

SOUTH AFRICA / JUDGMENT

EWN v Pharmaco Distribution (Pty) Ltd (JS654/10) [2015] ZALCJHB 329; (2016) 37 ILJ 449 (LC) (22 September 2015) [2015] ZALCJHB 329

COURT

Labour Court Johannesburg

BEFORE

Lagrange

CASE / FILE NUMBER

JS654/10

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THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Case no: JS654/10

In the matter between:

EWN[i] Applicant and PHARMACO DISTRIBUTION (PTY) LTD Respondent

Delivered: 22 September 2015

Summary: (Automatically unfair dismissal – 187(1)(f) of LRA – Unfair discrimination – s 6 of EEA – requirement to undergo psychiatric assessment – predominant reason applicant’s bi-polar condition – compensation – general damages – provision in contract contrary to s 7 of EEA)

LAGRANGE J

Introduction

- [1] The applicant in this matter, Ms L EWN, a pharmaceutical sales representative (‘EWN’), was dismissed on 3 December 2009 for a “particularly serious and/or repeated wilful refusal to carry out lawful instructions or perform duties”. The instruction she failed to perform was to present herself on 24 November 2009 to one Dr R Liebenberg, a psychiatrist, for a medical examination. The applicant, who suffers from a bipolar disorder, which she maintains was under control, claims that the instruction was unlawful and an act of unfair discrimination based on disability amounting to an act of harassment.

[2] The respondent company ('Pharmaco') contends that the instruction was both reasonable and lawful in terms of EWN's contract of employment, and was necessary to determine if she was "fit to work". The respondent claimed EWN was required to undergo such assessment "on account of her inappropriate, aggressive and irrational behaviour towards fellow workers and management on inter alia 20 October and 23 October 2009."

[3] In terms of the agreed pre-trial minute between the parties, the issues the court is required to determine are:

3.1 whether the provisions in EWN's contract of employment requiring her to undergo medical testing are enforceable or void;

3.2 whether her dismissal for failing to submit to a medical examination on the employer's instruction was automatically unfair in terms of section 187 (1)(f) of the Labour Relations Act, 66 of 1995 ('the LRA'), and

3.3 in the event her dismissal was not automatically unfair, whether it was substantively or procedurally unfair.

[4] EWN seeks relief in the form of payment of compensation to the in the amount of R524,064.00 being the equivalent of 24 months' remuneration or, alternatively payment of twelve months' compensation in the event her dismissal is found substantively and procedurally unfair. She also claims payment of an amount of R100, 000.00 in respect of non-patrimonial damages for contumelia, humiliation, impairment of dignity and injuria.

[5] The applicant testified herself and called one other witness, Ms R Chater, a former doctors' sales representative who had also worked in the Pretoria region where EWN worked. The respondent called Mr R Agustoni, the CEO of the respondent, Ms M Naidoo, a Sales Co-ordinator at the time ('Naidoo'), Ms L Mnyengeza, the personal assistant to Agustoni's secretary ('Mnyengeza'), Mr M Bauer, a director of the respondent's firm of instructing attorneys, and Mr P van der Walt, an external IT consultant ('Van der Walt') as its witnesses. Bauer's evidence only related to efforts of the respondent to secure the attendance of witnesses at the proceedings.

Brief chronology

[6] Before dealing with evidence pertinent to the main issues in dispute, it is useful to set out a brief chronology of events preceding EWN's dismissal based on what was common cause between the parties.

[7] The applicant was employed as a pharmacy sales representative on one July 2008 under a fixed term contract. In mid-July 2009 she was employed on an indefinite basis under a written contract of employment. A term of that contract reads:

"17 MEDICAL EXAMINATIONS AND HEALTH

17.1 The nature of the Employee's job in the Company's business requires good health and physical, as well as mental, fitness.

17.2 The Employee warrants that, at the time of signing this agreement, he/she is free from any disease or illness which is contagious all of which will, or may in time, lead to the Employee's incapacity disability or death. Misrepresentation in this respect will make this contract voidable.

