

SOUTH AFRICA / JUDGMENT

Ehlers v Bohler Uddeholm Africa (Pty) Ltd (JS296/09) [2010] ZALC 117; (2010) 31 ILJ 2383 (LC) (13 August 2010)

[2010] ZALC 117

COURT
Labour Court

BEFORE
Francis

CASE / FILE NUMBER
JS296/09

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IN THE LABOUR COURT OF SOUTH AFRICA
HELD AT JOHANNESBURG CASE
NO: JS296/09

In the matter between: CHRISTINE EHLERS Applicant
and
BOHLER UDDEHOLM AFRICA (PTY) LTD Respondent

JUDGMENT

Introduction

1. The applicant is a transsexual who brought an automatic unfair dismissal dispute to this Court in terms of section 187(1)(f) of the Labour Relations Act 66 of 1995 (the LRA). She is seeking reinstatement and damages in terms of the LRA and compensation and damages in terms of the Employment Equity Act 55 of 1998 (the EEA) and other ancillary relief. The respondent denied that the applicant's dismissal was automatically unfair and pleaded that her dismissal was an operational decision made by it.

The evidence led

2. The respondent called ten witnesses in this matter. They were Helmut Ulrich (Ulrich) - the managing director; Hawa Cassim (Cassim)
 - the human resources manager; Chrisjan de Wet (de Wet) - the branch manager of the respondent; Natasha Lage Alves (Natasha)

- an internal sales representative; Maria Fatima Lage (Fatima) - an assistant manager of internal sales; Sherry Anne Engelbrecht

(Sherry) a manageress; Monica Zondi - an internal sales representative; Linda Ruben Lengwathi - an employee in the sales department; Dirk van de Wall (de Wall) - a labour consultant who chaired the applicant's grievance hearing and the proceedings that resulted in her dismissal and Jan Francious du Toit (du Toit) - the chairperson of the appeal hearing and the respondent's

attorney of record. It is not necessary to repeat their evidence in any great detail since the facts are largely common cause. There was also in my view no need for the respondent to have called so many witnesses. Much time and resources was wasted during these proceedings. The applicant called an expert witness namely Dr Bernard Levinson who testified about what transsexualism means and the discrimination that the applicant was subjected to. The applicant testified in her own case.

3. The applicant was born as a male child. She had an overwhelming sense of being in the wrong body. This created a profound

alienation, an awareness of being different, being unacceptable, being an outsider, and being a grotesque freak. She suffered

enormously as a child. Her father was unable to accept this sexual change in orientation and feminine behaviour and rejected her totally. The entire family backed off and saw her as an alien. When she was five years old, she attempted to cut off her penis. One day at school the boys were asked to stand on the one side by the teacher and the girls on the other side. She stood in the middle and did not know where she had to stand. She was teased at school because of her femininity and was essentially alone. As an apparent male, she was inducted into the army after she had matriculated. This created a massive conflict within her. Circumstances were compelling her into situations that were completely abhorrent to her real basic personality. She found herself in an intense overt masculine world and was lost. She was at that time severely depressed and attempted to commit suicide. She was admitted to a military hospital. Whilst she was in the military hospital, the diagnosis of male to female transsexualism was made for the first time. For the first time she had a name for her bizarre condition and a realisation that there was a recognisable journey traversed by other transsexuals culminating in a surgical procedure and finally living out her days as a normal woman. After her stint in the army was over, she worked at Atlas Aircraft for three years as a heat treatment technician. In 1989, she worked for the respondent in Johannesburg for three months and was transferred to Cape Town where a plant was threatened with closure. She turned the position around. She did extremely well and there were no complaints about her work performance. She was there until 1996 when she resigned. She could not work under those conditions. She then went to Thyssenkrupp in internal sales. She had to target new businesses and was a technical advisor, a position she grew in. She then resigned for better prospects. She approached Mac Steel in internal sales where she achieved good sales. She worked there for five years and resigned in 2005 due to medical reasons. She is a qualified estate agent and worked as an estate agent from 2005 to September 2007.

4. The applicant consulted Dr Levinson on or about 30 August 2007 and thereafter on a regular basis. Dr Levinson qualified as a psychiatrist in 1960. He has been practising as a solo consulting psychiatrist for the past 50 years. Since 1980, he further specialised as a sexologist and his practice is confined totally to sexual issues. During the past 30 years he has diagnosed and treated many transsexuals, taking them from their first open declaration that they are in fact a transgender individual, to the final operative procedure. In the past 50 years, he has frequently been involved in court cases and has had many opportunities to assist various courts in clarifying sexual issues. The applicant is still his patient and is being treated by him. He testified that the transsexual state of mind has been described in the following terms “no true transsexual [has] yet been persuaded, bullied, drugged, analysed, shamed, ridiculed or electrically shocked into [the] acceptance of his physique. It [is] an immutable state.” In most medical circles it is considered that the only remedy for transsexualism is to bring the individual’s body into

alignment with his psychological gender by way of a sex change procedure. By the time the prescribed period of therapy of two

years had come to an end, he was satisfied to move the applicant on to the final stage of surgery. Following examinations and

investigations and after a few months of therapy, he concluded that the applicant was without any doubt a male to female transsexual.

He diagnosed her as suffering from transsexualism, the gender dysphoria syndrome. This is a medically recognised psychological

disorder (the condition). It can be described as a “passionate, lifelong condition that one’s psychological gender - that indefinable feeling of maleness or femaleness - is opposite to one’s anatomic sex.” It is not a whim or a psychological ploy. The behaviour and style of the applicant’s childhood parenting cannot in any way cause her to become transsexual. Much like homosexuality, the individual is born this way. It is a built-in developmental situation. There is no way of recognising this at birth. The baby appears to be a normal female or male. This devastating phenomena of having the wrong body slowly reveal itself. The incidence of transsexualism is 1:2500. This means that it is a fairly common occurrence. A transsexual, such as the applicant is usually obsessively disgusted by his sexual organs which he may seek to conceal from himself, and other persons, as these identify him with his abhorrent anatomical sex. It is known for transsexual males to amputate their genitalia or attempt to do so. A transsexual’s belief and conviction that he is really a member of the opposite sex, imprisoned in the wrong body, is constant and inflexible. This is the position with the applicant.

As a result of her condition, and for relief from the condition, she had to undergo sex change procedures, i.e. surgical and hormonal treatment, as a result of which a biological male or female may be given the appearance and indeed the pastiche of the sexuality of a member of his opposite sex. Before undergoing the sex change procedures, she was required to cross-dress and function as a woman in every way for two years. This was extremely important and critical to the

proper treatment and progress of the applicant. This period was laid down by one of the fathers of Sexology Dr Harry Benjamin who set the stage for all therapy in this area.

