

SOUTH AFRICA / JUDGMENT

Reddy v South African Revenue Services and Another (EQ19443/21) [2021] ZAGPPHC 468 (12 July 2021)

[2021] ZAGPPHC 468

COURT

North Gauteng High Court, Pretoria

BEFORE

Kubushi

CASE / FILE NUMBER

EQ19443/21

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EQUALITY

COURT IN PRETORIA

SITTING

IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG

DIVISION, PRETORIA

Case

Number: EQ19443 / 21

NOT

REPORTABLE

NOT

OF INTEREST TO OTHER JUDGES

Date: 12 July 2021

In

the matter between:

PRIYEN

REDDY

APPLICANT

and

SOUTH

AFRICAN REVENUE SERVICES

FIRST RESPONDENT

MARGARET

LEWIS

SECOND RESPONDENT

JUDGMENT

KUBUSHI J,

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by e-mail. The date and time for hand-down is deemed to be 10h00 on 12 July 2021

INTRODUCTION

[1] The complainant, PRIYEN REDDY ("Mr Reddy") instituted proceedings before the Equality Court in terms of section 20 of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 ("the Equality Act") read with Regulation 6 (1) thereof. The gravamen of the complaint is that Mr Reddy has been unfairly placed on early retirement due to ill health by his erstwhile employer, the South African Revenue Services ("SARS"), because of his disability. In essence his complaint is that in placing him on early retirement SARS contravened Section 9 read with item 23 (1) of Schedule 6 to the Constitution of the Republic of South Africa, 1996 ("the Constitution"). Mr Reddy, as such,

claims that his rights as a person with disability stipulated in the Constitution have been violated by SARS.

[2] SARS has not filed any affidavit or response to Mr Reddy's complaint and has also, not filed heads of argument even when asked to do so. On perusal of the documents filed by Mr Reddy it is evident that he has complied with the requirements of the Equality Act and the Regulations in placing this matter before the Equality Court. It is for this reason that I opt to proceed with the matter in SARS' absence.

[3] This court directed that Mr Reddy's complaint be determined on the papers filed on Caselines without oral hearing as provided for in this Division's Consolidated Directives re Court Operations during the National State of Disaster issued by the Judge President on 18 September 2020.

FACTUAL MATRIX

[4] Mr Reddy was employed by SARS since 12 January 2015 as an In bound Contact Centre Agent (Employee number 00013981) on Grade 3b performance Level.

[5] In a letter dated 21 February 2018 Mr Reddy was informed that he has been declared as a person with disability by SARS. The name of the disability as recorded in Mr Reddy's declaration of disability form is 'Depression and Generalised Anxiety Disorder'. And the nature of the disability is recorded as 'Mental illness - Severe depressive episodes without psychotic symptoms and panic disorder'.

- [6] In October 2019, due to an incident that occurred at work, Mr Reddy was suspended from employment. The reason for suspension is recorded in a letter sent to Mr Reddy by SARS dated 30 October 2019, as being that he 'made threatening remarks insinuating violence and made racial remarks to other employees. Furthermore, the employer believes your presence at the workplace poses a safety risk to other employees.'
- [7] Mr Reddy was referred to SARS HRM for an independent assessment to determine his health status and current level of functionality. The HRM found that Mr Reddy has chronic mental/behavioural disorder, complicated by comorbidity of Axis 1 pathology and intermittent compliance; has significant cognitive impairment precluding him from meeting the open labour market standards of his own or an alternative occupation; and that the sick leave usage correlates with chronic medical condition. susceptible to relapse. The HRM, consequently, recommended that Mr Reddy be considered for Ill Health Retirement Benefits based on his mental status and perpetuating nature of his symptom profile.
- [8] SARS decided on the basis of this recommendation to place Mr. Reddy on early retirement due to ill health, that is, he was medically boarded. Mr Reddy's appeal of SARS' decision was turned down on the basis that 'There is no new medical evidence that has been submitted that would warrant a different outcome.'
- [9] Not satisfied with the outcome, Mr Reddy referred the complaint to the Commission for Conciliation, Mediation and Arbitration ("CCMA") Where, on the basis of the formulation of his claim, he was informed

that discrimination cases are not handled in the CCMA but should be referred to the Labour Court for arbitration. Mr Reddy launched

proceedings in the Labour Court but it is not apparent from the papers filed what eventually happened in those proceedings. Be as it may, on 19 April 2021 Mr Reddy approached the Equality Court for relief.

APPLICABLE LAW

- [10] The purpose of the Equality Act is to give effect to section 9 read with item 23 (1) of Schedule 6 to the Constitution, so as to prevent and prohibit unfair discrimination and harassment; to promote equality and eliminate unfair discrimination; to prevent and prohibit hate speech; and to provide for matters connected therewith.
- [11] Section 20 (3) (a) of the Equality Act stipulates that a presiding officer of the Equality Court concerned should decide whether a matter instituted in the Equality Court, should be heard in that court or whether it should be referred to another appropriate institution, body, court, tribunal or other forum, which in the presiding officer's opinion, can deal more appropriately with the matter in terms of that alternative forum's powers and functions.

