IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG

CASE NO: JS02/07

In the matter between:

QUINTON ATKINS Applicant

and

DATACENTRIX (PTY) LTD Respondent

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JUDGMENT

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FRANCIS J

Introduction

1. The applicant was offered employment by the respondent after a successful interview. He duly accepted the offer and then announced to the respondent that he wanted to undergo a gender-reassignment process (sex change) from male to female. The respondent was not impressed and terminated his contract of employment because he had failed to disclose his intention during the interview. This omission was a serious case of misrepresentation which is dishonesty. It considered his actions to be a repudiation of the employment contract, which repudiation it accepted and no longer required his services. Fortunately for the applicant, he had not resigned from his previous employer, Amava Technologies (Pty) Ltd (Amava) and continued to work. He referred an unfair discrimination dispute to the Commission for Conciliation, Mediation and Arbitration (the CCMA) for conciliation and to this Court for adjudication.

2. On 20 November 2009, the parties agreed that the matter should proceed as a stated

case.

Facts that are common cause

3. The parties recorded that the facts set out below are those agreed facts on which the matter should be determined:

"3 The applicant is Quinton Atkins, an adult male person residing at Unit 11, The Governors, 423 West Avenue, Ferndale, Randburg.

4 The respondent is Datacentrix (Proprietary) Limited (registration number 1996/015808/07), a company registered in terms of the company laws of the Republic of South Africa, with its head office at Block 7, Sanwood Park, 379 Queen Crescent, Lynwood, Pretoria. The respondent is apparently a subsidiary company of Datecentrix Holdings Limited (registration number 1998/006413/06), a public listed company.

5 The applicant is an information technology technician, and has over 10 years experience in this field. His qualification include an N4 Certificate in electronics, mathematics, digital electronic and radar technology.

6 From 2002 until August 2006, the applicant had been employed as a Senior Network Administrator/Engineer by Amava Technologies (Pty) Ltd ("Amava"), a technology solutions provider with offices in Port Elizabeth and Johannesburg, at its Port Elizabeth office. His duties included server installations and configuration; PC installations and configuration; hardware support on servers and general IT equipment; medical application installations and support; on-site support for various customers via SLA agreements for Datacentrix, Webcom, ARC etc.; network installations and support; 3Com NBX installations and support; general office software

installations and support for example office, exchange etc; and on-site support contracts when required.

7 *During his employment at Amava, the applicant regularly liaised with the respondent, a client of Amava. During his liaison with the respondent in this period he had established a reputation for competence with the respondent.*

8 *In July 2006, the applicant was transferred to Amava's Johannesburg office known as BCSnet.*

9 *Between the end of July and the beginning of August 2006, the applicant engaged one Terrence Haggis ("Haggis"), a technical manager at the respondent, in discussions with the view to possible employment with the respondent. A few days later, Haggis interviewed the applicant for the position of senior support engineer: services division ("the position") at the respondent.*

10 *On 24 August 2006, the respondent offered the position to the applicant in writing, with effect from 1 September 2006. On 27 August 2006 the applicant accepted the offer in writing and personally delivered his written acceptance to Haggis. Accordingly, the parties formally entered in an employment relationship on 27 August 2006. During his interview for this position, the applicant did not disclose to the respondent that he was undergoing a gender-reassignment process.*

11 *Before leaving the respondent's premises in Samrand, the applicant informed Haggis that he was in the process of undergoing a gender-reassignment process that would result in his gender being changed from male to female. Haggis informed the applicant that he would inform the respondent's HR Division and revert to the applicant about this issue.*

12 *On 30 August 2006, less than twenty four hours before the applicant was due to commence working for the respondent, the applicant received a letter from the respondent, signed by one Annelie van Wyk. The contents of the letter, which led to this dispute, read as follows:*

'We refer to our letter of employment dated 24 August 2006 and your subsequent acceptance of this offer on 29 August 2006.

