

SOUTH AFRICA / JUDGMENT

Sun International Management Limited v Sayiti (JA 13/23) [2024] ZALAC 52; [2025] 1 BLLR 9 (LAC) (21 October 2024) [2024] ZALAC 52

COURT

Labour Appeal Court

BEFORE

Savage, Van Niekerk, Nkutha-Nkontwana

CASE / FILE NUMBER

JA 13/23

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FLYNOTES:

LABOUR – Discrimination – Religion –
Employee
not working Friday evenings and Saturdays – Obligation to
engage in weekend work was reasonably connected to
legitimate
work-related purpose – Inherent requirement of the job –
Company took measures reasonably to accommodate
his religious
beliefs – However, situation became intolerable –
Incapacity inquiry – Dismissal substantively
and
procedurally fair – Labour Relations Act 66 of 1995, s
187(1)(f) – Employment Equity Act 55 of 1998, s 6.
THE
LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG
Reportable
case
No: JA13/23
In

the matter between:

SUN
INTERNATIONAL MANAGEMENT LIMITED
Appellant
and
LUCKY
THANDIKAYA SAYITI
First
Respondent

Heard: 2 May 2024

Delivered: 21 October 2024

Coram: Savage ADJP, Van Niekerk et Nkutha-Nkontwana
JJA

JUDGMENT

NKUTHA-NKONTWANA, JA

Introduction

- [1] One of the hallmarks of an enlightened egalitarian society is the right to freedom of religion. [1] However, respect for religious rights is not a confined absolute right; like other rights, freedom of religion exists in the context of other correspondingly important rights of others. [2] They coexist alongside statutory imperatives to eliminate unfair discrimination and to promote vibrant and diverse workplaces.[3]
- [2] In this matter, the appellant appeals against the judgment of the court a quo, which held that the dismissal of the respondent was automatically unfair in terms of section 187(1)(f) of the Labour Relations Act[4] (LRA) and that the respondent had been unfairly discriminated against in terms of section 6 of the Employment Equity Act[5] (EEA) on the grounds of his religious tenets and ordered the respondent's reinstatement with retrospective effect.

Condonation

- [3] Before I deal with the merits, I deem it expedient to quickly dispose of the condonation applications. The appellant seeks condonation for the late filing of the notice of appeal, power of attorney and the record of appeal, and seeks reinstatement of its application as the appeal has lapsed. Despite his serious opposition on paper, the respondent abandoned his opposition to the grant of condonation for the late filing of the appellant's power of attorney. The respondent, likewise, sought condonation for the late filing of his power of attorney. This application was rightly not opposed. Both applications were accordingly granted.
- [4] Similarly, the appellant's condonation application for the late filing of the notice of appeal and the record of appeal was not seriously contested during oral argument. I also do not think much time should be spent on this issue. The explanation is reasonable and the overall delay did not negatively affect the prosecution of the appeal nor was it prejudicial to the respondent.[6] Nevertheless, litigants and representatives must be warned that holding them to the court's rules and directions is not pedantry as they are pivotal in the effective and efficient running of our courts' operations. Thus, the trend that is emerging in disregarding this Court's rules and practice directions will not be countenanced.

Background

facts

- [5] The appellant operates in the hospitality industry as an international company that also provides services in West, East and Southern Africa. In 2015, the respondent approached Karen Terrell (Ms Terrell), the appellant's Group Manager: Sales, for an employment opportunity with the appellant. Based on his Curriculum Vitae (CV), he was interviewed for the position of Marketing Manager: East Africa and Southern African Development Community (SADC) (Marketing Manager). Two interviews were conducted – first with Ms Terrell and, the second with Ms Beattie, the Group Sales and Marketing Manager: Africa who reported directly to Ms Terrell. Ms Beattie was responsible for the entire African market and was the line supervisor for the role of Marketing Manager that the respondent was interviewed for. The respondent was successfully recruited and commenced on 16 March 2015.
- [6] It is common cause that the respondent's contract of employment states, inter alia, that "... normal hours of work will be 08h30 to 17h00 Mondays to Fridays, with an hour for lunch. However, due to the nature of [appellant's] business [the respondent] will be required to work longer hours from time to time without additional compensation". Furthermore, the respondent employment contract contains the job flexibility requirement clause which states that:
- 'In order to fully utilise manpower resources all employees are required to perform work within their specific skills and capability level. To achieve this, you will accept any training and be prepared and willing to move from job to job, both within and between departments. as the operational needs of the company may require. The company shall at all times, have the discretion and right to transfer you to work in any department or section as it deems necessary. You may be required to perform various tasks in different departments during the course of your shift. Should you refuse or fail to transfer and for work without a valid and fair reason, the Company reserves the right to follow Its normal disciplinary procedures.'
- [7] The respondent did not raise any challenges concerning the hours of work and/or working days during his interviews. Pertinently, he did not mention any impediment for him to attend to weekend work. Ms Beattie testified that she had no reason to doubt that the respondent was well capable of performing all the duties, including the weekend work. That is so because the respondent's CV gave her the impression that he was conversant with the hospitality industry and its demands for travelling and flexibility regarding working hours.
- [8] On 7 May 2015, almost two months after commencing his employment, the respondent disclosed to Ms Terrell that he was a member of the Seventh Adventist Church and, therefore, he could not travel or attend events on the Sabbath (commencing on sunset Friday until sunset on Saturday). The disclosure was prompted by the respondent's receipt of his reservation and travel details to the Tourism Indaba, an annual trade show held in

Durban. According to the respondent, Ms Terrell took no issue with the fact that he could not work on the Sabbath and so did Ms Beattie. The respondent did attend the Tourism Indaba but only on Sunday and Monday.

- [9] Subsequently, the respondent did not attend events that took place on the Sabbath. According to the respondent, he did not sense any animosity from his colleagues because of his religious tenets. In any event, he had never experienced any challenges with his observance of the Sabbath during the 12 years of his working life before joining the appellant.
- [10] The appellant contends that it earnestly attempted to accommodate the respondent by excusing him from work during the Sabbath for a period of about 16 months. However, it became unsustainable because Ms Beattie, who had to step in most instances, endured substantial pressure which became unbearable as her responsibilities increased.
- [11] In July 2016, the appellant initiated an incapacity inquiry against the respondent. The outcome was that the respondent could not perform the role of Marketing Manager based on the inherent requirements of the job. It was recommended that he be given the option to take up alternative work which would not require him to work on the Sabbath. The appellant consequently offered the respondent the position of Co-ordinator: International Sales. The offer was declined as the respondent found it unreasonable since it meant a salary reduction of almost 45% of what he was earning as a Marketing Manager. The appellant terminated the respondent's employment with effect from 11 September 2016.