5. In September 2007 whilst the applicant was being treated by Dr Levinson, she approached de Wet, the branch manager of the

respondent for re-employment as a sales representative in the sale of steel. They discussed the position of a freelance sales

representative. A freelance sales representative services customers, seek new businesses and expand the company base. She was

earning 10% of the gross product of sales and had to pay her own petrol, medical aid, pension and cellphone. She had no benefits and started as a freelance sales representative up to 2 January 2008. She had worked with the individuals in the sales department from de Wet to the most junior clerk. The work environment and ethic were friendly and jovial. She respected them and they her and discussed her sexuality with them. Natasha asked her if she was gay and she told her that she was a transgender. Everybody asked her in their own way and she gave them her response. There were absolutely no complaints during that period. She became a permanent employee in January 2008 and enjoyed the benefits that goes with it like pension and medical aid. Her duties remained the same and she had to target lost clients specifically. There were no complaints about her performance. She sought clients up to her dismissal. In January 2008, she was asked by de Wet to clear the warehouse which was in a mess. It used to be at head office but was moved to their branch. She completed the task by April 2008 and received accolades from the warehouse staff and other employees. She continued her role as a sales person whilst she was in the warehouse. Her interaction with the sales employees was normal, courteous and jovial. Her relationship with the employees up to May 2008 was the same as before. The applicant continued to consult with Dr Levinson. According to Dr Levinson, he instructed Dr Lades to remove her testicles on 2 February 2008. According to the applicant, this happened in September 2008. The removal of her testicles allowed the female hormones to develop. She has adequate breast development. The applicant told de Wet about the sex change in April 2008. He

had no problem with it but told her to wear male clothes when she saw clients. She agreed to do so. The applicant still has a penis but is for all intents and purposes a woman.

6. The applicant and Natasha's relationship somewhat soured after the applicant became friendly with Fatima - Natasha's mother and Engelbrecht. This did not go well with Natasha. An incident happened in June 2008 which prompted the applicant to lodge a grievance against Natasha. There was a braai in the warehouse on a Friday afternoon at about 15h00. Natasha had asked the applicant to move her vehicle since she could not move hers. The applicant refused but after de Wet had asked her to do

so, did so. De Wet and Engelbrecht testified that she had called Natasha a "bitch" which the applicant has disputed. I have no reason to doubt that the applicant called her a "bitch". Natasha's response to being called a "bitch" made her to send the applicant two sms that read as follows: "I

will never have respect for a low class and a wannaB woman” and “shame 4 u will neva B DAT lol”. The applicant reacted with horror when she received the sms and felt that Natasha was against every thing that she was. She regarded this as derogatory and discriminatory and ended in tears. This went to her privacy and it meant that Natasha knew her socially and that she was a low class and wants to be a woman. Natasha according to the applicant knew that she was transgender from male to female and referred to it. It meant that she would never be a woman. Natasha testified that she did not have any malicious intent and was angry when she sent the sms. She was confused about whether the applicant was a male or female. The applicant was infuriated and called Fatima and told her that she was going to take the matter further. The grievance hearing took place on 26 June 2008. It was dealt in Cassim’s office. Fatima was called as a witness. The applicant and Natasha

were both issued with verbal warnings valid for three months. The applicant was not informed that a grievance was lodged against her. She accepted the warning and did not challenge it. She was not given any reasons why she was given a verbal warning. It appears to this Court that she was given a verbal warning for having called Natasha a “bitch”. The relationship thereafter became strained and very difficult. It was not the same again. She found negativity from basically everyone. Everyone according to the applicant appeared to have a problem of her becoming a woman. The customers asked her awkward questions. According to the applicant, her relationship with the employees became strained because of her change from male to female. This was denied by the employees. Ulrich was informed about the tensions and he spoke with the applicant in November 2008. He told her to invite the employees for pizzas and cold drinks. His approach was that they should settle their differences and ensure that the work was done. The applicant had long hair and Ulrich thought that she was gay but said that he did not discriminate against her. The applicant after having had her testicles removed and received hormonal treatment, started acquiring feminine features. Her nails and hair became longer and she developed breasts.

7. Sometime in November 2008, the applicant was informed by a customer that Natasha had called her as an “it”. This

was after the customer who saw the applicant standing towards her with her back had asked Natasha who the babe (the applicant) was. Natasha told the customer that she (the applicant) was not a babe but an “it”. The applicant after being told this by the customer who is a lesbian decided to telephone her attorney to sue Natasha. Natasha overheard the conversation and burst out crying. She had to be consoled by Monica. Natasha told Fatima about what had happened and she came storming into Sherry’s office where the applicant was sitting. What was said in her office was much in dispute. According to the applicant, Fatima told her that she was “immoral” and called her other names. Both Sherry and Fatima denied that the word immoral was used. According to Fatima, she told the applicant that her “shit” must stop and that she should stop acting childish and must grow up. It is not necessary to decide what actual words were used since the words used is not determinative of the issue that this Court must decide. This prompted the applicant to lodge a grievance against Fatima on 7 November 2008. She supplemented her

grievance with an annexure stating that she had endured gender discrimination. When she was referred to “it” she felt that the discrimination went against the nature of her freedom to change her gender from male to female. She wrote down what she felt. She believed that everything about her was being discussed with customers. She went to the office facing remarks and could deal with it to a certain extent. The discrimination relates to her gender which was changing from

male to female. After she had lodged the grievance, she was advised that there would be an investigation and she would have to attend a grievance hearing. After the respondent received the grievance, Cassim and de Wet decided that they should get an outside person to chair the grievance hearing since the issue was complex. De Wall was appointed and instructed by the respondent to chair the grievance hearing.

8. The grievance hearing took place on 20, 24 November and 1 December 2008. On the first day, the applicant was called in to

expand on her grievance. De Wall chaired the hearing and Cassim was present. No counter grievance was lodged against the applicant nor was she charged with any misconduct. De Wall discussed with the applicant a little bit of her grievance. None of the employees who were called at the hearing gave their versions in the presence of the applicant. They all blamed the applicant as the cause of the tensions in the sales department. They complained that she was moody. She would sometimes greet them and at other times not. She would make an appearance in the office and throw her things on her desk. They had once given her a birthday card with well wishes that they had written on it. The next day they found pieces of the card with their messages on their desks. Some of them said that they were afraid of the applicant but could not say why they were afraid of her. De Wall decided to ask his wife to conduct certain tests on the applicant and the employees. The respondent had agreed to this. After the applicant had given her input, she was told to return on 24 November for a further meeting. She was subjected to a psychometric test in writing by de Wall's wife. It perplexed her since it was not part of the grievance. It was briefly discussed with her but her results were not discussed with her. De Wall's wife did the test. The applicant was not given an opportunity to ask her questions. She still does not know what the outcome of her grievance was. At some stage during the discussions, de Wall raised the issue of her becoming a freelance sales representative. De Wall said that he would give the respondent a draft contract. De Wet was not satisfied with the draft and decided to use and give the applicant a copy of his freelance contract which was more favourable to that of de Wall. The applicant stated that she would consider the contract but would consult her attorney first. The respondent closed down for December 2008. The applicant continued to work until 24 December 2008 and returned to work on the 3rd or 4th January 2009. She was handed a copy of the outcome of the grievance.