17.3 The Employee will, whenever the Company deems necessary, undergo a specialist medical examination at the expense of the Company, by a medical practitioner nominated and appointed by the Company. The Employee gives his/her error of operable consent to any such medical practitioner making the results and record of any medical examination available to the Company and to discuss same with such medical practitioner. The above shall include and apply to psychological evaluations.

17.4 Should the medical diagnosis and/or prognosis indicate a certified medical need to recuperate from any illness then a maximum of 6 (six) weeks shall be granted. However, if repeated periods of recuperation of Thereafter needed, exceeding an aggregate of 2 (two) weeks or more with in the following 6 (six) months, the Company may at its discretion conclude that the Employee is medically incapacitated to continue with the employment relationship. The Employee's services may then be terminated without the Company incurring any further liability towards you. It is agreed that the aforesaid period granted for recuperation shall be non-remunerative, i.e once you are sick leave allowance for paid sick leave is used up (if any), then you shall not receive any payment whatsoever from the Company for the remainder of the recuperation period.

17.5 If in the course of any treatment for any medical or mental condition, such medical treatment is subject to the taking of drugs treatment which may impair mental faculties or performance, then and in that event the Company may at its discretion conclude the Employee is medically and/or mentally unsuitable for continued employment and the Employee's services may be terminated without further liability."

[8] In December 2008 EWN's performance appraisal stated that her performance was "exceptional and consistently demonstrates excellent standards in all job requirements."

[9] During January to October 2009, EWN queried the calculation of commission as determined by Pharmaco and delays in paying her commission due. On 25 October 2009 she addressed an email to Mr R Agustoni, the chairperson and CEO of Pharmaco ('Agustoni'), which read:

"Dear Roberto,

As per our discussion on Friday 23 October at the office, I confirm that I have received a printout with my sales per pharmacy, per product for the year to date. I also confirm that I have pointed out to you Roy and Phillip some very obvious and blatant errors. These errors affect commission owing and payable to me as per the company's commission structure materially.

I confirm that on more than one occasion I have respectfully requested Pharmaco to rectify the mistakes as a matter of urgency. I personally have spent many days of my own personal time to fix errors, link pharmacies that were omitted and add pharmacies that were part of my area structure.

I record respectfully that I do not agree with the sales numbers as per the printout presented to me on Friday. I once again requested sales attributable to me for commission purposes be corrected.

January to July commissions on now long overdue so treat this matter as of the utmost urgency.

I look forward to a positive written response from you soonest.

Regards

Lize EWN”

[10] Subsequently, on 28 October 2009, EWN raised a formal grievance about her commission payments. On the same day, she was given a notice to attend a disciplinary enquiry scheduled for 30 October 2009. The enquiry concerned six charges all of which arose from her interactions, particularly on 20 and 23 October 2009, with various staff in her efforts to resolve her complaints about her commission payments. She was found guilty of some of the charges which related to alleged incidents and/or using abusive and/or insulting language towards fellow employees and the employer and of going to head office without permission on 23 October 2009, and of damaging the company’s reputation by insisting that the employer had produced incorrect sales figures to deprive her

of commission. The only charge she was found not guilty of was of intimidating another employee.

[11] Naidoo had said that on 23 October 2009, EWN had come into head office unannounced and demanded information about her sales figures. In the three weeks prior to that, EWN had come to head office every Friday to address the queries she had about the discrepancies in the reports she had received. Naidoo claimed that EWN was screaming and shouting, raising her voice and talking in an aggressive fashion. Naidoo said she could not assist her and she would have to wait for Van der Walt. EWN approached Naidoo at the front of her workstation then walked around behind her wanting to get access to Naidoo’s computer. When Naidoo refused, EWN told her

to get off her chair so she could get access to the computer herself. Naidoo felt a bit intimidated but knew she could do her no harm and at no stage did she feel physically threatened by her behaviour on that occasion. Naidoo refused to move and refuse to access the report because EWN was supposed to get that from Van der Walt. EWN then asked her how she could get the information and Naidoo told her to wait for Van der Walt.