In the court a quo

- [12] The Respondent challenged his dismissal as automatically unfair in terms of section 187(1) (f) of the LRA. Following a failed conciliation at the Commission for Conciliation, Mediation and Arbitration (CCMA), he referred the dispute that served before the court a quo. The scope of issues for determination was narrowed by the parties' responses in compliance with clause 10.4.2.3 of the Labour Court Practice Manual[7] and pertinently as follows:

‘18.1 The Applicant contends that his dismissal is automatically unfair on the following basis:

18.1.1 The Respondent's conduct in electing to dismiss the Applicant due to the fact that he is a member of the Seventh Adventist Church religion, constitutes a discriminatory dismissal within the meaning of Section 187(1)(f) of the LRA.

...

18.3 The Respondent's answer thereto: The Respondent concedes that there was discrimination but that such discrimination was fair.’

- [13] The court a quo did not pronounce on whether the conceded discrimination was the proximate cause for the respondent's dismissal.[8] It does not look like it was seriously contested. The whole enquiry turned on the appellant's defence that the dismissal was not automatically unfair because it was an inherent requirement of the role of Marketing Manager to perform weekend work. The appellant, in addition, contended that it attempted to accommodate the respondent to the point of undue hardship.
- [14] The respondent, on the other hand, was adamant that his employment contract did not explicitly state that weekend work was an inherent requirement of his job. Yet, he did not have any problem with travelling and performing weekend work to the extent that they were not taking place on the Sabbath. To him, the incapacity allegation did not make sense because his performance track record and the accolades he had received for reaching his sales targets alluded to the fact that his religious tenets did not negatively impact his capacity to perform his duties.
- [15] The court a quo found that "it was common cause" that the employment contract did not explicitly state that the weekend work constitutes an inherent requirement of the job of Market Manager. Thus, the appellant failed to demonstrate that the weekend work was rationally connected to the performance of the job to pass the inherent requirement test. It went further to consider the issue of reasonable accommodation and found that the appellant failed to demonstrate that it was impossible to accommodate the respondent without imposing undue hardship on its operations. Accordingly, it upheld the respondent's automatically unfair dismissal claim and ordered his reinstatement.

In this Court

- [16] In this Court, the matter was likewise argued on the basis that the appellant concedes the prima facie discrimination and that it is the proximate cause for the respondent's dismissal. The appellant, however, impugns the automatically unfair dismissal claim and invokes the section 187(2)(a) defence. This narrow approach is consistent with the concession made by the appellant in the pre-trial minute and was confirmed by its counsel at the hearing of the matter.
- [17] The appellant assails the judgment of the court a quo on two main grounds. Firstly, whether the court a quo erred in concluding that weekend work did not constitute an inherent requirement of the job of Marketing Manager simply because the respondent's employment contract and the internal vacancy advice did not specifically mention same. Secondly, whether the court a quo erred in conflating the defence of reasonable accommodation with the inherent requirement and resultantly finding that the appellant failed to reasonably accommodate the respondent.
- [18] Section 187(1)(f) of the LRA provides:
- '(1) A dismissal is automatically unfair if ... the reason for the dismissal is –

- (f) that ... the employer unfairly discriminated against an employee, directly or indirectly, on any arbitrary ground, including, but not limited to... religion, conscience, belief...'

While section 187(2)(a) provides that:

'(2) Despite subsection (1)(f) –

- (a) a dismissal may be fair if the reason for dismissal is based on an inherent requirement of the particular job...'

[19] In TFD Network Africa (Pty) Ltd v Faris[9] (TFD Network), this Court, similarly confronted with a case of automatically unfair dismissal on the grounds of religion, succinctly set out the test for whether the requirement is inherent as follows:

[37] The test for whether a requirement is inherent or inescapable in the performance of the job is essentially a proportionality enquiry.

Considering the exceptional nature of the defence, the requirement must be strictly construed. A mere legitimate commercial rationale

will not be enough. In general, the requirement must be rationally connected to the performance of the job. This means that the

requirement should have been adopted in a genuine and good faith belief that it was necessary to the fulfilment of a legitimate

work-related purpose and must be reasonably necessary to the accomplishment of that purpose.

[38] However, even if that is shown, the enquiry does not end there. In addition, the employer bears the burden of proving that it is

impossible to accommodate the individual employee without imposing undue hardship or insurmountable operational difficulty. [Own emphasis]

Was the requirement to work over the weekends inherent or necessary for the fulfilment of a legitimate work-related purpose?

[20] Since the appellant invoked the section 187(2)(a) defence, the question is whether weekend work constituted an indispensable attribute which pertained to an inescapable way to the performing of a job necessary for the fulfilment of a legitimate work-related purpose.[10] The respondent persists in reliance on the terms of his employment contract, contending that he had no contractual obligation to perform weekend work since his employment contract did not explicitly stipulate same.

[21] Furthermore, the respondent contends that this matter does not concern the interpretation of a contract; but implicates the sanctity of contracts. As such, the appellant impermissibly seeks to read in that which is not there or is attempting to re-write the terms of their contract. I disagree. There are divergent views on the meaning of the provisions in the respondent's employment contract and that necessitated the interpretation of the impugned

clauses. Thus, the respondent's reliance on *Beadica 231 CC and Others v Trustees for the time being of the Oregon Trust and Others*[11] is misplaced.

- [22] The canons of interpretation of legal documents have crystallised. Quintessence is the contextual and purposive methods of construction, consistent with the Constitution.[12] It follows, as correctly contended by the appellant, that the test in question is not formalistic and as such, labelling or failing to label a requirement as "inherent" in a job description or advertisement would not automatically render it so nor does it mean it was not so. A formalistic and restrictive construction of the words in a contract without regard to the context is undesirable.[13] The parties' subsequent conduct in relation to the contract is also an important consideration in the process of contextual analysis,
- which is the objective determination of the contracting parties' apparent common intention.[14] For this reason, the respondent's denial of flexibility in the interpretation of the terms of his employment contract is untenable as it is perceptibly unbusiness like and would lead to absurdity. [15]

- [23] A sensible construction of the respondent's employment contract could only lead to a conclusion that, since he was required to work longer hours from time to time without compensation, he knew or ought to have known that he would be expected to work even over weekends. Markedly, the respondent readily conceded during his cross-examination that it was essential for the Marketing Manager to attend trade shows, a responsibility he also mentioned in his CV.
- [24] Moreover, the internal vacancy, a job specification for the role, objectively states that the Marketing Manager was required to travel to various international and local trade shows and needed to have maximum flexibility for such travel. Whichever way one looks at the role of the Marketing Manager, it is clear that underpinning the employment relationship is flexibility – a point conceded by the respondent as explicitly articulated in the internal vacancy.
- [25] Despite the respondent's bald denial that he was taken through the internal vacancy during his interview, the court a quo duly accepted that he might have been aware of this document; but opined that it did not assist the appellant's case. That cannot be correct because the internal vacancy indicated objectively that the Marketing Manager was required to travel to various international and local trade shows and needed to have maximum flexibility for such travel. It is also not correct, as found by the court a quo, that it was not the respondent's duty to attend trade shows, as the objective facts clearly show that this was intricately linked to the fulfilment of his job. As well, it is clear from the evidence that leaving business cards without showing face would not have sufficed.