9. This Court will deal with de Wall's report and his evidence later in this judgment. He had in essence found that there was serious conflict in the workplace which led to the first grievance hearing. There was a second incident. The applicant's

position was distinctly for a male employee and she had already distinct female features that created a difficult situation. Her changes to female were completed. He found that the applicant's conduct most certainly justified further action and that she should change her relationship back to where she was previously as a free lancing sales person and her conditions of employment to revert to the same as before she was appointed as a permanent sales representative. She should not be in contact with any internal employees except management. If those alternatives were implemented, the situation should be reevaluated every three months. The applicant denied that the position of freelancing was discussed at all. She did not give any attention to it. De Wet had testified that the applicant had shown some interest but did not say that she was accepting it. She denied that her position was redundant.

10. On 22 January 2009, the respondent addressed a letter to the applicant to attend an enquiry on 23 January 2009, about her future employment relationship with the respondent. She attended the enquiry on 23 January 2009. It was chaired by de Wall. The applicant handed de Wall a copy of her identity document that indicated that her name had changed from Chris to Christine and a copy of a letter from Dr Levinson dated 30 August 2007 stating that she had to wear women's clothing. The applicant denied that she said that she would consider the position of sales representative if she was dismissed first. The respondent's

version as testified to by de Wall is that she had said she should first be declared redundant and would thereafter consider the position of the sales representative. De Wall concluded that the respondent declared the position and employment relationship between her and the respondent redundant and granted her, inter alia severance pay and statutory monies. She was informed that she has the right to lodge an appeal and handed a dismissal letter dated 23 January 2009. The Court will deal with what happened at this meeting later in this judgment.

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11. The applicant duly appealed against her dismissal on the grounds of gender discrimination. The grounds of appeal are set out in a letter dated 28 January 2009. The appeal hearing was set down for 2 February but was postponed to 5 February 2009. The appeal hearing was chaired by the respondent's attorney of record du Toit. The applicant arrived at the hearing wearing women's clothing. Du Toit was not impressed with this. Both parties were allowed to make representations and du Toit issued his findings on the same day. He dismissed the appeal because he could find no gender discrimination. The Court will deal later in the judgment about what happened at the appeal hearing.
12. After the applicant was dismissed her life fell apart. She was very depressed and was suicidal. She stopped her hormonal and laser treatment and her medication for bipolar disorder. She could not have the major operation in October 2009 where her penis was going to be removed and a vagina created which would have made her a complete woman. She lost her accommodation and lived like a gypsy and in a commune. She was assisted by her attorney. She had moved beyond suicide and had no reason to live. She looked for employment and had sent her CV to many places. She did not find any alternative employment although she had applied at many companies in the steel industry. She is currently unemployed. She is seeking reinstatement. She will go back to do her work. She believes that she has done absolutely nothing wrong and did her job and what was required of her. She is still being treated by Dr Levinson and is also an outpatient at Tara. Her dismissal had an adverse psychological effect on her and caused her a substantial amount of pain and suffering, which continues. By now all surgery should have been completed and she would have moved entirely into the reality of a feminine world. She is on anti depression medication and is again in intensive psychotherapy. She has been in the most severe depths of despair. There were moments when Dr Levinson was afraid that she may become suicidal. She struggled with sleep and had to resort to night sedation. She has lost weight and is physically hopelessly unfit. She was suicidal and was extremely lonely, lost, depressed and was abandoned by her work. Her life and discrimination came to the fore. To have called her "a wannaB woman" according to Dr Levinson was denigrating, belittling and discriminatory. She wanted to be accepted as a woman. It is discrimination and is ugly. It made her feel angry and let down. This was unacceptable.

According to Dr Levinson, many workplaces would have accepted the applicant if she was dressed as a woman. The word gay is derogatory and demeaning. Closing arguments

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According to Dr Levinson, many workplaces would have accepted the applicant if she was dressed as a woman. The word gay is derogatory and demeaning.

Closing arguments

13. The respondent contended that the applicant was an untruthful witness who admitted that she had lied several times. She had lied on the 3rd Degree program when she stated that she had a sex change operation in September 2008 and that her penis was stitched back in. This was a total lie which she told the whole country to get sympathy. She lied when she told de Wall that she was a hermaphrodite. Dr Levinson testified that she was never a hermaphrodite but is a transsexual. She admitted that she lied when she testified that she had resigned from a previous employer, MacSteel and admitted under cross examination that the reason she left was because of medical reasons, she had tried to commit suicide and was depressed. She lied about an sms she sent to de Wet threatening to take the respondent to Carte Blanche and exposing an alleged sex scandal. When the Court ordered the sms to be retrieved, she admitted that the sms existed and was indeed sent. She lied about her mood swings and aggressiveness at work despite what Dr Levinson testified about the bubbling anger in the applicant. She had lied about not having called Natasha a bitch when the

evidence indicated that she did that. She lied about being called immoral by Fatima. At the trial she said that she was reluctant to wear men's clothes whereas in the 3rd Degree program she said that she was not prepared to wear women's clothing whilst still being a biological man as she perceived this to be degrading. She stated that she would be a man dressed as a female and that she was not a drag queen. She had on 23 January 2009 demanded to have her position made redundant.

14. It was further contended by the respondent that the applicant had put in place a strategy on 23 January 2009 in an attempt to become untouchable. She had challenged de Wall to make her position redundant. De Wall testified that he conceded to her request as it would be financially better if her position was made redundant as she would receive a severance package. She appealed on the grounds of gender discrimination and arrived at the appeal hearing dressed in women's clothing and stated that in the future she would dress as a woman. She arrived with a list of demands. Du Toit concluded that there was no discrimination against the applicant as she was unable to put forward any reason she alleged that her dismissal was based on discrimination. Her behaviour effective 23 January 2009 is indicative of a person who is desperate for money and would go to any lengths to get as much as she could. Her request to be made redundant must be seen in this light. She made several threats and lied to the media to get public support and to influence this Court.
15. It was further contended by the respondent that the applicant did not reveal her true personality until after her permanent

employment with the respondent and that she made the situation in the sales office intolerable by her antisocial behaviour. The reason for her termination was because of the conflict in the sales office. The respondent was faced with a situation where it was the applicant against the rest of the sales office. She was identified as the trouble maker and offered an alternative which she first accepted and then rejected. The two sms messages were dealt with by the respondent. She also discriminated against Natasha by calling her a bitch. The sms sent by Natasha were private and in retaliation to the applicant calling her a "bitch" in front of her colleagues. The applicant chose a young and vulnerable woman to insult and terrorise and she is twice her age. Natasha and all the other employees of the sales office have as much constitutional rights as the applicant and are entitled to work in a safe and harmonious work environment. The respondent's witnesses were credible and at no time during the trial was their integrity compromised. The applicant on the other hand was a completely unreliable witness. The respondent's evidence should be accepted. The applicant has failed to prove on a balance of probabilities that her dismissal was automatically unfair and her application should be dismissed with costs.