[12] Section 13 of the Equality Act envisages a two stage enquiry, the first part of which under s 13 (1) is for the complainant to demonstrate, on the thin threshold test of prima facie proof, that there was a discriminatory act or omission. If such discrimination is found to have taken place, the second stage is to enquire whether such discrimination is unfair based on any of the prohibited grounds in terms of the Equality Act

[13] I, consequently, have to first determine whether on the papers before me, a prima facie has been made out.

[14] The test for determining whether a claim based on unfair discrimination should succeed was laid down by the Supreme Court of Appeal in *Safi v National Commissioner of the South African Police Service and Others*,^[1] wherein that court expressed the following:

“[10]. . . What needs to be established at the commencement of the enquiry is whether the policy or practice on which the challenged decision was based, Differentiates between people. If it does, whether the differentiation bears a rational connection to a legitimate

government purpose. If it does, the policy or practice may or may not, depending on the circumstances of a particular case, violate section 9 (3) of the Constitution.”

ANALYSIS

[15] Mr Reddy brought proceedings before the Equality Court contending that SARS has unfairly discriminated him on the basis of his disability.^[2] As a consequence of such unfair discrimination he was placed on early retirement due to ill health.

[16] In order to provide a full understanding, section 9 of the Equality Act^[3] should be read together with the definition of "discrimination"^[4]and "prohibited grounds"^[5] in s 1 (1) of the Equality Act. The act complained of should as a result impose burdens, obligations or disadvantages on, or withhold benefits, opportunities or advantages from any person on the ground of disability.

[17] It is only necessary to show discrimination as defined in the Equality Act, that is, the complainant need only establish the elements of discrimination, namely: an actor omission that may be direct or indirect that imposes a burden or withholds a benefit on a prohibited ground.

[18] The element of whether the claim is based on a prohibited ground has clearly been proven in the papers before me. SARS, as earlier stated has declared Mr Reddy as a person with disability. Discrimination on the basis of disability is one of the grounds provided for in the Equality Act ^[6] What Mr Reddy ought to further establish is that there has been an act or omission that may be director indirect that imposes a burden or withholds a benefit.

[19] Mr Reddy's complaint is succinctly set out in the heads of argument as follows:

“FACTUAL BACKGROUND TO CASE:

1. I Priyen Reddy was employed by South African Revenue Services since 12 January 2015 as an Inbound Contact Centre Agent (Employee id 00013981) on Grade 3b performance level. I currently suffer from paranoid Schizophrenia and I decided to declare my limitations to the Employer on 14 December 2017 which included nature of my disability which is recurring and likely to occur again I also reported challenges in the context of working environment which included (Conflict with colleagues who misunderstand my illness and possible related environmental stress. I also declared that I am receiving medication and therapy as an assistive mechanism the proposal for possible reasonable accommodation would be related to leave.
2. My declaration to the employer was accepted and I received the outcome letter of my declaration on 12 March 2018 and had forwarded it to the Ops manager at the time James Baloyi on the very same day, however the employer ignored my declaration and later revealed during Stage 2 incapacity enquiry that he did not know I have a disability.
3. I was subjected to unfair discrimination and bullying by co-workers which I do relate as interpersonal issues the constant harassment was detrimental to my health and exacerbated my already fragile condition , the situation was becoming unbearable there was hardly or no intervention by management t to relieve me of such environmental stressors. I put in a grievance for Charmaine Pretorius on 20 September 2019.
4. The bullying and harassment which occurred on Wednesday 16 October 2019 resulted in me being suspended on 30 October 2019. The employer (HRM) relied on assumption and hears3yevidence that my presence at the workplace poses a threat to other employees, based on my disability. On Wednesday 16 October 2019 I approached centre manager Rirhandzu Ndubane in order to assist me with a formal grievance to which she Refused in doing act she automatically subjected me to unfair labour practices. The employer did not attempt to resolve the issue and did not follow regulations according to the Labour Relations Act, section 185.1 was subsequently suspended and requested to attend a full health assessment on 18 may 2020 which I agreed and though it was for purposes required as investigations regarding allegations against me for the suspension.
5. The suspension was unreasonably long more than 12 months there was no disciplinary hearing instead the employer initiated a ill Health Incapacity Stage 2 Enquiry. The fact that there was no fair disciplinary hearing within 6 months as regulated by the Labour Relations Act, section 185 leads to automatically unfair labour practices and the Employer contravened Section 9 read with item 23(1) of Schedule 6 of the Constitution of the Republic of South Africa 1996.
6. The Employer relied on Medical Information presented by Alexander

Forbes, and typed discriminatory unfounded assumptions directed at my disability, with the aim of constructively forcing me to take early retirement due to Ill health as a form of no fault dismissal. During the Stage 2 enquiry the Employer alleged that he did not know that in fact I had a disability and accused me of not informing him. I contended then the declaration was sent on

12 March 2019. The Employer further admitted the fact that the Stage 1 enquiry had not been closed prior to initiating Stage 2 enquiry. This fact is another deviation of the employer regarding the Labour Relations Act, section 185 as unfair labour practice.