[26] That being the case, the appellant successfully showed that the respondent's weekend duties, including attending trade shows, constitute a legitimate commercial rationale; and, contrary to the court a quo's finding, they are also reasonably connected to the fulfilment of a work-related purpose to pass the first leg of the inherent requirement test.

Did the court a quo conflate the defence of reasonable accommodation with inherent job requirement in its finding the appellant failed to reasonably accommodate the respondent?

[27] The appellant criticises the court as a quo of conflating the defence of inherent job requirements with reasonable accommodation. It contends that once it is accepted that the employee could not perform in terms of the inherent requirement of the job and that the position could not be adapted, that is the end of the enquiry. To buttress the contention, reliance is placed on the Constitutional Court (CC) judgment in *Damons v City of Cape Town*[16] (*Damons*).

[28] Of course, I accept that in *MEC for Education: Kwazulu-Natal and others v Pillay*[17] the CC, in the majority judgment penned by Langa CJ, cautioned against reducing the test for fairness of a discriminatory standard

to a test for reasonable accommodation. Even so, it was acknowledged that:

'There may be circumstances where fairness requires a reasonable accommodation, while in other circumstances it may require more or less, or something completely different. It will depend on the nature of the case and the nature of the interests involved. Two factors seem particularly relevant. First, reasonable accommodation is most appropriate where, as in this case, discrimination arises from a rule or practice that is neutral on its face and is designed to serve a valuable purpose, but which nevertheless has a marginalising effect on certain portions of society. Second, the principle is particularly appropriate in specific localised contexts, such as an individual workplace or school, where a reasonable balance between conflicting interests may more easily be struck.'[18] [Own emphasis]

[29] It follows that, understood in its proper context and in line with the principle articulated above, fairness did not require a reasonable accommodation in *Damons*. That is so because what served before the CC in *Damons* was a scenario where the employee could not meet the inherent requirements of a job as a firefighter because of injury-related incapacity. The employer's negation of the duty to accommodate the employee was upheld because it would have meant that a new position had to be created; an unreasonable burden on the employer. Notwithstanding, given the peculiar facts in the present instances, it cannot be said that fairness did not require reasonable accommodation. Therefore, the appellant's construction of the majority decision in *Damons* is untenable.

[30] Instructively, TFD Network introduced a two-pronged approach that is based on the judgment of the Canadian Supreme Court (CSC) in *British Columbia (Public Service Employee Relations Commission) v. BCGSEU*[19] (*BCGSEU*). In that case, the CSC introduced a united approach in dealing with both direct and indirect discrimination claims brought

under the human rights legislation. Pertinently, the CSC introduced a three-step test for determining whether a prima facie discriminatory standard is a bona fide occupational requirement (BFOR), stating that to justify the impugned standard, the employer must establish, on the balance of probabilities:

- ‘(1) that the employer adopted the standard for a purpose rationally connected to the performance of the job;
- (2) that the employer adopted the particular standard in an honest and good faith belief that it was necessary to the fulfilment of that legitimate work-related purpose; and
- (3) that the standard is reasonably necessary to the accomplishment of that legitimate work-related purpose. To show that the standard is reasonably necessary, it must be demonstrated that it is impossible to accommodate individual employees sharing the characteristics of the claimant without imposing undue hardship upon the employer.’[20] [Own emphasis]
- [31] TFD Network markedly endorsed the third step in the BCGSEU test as a second leg of our inquiry which entails that, even though the impugned standard “pursued a legitimate commercial rationale adopted in a genuine belief that it was necessary for the fulfilment of a legitimate work-related

purpose... [the] justification ultimately does not withstand scrutiny”.[21] The employer must still show that no further accommodation was possible without imposing undue hardship to successfully invoke the section 187(2)(a) defence to the prima facie case of discrimination.[22]

- [32] The purposive approach to the duty to accommodate espoused in TFD Network derives from the long-established axiom of statutory interpretation holding that legislation should be construed in the manner which best achieves their purposes. This axiom was recently underscored by the CC in *Regenesys Management (Pty) Ltd t/a Regenesys v Ilunga and others*[23], where the Court referred, with approval, to *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd: In re Hyundai Motor Distributors (Pty) Ltd v Smit N.O.*[24] where it was observed that:

‘The purport and objects of the Constitution find expression in section 1, which lays out the fundamental values which the Constitution is designed to achieve. The Constitution requires that judicial officers read legislation, where possible, in ways which give effect to its fundamental values. Consistently with this, when the constitutionality of legislation is in issue, they are under a duty to examine the objects and purport of an Act and to read the provisions of the legislation, so far as is possible, in conformity with the Constitution.’[25] [Own emphasis]

- [33] Therefore, the censure against the court a quo is without merit. The enquiry into reasonable accommodation was prudently undertaken as an alternative to the court a quo’s finding that weekend work did not constitute an inherent requirement of the respondent’s job.

- [34] That then takes me to the second leg of the enquiry which is whether the appellant could have accommodated the respondent’s

religious tenets without imposing undue hardship or insurmountable operational difficulty. TFD Networks tells us that the duty of reasonable accommodation imposed on the employer is one of

[35] modification or adjustment to a job or the working environment that will enable an employee operating under the constraining tenets of his religion to continue to participate or advance in employment.[26] Likewise, the evidentiary burden of showing undue hardship by non-compliance with the inherent requirement is on the appellant.[27]

[36] The appellant contends that the respondent's inability to perform weekend work affected the general effective running of its operations. Ms Beattie testified that to accommodate the respondent's religious tenets, she had to step in and perform the respondent's duties over the weekends. She, however, could not continue to step in for the respondent because she had a bigger focus and responsibility as the appellant's Africa division was growing substantially.

[37] The above concerns led to the incapacity hearing on 21 July 2016. The allegations that were levelled against the respondent were, inter alia, as follows:

'1.1 The crux of Sun International's complaint against you is that you, as a Market Manager: SADC are incapable of performing your duties in line with your job requirements and Sun International's business objectives.