During the interview held on 27 July 2006 the job specification and requirements, working environment, client profile, etc. were discussed with you and you in turn presented us with details regarding your experience and qualifications. At no time during the interview did you divulge to us that you are in the process of gender-reclassification and only chose to do so after you accepted the offer. We fail to understand why you had thought that this information was important enough to disclose only after accepting the offer, but had not thought to mention it during the interview.

We regard this omission as a serious case of misrepresentation which constitutes dishonesty.

Please note that we consider your actions to constitute a repudiation of the employment agreement. We hereby accept your repudiation of the agreement and confirm that your services will no longer be required.'

13 *On 12 October 2006, following the referral of a dispute to the CCMA by the applicant, the CCMA convened a conciliation meeting attended by the parties. The dispute could not be resolved. The CCMA indicated on the certificate of outcome that the dispute concerned an automatically unfair dismissal dispute which must be referred to the Labour Court for adjudication.*

14 *The applicant did not resign from his employer, Amava, before being*

dismissed by the respondent.

QUESTION OF LAW IN DISPUTE

Arising from the above statement of facts, the parties agreed that the following questions of law are in dispute:

15 Whether this Honourable Court has jurisdiction to adjudicate this dispute. The applicant contends that it does, since he was dismissed for undergoing gender-reassignment surgery, and the certificate of outcome stated that the matter related to an automatically unfair dismissal. The respondent denies that it dismissed the applicant for undergoing gender-reassignment surgery, but for failure to disclose a material. For this reason, the respondent contended that the Court lacks jurisdiction, since this is an ordinary (misconduct) dismissal dispute;

16 If the question in paragraph 15 above is answered in the affirmative (it being common cause that, should it be answered in the negative, that is the end of the applicant's cases before this Court), whether, during the interview, the applicant was under any duty to disclose to the respondent the fact that he was in the process of undergoing a gender-reassignment process that will result in his gender being changed from male to female. The respondent asserts that the applicant was under such duty, while the applicant denies that he was;

17 If the question in paragraph 16 above is answered in the affirmative, whether such non-disclosure was so material that it justified the summary termination of the applicant's contract of employment;

18 If the question in paragraph 16 above is answered in the negative:

18.1 Whether the termination of the applicant's employment by the

respondent constituted

18.2 *Unfair discrimination of the applicant by the respondent on the grounds of gender, sex and/or sexual orientation within the meaning of section 6(1) of the Employment Equity Act 55 of 1998 ("the Equity Act");*

18.3 *Automatically unfair dismissal of the applicant by the respondent on the basis of gender, sex and/or sexual orientation within the meaning of section 187(1)(f) of the Labour Relations Act 66 of 1995 ("the LRA");*

18.4 *The relief, if any, to which the applicant is entitled. The applicant submits that this Court ought to make the following order (all of which the respondent opposes, on the basis that it did not violate any provision of the Employment Equity Act or the LRA):*

Under the Employment Equity Act

19.1 *An order in terms of section 50(1) and/or section 50(2) of the Equity Act, declaring that the respondent unlawfully and unfairly discriminated against the applicant on the grounds of sex, gender and/or sexual orientation;*

19.2 *An order in terms of section 50(1)(d) and (e) of the Equity Act directing the respondent to pay compensation and/or damages to the applicant in the amount of R300 000;*

19.3 *An order in terms of section 50(2)(c) of the Equity Act directing the respondent to take steps to prevent the same unfair discrimination or any similar practice occurring in respect of other employees, and to report to this court within three months on the steps to taken;*

19.4 An order in terms of section 50(1) and 50(2) of the Equity Act, directing the respondent to publicly and in writing apologise to the applicant within one week of this order being made;

19.5 An order directing the respondent to pay the costs of this suit.

19.6 An order granting further and/or alternative relief.

<u>Under the LRA:</u>

19.7 An order in terms of section 193(3) of the LRA, declaring that the respondent unlawfully and unfairly discriminated against the applicant on the grounds of sex, gender and, or sexual orientation;

19.8 An order in terms of section 193(3) of the LRA, directing the respondent to pay compensation to the applicant equal to twenty four months' remuneration, amounting to R508 000.00;