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16. It was contended on behalf of the applicant that the respondent had said that the reason for her dismissal was that her position was declared redundant. There was no consultation process at all. The goalposts were moved from redundancy to a resignation which was never the respondent’s case. This was not a genuine retrenchment case. It was contended that if there was an agreement that she would dress as a male when seeing clients, such an agreement would be unlawful and against the values of the

community. There would have to be a finding of guilty for the misconduct. If she was alleged to be incompatible, she should have been charged for it. This was an after thought on the part of the respondent. The true reason for her dismissal is recorded in de Wall’s reports of December 2008 and January 2009 where it is stated that “It was also determined in discussion with management that the position is distinctly for a male employee and the Applicant got already distinct female features that create a difficult situation. During the follow-up meeting and report back the Applicant again raised the fact that all changes to female are completed. The worrying fact is during this report back the Applicant indicated that he (sic) is diagnosed with level 1 Bi-Polar disorder. This even aggravates the situation.” Further “The full change and demand of the Employee creates an intolerable situation and construe a breach of all agreements and submissions in the past required for the efficient operations of the business and employment relationship between the parties”. This so it was contended goes to the core issue which was the

change of the applicant from male to female. Du Toit at the appeal hearing recorded that the respondent had argued that it is an international concern that has to protect its image in the market in the metal industry, which was predominantly male oriented. The rationale was operationally motivated. This was the true reason and the rest fall away. The dismissal was not procedurally fair. The procedure followed in both grievances was not fair. With the second grievance she lodged a grievance which was used to result in her dismissal.

17. It was contended that the applicant is entitled to be reinstated. If she does not get reinstated employers would be allowed to gang up against an employee. The alternative was to award 24 months compensation. The total package that she received is R32 940.76 per month. In addition she is entitled to damages for medical expenses and solatium and R300 000.00 would be just and

fair. The respondent should pay the cost for the preparation of the expert witness and the expert witness' fees. The respondent contended that if the Court found that her dismissal was automatically unfair she should be awarded 12 months compensation

and R60 000.00 damages since her role should be taken into account. She should not be reinstated. Analysis of the evidence and arguments raised

18. This Court is required to decide what the true reason for the applicant's dismissal was. If it is found that her dismissal

was because she was a transsexual it follows that her dismissal would be automatically unfair in terms of section 187(1)(f) of the LRA since the respondent has not pleaded that the discrimination was fair. The Court will also have to decide whether the applicant should be reinstated and be paid damages in terms of section 193(3) of the LRA and compensation and damages in terms of section 50 of the EEA.

19. The applicant alleges direct discrimination on inter alia the following grounds: 19.1 The reasons for the termination of her employment by the respondent related to the fact that she had commenced a gender

reassignment procedure.

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19.1 The reasons for the termination of her employment by the respondent related to the fact that she had commenced a gender

reassignment procedure.

19.2 The respondent dismissed her despite the fact that she has the necessary occupational qualifications, skills and knowledge for capacity in which she was employed. 19.3 The respondent considered the fact that she had commenced a gender reassignment procedure and her actions and/or omissions as offensive or inappropriate and contended that it adversely affected her performance of her duties and functions. 19.4 The respondent's reasons for terminating her employment are not valid reasons, are in contravention of section 187 of the LRA and thus constitutes an automatic unfair dismissal in that it is direct discrimination against her as a person and/or employee because of her gender and/or sex and/or sexual orientation and/or belief and/or opinion.

20. The respondent denied having committed any act/s or direct discrimination complained of by the applicant and contended that the reason for her dismissal was an operational decision made by it.

21. Section 9 of the Constitution deals with the equality clause and provides as follows:
"Equality.

- (1) Everyone is equal before the law and has the right to equal protection and benefit of the law.

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21. Section 9 of the Constitution deals with the equality clause and provides as follows:

"Equality.

(1) Everyone is equal before the law and has the right to equal protection and benefit of the law.

(2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative

and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.

(3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language, birth.

(4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3).

National legislation must be enacted to prevent or prohibit unfair discrimination.

(5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair."

22. It is apparent from the provisions of section 9 of the Constitution that discrimination is prohibited on any of the grounds

referred to in subsection (3) unless it is fair. The provisions are not only applicable to the State but also to persons which would include employers. In compliance with the provisions of section 9(3) of the Constitution, the LRA and the EEA were enacted which also outlaws discrimination in the work place unless it is fair.

23. The preamble of the EEA provides as follows: "Recognising -

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and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.

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- 23. The preamble of the EEA provides as follows:

“Recognising -

that as a result of apartheid and other discriminatory laws and practices, there are disparities in employment, occupation and income within the national and labour market; and that these disparities create such pronounced disadvantages for certain categories of people that they cannot be redressed simply by repealing discriminatory laws, Therefore, in order to - promote the constitutional right of equality and the exercise of true democracy; eliminate unfair discrimination in employment; ensure the implementation of employment equity to redress the effects of discrimination; achieve a diverse workplace broadly representative of our people; promote economic development and efficiency in the workplace; and give effect to the obligations of the Republic as a member of the International Labour Organisation.”

- 24. Section 5 of the EEA provides that every employer must take steps to promote equal opportunity in the workplace by eliminating

unfair discrimination in any employment policy or practice. Section 6 prohibits unfair discrimination and provides that no person may unfairly discriminate, directly or indirectly, against an employee, in any employment policy or practice, on one or more grounds, including race, gender, sex, pregnancy, marital status, family responsibility, ethnic or social origin, colour, sexual orientation, age, disability, religion, HIV status, conscience, belief, political opinion, culture, language and birth.

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promote the constitutional right of equality and the exercise of true democracy;

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25. This Court will first deal with her claim in terms of the LRA. Section 187(1)(f) of the LRA 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 applicant's dismissal is not in dispute. What is in dispute is the true reason for the dismissal. It is trite that section 187 of the LRA imposes an evidential burden upon the applicant to produce evidence which is sufficient to raise a credible possibility that an automatically unfair dismissal has taken place. It is then for the respondent to produce evidence to show that the reason for the dismissal did not fall within the circumstances envisaged in section 187 of the LRA for constituting an automatically unfair dismissal.