1.2 As a result of your incapacity, you have failed to attend host events organised over the weekend, resulting in your line manager or associates hosting and attending the events. The following are some examples of events you failed to attend:

1.2.1 Indaba event May 2015;

1.2.2 Spotlight Workshop in Kenya - June 2015;

1.2.3 Zambia Travel Expo 21 to 23 May 2015 Royal Livingstone had to represent SI as the event was over a weekend;

1.2.4 SAT Mozambique activation 30-31 May 2015;

1.2.5 Hosting Mozambique Media on 31 July 2015; and

1.2.6 Travelshop PA educational with SSA Kenya 4-6 September 2015.

1.3 Your incapacity to perform your duties has placed unnecessary pressure and burden on your line manager to stand in for you for events organised over weekends. This has become disruptive and is not beneficial to Sun International.'

[38] It is common cause that the allegations of incapacity pertain only to the above-mentioned events. The respondent challenged the veracity of these allegations.

[39] He testified that the Indaba Trade Show in May 2015 commenced formally on Saturday and finished on Monday. He was able to attend the Sunday and Monday sessions. He denied that his absence during Sabbath placed an undue hardship on the appellant because 13 staff members attended the event, including Ms Beattie. Therefore, he was adamant that the charge sheet incorrectly reflected that he did not attend this event, a concession duly made by Ms Beattie.

[40] Ms Beattie conceded further that the Spotlight Workshop in Kenya is a business workshop that was normally held during the week's normal working hours. Contrary to Ms Beattie's evidence, the respondent did attend this workshop in 2015. The respondent denied that there were events that were organised to take place on Saturday. The programme for this event, albeit for 2016, shows that the business meetings with clients were incorporated into the weekday line-up. It is not in dispute that no one attended this event in 2016 because of budgetary constraints.

[41] As regards the Zambia Travel Expo, the respondent testified that it commenced on 18 May 2015 and ended on 23 May 2015. Ms Beattie sent him the invite on 18 May 2015, stating that:

'I only received this today. I know 'that it is a bit late... this week, would have been great to have attended. Please find out more and make sure we are on the invitee list for this and other Zambian fairs that they do.'

Yet, her evidence was that the respondent could not attend this event because of his unavailability during the Sabbath.

[42] Ms Beattie testified that the respondent failed to attend the SAT Mozambique activation on Saturday and left the appellant's

space standing empty and unmanned. The respondent disputed this allegation and showed through his itinerary that this event took

place on Sunday, 31 May 2015 and ended on Thursday, 2 June 2015. He denied that there was ever an event on Saturday, 30 May 2015. To him, the alleged Saturday event was fabricated to taint his integrity and legacy. Curiously, Ms Beattie conceded that she did attend this event.

[43] The respondent refuted the allegation that he deliberately failed to host Mozambique media on 31 July 2015 as he was attending to the business of the appellant in Botswana. This evidence was not refuted. Yet Ms Beattie refused to accept that the respondent could be in two places at that same time.

[44] The nub of the respondent's defence was that in 2015, he managed to attend all the trade shows on Sundays and successfully

scheduled his business engagements from Sunday to Friday before sunset. He was adamant that the accolade for his outstanding performance was a clear indication that his observance of the Sabbath had no bearing on his overall performance. Hence, he refuted the finding that he was incapacitated to fulfil the inherent requirement of his job and found the alternative position he was offered unreasonable.

[45] Indeed, performance management should not be conflated with the incapacity process. The incapacity enquiry dealt with the operational challenges brought about by the respondent's alleged inability to perform weekend work. Therefore, the appellant is correct in its contention that the court a quo misconstrued the true nature of the inquiry in finding that the appellant punished the respondent by hauling him to an incapacity enquiry for poor performance when, on the common cause facts, he was a good performer. Nonetheless, the respondent's good performance is one of the considerations in determining whether he could have been reasonably accommodated.

[46] It must be recalled that an enquiry into reasonable accommodation is context-specific. Contrary to the appellant's contention, in my view, TFD Network finds application in this instance. Similarly, in this case, there is no cogent evidence to support the appellant's contention that it had tried to accommodate the respondent up to the point of hardship. Ms Beattie's evidence that her increased portfolio made it impossible to continue to accommodate the respondent is purely anecdotal; and, worst still, is beset by inconsistencies.

[47] Ms Beattie failed to explain why the incapacity hearing in July 2016 was only limited to the events that took place from May 2015 to September

2015. She conceded that there was no evidence on record referring to the events between September 2015 and July 2016. It is also instructive that, in terms of the pre-trial minute, the enquiry was limited to the allegations pertaining to the events that took place between May 2015 to September 2015. At stake is the proportional assessment of competing interests and to the extent that the appellant's defence rests on factual considerations, it had to place the requisite factual material before the court a quo.[28] Failure to do so in this instance is fateful.

[48] While it is accepted that the trade shows are important, it is not controversial that they are annual events and attendance was apparently subject to budgetary constraints and business prospects. As it were, Mr Kashiku testifies that no one attended the Durban Indaba trade show in 2016 because the appellant did not expect any business yield from the event.

[49] There is also no evidence that the appellant explored other options that are less discriminatory while still accomplishing its legitimate purpose like stand-in arrangements with the other colleagues, other than Ms Beattie. Yet, Mr Kashiku gave an impression that their team, supervised by Ms Beattie, was willing to help each other, a sentiment echoed by the respondent. The respondent was the only person who observed the Sabbath in his team. Besides, Mr Kashiku was duly accommodated to observe his religious tenets as a Muslim

even during trade shows even though it was not for the whole day.[29]

[50] Even if the impact of accommodating the respondent on Ms Beattie is pertinent, there is no evidence that such an impact had ramifications on the appellant's business operations.

Worst still, to offer the respondent a position that meant an almost 50% salary reduction

cannot constitute reasonable accommodation. The fact that the respondent had a good performance track record cannot be ignored. It, therefore, cannot be overstated that an inflexible application of a standard that compels the employee to choose between his convictions and his career where non-compliance would have little or no ramifications to the employer's business cannot be

countenanced.[30]

Conclusion

[51] On all of the evidence, the court a quo erred in its finding that weekend work was not an inherent requirement of the respondent's job. However, the conclusion the court a quo came to that the appellant failed to show that it could not accommodate the respondent without imposing undue hardship on its business operations is unassailable. Therefore, the appellant unsuccessfully invoked the section 187(2)(a) defence to a claim of automatically unfair dismissal.

Relief

[52] Even though restatement is a primary remedy, the appellant contends that the court a quo erred in ordering reinstatement because the position of Marketing Manager no longer exists. This was supported by the unrefuted evidence of Ms Beattie and Mr Kashiku who both testified that there was a restructuring that resulted in consolidation of roles and doing away with the role of the Marketing Manager and was acknowledged by the court a quo. Yet, the court a quo incorrectly found that there was no evidence before it that the appellant would not be in a position to place the respondent in his former position when he observes the Sabbath without undue hardship on it.

[53] Section 193(2)(c) of the LRA which provides that:

‘(2) The Labour Court or the arbitrator must require the employer to re-instate or re-employ the employee unless –

(c) it is not reasonably practicable for the employer to reinstate or re-employ the employee...’