19.9 An order in terms of section 193(3) of the LRA directing the respondent to take steps to prevent the same unfair discrimination or any similar practice occurring in respect of other employees, and to report to this Court within three months on the steps so taken;

19.10 An order in terms of section 193(3) of the LRA, directing the respondent to publicly and in writing apologise to the applicant within one week of this order being made;

19.11 An order directing the respondent to pay the costs of this suit;

19.12 An order granting further and/or alternative relief."

Analysis of the evidence and arguments raised

6. The respondent opposed the matter on the basis that the termination of the applicant's services constituted a dismissal in terms of section 188(1)(a) of the LRA and that this

Court does not have jurisdiction to adjudicate the dispute. It denied any claim of discriminatory treatment in terms of an employment policy or procedure. It was contended that this Court must determine what the real basis was for the termination of the applicant's services on 30 August 2009 was. The applicant did not disclose during the interview or before his employment at the respondent, the process of gender reassignment. Shortly after he had signed the contract of employment he decided that it was necessary to disclose the gender reassignment process. He did not resign from his previous employer before being dismissed by the respondent. The applicant acted *mala fide* and knew that it was a material aspect that should have been disclosed at the interview with Haggis. Various issues including personal circumstances were discussed at the interview. He had an opportunity to disclose the gender reassignment process. In terms of normal contractual principles of common law there is a duty on a prospective employee to disclose potential relevant information to his prospective employer. Where there is a special relationship between the parties and the one knows of the other's ignorance of material facts there is a common law duty to disclose the material facts. The respondent had a legitimate basis to terminate the applicant's services. It was contended that it was not for this Court to decide whether the dismissal of the applicant was substantively and procedurally fair or unfair. There is no agreement between the parties in terms of section 158(2) of the LRA that this Court sits as an arbitrator.

7. It was further contended by the respondent that there must be a causal connection between the dismissal and the alleged discrimination. If there was such a causal connection which the respondent denied, such a causal connection was interrupted by the common cause facts that the applicant failed to disclose the gender reassignment

process and that the respondent had a legitimate basis to terminate his services. Further that should this Court find that there was indeed discriminatory treatment by the respondent, which it denied, the basis of the discriminatory treatment of the respondent of the applicant must be investigated. The applicant alleges that the respondent unfairly discriminated in an employment policy or practice. The applicant does not disclose what policy or practice he is referring to. In the absence of disclosure upon which employment policy or practice the applicant is relying upon the applicant has failed to show a *prima facie* case. The applicant has failed to show a causal connection between the employment policy or practice and an adverse effect being the dismissal. The allegation of discrimination based on sex, gender and/or sexual orientation is regarded as *prima facie* unfair if the applicant showed that there is a discriminatory employment or practice. The applicant has failed to do so. If the Court finds that there was indeed a discriminatory employment policy and/or practice and that such discrimination is unfair, this Court must determine what is appropriate compensation. The circumstances of this case do not justify compensation, alternatively, limited compensation should be awarded in terms of section 194(3) of the LRA. The compensation in terms of section 50 of the Employment Equity Act (EEA) should also be limited.

8. The applicant is a transsexual. Jerold Taitz in an article in the *1989 ILJ (10)* at 577 deals with sex change as follows:

"At the outset it must be pointed out that there is no such phenomenon as a change of biological sex. A true sexual metamorphosis is an impossibility. However, persons suffering from transsexualism (the gender dysphoria syndrome), a medically recognized psychological condition, may undergo, for relief from the condition, 'sex

change' procedures i.e. surgical and hormonal treatment, as a result of which a biological male or female may be given the appearance and indeed the pastiche of the sexuality of a member of his opposite sex. Further, with proper deportment and voice training it is often difficult, if not impossible, to detect a post-operative transsexual as being a member of his former sex.

Transsexualism, as indicated above, is a medically recognized psychological disorder. It has been described as -

'a passionate, lifelong condition that one's psychological gender - that indefinable felling of maleness or femaleness - is opposite to one's anatomic sex'.