26. It is common cause that the applicant was employed by the respondent from September 2007 to 31 December 2007 as a freelance contractor. On or about 2 January 2008, she was made a permanent employee and became a member of the respondent's pension fund,

medical aid and group life and disability scheme. She was responsible for the sale of steel tools which involved inter alia technical knowledge and understanding of steel tool designs, drawings and applications; the correct processing procedures of the dies, machining and physical metallurgy; and establishing, developing and maintaining sales to customers and potential customers of the respondent. It is common cause from the pleadings that during January until June 2008, one of the respondent's employees, Natasha adopted and displayed a disrespectful attitude and behaviour towards her, in that she, from time to time, would refuse to greet or communicate with her and completely disregarded and/or ignored work-related requests and communications from the applicant. The applicant lodged a grievance against Natasha in June 2008 which resulted in both of them receiving verbal warnings. A further incident happened between the applicant and Fatima which caused the applicant to lodge a grievance against Fatima contending inter alia gender discrimination.

27. De Wall was appointed by the respondent to chair the applicant's grievance hearing against Fatima. Du Toit was appointed by the respondent to chair the appeal hearing after the applicant's services were terminated. They were both crucial witnesses for the respondent. The grievance hearing was recorded and a transcript of the proceedings was handed in during these proceedings. De Wall issued his findings and ruling on 1 December 2008. The report was given to the applicant in January 2009. None of the employees who were called by de Wall when he conducted the grievance hearing testified in the presence of the applicant nor was she informed what they had said about her. No counter grievance was lodged against her by any of the employees. De Wall when he dealt with the applicant at the grievance hearing was brutally honest about how he felt towards her. When he testified in Court he tried to distance himself from what was recorded. The problem that he is faced with is that the recordings do not tell a lie. It records what was said at the grievance hearing. He was a terrible witness and was argumentative and had asked for questions to be repeated. He was extremely vague about what his exact mandate was during the grievance proceedings. He said that his mandate was to investigate the grievance and to make a recommendation to the respondent. He later testified and said that there were three legs to his mandate and that this was explained at the grievance hearing. He said that it was not reflected in the transcript of the proceedings but should appear where the words 'a clashes of voices' appear. The Court adjourned the proceedings to allow both parties to listen to the portion of the tape/cassete/device. Both parties informed

the Court that there was no such explanation given about what the mandate is. It is clear to this Court that the respondent had entrusted the matter with de Wall. He had to hear evidence about the grievance and make a finding like Cassim did in the first grievance against Natasha although the process followed by Cassim was patently flawed.

28. It is clear from the evidence led that there was a conflict in the internal sales department between the applicant on the one hand and the rest of the internal sales employees. It is also clear from the transcript that de Wall questioned her about her sex change operation. He said that he was understanding the changes that she was going through. They were in good

space. He told her that she could not hide it. He noted that she had extreme long nails for a man and she told him to move on. She agreed that the steel environment is rough. There were many clients in the steel industry. The guys talk the language of the steel industry and she would hide her status as a male. She was going to have an operation in October 2009. He asked her how the clients would have reacted and that it was a difficult situation. He enquired from her what would happen once she had completed the full sex change operation when she would no longer be able to hide her feminine side. He reminded her that she had an agreement with de Wet to wear male clothes when seeing clients. She would damage the respondent because she was changing from male to female. He said that he did not consult the respondent about the applicant's situation but was referring to the special agreement she had with the respondent where she would continue to work as a male and hide her female identity and that she would not be able to hide it and would not be able to honour the agreement. He told her that she had failed to disclose at the commencement of her employment that she was required to undergo the procedure and that she would be changed fully to a female. She agreed that she was employed as a male and would stay as a male. The applicant confirmed that the position in which she was employed required an employee of the male gender and that she would hide her physical changes not to create any detrimental misperceptions and harm the relationship between the respondent and its clients. He told her that she appeared to be the over sensitive one. She was the little bad person and had provoked situations. She ignored the one party and they felt that she was an instigator of conflict. She was sometimes very happy and had no problems. At other times she was very aggressive, agitated and would shout over the telephone. He told her that would not have raised a grievance since she was the little bad guy. He told her that the employees did not discriminate against her but she caused the provocation. There was a breakdown in the work harmony and he construed the alternatives to consider either was a redundancy of the position or to change to freelancing where she would not be confronted with the group environment. He had a one on one interview with the parties and they explained to him how they experienced it. At the end of the day he was convinced that there was a major problem with conflict and handling of conflict between the people. There was a concern that if there was something like that he had to find a way to protect her and them and not to make them guilty of discussing her with the customer. The exceptional situation was changing from male to female. He considered this in arriving at his conclusion. He told her that it was harmful changing from one sex to the other and it was exceptional and she had to sort it out. The solution was to give her an opportunity to continue working and earn a living. The applicant had told him that she was born a hermaphrodite. He had compassion for her. He said that he had no mandate to hire or fire her. His mandate was not to offer her a freelance contract or to declare her position redundant but to address the grievance. A third option was to wait until a disciplinary hearing ensued. He discussed the position of freelance with her at the hearing on 1

December 2008. It would let her do her work and earn more through commission. He suggested a freelance at her own station and she would not be involved with the others and do her work. He had asked himself how he could find a solution so that they would not be faced with it and create an ideal environment and an opportunity and go to changes and all the persons could benefit and there would be no conflict in it. The alternative would be a redundancy. De Wall said that the applicant accepted the offer of freelance. He was however contradicted by de Wet who said that the applicant had said that she would consider the position or had shown some interest.

29. De Wall issued his report. He found in essence that the position that the applicant was employed in was for a male employee

and she had distinct female features and this and the fact that she was diagnosed with level 1 Bi-Polar aggravated the situation. She should either revert to a freelancing sales person or be declared redundant. On 22 January 2009 the applicant was notified to attend a meeting on 23 January 2009 to discuss her continued and future employment at the respondent. She had expected to receive the outcome of her grievance. She attended the meeting and handed in her identity document indicating a name change and a letter from Dr Levinson. She informed de Wall that she was not going to accept the freelancing position. De Wall testified that the applicant had said that she should first be declared redundant and would thereafter consider the freelancing position. He proceeded to declare her redundant and stated that she would be paid the requisite severance pay and notice pay. De Wall testified that the applicant had resigned and when asked why he did not state in the dismissal letter that she had resigned said that he had used a pro forma letter. He stated further that had he put it that she had resigned, she would not have been entitled to be paid severance pay and claim unemployment insurance. There is no substance to the respondent's contentions that the applicant resigned. In the written outcome of the meeting of 23 January 2009 it is stated that she had first agreed to revert to a freelancing sales position but had refused but had accepted a redundancy order and take up the severance benefits. She was informed in the same report that she had the right to submit an application to appeal. The applicant did not resign or agreed to be declared redundant as contended by the respondent but was dismissed hence her appeal on the grounds of gender discrimination.