[54] The phrase “not reasonably practicable” in section 193(2)(c) refers to the notion of feasibility. [31] In this case, it is clear that it is not pragmatically possible to reinstate the respondent as his job no longer exists.[32] Section 194(3) of the LRA provides that compensation awarded to an employee whose dismissal is automatically unfair must be just and equitable, but not more than the equivalent of 24 months' remuneration.

[55] I accept that reinstatement is no longer feasible. In determining the compensation, I have considered the egregious infringement abuses of the respondent's constitutional rights; and the fact that the respondent is still unemployed. In light of the circumstances, the award of a maximum compensation of 24 months' remuneration as a solatium should be fair and equitable.

Costs

[56] The court a quo did not award costs. Equally in this Court, the fairness standard in terms of section 162(1) dictates that no order as to costs be made.

[57] Therefore, I would make the following order:

Order

1. The late filing of the notice and the record of appeal is condoned.
2. The lapsed appeal is revived and reinstated.
3. The appeal is upheld in part and the order of the court a quo is set aside and substituted with the following order:
 - 3.1 The dismissal of the respondent is automatically unfair.
 - 3.2 The appellant shall pay the respondent compensation equivalent to 24 months' remuneration.
4. There is no order as to costs.

VAN NIEKERK JA

[58] I have read the judgment prepared by my colleague Nkutha-Nkontwana JA (first judgment) in which she finds unassailable the Labour Court's conclusion that the appellant failed to establish that it could not accommodate the respondent without imposing undue hardship on its business operations. Regrettably, I find myself unable to agree with that conclusion.

[59] The factual background is set out in the first judgment. In so far as the first judgment draws a series of conclusions from the facts, I agree with the factual finding that it was essential for the respondent to engage in work on Friday evenings and Saturdays (weekend work requirement), among other things to attend national and international trade shows, and further that the respondent ought to have known, given the terms of his employment contract, that he would be required to engage in weekend work. During the hearing before us, the respondent's counsel persisted with the submission that a finding that weekend work was an inherent

requirement of the job would be at odds with the terms of the respondent's employment contract, which the respondent contended did not oblige him to participate in weekend work. For the reasons articulated in the first judgment, I agree that the defence of pacta sunt servanda that the respondent sought to raise is both misguided and misplaced. I agree too with the first judgment that contrary to the finding made by the Labour Court, the respondent's obligation to engage in

weekend work was reasonably connected to a legitimate work-related purpose. This much was the subject of the finding of the incapacity hearing conducted in July 2016 before an independent chairperson, Adv Navsa. Adv Navsa canvassed this issue at length, and came to the conclusion that on the totality of the evidence, it was an inherent requirement of the job of marketing manager that the respondent attend and host events organised over the weekend, and that he was able to travel over weekends to domestic and African destinations. The same evidence was tendered at the trial, and there is no reason on the basis of that evidence to call Adv Navsa's findings into question. I thus concur with the conclusion reached in the first judgment that contrary to the finding made by the Labour Court, the weekend work requirement constituted an inherent requirement of the job for the purposes of s 187(2) of the LRA.

[60] The first judgment finds that the respondent's dismissal was automatically unfair because the appellant failed to establish that it could not accommodate the respondent to the point of undue hardship or insurmountable operational difficulty. In this regard, the first judgment refers specifically to the detail of the allegations levelled against the respondent at the incapacity hearing, being an alleged failure to attend or host events over the period May 2015 to September 2015. The first judgment is critical of the limitation of the allegations of incapacity to this period, and questions why no evidence had been led regarding events between September 2015 and July 2016, the date of the incapacity hearing. Further, the first judgment finds that there is no evidence that the appellant explored other options that are 'less discriminatory', and finds that other similarly situated employees (specifically, Kashiku) were accommodated by the appellant. Finally, regarding the business impact of any accommodation of the respondent's religious beliefs, the first judgment finds that the impact on Beattie aside, no evidence was adduced of any ramifications for the appellant's business operations. Finally, the first judgment is critical of the offer of alternative employment made by the appellant to the respondent, given that the offer encompassed a significant reduction in remuneration. The first judgment thus concludes that while the Labour Court erred in finding that the weekend work requirement was not an inherent

requirement of the job, the finding that the appellant had failed to meet the threshold for reasonable accommodation is unassailable. For the reasons that follow, I am unable to agree with that conclusion.

[61] It warrants mention at the outset that although the statement of claim and the Labour Court's judgment refer to s 6 of the EEA, the only claim that served before the court was one in terms of s 187 (1)(f) of the LRA. At no stage did the respondent refer to the CCMA any dispute under the EEA; the referral form makes clear that the dispute is confined to one of unfair dismissal. While there is an obvious conceptual overlap between claims of discrimination in an employment policy or practice for the purposes of the EEA and a claim of unfair dismissal on the basis that the reason for dismissal is automatically unfair because it constitutes an act of discrimination, these are discrete claims. The point is not without significance – s 6 (2) (b) of the EEA provides that it is not unfair discrimination to distinguish, exclude or prefer any person on the basis of an inherent requirement of a job; s

187 (2)(b) of the LRA provides that a dismissal may be fair if the reason for dismissal is based on the inherent requirement of the particular job. The EEA thus provides a specific defence of the inherent requirements of a job as an element of a general fairness defence to a claim of unfair discrimination in any employment policy or practice; the focus of the LRA is on the reason for dismissal. If the reason is based on an inherent requirement of a job, the dismissal 'may be fair'.

[62] In the present instance, the respondent was dismissed for incapacity, in the form of his inability to fulfil the weekend work requirement. In the present dispute, the parties agreed in the pre-trial minute that the appellant's conduct in failing to appreciate that the respondent's religious beliefs precluded him from working over certain periods, electing instead to institute an incapacity procedure and ultimately dismissing him, constitutes a dismissal that is discriminatory on the basis of religion. The

appellant thus conceded that 'there was discrimination', but contended that the discrimination was fair. What this concession entails is the appellant's acceptance that by dismissing the respondent for incapacity, it discriminated against him on the grounds of his religious beliefs, but that his dismissal was nonetheless fair because the reason for dismissal was based on the weekend work requirement, that being an inherent requirement of the respondent's job.

[63] What constitutes an inherent requirement of the job for the purposes of s 187 of the LRA (and indeed, s 6 of the EEA), has been the subject of a number of judgments by this Court. In *TFD Network Africa (Pty) Ltd v Faris*[33] (TFD Network) this Court stated:

'The test for whether a requirement is inherent or inescapable in the performance of the job is essentially a proportionality enquiry.