[12] Mnyengeza was the other witness to EWN's anger on that occasion. At the time she was manning the reception and the switchboard and witnessed EWN shouting at Naidoo. When EWN could not get access to Naidoo's computer, she came to the front desk and grabbed the switchboard phone without asking and tried to get hold of Van der Walt. She returned to Naidoo when this proved unsuccessful. Mnyengeza was disturbed by the change in EWN's behaviour because she was normally a nice person. Nevertheless, Mnyengeza agreed that she did not fear for her own safety nor did she think that EWN was threatening towards Naidoo. She also did not feel

the need to alert Tindale to the situation and could not say whether he came out of the office because EWN was shouting for him or because he had heard her shouting.

[13] Naidoo was only responsible for entering the details of new clients on the system according to area whereas Van der Walt was responsible for ensuring that sales were properly captured on the system.

[14] After unsuccessfully trying to reach Van der Walt on the receptionist's phone, EWN then shouted down the passage a few times for Tindale. Tindale came and asked her to calm down and wait for the information, but she was still very upset and as far as Naidoo could recall, she then went to see EWN's secretary. It was not the way EWN normally behaved and Naidoo was shocked how different she was. However, she conceded that EWN had not used any abusive or crude language. Naidoo claimed not to have been aware of EWN's bipolar condition and said she only heard about it afterwards. Although she was friendly with EWN, EWN had never mentioned it to her. This was never put to EWN under cross-examination.

[15] On 5 November 2009, EWN was issued with a final written warning based on the enquiry findings, against which she appealed on 10 November 2009.

[16] On 20 November 2009, Agustoni issued EWN with a letter suspending her on full pay with immediate effect instructing her to present herself for a medical examination before Dr Liebenberg, a psychiatrist, on 24 November 2009. She was told that the purpose was to determine "whether or not you are fit to deal with your tasks". EWN was further warned in the letter that failure to attend the examination would constitute a serious offence.

[17] The parties recorded that it was common cause that, prior to this instruction being issued, she had performed her work satisfactorily and competently and Pharmaco had not questioned her work performance or competency.

[18] On 20 November 2009, EWN responded through her attorneys of record at the time. Their letter outlined the disciplinary measures taken recently against EWN as well as the pending CCMA referral and grievance relating to her commissions. The letter suggested that Pharmaco was victimising her and called upon the company to uplift her suspension and withdraw the instruction. Pharmaco responded on 23 November 2009, rejecting the demand and suggesting that any complaint about victimisation was just an attempt to divert attention from the actual matter at hand which it described as a 'simple' one, namely:

“... we did not know about the bipolar disorder of your client until she revealed suffering from such to Mr Hippele and Mr Tindale during a recent hearing. There had been incidents in our company which forced us as a caring and responsible employer to insist that Mrs EWN attend the doctor’s appointment we have arranged back tomorrow... both in her own and in the company’s lawful and justified interest.”

[19] It was common cause that no sales representative had been subjected to any pre-employment medical or psychological assessment. Agustoni was of the view that there was no need to be concerned about the lack of pre-employment medical testing because the employee warranted that they were free from any illness which might incapacitate them in clause 17.2 of the contract. Agustoni did agree that if an employee was unable to perform their duties that would constitute some form of incapacity.

[20] On 23 November 2009, EWN referred an unfair labour practice dispute concerning the instruction to submit herself to a medical examination. Following her dismissal on 3 December 2009, she referred a dismissal dispute to the CCMA on 5 December 2009. On the same day she provided Pharmaco with a letter from a counselling psychologist, Mr KD Fourie, dated 23 November 2009. The content of the letter stated:

“Ms EWN requested psychotherapy during March 2007 shortly after moving to Pretoria. Prior to that, she was in therapy with Dr J de Villiers in Cape Town, who referred her to me. She has been in therapy with me on an ongoing basis since then, on average once a month.