De Wall had testified that there was no recording of the meeting of 23 January 2009. This is not correct since the said meeting was recorded and appears at F48 where it is recorded as follows:

"MT. V/D WALL: The main purpose of today's meeting is to address uhm, the outcome and conclusions submitted at the grievance procedure that was instigated in November and December 2008. The conclusion that was reached in this investigation and procedure was done in writing and submitted to you. The conduct of the applicant most certainly justify further action therefore the presiding official submits that the applicant should change it's relationship back to where he was previously where he was a free lancing sales person. And his conditions of employment to revert back to same as before he was appointed as a permanent sales rep. He should not be in contact with any internal employees except Management. Alternatively the applicant should accept a redundancy order and take UP the severance benefits. It is also submitted that if alternative 6.1.1 is implemented the situation should be re-evaluated every 3 months. Uhm, this is quicker than 3 months, but it is because it appears that you

made the choice of not accepting the reverting back to a freelancing sales representative for the company and therefore the company now must look at the alternative offer, redundancy, if you do not accept the one. MR. EHLERS: Okay, at what point and for what reason is my contract been terminated? Which law have I transgressed? Which grievance

procedure has the company raised against me, to institute this action? Uhm, at what point was I informed either in writing or

verbally that a action or a grievance procedure has been raised against me. This is with, this in accordance with Employment

Law, as mentioned in section 5 of the employment act number 55 of 1998.” This extract contradicts de Wall when he testified that the applicant had demanded that she be declared redundant before taking

up the freelancing post. She rejected the offer and was clearly aggrieved that her contract was being terminated and wanted to know which law she had transgressed. It is clear from the extract that after she had rejected the offer of freelancing contract, de Wall said that they had to look at the position of redundancy.

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up the freelancing post. She rejected the offer and was clearly aggrieved that her contract was being terminated and wanted to know which law she had transgressed. It is clear from the extract that after she had rejected the offer of freelancing contract, de Wall said that they had to look at the position of redundancy.

30. It is clear from the evidence before this Court that the applicant had told de Wall that she wanted to be left alone so that she could do her work. De Wall assumed that she wanted to be allowed to work as a freelance sales person. He did not ask her what she meant when she said that she wanted to be left alone. She would have explained this to him had he asked her. There was no evidence led before this Court that the sales department or the respondent's operations were dysfunctional as a result of the conflict. The applicant was after all not charged with incompatibility. The applicant had told de Wet that she intended to conclude a sex change and that she was born a hermaphrodite and this caused people to be insulting and talking behind her back. She had lodged a grievance and was waiting to hear what the outcome of her grievance was. She was not informed what

the outcome of her grievance was, instead it led to her dismissal. It is clear from the respondent's letter of termination where it is stated that "we regret the necessity to terminate the employment relationship and wishes you the best for future endeavours" that her services were terminated.

31. The appeal chairperson's testimony and findings are also damning against the respondent. It is common cause that when the applicant appeared at the appeal hearing she was dressed as a woman and handed du Toit the letter from Dr Levinson and a copy of her identity document. Du Toit was taken aback by this and had expected to be dealing with Chris and not Christine. It is clear from du Toit's evidence that he was concerned that the applicant was intent on wearing women's clothes when dealing with customers despite the agreement that she had with de Wet and the fact that she was not looking like a woman. He felt that the respondent would suffer financial harm if the applicant was allowed to act in the manner that she wanted to. He could see that she was a male. He found that there was an arrangement and it was not necessary for her to go through the awful process. He said that the respondent had argued that it was an international concern and had to protect its image in the metal industry that was predominantly male oriented. The respondent's rationale was operationally motivated. It was not acceptable to the customers if she was dressed as a female because she did not appear like a female. He did not hear any evidence from customers.
32. Du Toit issued his findings and stated that the issue of sexual discrimination was obfuscated by the fact that the applicant was employed as a male and was introduced by the customers as such. During the employment relationship a transformation took place whereby the end result was a female employee and customers obviously noted the subtle change in behaviour. It was furthermore required by a psychiatrist that the applicant must be allowed to act out her female role, ie dressed and made up as a female. This would obviously impact on the professional relationship with the customers. This was submitted by the respondent and is what he perceived. He said that he was seeking a compromise and wondered why the

applicant was pushing it and why at that time. The respondent had to protect its business and demand a standard of acceptability from its representatives in relation to its customers. He had to stop her from living out her threats before she could harm the company.

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33. It was contended by the respondent that the applicant had lied in certain respects when she testified. She had said in the 3rd Degree interview that her "balls and penis were chopped off". Dr Levinson testified that the applicant did not have the final operation where her penis would have been removed and a vagina created for her. It is also so that she told de Wall that she is a hermaphrodite but Dr Levinson said that she was not. It is also so that she testified that she was unable to secure any employment after her dismissal but later agreed that she worked for a month. It is also so that she lied about whether she had called Natasha a bitch when she clearly did so. It is also so that she did not disclose that at her previous employment she resigned for medical reasons but had said that she left for better opportunities. It is not clear why the applicant had approached the media or 3rd Degree about her dismissal. It is not necessary for this Court to speculate. The applicant did not

make a good impression on me when she testified. She had clearly lied to 3rd Degree about the true nature of the operation that she had. Dr Levinson had testified that she could not undergo the final operation due to her mental and health state. The operation was scheduled to take place in October

2009. It might be true that the applicant has sought to get the public support. There is nothing wrong with that. Victims of apartheid also solicited the public support of the international public. There was nothing wrong with that. I accept that the applicant had contradicted herself in several aspects. It does not follow that because she had contradicted herself in several respects that the Court should disbelieve her evidence in its entirety. Even

if the Court was to do so, the evidence tendered by the respondent indicates that her services were terminated because of the sex change process that she was going through. The reports issued by the two chairpersons speak for themselves and made this Court's task easier in deciding what the true reason for the applicant's dismissal was.

34. It is clear from the evidence led before this Court that there were two distinct camps at the sales department of the respondent at its Isando branch. On the one side it was the applicant and on the other side the rest of the internal sales department. It is also clear from the evidence led that the internal sales staff knew that the applicant had undergone some sex change operation, the details of which was not disclosed to them. It is also clear from the evidence that the conflict was not managed properly by the respondent. Ulrich had made certain suggestions which did not seem to have the desired effect. It is not clear why he did not call the entire sales department and had addressed it. Matters escalated after the applicant had lodged a grievance against the acting manager, Fatima. The respondent then decided to call in the assistance of experts to deal with the second grievance. Things then went horribly wrong for the applicant and for the respondent. Not only was the nature of the dispute out of the depth and field of expertise of de Wall but he used the grievance against the applicant to get rid of her. It is clear from the reports of de Wall and du Toit that the applicant was employed as a male. She was working in a male dominated industry and because of the sex change procedure she could no longer present herself as a male and they had to protect the business interest of the respondent. She wanted to express her femininity. She was now becoming a female and this was unacceptable to the respondent. The behaviour of both de Wall and du Toit are shocking. Du Toit is a labour law attorney and was aware of the provisions of the Constitution, the LRA and EEA and despite this knowledge still made the finding that he made. He was at least

honest about how he felt towards the applicant.