To a person suffering with the condition it is no less real than the awareness and effects of any serious illness, 'incurable defect or physical malformation of the body'. The syndrome may manifest itself in various neurotic or psychotic forms, leading even to suicide in extreme cases.

A transsexual is usually obsessively disgusted by his sexual organs which he may seek to conceal from himself, and other persons, as these identify him with his abhorrent anatomical sex. It is not unknown for transsexual males to amputate their genitalia or attempt to do so.

A transsexual's belief and conviction that he is really a member of the opposite sex, imprisoned in the wrong body, is constant and inflexible. The transsexual state of mind has been described in the following terms:

'no true transsexual [has] yet been persuaded, bullied, drugged, analysed, shamed, ridiculed or electrically shocked into [the] acceptance of his physique. It [is] an immutable state.'

In most medical circles it is considered that the only remedy for transsexualism is to bring the individual's body into alignment with his psychological gender by way of

'sex change' procedure. It is relevant to point out that the number of transsexuals is not as rare as is generally believed, the ratio being 1:37 000 of the general population with male-to-female transsexuals being three to four times greater in number than female-to-male transsexuals."

9. It is common cause that the applicant wants to undergo a gender reassignment process. It is not clear whether this process has now been done. The applicant had previously disclosed this fact to his employer, Amava who was supportive. He applied for a position with the respondent and was made an offer which he accepted. He than disclosed to the respondent about his intentions and was duly dismissed on the basis that he was dishonest and had therefore breached his contract of employment. The respondent contended that this Court does not have jurisdiction to hear the matter because the applicant was dismissed for misconduct and that the matter should have been referred to arbitration rather than adjudication.

10. Before dealing with the respondent's contentions it is necessary to refer to the equality clause in section 9 of the Constitution. It provides as follows:

"Equality.

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

(2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.

(3) The state may not unfairly discriminate directly or indirectly against anyone

on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language, birth.

(4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.

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

11. It is apparent from the provisions of section 9 of the Constitution that discrimination is prohibited on any of the grounds referred to in subsection (3) unless it is fair. The provisions are not only applicable to the state but also to persons which would include employers. In compliance with the provisions of section 9(3) of the Constitution, the LRA and the EEA were enacted which also outlaws discrimination in the work place unless it is fair. Section 187 of the LRA provides that a dismissal is automatically unfair if the employer, in dismissing the employee, acts contrary to section 5 or, if the reason for the dismissal is that the employer directly or indirectly, on any arbitrary ground, including, but not limited to race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, political opinion, culture, language, marital status or family responsibility. Both the EEA and LRA give effect to the provisions of the Constitution that outlaws unfair discrimination.

12. The preamble of the EEA provides as follows:

"Recognising -

that as a result of apartheid and other discriminatory laws and practices, there are disparities in employment, occupation and income within the national and labour

market; and that these disparities create such pronounced disadvantages for certain categories of people that they cannot be redressed simply by repealing discriminatory laws,

Therefore, in order to -

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

eliminate unfair discrimination in employment;

ensure the implementation of employment equity to redress the effects of discrimination;

achieve a diverse workplace broadly representative of our people;

promote economic development and efficiency in the workplace; and

give effect to the obligations of the Republic as a member of the International Labour Organisation."

13. Section 5 of the EEA provides that every employer must take steps to promote equal opportunity in the workplace by eliminating unfair discrimination in any employment policy or practice. Section 6 prohibits unfair discrimination and provides that no person may unfairly discriminate, directly or indirectly, against an employee, in any employment policy or practice, on one or more grounds, including race, gender, sex, pregnancy, marital status, family responsibility, ethnic or social origin, colour, sexual orientation, age, disability, religion, HIV status, conscience, belief, political opinion, culture, language and birth.

14. The LRA defines who an employee is. It does not distinguish between males and females. A transsexual who undergoes a gender reassignment process would continue to remain an employee and the prohibition against unfair discrimination would still

exist unless the respondent could show that the discrimination was fair. The LRA, the EEA and Constitution prevent employees being discriminated against on the basis of their sex, gender and other grounds. The only defence against discrimination would be fair discrimination. The respondent does not rely on fair discrimination as a defence but simply that there was a duty on the applicant to have disclosed his intentions but had failed to do so and was therefore in breach of his common law duties for non disclosure. The issue of fair discrimination does not arise at all in this case.