Therapy is primarily of a supportive nature and is intended to assist with the management of her bipolar disorder and general life stressors. The functioning as well as appeared to be good and her bipolar disorder well-managed. She is also medication compliant. I can therefore see no reason why this condition should in any significant way have affected her ability to function effectively in the work environment.”

[21] The same day, EWN’s attorneys sought an undertaking from the company suspending the medical examination pending the outcome of an urgent application in the Labour Court. An application was launched on the same day to uplift EWN’s suspension and to declare Pharmaco’s instruction unlawful. The application was unsuccessful.

[22] The 26 November 2009, EWN was issued with a notice of a second disciplinary enquiry to be held on 2 December

2009. The following day, a hearing was held to consider her grievance over commission payments. Her grievance was dismissed as unfounded on 30 November 2009.

[23] The second disciplinary hearing took place on 2 December and the following day she received a letter confirming she had been dismissed. EWN referred an unfair dismissal dispute to the CCMA but at arbitration proceedings the arbitrator ruled that the CCMA did not have jurisdiction to hear the dispute which led to the referral to this Court.

[24] EWN was able to get alternative employment with another pharmaceutical company in January 2010 at approximately the same level of remuneration.

Material aspects of the evidence

[25] EWN testified that shortly after commencing employment with the company she had informed Mr Roy Tindale, the National Sales Manager, of the fact that she suffered from bipolar disorder. Chater was unable to confirm whether management was aware of the applicant's condition, but confirmed that it was well known within the company and was spoken of in meetings held between the sales representatives and management. Agustoni was unable to confirm this and the company did not call Tindale as a witness. Agustoni claimed however to have been very concerned about learning of EWN's condition because of the nature of the work she was doing. He decided that it was necessary to obtain an assurance that she could perform her duties and did not pose a risk to the company or its client market. There was some controversy about whether EWN's condition was known within the company. On the evidence, I am satisfied that her bi-polar status probably was known by Tindale and at least some of the sales staff, but I accept that Agustoni might not have been aware of it personally until the issue came up in the disciplinary enquiry.

[26] Chater also testified that she did not find her work stressful, contrary to Agustoni who maintained that the limited time that representatives had with customers meant that they had to be very focused and to the point in their communications which place them under a lot of pressure.

[27] The main purpose of EWN's job as a pharmacy sales representative as described in her written job description was:

"To provide pharmacies (and other designated targets) with all necessary information on specific company's products, with the aim to negotiate their correct installation and development within the pharmacy (or other retail outlet). Setup of all regular and necessary activities, promotions and deals, enabling a successful and sustainable product sales development, according to company policy, strategies and budgets."

[28] She was also assigned detailed tasks/responsibilities which included, amongst other things:

28.1 calling on pharmacies within a designated geographic area of responsibility, which could be changed by Pharmaco from time to time;

28.2 development of targeted pharmacies and outlets prioritising them according to a company classification system;

28.3 promoting Pharmaco's products, and

28.4 ensuring adequate product stock levels were maintained at pharmacies.

[29] EWN performed sufficiently well to have her fixed-term contract converted into a permanent contract and in her latest performance assessment her performance was rated as "exceptional". EWN claimed that her job did not require any particular level of medical fitness or psychological well-being.