35. We live in a constitutional democracy where the Constitution is the supreme law of the land. This is a factor overlooked by both de Wall and du Toit. I find it rather appalling that the respondent had in the first place an agreement with the applicant that she would wear male clothes when she consults with clients. The justification given for this request is that the engineering industry is male dominated and they would not take kindly if the applicant

came to see them wearing female clothes. This is reminiscent of the dark ages or to our most recent past where there were job reservations and certain jobs were reserved for white people only and white males in particular. It is shocking that such sentiments still do exist. Even if they do exist, it is shocking that there are still perceptions that only males can do certain jobs. The applicant was not employed in a specialist area where there were inherent requirements of the job that dictated her sex or gender. The sex change operation would not affect her competency as an employee. She remains as an employee despite her sex change. She

was employed as sales representative who had excelled in her field. She regarded herself as the best. Suddenly because she had to undergo a sex change operation and wanted to assert her femininity, she was dismissed because it might upset some backward customers. None of those customers were called as witnesses nor was it the respondent's defence that the discrimination that the applicant was subjected to was fair. The fact that the applicant was asked to hide that she is a transsexual is per se unfair discrimination. The fact that she has agreed to do so does not legitimise the discrimination that she endured.

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36. The only conclusion that this Court can arrive at from the evidence placed before me is that the true reason for the applicant's dismissal was as a result of the fact that she is a transsexual who was in the process of undergoing a sex change. She was employed as a male and had now developed feminine features and was working in a male dominated environment and was known to the customers as a male person. She had to be stopped from living out her threats before she could harm the respondent. But for the sex

change process, her services would not have been terminated.

37. It is my finding that the applicant's dismissal by the respondent was automatically unfair in terms of section 187(1)(f) of the LRA. The relief sought
38. It is common cause that at the time of her dismissal she was earning a gross taxable salary of R256 977.94 per annum and was entitled to a monthly car allowance of R3 500.00 per month, petrol allowance per month and cellular phone allowance of R1 500.00. In addition to the aforesaid amount she would earn a commission on all sales performed by her which amounted to R6 525.94 on average. In addition to the aforesaid she received a thirteenth cheque equal to R12 760.00 and an annual bonus of R12 759.96.
39. The applicant is seeking reinstatement and damages in terms of section 193(2) and (3) of the LRA respectively. She is also seeking compensation and damages in terms of the EEA. The applicant cannot seek both reinstatement and compensation in terms of section 193 of the LRA. She can only seek reinstatement or compensation. This much is clear from the provisions of section 193(1) of the LRA. The Court will first deal with the issue of reinstatement.
36. The only conclusion that this Court can arrive at from the evidence placed before me is that the true reason for the applicant's dismissal was as a result of the fact that she is a transsexual who was in the process of undergoing a sex change. She was employed as a male and had now developed feminine features and was working in a male dominated environment and was known to the customers as a male person. She had to be stopped from living out her threats before she could harm the respondent. But for the sex

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40. Section 193(2) and (3) provides as follows: “(2) The Labour Court or the arbitrator must require the employer to reinstate or re-employ the employee unless -
- (a) the employee does not want to be reinstated or re-employed;
 - (b) the circumstances surrounding dismissal are such that a continued employment relationship would be intolerable;
 - (c) it is not reasonably practicable for the employer to reinstate or re-employ the employee; or
 - (d) the dismissal is unfair only because the employer did not follow a fair procedure.
- (3) If a dismissal is automatically unfair or, if a dismissal based on the employer’s operational requirements is found to

be unfair, the Labour Court in addition may make any other order that it considers appropriate in the circumstances.”

41. It is trite that the onus is on the respondent to prove that the requirements of section 193(2) (b) and (c) exist. Since the applicant is seeking reinstatement and her dismissal has been found to be automatically unfair, the provisions of section 193(2)(a) and
- (d) are not applicable. It was not the respondent’s case and it was also not argued that it would not be reasonably practicable for the respondent to reinstate or re-employ her.
40. Section 193(2) and (3) provides as follows:

“(2) The Labour Court or the arbitrator must require the employer to reinstate or re-employ the employee unless -

- (a) the employee does not want to be reinstated or re-employed;
 - (b) the circumstances surrounding dismissal are such that a continued employment relationship would be intolerable;
 - (c) it is not reasonably practicable for the employer to reinstate or re-employ the employee; or
 - (d) the dismissal is unfair only because the employer did not follow a fair procedure.
- (3) If a dismissal is automatically unfair or, if a dismissal based on the employer’s operational requirements is found to

be unfair, the Labour Court in addition may make any other order that it considers appropriate in the circumstances.”

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- (d) are not applicable. It was not the respondent’s case and it was also not argued that it would not be reasonably practicable for the respondent to reinstate or re-employ her.
42. All that remains to be determined is whether the circumstances surrounding the applicant’s dismissal are such that a continued employment relationship would be intolerable. All of the witnesses who testified for the respondent stated that they could no longer work with the applicant because she had taken the respondent to the media and for the programme on 3rd Degree. None of them testified that the applicant was not a competent employee. Her testimony that she was best in what she did whilst she was working for the respondent was not challenged. She had in addition to her normal duties sorted out the warehouse after it had moved from head office to the branch. She was for all intents and purposes an excellent employee. It is so that the applicant had referred the respondent to the media. The respondent was approached for its comments but had taken a position that it would only issue a press statement after judgment had been given in this matter. The respondent’s counsel had argued that the applicant waged a media campaign to get public support and to influence this Court. This Court takes serious exception to the submissions made by the respondent’s counsel that the applicant had lied to the media to influence this Court. The inference to be drawn is that the Court is influenced by the media reports and would arrive at its decision not based on the facts but what was said in the media. This is not how our courts operate. Issues are decided on the facts presented to a Court and a Court is not swayed by what appears in the media. Courts do not arrive at decisions based on what is reported in the media. The Courts are independent and are loyal to the Constitution and not to the media. This is a rather unfortunate

submission by the respondent’s counsel.

43. The respondent prides itself that it does not tolerate discrimination in the workplace. It is an international company and

has a policy against discrimination. Mr Ulrich struck me as an honest and sincere witness when he testified and said that the

respondent did not discriminate. It is rather strange that the respondent can argue against reinstatement when this Court has found that the applicant had been discriminated against. The sales employees who testified were all on her level and if they have issues around the applicant’s sexuality they will have to deal with it. It appears to me that what the respondent will have to do is call in experts to deal with the conflict that had arisen in the workplace. The respondent’s policy on discrimination is as follows: “Based on the UN Charter and the European on Human

Rights, human rights are viewed by the group as a fundamental values which must be respected and observed by all employees. The corporate culture of voestalpine group acknowledges and welcomes the fact that

each person is unique and valuable and shall be respected for his or her individual abilities. Voestalpine group therefore does not tolerate any type of discrimination whatsoever in any form.”

