of the periods but with specific long unexplained gaps in between.

[38] It is clear that the applicant from time to time personally followed up as to the progress of her matter and also that in part she was let down by her legal representatives.

[39] The respondent points out the unexplained periods. Those are almost a 40-day period from 20 June 2014 to 1 August 2014 and the first half of September 2014 which is another 15 days.

- [40] In October 2014 during a period of 30 days there is only one exchange.
- [41] During the whole of November 2014 nothing happens save for one entry. During the first half of January 2015 nothing happens.
- [42] The period 27 January 2015 to 24 March 2015 is explained partly in the sense that she terminated the mandate of her previous attorneys and looked for new legal representatives.
- [43] From 24 March 2015 to 27 July 2015 for a period of four months the explanation is thin.
- [44] Some of these periods are substantial and demanded a detailed explanation that was not forthcoming.
- [45] In the absence of a satisfactory explanation for the delay, which in this case was substantial, there is no need to consider the prospects of success.
- [46] In my view, the explanation has been inadequate. For the best part of the delay the applicant blames her legal representatives – both the first and second set.
- [47] She adds that she did have the funds to properly litigate this matter. She had set aside sufficient funds to pay for legal representatives.
- [48] She is an educated person who understood her rights as explained to her. Notwithstanding, there are lengthy periods when nothing was done by her or her representatives in order to pursue the case.
- [49] It is so that there is authority for the proposition that if the prospects of success are so good, that it, as a consideration, may override even the absence of a satisfactory explanation. The final test thus is whether it is in the interest of justice to grant or refuse condonation.

[50] For that reason, in order to determine whether it is in the interest of justice, I have considered the prospects of success.

[51] She relies on section 187(1)(d) for the argument that her dismissal was automatically unfair. This section provides as follows:

'That the employee took action or indicated an intention to take action against the employer by:

1. Exercising any right conferred by this act; or
2. Participating in any proceedings in terms of this Act.'

[52] Secondly, it is argued that the applicant was dismissed on the basis of a disability and not for incapacity which constitutes a ground for unfairness. This aspect is addressed below.

[53] Otherwise it is argued that she was dismissed for making a protected disclosure. This basis was not pursued vigorously because in her affidavit itself she said that she had been advised that her grievances did not constitute a protected disclosure.

[54] The prospects of success, in my view, are not very good. There is no reason to grant condonation simply on the basis of the prospects of success in this matter being so good that in weighing up all the factors that I must have regard to, that it would sway the scales in favour of the applicant.

[55] As far as prejudice is concerned; the normal kind of prejudice arises in a matter where there is a long delay like this. The applicant would argue that she is prejudiced if her case cannot come before court and the respondent says that the memories of witnesses fade and that contact with witnesses gets lost. There is no special prejudice to either party.

[56] That leaves the importance of the case.

[57] The applicant says that this case is more important than others, because there is a public interest in the sense that a court needs

to deal with a particular aspect of this matter. This aspect is the following: The applicant says she was in fact dismissed for being bipolar, which is, according to the applicant, a disability and not an incapacity. She was not dismissed, according to her, for incapacity in the sense of being ill or unable to do her work for other reasons. The true basis is, according to the statement of claim: that there was a disability and that the dismissal was for having a disability. When an employer deals with an employee who has a disability, it has special provisions to comply with in terms of the Labour Relations Act.

[58] I have considered whether the employer adopted the disability or incapacity procedures. At the end of the day, the applicant was dismissed for incapacity. She could not do her work for whatever reason. That reason could have been because she was ill or suffering from a disability, which would not necessarily make the dismissal unfair. There is no absolute prohibition against dismissing an employee by reason of a disability when the disability leads to incapacity to fulfil the functions in the workplace.

[59] The employer adapted her functions and granted her leave. She still could not cope with the work.

[60] In my view, the test to be applied is whether the person is capable or incapable of doing the work. The remedies follow afterwards and may, to a certain extent, be influenced by the reason.

[61] There is nothing new in the proposition that she was dismissed for suffering from a disability that elevates this case above other cases of disability.

[62] It has correctly been categorised as a dismissal for incapacity. She was not dismissed for suffering from a disability. She was dismissed for being unable to do her work.

[63] In the final analysis, in my view, this is not a matter where condonation is appropriate. The delay is excessive. The

explanation is inadequate and the interest of justice does not demand that the matter should proceed.

[64] I have considered the factors relevant to a cost order and I am not of the view that it is appropriate to make a cost order.

[65] I make the following order:

[65.1] The application for condonation is dismissed.

[65.2] There is no order as to costs

Faan Coetzee

Acting judge of the Labour Court of South Africa

Appearances:

For the applicant: Adv M lennox

Instructed by: Simpson Incorporated

For the Respondent: Adv Reddy

Instructed by: Norton Rose Fulbright South Africa Inc.

LABOUR COURT