- [30] The difficulties relating to her commission payment began in September 2009, when her sales figures were adjusted downwards when a number of sale items appearing on an initial list were removed in a subsequent list, which had the effect of reducing her commission. She felt that Pharmaco did not explain the reason for the amendment and would not engage with her about it. The matter caused her considerable aggravation. Despite meetings between herself, Tindale and Van der Walt to try and address the issue, her claims were rejected and Pharmaco would not admit it had made a mistake. At one point, Tindale had demonstrated his attitude towards her claim by throwing her figures in the bin acc.
- [31] It was suggested to EWN under cross-examination that ultimately her claim for extra commission was unfounded as she had not pursued it after the grievance hearing. EWN's explanation was that she did not take it further because the grievance had become overshadowed by her subsequent dismissal and the litigation relating to that. Nonetheless, she was not happy with the outcome of the grievance hearing which it had been found that the figures relied upon by the company to determine her commission were correct. She still believed that the company had not properly explained discrepancies in relation to the different printouts she had received, taking into account invoices which she had presented to substantiate her position.
- [32] It was EWN's interactions with staff in October 2009 which resulted in the first disciplinary charges being brought against her. EWN noted that in the course of the testimony in the disciplinary enquiry neither Naidoo nor Mnyengeza testified that the applicant had behaved in an abusive manner. Even though they said that she had raised her voice they acknowledged that their perceptions may have been affected by the fact that the applicant was generally very polite. Neither of them had said they felt threatened by her. She had lodged an appeal against the final written warning which had been issued but that process also was overshadowed by her dismissal.
- [33] Van der Walt managed the custom designed Pharmaco Management Information System ('PMIS'). The system enabled the respondent to identify who had sold what products to which clients in the course of a month. It was his responsibility to verify with sales representatives which customers' sales should be allocated to them. He could not alter the data which was inputted into the system when sales were generated. Some of the data was entered daily and data from smaller companies was entered monthly. He had spent some days going through the reports with her adding customers in her area. However she was still not satisfied. There was a disagreement between him and EWN about signing off on the reported after she had accessed the system and amended the list of customers whose sales should be attributed to her. Van der Walt would not sign off on the changes because that had to be approved by Tindale. EWN got very angry when she was told that Tindale would not approve the inclusion of one wholesaler on her list. She had turned red in the face, was tearful, but also smiled. He felt uncomfortable and left the office. He understood she was angry because she did not make her commission target. He felt it was unfair that he had to explain the exclusion of the wholesaler from her list, as he was not part of management. He

could not explain any discrepancy EWN had complained about in respect of the specific product sales credited to her account, because it was difficult to say which of the two report sheets were correct in view of numerous calculations in the background of the reports.

- [34] It was during the disciplinary enquiry of 30 October 2009 that EWN said that Tindale had interrupted her and asked her what medication she was on. She said it was for her bipolar condition, which he already knew about. He had only denied that he knew about her condition in his official capacity. In her termination letter it was recorded that "... Tindale explained for the company that he never had any formal or official knowledge of your bipolar condition until recently when you confirmed that you suffer from such disease (although allegedly nonsymptomatic) during a disciplinary hearing." Agustoni denied that this suggested Tindale knew of EWN's condition unofficially. Agustino did concede that it was possible the company would not have asked EWN to undergo a medical examination if she had not disclosed her bipolar status, but her conduct had raised concerns. However, he would not have asked her to be medically examined based simply on her behaviour alone.
- [35] EWN said she was surprised by Tindale's question and afterwards learnt from Chater that Tindale had told Chater that she was mentally unstable and that the company had asked her to undergo a psychiatric assessment. Chater confirmed this account in her testimony. EWN was insulted and distressed by Tindale's question. EWN was challenged about the prior disclosure of her condition. She said that it was something that was generally known in the company and it had come up in a general discussion between management and reps when they were talking about medical conditions. Chater confirmed that she had learnt of EWN's bipolar condition from other sales representatives very soon after she was employed.
- [36] EWN's subsequent suspension on 20 November came as a surprise to her and she pointed out under cross-examination that she would have expected them to have suspended her after the events of 20 and 23 October if they were genuinely concerned about her behaviour. She confirmed that she had tendered a letter from her psychologist in response to the notice to undergo an examination. The company never responded to this. Agustoni defended Pharmaco's insistence that EWN submit to a psychiatric examination because the psychologist was not a psychiatrist, but he admitted that this was never conveyed to EWN. EWN also stressed that there had never been a question about whether she was able to do her job and could not accept that the employer needed a medical opinion

to confirm that she was fit to do her work. Agustino was adamant that EWN's psychologist was not capable of addressing her condition in full and the company was entitled to rely on clause 17.3 to insist that she was examined by a medical professional. He also said it was unlikely the company would have accepted an opinion from EWN's own psychiatrist, because it wanted an opinion from someone who had no link with her.