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44. The respondent should practice what it preaches. It has a policy against discrimination yet it wanted the applicant to hide

the fact that she was a transsexual. Unfair discrimination in the workplace should not be tolerated at all costs. It is ugly. It is an evil that need to be routed out in the workplace. By not reinstating the applicant, the discrimination that gave rise to her dismissal which the Court has found to be the reason for her dismissal would continue to exist. The message that this Court will be sending out by not ordering her reinstatement is that employees like the applicant can be dismissed and no Court will come to their aid. After the applicant was dismissed, she sought employment and could only find employment for a month. Dr Levinson testified that there was no doubt in his mind that the applicant is capable of making a good and meaningful relationship with her employer and her clients and that she is still fully capable of performing her duties and functions previously performed at the respondent. His evidence in this regard was not challenged by the respondent.

45. The respondent contended that it treated the applicant with compassion. The facts of this case show otherwise. It is strange

that all of the employees in internal sales testified in Court and advanced the same reasons why they did not want the applicant to be reinstated. This case shows what discriminated people undergo daily in the workplace. It is a sad indictment to our society that despite our discriminatory past and all the non discriminatory laws that we have in place, that discrimination in the workplace still thrives. The applicant is one such a victim. Not only did she suffer discrimination and rejection in her family but was also subjected to ridicule by some of her colleagues. Some people believed that they had the right to call her names simply because she was different. This is a rather sad state of affairs. She excelled in her workplace. She was the best. I do not understand why her change gender would now affect her performance.

46. The reasons advanced by the respondent about why the applicant should not be reinstated do not fall within the provisions of section 193(2)(b). The respondent has failed to discharge the onus that rests on it that reinstatement should not be granted in terms of section 193(2) of the LRA.

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46. The reasons advanced by the respondent about why the applicant should not be reinstated do not fall within the provisions of section 193(2)(b). The respondent has failed to discharge the onus that rests on it that reinstatement should not be granted in terms of section 193(2) of the LRA.

47. This Court cannot order the respondent to pay the applicant damages or compensation in terms of section 193(3) of the LRA. The Court could like is the case in section 50(2)(c) of the EEA direct the respondent to take steps to prevent the same unfair

discrimination practice occurring in the future in respect of other employees. The section was not designed to allow the applicant to receive further compensation or damages. The applicant is not entitled to be compensated or be awarded damages in terms of section 193(3) of the LRA.

48. This brings me to the applicant's claim for compensation and damages in terms of the EEA. She is seeking to hold the

respondent liable as a result of discrimination. She has not brought a claim against Natasha or Fatima. The question that arises

is whether the applicant can also bring a claim for damages in terms of the EEA from the same set of facts. If she intends to hold the respondent liable for damages in terms of the EEA, she will have to satisfy the requirements of section 60 of the EEA. To succeed with such a cause of action, she will have to plead it specifically. Section 10(2) of the EEA is not a bar to her proceeding with a claim both in terms of the LRA and EEA but this depends on the facts of each particular case. It is unclear from the statement of claim on what basis she is seeking to hold the respondent liable in terms of the EEA. It is not pleaded in her statement of claim that the respondent had discriminated against her when she informed de Wet that she was undergoing a sex change operation by asking her to wear man's clothing when visiting clients. This was also not her case when she testified before Court. If that was the basis of her claim for discrimination in terms of the EEA, this Court would not have hesitated in awarding her damages. The same applies to her claim for compensation in terms of the EEA.

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49. One of the common cause facts in the pre trial minute appearing at paragraph 3.10 is that "Despite the Applicant having brought Alves' (Natasha) conduct to the attention of the Respondent through de Wet and the Respondent's Assistant Internal Sales Manageress, namely Mrs Fatima Lage ("Lage"), the Respondent failed and/or refused and/or neglected to intervene and instruct Alves to immediately cease such conduct." It is not clear whether it was the applicant's case that the respondent should be held liable because it had taken no steps against Natasha after she had sent the two sms to the respondent. If this is the case, to succeed in her claim for damages against the respondent in terms of the EEA, she will have to prove that she suffered discrimination at the workplace, she brought it to the attention of the respondent, the respondent knew about it and did not take any reasonable steps to prevent it from happening. The applicant's case before this Court as stated above was not that the respondent in forcing her to wear man's clothes was discriminating against her. Her claim for damages against the respondent in terms of the EEA stands to be dismissed on the grounds that there is nothing before this Court that indicates that she was subjected to discrimination by the employer before her dismissal or that the respondent did not take any steps to deal with the discrimination. She had lodged a grievance against Natasha who had sent her the two denigrating sms and the respondent took steps against her. When she lodged the second grievance, it was investigated by the respondent which unfortunately led to her dismissal. Section 60 of the EEA deals with liability of employers. The respondent will only be liable if the applicant was able to prove that it brought the discriminatory

conduct of the employee to the attention of the respondent and the respondent had failed to take all the reasonably practicable steps to ensure that the employees would not act in contravention of the EEA. She has not made out a proper case for damages in terms of the EEA.

50. There is no reason why costs should not follow the result. The costs order should include the costs for the preparation of the expert witness and the expert witness's fees.
51. In the circumstances I make the following order: 51.1 The applicant's dismissal by the respondent is found to be automatically unfair in terms of section 187(1)(f) of the LRA in that it had unfairly discriminated against her on the grounds of her sex and gender. 51.2 The

respondent is to reinstate the applicant from her date of dismissal to the same position that she held before her dismissal. 51.3 The applicant's claim for compensation and damages in terms of section 193(3) of the LRA is dismissed. 51.4 The applicant's claim for compensation and damages in terms of the EEA is dismissed.

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51.3 The applicant's claim for compensation and damages in terms of section 193(3) of the LRA is dismissed.

51.4 The applicant's claim for compensation and damages in terms of the EEA is dismissed.

51.5 The respondent must take steps to prevent the same unfair discrimination or any similar practice occurring in respect of other employees, and to report to this Court within three months from the date of this order on the steps so taken. 51.6 The respondent must apologise to the applicant in writing within one week of this order being made. 51.7 The respondent is to pay the applicant's costs which costs include the preparation costs of the expert witness and the expert witness fees. FRANCIS J JUDGE OF THE LABOUR COURT OF SOUTH AFRICA FOR THE APPLICANT : L M MALAN INSTRUCTED BY AC SCHMIDT INC FOR THE RESPONDENT : L CHAROUX INSTRUCTED BY J F DU TOIT DATE OF HEARING : 19 - 23 JULY 2010 DATE OF JUDGMENT : 13 AUGUST 2010

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51.7 The respondent is to pay the applicant's costs which costs include the preparation costs of the expert witness and the expert witness fees.

FRANCIS J

JUDGE OF THE LABOUR COURT OF SOUTH AFRICA

FOR THE APPLICANT : L M MALAN INSTRUCTED BY AC SCHMIDT INC

FOR THE RESPONDENT : L CHAROUX INSTRUCTED BY J F DU TOIT

DATE OF HEARING : 19 - 23 JULY 2010

DATE OF JUDGMENT : 13 AUGUST 2010

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