Considering the exceptional nature of the defence, the requirement must be strictly construed. A mere legitimate commercial rationale

will not be enough. In general, the requirement must be rationally connected to the performance of the job. This means that the

requirement should have been adopted in a genuine and good faith belief that it was necessary to the fulfilment of a legitimate

work-related purpose and must be reasonably necessary to the accomplishment of that purpose.'

[64] On this construction, the employer must satisfy the court that the inherent requirement that it asserts is, indeed, a genuine requirement and not merely a guise for an act of discrimination. As I have indicated, I agree with the first judgment's finding that the weekend work requirement in the present instance is a requirement that is rationally connected to the performance of the job of marketing manager and necessary to the accomplishment of a legitimate work-related purpose.

[65] The question then is what efforts (if any) the appellant was required to make to reasonably accommodate the respondent, and if so required, whether it did so. The obligation on an employer to make reasonable efforts to accommodate an employee who is unable to fulfil the inherent requirement of the job has its origins in the judgment by this Court in TFD Network. The Court said:[34]

‘However, even if that is shown, the enquiry does not end there. In addition, the employer bears the burden of proving that it is impossible to accommodate the individual employee without imposing undue hardship or insurmountable operational difficulty. In SA Clothing and Textile Workers Union and Others v Berg River Textiles - A Division of Seardel Group Trading (Pty), the Labour Court correctly and succinctly put it as follows:

“In particular, the employer must establish that it has taken reasonable steps to accommodate the employee's religious convictions. Ultimately the principle of proportionality must be applied. Thus an employer may not insist on the employee obeying a workplace rule where that refusal would have little or no consequence to the business.”

[66] The Constitutional Court recently canvassed the scope of the reasonable accommodation requirement in a claim for unfair discrimination on the grounds of disability. Damons v City of Cape Town[35] (Damons) concerned a firefighter who had been denied advancement to the post of senior firefighter on account of a work-related injury that

precluded him from undertaking strenuous physical activity. The employee was transferred to a post in which he undertook administrative and educational work. He then applied for promotion to the position of senior firefighter. The employer refused to promote him to this position on account of a physical fitness requirement. In a claim under the EEA, it was not in dispute that the physical

fitness requirement attached to that post was an inherent requirement of the job. The minority judgment held that the employer was in breach of ss 5 and 6(1) of the EEA because it had refused to reasonably accommodate the employee in a job, with prospects for advancement, for which physical fitness was not required. The majority of the Court held that once it had been established that physical fitness was an inherent requirement of the job, that was the end of the enquiry, and there was no obligation of reasonable

accommodation on the part of the employer. The Court said the following:

‘If the first judgment’s understanding of s 6(2) were to prevail, employers would effectively be required to reasonably accommodate employees who cannot meet the inherent requirements of the job to which they seek appointment. Or worse, it would place an obligation on employers to create new positions in order to accommodate employees who did not meet the inherent requirements of a different job altogether. This is plainly incompatible with the very nature and purpose of reasonable accommodation, which is to enable an employee with disabilities to perform in accordance with the inherent requirements of the job.’[36]

[67] Damons raises the relationship between the inherent requirement of the job and the employer's obligation to make reasonable accommodation

and asks whether, as the appellant submits, for the purposes of s 187 of the LRA, the defence of an inherent requirement of the job is a complete defence to a claim of unfair dismissal, at least where the reason for dismissal is an act of discrimination. For different reasons, I share the view expressed in the first judgment that Damons can be distinguished from the present case. First, the claim in Damons was filed under s 6 of the EEA. As I have indicated above, while there is an obvious overlap between the prohibition of unfair

discrimination in employment policies and practices as contemplated by s 6, s 187 of the LRA deals discretely with dismissals that are alleged to have as their basis an act of unfair discrimination by the employer. A claim such as the present, filed under s 187 of the LRA, must be determined by reference to the LRA, its prohibition of dismissals that constitute acts of unfair discrimination, and the specific defences that are made available to the employer in s 187 (2). The reason for the focus on the reason for dismissal in a claim that a dismissal is automatically unfair is because few employers would dismiss for a reason that is overtly an act of discrimination – a claim of automatically unfair dismissal in the form of a dismissal on a prohibited ground inevitably involves an enquiry into the true as opposed to the apparent reason for dismissal. The enquiry under s 187 is thus inevitably one of causation. In this instance, the Labour Court was relieved of that obligation by the appellant's concession that it had committed an act of discrimination on the grounds of the respondent's religious beliefs. Secondly, Damons concerned an employee who, on account of his disability, could never meet the requirements of the job. Put another way, his incapacity was absolute. No amount of accommodation was going to place him in a position to meet the physical requirements of the position to which he sought appointment. In the present instance, religious belief cannot be said to fall into the same category. Conceptually at least, some form of accommodation or compromise by either the appellant or the respondent (or both), might have enabled the respondent to remain engaged in the post that he occupied, despite his inability to meet an inherent requirement of that post. Thirdly, s 187(2) (a) provides that "a dismissal may be fair if the reason for dismissal is based on an inherent requirement of the particular job". What this formulation suggests is that successfully establishing that a particular requirement is an inherent requirement of the job is not a complete defence – there may be other factors or circumstances that justify a finding of unfair dismissal. Indeed, it is a general principle that underpins the law of unfair dismissal that in a case of incapacity, for example, the extent to which the employee can be accommodated must be considered, as must the availability of any suitable alternative work.[37]

[68] In short, and contrary to what the appellant submits, this Court's decision in TFD Network remains intact. The defence of an inherent requirement of the job for the purposes of s 187(2)(a) of the LRA requires the employer to demonstrate that the requirement in issue is rationally connected to the performance of the job, that the requirement is necessary for the fulfilment of a legitimate work-related purpose, and that it is not possible to accommodate the employee without imposing undue hardship or insurmountable operational difficulty. As

this Court observed in TFD Network, this may require modification or adjustment to a job or the working environment, so as to enable the employee to continue to work under the constraining tenets of the employee's religious beliefs. But the scope of the requirement of reasonable accommodation, by definition, can extend only to those adjustments or measures that are reasonable in the circumstances for the employer to make or implement. This is a factual enquiry, and posits an objective test that engages with considerations of practicability and cost, the availability of suitable alternative employment, available resources, and the like.

[69] In TFD Network, this Court concluded on the facts that the employer had been unable to show that it would suffer any hardship were the employee to be absent from a Saturday stocktake on account of her religious beliefs. There was no indication that her absence impacted on her employer's ability to complete stocktakes. In particular, there was no evidence to suggest that the employee's absence from stocktakes would impede, frustrate or delay the stocktaking process. To the extent that the employer submitted that

attendance at stocktakes was an essential part of the employee's managerial training, the Court found that the employee could have obtained knowledge of the stocktaking process by other means, or that she could have been trained in other managerial functions. The Court concluded that the 'real reason' for the employee's dismissal was her manager's reluctance to make an exception – if he accommodated the employee, he feared that he would have to accommodate others. On the facts, the Court held that this 'floodgates' argument was misplaced, unfounded and lacked a rational basis.