- [37] In EWN's termination letter, Agustoni stated: In his letter of termination Agustoni noted that "The Company also has rights, including the right that its employees and clients are protected and safe at all times." An important leg of Agustoni's testimony was his defence of

clause 17.3 of EWN's contract of employment. He maintained that it had been included to protect both employees and the company's clients and he had checked to see if it was permissible. Amongst other things she believed that the clause would permit the company to ask a female employee who was sluggish at a particular point of the month, to subject herself to the company's appointed gynaecologist, or to request an employee who had lesions on their body to submit to a blood test. He gave an examples of one employee who had shown signs of drug abuse and on being tested this had been confirmed, and another example of someone who had been fainting in meetings and was found to have high blood sugar levels. He insisted that EWN had been dismissed solely because of her failure to submit to the medical examination as instructed: it had nothing to do with her complaining about her commission payment.

Analysis

Was the instruction to the applicant permissible?

[38] Before deciding if the dismissal of EWN for failing to submit to a medical examination was automatically unfair or not, the first question which must be addressed is whether the instruction was legally permissible. Section 7 of the Employment Equity Act, 55 of 1998, does permit medical testing of employees, but only in limited circumstances:

"7 Medical testing

- (1) Medical testing of an employee is prohibited, unless –
 - (a) legislation permits or requires the testing; or
 - (b) it is justifiable in the light of medical facts, employment conditions, social policy, the fair distribution of employee benefits or the inherent requirements of a job.
- (2) Testing of an employee to determine that employee's HIV status is prohibited unless such testing is determined to be justifiable by the Labour Court in terms of section 50 (4) of this Act."

[39] The first point to notice about the provision is that no exception to the prohibition against medical testing is made on the basis that an employee consented to the medical testing. Section 7 (1) (a) clearly has no application in this case. Consequently, the respondent could only require EWN to undergo a test if the requirements of s 7(1)(b) of the EEA were met. Essentially, Pharmaco argued that the testing was justified given that EWN had consented to undergoing a medical test when reasonably required by it, and her behaviour coupled with the disclosure of her psychiatric condition provided sufficient justification.

[40] Having regard to the wording of section 7

- (1) (b) itself, the known medical facts were that: EWN suffered a bipolar disorder and that she was undergoing regular therapy and being medicated for her condition. There was also the opinion of her psychologist, that her condition should not affect her ability to function effectively in her work environment.
- [41] In so far as the respondent might find support in the section that ‘employment conditions’ justified the psychiatric examination, the respondent made some attempt to try and suggest that the working environment of EWN was very pressurised and stressful. By implication, as I understood the argument, it could not risk employing someone in the position if there was a question mark about their ability to remain mentally stable to cope with the demands of the job. However the balance of evidence did not support the view that conditions of work in the job were inherently stressful, still less that any expressions of anger or frustration would render the person unable to perform their duties.
- [42] It should also be mentioned that what triggered EWN’s outburst, had nothing to do with the performance of her duties but arose out of a dispute over an important aspect of her remuneration. On the evidence presented, it seems clear that the applicant lost her temper on 23 October 2009 as a result of her frustrations over what she perceived was an attempt by Pharmaco to avoid addressing her complaints about her commission flowing from what she believed were erroneous sales figures attributed to her. In passing, I note that although the respondent was adamant there were no errors, Agustoni’s and Van der Walt’s evidence did little to clarify the correctness of the amended sales report or why it had changed. In any event, in so far as it may be relevant, EWN had a genuine belief that she had been severely prejudiced by an unwarranted revision of the sales figures.
- [43] A similar alternative justification under section 7(1)(b) might in theory be founded on an argument that it is an inherent requirement of the job of a pharmaceutical sales representative to be medically certified fit for work. In this respect also, the respondent failed to demonstrate such a threshold health qualification was required to perform the duties the job entailed.
- [44] The above arguments are the only ones that might conceivably have provided Pharmaco with a basis for exemption from the prohibition against medical testing. It should also be mentioned in this context that the ostensible object of the examination was not to determine if the applicant was suffering from some unidentified ailment that was affecting her ability to work, but whether her disclosed psychiatric condition made her unfit for performing her duties. Yet, it was common cause that there were no complaints about her work performance.
- [45] In light of the above, I am not persuaded that the respondent established that its instruction to the applicant to undergo a psychiatric examination to determine if she was fit to do her work was one that was not prohibited in terms of section 7 of the Employment Equity Act, as it failed to establish that it met any of the exceptions to the prohibition.