7. The Employer alleges that I was accommodated on four instances of extended sick leave applications as reasonable accommodation as well as e filing activations.
8. Extended sick leave is a mechanism available to every ordinary SARS employee. I contended that had the employer assisted me with discretionary leave as stipulated in SARS Conditions of Service PAGE 24 of 31, there might have been more opportunity for me to protect my employment by doing this the employer did not follow its own Conditions of service. The employer deviated from legislation Unfair Discrimination Act 4 of 2000 as amended, The Employer contravened Section 9 read with item 23(1) of Schedule 6 to the Constitution of The Republic of South Africa, 1996 .
9. I contended that the reasonable accommodation with Extended Sick leave and E Filing activations was unjust and further exacerbated my illness resulting in further anxiety and stress. The accommodation on E filing activations and extended sick leave had a negative effect on my attendance, the employer was not careful to avoid indirect discrimination of disability and the latter as a resort to unfairly dismiss me. The employer deviated from legislation Unfair Discrimination Act 4 of 2000 as amended. The employer contravened section 9 read with item 23(1) of Schedule 6 to the Constitution of The Republic Of South Africa, 1996 .
10. The Health Assessment Summary used to force me into early retirement due to Ill Health on 12 August 2020 is further discriminatory to an unjustifiable extent that it discriminates; up unto my family history

of "mental illness" this fact amounts to automatically unfair discrimination by association. The extreme callousness and contents of the document further discriminates by propagation and describes my thought process as negative towards other employees

instead of the extent to which I can do my work. My impairment is described as significant cognitive impairment the employer deviated

from legislation Unfair Discrimination Act 4 of 2000 as amended. The Employer contravened Section 9, read with item 23(1) of Schedule 6 to the Constitution of The Republic Of South Africa, 1996,

11. There was no extent to which has been taken by the employee to adapt the working environment or alternative placement short of dismissal. There was no monitoring or counselling prior to the employer considering dismissal. The employer deviated from legislation Unfair Discrimination Act 4 of 2000 as amended. The Employer contravened' Section 9 read with item 23(1) of Schedule 6 to the Constitution of The Republic of South Africa, 1996.

12. The Stage 02 Enquiry held on 12 August 2020 Should have been punitive instead of disciplinary. The employer alleged that the extended sick leave was a means of reasonable accommodation, I contended that my

absenteeism arose from my disability and cannot be used as disciplinary action against me this can amount to automatically unfair discrimination of disability. the employer deviated from legislation Unfair Discrimination Act 4 of 2000as amended,

13. My appeal against the no fault dismissal was turned down for reasons that no new medical evidence was presented. The employer changed the word early retirement due to ill health which is a lump sum pay out

or my pension fund into medical boarding I contended that proper medical boarding is applied through the medical scheme where I would still have the advantage of medical aid in order to treat my chronic condition, the payment of my pension benefits is a benefit to any ordinary person in employment the employer contravened Section 9 read with item 23(1) of Schedule 6 to the Constitution of The Republic Of South Africa,1996”

[20] Mr Reddy's complaint stems from being placed on early retirement due to ill health. This he contends was done because of his disability. The genesis of his complaint therefore is SARS' policy relating to placement of SAR'S employees on early retirement due to ill health. What however does not come out from Mr Reddy's complaint is that such policy is unfairly discriminatory, in that it differentiates between people.

[21] In essence, the sum total of Mr Reddy's complaint is that he has not been fairly treated during the process of his placement on early retirement due to ill health, and, as such, was unfairly made to go on early retirement. This is not a case for unfair discrimination that is envisaged in the Equality Act that ought to be entertained by this court. A remedy for Mr Reddy in such circumstances, if properly formulated, lies with the CCMA or the Labour Court.

[22] For the reasons I have advanced here above, Mr Reddy's complaint is dismissed. There is no order as to costs.

E.M KUBUSHI

JUDGE OF THE EQUALITY COURT

GAUTENG DIVISION, PRETORIA

Appearance:

Applicant

:SELFREPRESENTED

Respondent

: UNREPRESENTED

Date of hearing

: 12 May 2021

Date of judgment

: 12 July 2021

[1]

[2014] ZACC 19.

[2] Section 9 of the Equality Act.

[3] Subject to section 6, no person may unfairly discriminate against any person on the grounds of disability.

[3] Subject to section 6, no person may unfairly discriminate against any person on the grounds of

disability.

[4] "Discrimination" Means any act or omission, including a policy, law, rule, practice, condition or Situation which directly or indirectly - (a) Imposes burdens, obligations or disadvantages on; or (b) Withholds benefits, opportunities or advantages from any person on one or more or the prohibited grounds.

[4] "Discrimination" Means any act or omission, including a policy, law, rule, practice, condition or

Situation which directly or indirectly -

(a) Imposes burdens, obligations or disadvantages on; or

(b) Withholds benefits, opportunities or advantages from

any person on one or more or the prohibited grounds.

[5] "Prohibited grounds" are (a) Race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth; or ..

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(a) Race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth; or ..

[6] Section 9.

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