[70] In the present instance, there is no evidence to suggest that elements of the job of marketing manager that the respondent was required to fulfil were peripheral or otherwise incidental to the requirements that attached to the job. Beattie testified that the respondent was the marketing manager for the SADC region, one of four employees in a team that she headed, covering the whole of the African continent. Specifically, the respondent was part of a small team and one of only two marketing managers, the other, Kashiku, being responsible for West Africa. Beattie testified that she escalated the respondent's inability to perform weekend work to the human resources department, where it was agreed that on account of the sensitive nature of the issue, the appellant would do its best to accommodate the respondent. The interruption to the general effective running of the appellant's business and the inconvenience occasioned by the respondent's inability to fulfil an inherent requirement of the job was extensively canvassed by Beattie. In the course of her evidence, she testified that costs aside, the undue burden to the business was that from time to time, someone else had to step in and take on the respondent's role, over and above their own role. While she herself had taken on the respondent's role most of the time, she had been given a greater responsibility for the Africa division, and there was 'just no way' that she could continue to carry on her own job and do the respondent's job. The appellant's business in the Africa region had increased considerably, and after 16 months of being 'lenient and supportive', Beattie stated that the demands of her own job brought matters to a head. Beattie testified

further that the respondent's absence from weekend events cast the spotlight on the entire team; questions were being asked about her subsuming the respondent's role. Matters culminated in the independent enquiry conducted by Adv Navsa in July 2016, where he found that the respondent was not capable of performing the work of a marketing manager based on the inherent requirements of the job, and made a recommendation that the respondent be given the option of talking up alternative work either in the capacity of a key account manager or a sales coordinator. Beattie testified that the HR department made a list of all available posts within the Sun International group. The post of sales coordinator in the international sales team was offered to the respondent, albeit at the commensurate lower level of remuneration. The respondent rejected the offer, contending that he could continue to be employed in his current position.

- [71] To the extent that the first judgment regards as significant the limitation of the incapacity enquiry to events that occurred between May 2015 and September 2015, this was the period that formed the subject of the incapacity hearing. Those events and the respondent's ability or otherwise to attend or host them goes to the question of whether weekend work is an inherent requirement of the job, and not to the obligation of reasonable accommodation. Indeed, Adv Navsa's finding was that weekend work constituted an inherent requirement of the job, a finding on which he based a recommendation that the appellant seek to accommodate the respondent in alternative work, so that the respondent may observe his Sabbath, without placing undue hardship on the appellant. The respondent concedes that the appellant took measures reasonably to accommodate his religious beliefs over the period of some 16 months after his employment. The issue is whether the appellant was justified in drawing the line in the sand that it did in July 2016 when it convened the incapacity hearing and its response to the findings made. In so far as the first judgment considers the appellant's accommodation of Kashiku as relevant to the question of whether the appellant sought reasonably to accommodate the respondent, Beattie testified that Kashiku's religious beliefs, and specifically his attendance at Friday prayers were in fact accommodated. Kashiku confirmed this. He recalled a single incident where he left business cards at a trade show stand with a request to others to distribute them and record contact details of any person who approached the stand during the relatively

brief time that he attended prayers. This accommodation posed no disruption to the appellant's business, given that the periods

that Kashiku was absent from his post were minimal. Kashiku's circumstances were thus entirely distinguishable from those of the respondent.

- [72] To the extent that the first judgment finds that the appellant failed reasonably to accommodate the respondent on account of the fact that the offer of alternative employment made to the respondent contemplated a significant reduction in remuneration, that finding, with respect, fails to account for Beattie's uncontested evidence that the outcome of the incapacity hearing proposed that the respondent be offered alternative employment either as a key accounts manager or sales co-ordinator, and that the position of

sales co-ordinator was in fact offered to the respondent, at the rate applicable to that post. To borrow from the words of Damons, there cannot in the present circumstances be an obligation on the appellant to create a new position in order to accommodate the

respondent.

[73] In my view, Beattie adduced cogent evidence to establish that the appellant sought reasonably to accommodate the respondent's

religious beliefs. Beattie's undisputed evidence (most if it inexplicably ignored by the Labour Court) was that after the

respondent disclosed that he was unable to meet the weekend work requirement on account of his religious beliefs, she and the appellant's human resources department appreciated that they were dealing with a sensitive matter and tried to 'work around' the respondent. The appellant tolerated a situation where others (and Beattie in particular) performed the respondent's duties on Friday evenings and Saturdays for some 16 months before the situation became intolerable, in the sense that the demands of Beattie's own and enhanced responsibilities precluded her from doing so. Beattie's evidence was that '... we tried to work around him we honestly did and I can honestly say I did my best of my abilities until it just became too much'. This is not, as the Labour Court appeared to suggest, anecdotal evidence – Beattie spoke directly to her own experience and the impact that the respondent's inability to engage in weekend work on the team that she managed. There was no inconsistency in Beattie's evidence in this regard, certainly none to warrant the adverse observation made by the Labour Court. Kashiku's evidence discloses that the measures taken by the appellant to accommodate his religious beliefs were in no way disruptive to the conducting of the appellant's business. Kashiku's situation is entirely distinguishable from that of the respondent. Beattie's undisputed evidence was that the position of sales co-ordinator offered to the respondent was the only post available at the time. In his evidence, the respondent was pressed on his failure to make any counter-offer or propose such alternatives that may have addressed his incapacity to perform weekend work. Beattie's undisputed evidence was that the respondent was uncooperative and uncompromising in the search for alternatives, and simply remained adamant in his denial that he had failed to perform an inherent requirement of the job.

[74] The present case is thus entirely distinguishable from TFD Network. The respondent sought employment in a capacity that manifestly required the availability to engage in weekend work, in circumstances where he failed to disclose prior to his appointment the limitations that would be presented by his religious beliefs. The appellant adduced undisputed evidence of accommodation over a period of more than a year. As I have noted, the respondent concedes this much – he did not dispute that after the appellant became aware of the restrictions posed by his religious beliefs, the appellant

accommodated him by way of Beattie standing in when events required attendance from a Friday at sunset until Saturday at sunset. Beattie gave cogent evidence as to why this option was not sustainable. The point was reached in July 2016 when legitimate business reasons, and in particular, the cost of the continued accommodation and in particular, the cost to Beattie of the

ability to do her own job, precluded the appellant from doing so. Beattie's concern at the continued inability by the respondent to meet his work obligations was vindicated by an independent enquiry. On the recommendation of the chairperson of the enquiry, the appellant offered the respondent an alternative position, albeit at a lower rate of remuneration, there being no other suitable vacancies at the time. In the circumstances, it is difficult to imagine what more the appellant could have done to accommodate the respondent's religious beliefs.