[46] On the same reasoning, in the absence of being able to establish that clause 17.3 of EWN's contract was justifiable under one of the exceptions to the prohibition in section 7 of the Employment Equity Act, that provision is unlawful and unenforceable.

Did the respondent unfairly discriminate against the applicant and was her dismissal automatically unfair?

[47] While there are suggestions that other issues might have motivated her dismissal, the central issue the Court is required to determine is if the reason for her dismissal was one that was automatically unfair within the meaning of s 187(1)(f). It has already been established that the instruction which EWN was dismissed for disobeying was an unlawful one. But in itself that is not sufficient to establish that her dismissal was on account of a prohibited reason. The applicant contends that the reason for her dismissal was that the instruction was only issued because she suffered from a bipolar disorder and that if that had not been the case she would not have been required to undergo a medical examination and would not have been dismissed. In effect, it was her bi-polar condition which led to her being required to undergo the examination on pain of dismissal. That in itself was unfair discrimination in terms of s 6 of the Employment Equity Act. Consequently, her subsequent dismissal for refusing to accede to being tested for that reason was also dismissal for a prohibited reason in terms of section 187 (1)(f) of the Labour Relations Act 66 of 1995 ('the LRA').

[48] Agustoni admitted that he would not have required EWN to undergo testing on account of the conduct for which she was disciplined alone. The knowledge that she was bi-polar was therefore decisive. It is noteworthy also that EWN's performance had been rated as "exceptional"; she had no history of absenteeism; the company had not considered it necessary to subject any employees to pre-employment medical or psychological examinations; when EWN had an outburst on 23 October 2009 over her commission dispute, none of the staff had felt threatened by her. Consequently, I agree with the applicant that there was no factual basis to doubt her ability to perform her work duties or discharge her functions. Accordingly, the ostensible rationale advanced for the examination, namely to determine if she was fit to do her work, is hard to believe. It seems more probable on the evidence that the predominant reason she was required to undergo the testing was because senior management became aware of her bi-polar status[1]. Had she not suffered from that condition she would consequently, not have been placed in a situation where she faced dismissal for not acceding to an examination based solely on her condition.

[49] Consequently, I am satisfied that her dismissal in the circumstances was based on her refusal as person with a bi-polar condition to undergo a medical examination, which she would not have been required to undergo, but for her condition. The stigmatising effect of being singled out on the basis of an illness that she was managing, notwithstanding the absence of any objective basis for doubting her ability to perform, is obvious. The act of requiring her to submit to the examination in the circumstances was also an act of unfair discrimination in terms of s 6 of the Employment Equity Act.

[50] Apart from declaratory relief relating to her contract, the applicant seeks compensation for her dismissal and general damages for iniuria relating to being instructed to submit to the examination. In evaluating the respective claims I am conscious that the fact she was dismissed in consequence of the respondent's unfairly discriminatory action was the greater of the wrongs she suffered. Had she refused to attend the examination and had the respondent done nothing the effect on her dignity would not have been as severe. Nonetheless, though closely related, the two claims do not overlap entirely.

Declaratory relief

[51] For the reasons stated earlier, I am satisfied that clause 17.3 of the applicant's contract of employment is not permissible in terms of section 7 of the Employment Equity Act and can be declared null and void.