15. The applicant's dismissal is not in dispute. What is in dispute is the true reason for the dismissal. It is trite that section 187 of the LRA imposes an evidential burden upon the applicant to produce evidence which is sufficient to raise a credible possibility that an automatically unfair dismissal has taken place. It is then for the respondent to produce evidence to show that the reason for the dismissal did not fall within the circumstances envisaged in section 187 of the LRA for constituting an automatically unfair dismissal.

16. It is clear from the facts placed before this Court that the applicant is a competent employee. He was offered employment which he accepted. It was only after he had disclosed to the respondent that he wanted to under go a gender re-assignment process that he was dismissed. The respondent's defence is that he was not dismissed for wanting to undergo gender reassignment surgery but his failure to disclose this which was material. He was under a duty to have disclosed this and had failed to do so. It is clear from the facts placed before this Court that the applicant's employer, Amava, had a relationship with the respondent. Both companies work in the IT industry. The

respondent was impressed with the quality of the applicant's work that it offered him employment. He was dismissed after he had disclosed that he wanted to undergo a gender reassignment process. The impression that the respondent is giving is that had the applicant disclosed that he wanted to under go the process, he would not have been dismissed. I do not think so. The only inference that one can draw from the facts placed before this Court is that the respondent would not have employed the applicant in the first place had he disclosed his true intentions. It looked in vain at common law to justify why it should terminate the applicant's employment since it clearly has issues with the process that the applicant intended to undergo.

17. The respondent's defence presupposes that there was a duty on the applicant to have disclosed that he was a transsexual and that he wanted to go for a gender re-assignment process. The question that should be posed is whether there was a legal duty on the applicant to have disclosed that he wanted to under the said process. If there was such a legal duty, he should have disclosed it and that would be the end of the matter. If there was no such a duty than it is the end of the matter for the respondent. It is not clear why the respondent contends that the applicant was dishonest when he in the first place had no legal duty to have informed the respondent that he wanted to go for a gender re-assignment. It might have been different had he been asked this question during the interview and had lied about it. I do not understand what the misrepresentation is that the respondent is referring to. It is not clear how the applicant had misrepresented himself. There was simply no legal duty for the applicant to have disclosed what his intentions were. It was simply none of the respondent's business that he wanted to undergo the process. The issue of the applicant's re-assignment process did not arise at the interview. The applicant was

after all working in the IT industry where the issue of his sex or gender is not important. His employer had a much mature outlook towards his intentions and gave him its blessings.

18. It is clear from the common cause facts before me that the principal or dominant reason for the applicant's dismissal was that the respondent was not happy that he was going to under go a gender re-assignment process and dismissed him for that. The applicant has discharged the evidential burden which raised a sufficient credible possibility that an automatic unfair dismissal has taken place. The respondent has failed to show that the reason for the dismissal was not automatically unfair as envisaged in section 187 of the LRA.

19. The applicant's claim is founded both in terms of the LRA for the unfair discrimination dismissal and the EEA for the unfair discrimination. The provisions of both Acts do not have a *numerus clausus* of examples of discrimination. The discrimination that this Court is dealing with fits under both sex and gender. Even if it does not fit neatly under the two it is still covered under section 187(1)(f) which refers to various grounds of discrimination. The section is wide enough to cover this type of discrimination. However, there is an element of gender involved in this case. The applicant wants to change his gender. The respondent has a problem with it. Once he undergoes the sex or gender process, he continues to remain an employee and continues to enjoy the protection afforded to him by the LRA, the EEA and Constitution. He does not become a less worthy human being.