[75] In sum, the appellant has established that it took such steps that were reasonably available to it in the circumstances to accommodate the respondent's inability to engage in weekend work on account of his religious beliefs. The reason for the respondent's dismissal was based on an inherent requirement of the particular job, and thus not automatically unfair. The appeal stands to succeed. Neither party pursued the issue of costs, and no order for costs will be granted.

[76] I make the following order:

1. The late filing of the notice of appeal and the record of appeal is condoned.
3. The appeal is upheld. The order of the Labour Court is set aside and replaced by the following:

'The applicant's dismissal was substantively and procedurally fair.'

A van Niekerk JA

Savage ADJP concurs.

APPEARANCES:

FOR THE APPELLANT: FA Boda SC Instructed by Cliffe Dekker Hofmeyr Inc. FOR THE RESPONDENT: T Govender Instructed by Norton Rose Fulbright South Africa Inc.

[1] See: *Prince v President of the Law Society of the Cape of Good Hope*

[2002] ZACC 1; 2002 (2) SA 794; 2002 (3) BCLR 231 at para 49. See also: *MEC for Education: KwaZulu-Natal and others v Pillay (Pillay)*

[2007] ZACC 21; 2008 (1) SA 474 (CC) at paras 62 - 65.

[2] *Id.*

[3] Employment Equity Act 55 of 1998 enjoins every employer to promote equal opportunity in the workplace by eliminating unfair discrimination from any employment policy or practice, and to demonstrate progress in diversifying the workplace so that previously disadvantaged groups are fully represented and promoted.

[4] Act 66 of 1995, as amended.

[5] Act 55 of 1998, as amended.

- [6] See: *Steenkamp and Others v Edcon Limited* [2019] ZACC 17; [2019] 11 BLLR 1189 (CC) at para 36.
- [7] Practice Manual of the Labour Court of South Africa, effective 2 April 2013 (repealed).
- [8] See: *National Union of Metalworkers of SA and others v Aveng Trident Steel (A Division of Aveng Africa (Pty) Ltd) and another* [2020] ZACC 23; (2021) 42 ILJ 67 (CC) at paras 69 - 98.
- [9]
- [2018] ZALAC 30; (2019) 40 ILJ 326 (LAC) at paras 37 – 38.
- [10] *Id* at para 36.
- [11]
- [2020] ZACC 13; 2020 (5) SA 247 (CC); 2020 (9) BCLR 1098 (CC).
- [12] *Natal Joint Municipal Pension Fund v Endumeni Municipality*
- [2012] ZASCA 13; 2012 (4) SA 593 (SCA) (Endumeni) at para 18. See also: *Bothma- Batho Transport (Edms) Bpk v S Bothma & Seun Transport* [2013] ZASCA 176; [2014] 1 All SA 517 (SCA); 2014 (2) SA 494 (SCA) at para 12.
- [13] *Id*.
- [14] See *Yardley v Watson and Another (Yardley)* (6717/2016) [2016] ZAWCHC 146 (28 October 2016) at paras 14 - 16.
- [15] *Endumeni supra* fn 12.
- [16]
- [2022] ZACC 13; (2022) 43 ILJ 1549 (CC) at para 143.
- [17] *Pillay supra* fn 1 at para 77.
- [18] *Id* at para 78.
- [19]
- [1999] 3 SCR 3.
- [20] *Id* at para 53.
- [21] *TFD Network supra* fn 9 at para 43.
- [22] *Id* at para 38.
- [23]
- [2024] ZACC 8; 2024 (7) BCLR 901 (CC); [2024] 8 BLLR 777 (CC);

[2024] 45 ILJ 1723 (CC) at para 61.

[24]

[2000] ZACC 12; 2000 (10) BCLR 1079 (CC); 2001 (1) SA 545 (CC).

[25] Id at para 22.

[26] TFD Network supra fn 9 at para 48. In BCGSEU at para 65, it was held that, in determining how to accommodate individual differences, the following questions may be asked: ‘(a) Has the employer investigated alternative approaches that do not have a discriminatory effect, such as individual testing against a more individually sensitive standard? (b) If alternative standards were investigated and found to be capable of fulfilling the employer’s purpose, why were they not implemented? (c) Is it necessary to have all employees meet the single standard for the employer to accomplish its legitimate purpose or could standards reflective of group or individual differences and capabilities be established? (d) Is there a way to do the job that is less discriminatory while still accomplishing the employer’s legitimate purpose? (e) Is the standard properly designed to ensure that the desired qualification is met without placing an undue burden on those to whom the standard applies? (f) Have other parties who are obliged to assist in the search for possible accommodation fulfilled their roles?’

[26] TFD Network supra fn 9 at para 48. In BCGSEU at para 65, it was held that, in determining how to accommodate individual differences, the following questions may be asked:

‘(a) Has the employer investigated alternative approaches that do not have a discriminatory effect, such as individual testing against a more individually sensitive standard?

(b) If alternative standards were investigated and found to be capable of fulfilling the employer’s purpose, why were they not implemented?

(c) Is it necessary to have all employees meet the single standard for the employer to accomplish its legitimate purpose or could standards reflective of group or individual differences and capabilities be established?

(d) Is there a way to do the job that is less discriminatory while still accomplishing the employer’s legitimate purpose?

(e) Is the standard properly designed to ensure that the desired qualification is met without placing an undue burden on those to whom the standard applies?

(f) Have other parties who are obliged to assist in the search for possible accommodation fulfilled their roles?’

[27] Id at para 49.

[28] See: *Moise v Greater Germiston Transitional Local Council: Minister of Justice and Constitutional Development Intervening* (Women’s Legal Centre as amicus curiae)

[2001] ZACC 21; 2001 (4) SA 491 (CC); 2001 (8) BCLR 765 (CC) at para 18.

[29] See: TFD Network *supra* fn 9 at para 43.

[30] *Id* at para 38; see also Department of Correctional Services and Another v Police and Prisons Civil Rights Union (POPCRU) and others [2013] ZASCA 40; (2013) 34 ILJ 1375 (SCA); [2013] 7 BLLR 639 (SCA) at para 25; Groff

v. DeJoy, 600 U.S. 447 (2023).

[31] See: Xstrata South Africa (Pty) Ltd (Lydenburg Alloy Works) v National Union of Mineworkers obo Masha and others

[2016] ZALAC 25; [2017] 4 BLLR 384 (LAC) at para 11.

[32] *Id*.

[33] TFD Network *supra* fn 9 para 37.

[34] Para 38.

[35] Damons *supra* fn 16.

[36] *Ibid* para 143.

[37] See clause 11 of the Code of Good Practice: Dismissal; Schedule 8 to the LRA.

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