Unfair discrimination

[52] Singling the applicant out for medical examination on account of her bi-polar illness, despite her performance record, was a stigmatising act and was aggravated by the remark made by Tindale about her mental stability. The applicant sought an award of R 100,000 in general damages, but no specific motivation was advanced for this amount. In the circumstances, I think a sum of R 15,000-00 would be adequate recompense.

Automatically unfair dismissal.

[53] In assessing an appropriate amount of compensation, a number of considerations have to be weighed up. In this instance, I have considered the applicant's previous length of service with the respondent and the fact that even though the respondent ought to have realised the stigmatising effect of its conduct, and should have reflected on whether its instruction was a reasonable one in the circumstances, it appears to have genuinely believed that the terms of the applicant's contract protected it against any legal challenge to the instruction it issued. I must also consider that the respondent did have an early opportunity to reflect on the lawfulness of its actions when confronted by EWN's original attorneys of record, but ploughed ahead with its intended

course of action regardless. Its ostensible rationale for demanding the examination also lacked a credible basis for wanting to assess her fitness to perform her duties.

[54] Accordingly, I believe compensation in the amount of twelve months' salary is appropriate. It was recorded in the pre-trial minute that the parties were in dispute about whether the travel and telephone allowances paid to the applicant, amounting to R 8,350-00 and R 500-00 respectively were part of her remuneration, but the respondent never canvassed this issue in the evidence. Accordingly, the claim that they formed part of her remuneration was not effectively challenged. The applicant's gross remuneration excluding commission payments was R 18, 500-00 per month in terms of her contract of employment.

[55] The applicant on the other hand did not prove the quantum of commission which she claimed formed part of her regular income. There was no detailed evidence presented of her previous commission payments and in view of the dispute over her commission due, she did not receive a commission payment for the period after the end of the first quarter in 2009. Section 35(4)(a) of the Basic Conditions of Employment Act, 75 of 1997, ('the BCEA') provides that where an employee's wage is calculated wholly or in part on a basis other than time or if it fluctuates significantly from period to period any payment due under that Act is calculated with reference to the employee's earnings during the preceding thirteen weeks. Although s 35(4) does not necessarily apply to the determination of the applicant's gross remuneration in this instance, it does illustrate the difficulty of extrapolating from past variable earnings to determine what constitutes a regular income. No detailed evidence of the history of EWN's gross earnings was led in this regard on which the court could reliably estimate an average commission component of her salary. Accordingly, her remuneration for the purposes of compensation has been based on her basic salary of R 18, 500.00 per month.

Order

[56] Clause 17.3 of the applicant's contract of employment is in breach of the provisions of s 7 of the Employment Equity Act and is of no legal force or effect.

[57] The applicant was unfairly discriminated against in terms of s 6 of the Employment Equity Act when the respondent instructed her to undergo a psychiatric examination on account of her bi-polar status ostensibly to determine her fitness to work.

[58] The applicant's dismissal by the respondent for failing to undergo a psychiatric examination on account of her bi-polar status ostensibly to determine her fitness to work was automatically unfair in terms of s 187(1)(f) of the Labour Relations Act.

59.1 pay the applicant R 15,000-00 (fifteen thousand rands) as general damages for the unfair discrimination committed in terms of s 6 of the Employment Equity Act, and

59.2 must pay the applicant R 222,000-00 (two hundred and twenty-two thousand rands) as compensation for her automatically unfair dismissal.

[60] The respondent must pay the applicant's costs.

Lagrange J

Judge of the Labour Court of South Africa

APPLICANT: Instructed by: Adv G. Hulley JD Verster RESPONDENT: Instructed by: Adv B Rhoode
Friedland, Hart Solomon & Nicolson

[1] On the applicable test see *Kroukam V SA Airlink (Pty) Ltd* (2005) 26 ILJ 2153 (LAC) at 2184, paras [90] and [91] and 2206, para [26].

[i] Applicant's name omitted for publication purposes

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