20. The maximum compensation that can be awarded for unfair discrimination is 24 months remuneration in terms of section 194(3) of the LRA. The Legislature had deemed it necessary to award twice the amount for compensation in discrimination cases for obvious reasons. It is common cause that after the applicant was dismissed by the respondent he went back to his previous place of employment and continued to work. It is unclear how much he was earning at Amava. The compensation that he is seeking is R508 000.00 which is twenty-four months remuneration. He would have earned R21 166.66 per month at the respondent. It is not clear from the evidence place before me whether he would have been better off at the respondent than he was at his employer. This Court must send out a message to employers who might still have some hangups about sex change operations that such conduct will not be tolerated at all. The best way to protect those employees who believe that they are trapped in a wrong gender and who are the most vulnerable employees is to award such compensation that will act as a deterrent to employers from acting in the manner that the respondent did. The respondent was totally insensitive to the plight of the applicant. It sought to use reasons to justify why his services were terminated. Discrimination is painful and is an attack on a person's dignity as a human being. It is hurtful and has been outlawed by our Constitution, the LRA and EEA in the workplace. Fair discrimination is permissible in limited cases. Even in those limited cases, employers must tread carefully and should be aware that discrimination is painful. We are no longer living in the dark ages or during the apartheid years where some employees had to live in closets. Whatever ones' views might be on gender re-assignment those should remain your own views. Whether a person rightly or wrongly believe that he or she is trapped in the wrong gender should not be a basis to dismiss or discriminate against such a person. It is surprising that during this day and

age and 15 years into our democracy that some employers would not be mindful of the provisions of section 187(1)(f) of the LRA, the EEA and of Constitution. This is a lamentable state of affairs. What the facts of this case show is an inability by the respondent to have shown empathy towards the applicant.

21. I have taken into account that the applicant after he was dismissed by the respondent continued to be employed by his employer from whom he did not resign. It would in my view be just and equitable to order the respondent to pay the applicant compensation in an amount of R100 000.00 which is the equivalent of just less than five months remuneration for his claim brought in terms of section 187 of the LRA.

22. Both counsel for applicant and respondent said that a claim for discrimination could be brought both under the EEA and LRA. The only relief that this Court can award under the LRA is compensation or reinstatement. Since the claim is founded under both the LRA and EEA all that remains to be decided is what relief if any should be awarded under the EEA. The applicant sought damages in an amount of R300 000.00. The parties had decided to bring this case by way of a stated case. There is simply no evidence placed before this Court around the issues of damages. It is unclear how the amount of R300 000.00 is arrived at. There is simply no evidence before me how the applicant felt after he was dismissed. The amount awarded in his claim for the automatic unfair dismissal is generous enough.

23. The respondent did not place any facts before this Court that shows that it does not have any policy or practice in place at the workshop against transsexuals. It was contended that the applicant bears this onus. I do not agree. If the respondent had

such a practice or policy in place, it would not have dismissed the applicant in the first place. The respondent has not deemed it necessary to show any remorse or to apologise to the applicant but had persisted with some meritless defence.

24. In the circumstances I make the following order:

24.1 The applicant's dismissal by the respondent amounts to an automatic unfair dismissal in terms of section 187(1)(f) of the LRA.

24.2 The respondent had unlawfully and unfairly discriminated against the applicant on the grounds of his sex and gender.

24.3 The respondent is to pay the applicant R100 000 compensation for the automatically unfair dismissal claim payable within ten days of date of this order.

24.4 The respondent is in terms of section 50(2)(c) of the EEA directed to take steps to prevent the same unfair discrimination or any similar practice occurring in respect of other employees, and to report to this Court within three months from the date of this order on the steps so taken.

24.5 The respondent is in terms of section 50(1) and 50(2) of the EEA directed to apologise to the applicant in writing within one week of this order being made.

24.6 The respondent is to pay the costs of this application.

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FRANCIS J

JUDGE OF THE LABOUR COURT OF SOUTH AFRICA

FOR THE APPLICANT	:	PETER MAHLANGU OF CHEADLE THOMPSOM & HAYSOM INC
FOR THE RESPONDENT	:	PH KIRSTEIN INSTUCTED BY COUZYN HERTZOG & HORAK ATTORNEYS
DATE OF HEARING	:	12 NOVEMBER 2009
DATE OF JUDGMENT	:	2 DECEMBER 2009