



Not reportable

THE LABOUR COURT OF SOUTH AFRICA,

HELD AT CAPE TOWN

CASE: C820/2019

In the matter between:

CAROLINE FREDERIKA ARNOLD

Applicant

and

DEPARTMENT OF HEALTH, FREE STATE PROVINCE

Respondent

Date of Hearing: 26 May 2021

Date of Judgment: This judgment was handed down electronically by circulation to the parties' legal representatives by email, publication on the Labour Court website and release to SAFLII. The date and time for handing down judgment is deemed to be 10h00 on 28 May 2021.

Summary: (Unfair discrimination claim - application for default judgment-condonation for late filing of answering affidavit-costs]

JUDGMENT

LAGRANGE J

Introduction

- [1] The applications before court is an application for default judgment in an unfair discrimination claim, an application to condone the late filing of the employer's statement of response to the claim, and an application to condone the late filing of the answering affidavit in the condonation application.
- [2] The hearing of the applications was conducted using Zoom, owing to the prevailing conditions of the Covid 19 pandemic.

Brief narrative

- [3] The applicant, Ms C F Arnold ('Arnold'), a white female, was appointed as a Pharmacist Assistant (Basic), Grade 3, after completing a Basic Pharmacist Assistant course and training as a post basic pharmacist assistant. Arnold had been employed with the respondent ['the department'] for a few years prior to that in a different capacity. She was registered with the South African Pharmacy Council in July 2011. Arnold progressed as far as she could to pharmacist assistant [basic] grade 3, notch/level 11 and remained at this level since 2016. Her three colleagues were able to progress to pharmacist assistant [post basic] grade 2, level 11.
- [4] Arnold claims that she ought to be in the same position as her three colleagues and enjoying the commensurate remuneration and benefits. She believes she was denied this on grounds of her race and or gender, or some other arbitrary ground of discrimination. In 2019, she had referred an unfair labour practice relating to the failure to promote her to the same position as her three colleagues. The arbitrator found that the other three employees had been promoted to their positions contrary to the provisions of resolution three of 2009 and their promotion did not create a right for Arnold to be promoted. Accordingly, her unfair labour practice claim was dismissed by the arbitrator on 24 June 2019.
- [5] Arnold filed her unfair discrimination claim with the labour court on 24 December 2019. Apart from declaratory relief *inter alia* to the effect that she had been unfairly discriminated against on various grounds, she

sought an order translating her to the position of Pharmacist Assistant [Post Basic] with retrospective effect to July 2011, the payment of the difference between the salary she received and the salary she would have received had she been so appointed with interest, and damages in the amount of R1.5 million.

- [6] The only response from the department to her referral was to file a notice of opposition on 5 February 2020. It never filed a statement of response until 17 December 2020, nearly a year later. Arnold's attorney notified the respondent on 10 February 2020 that the notice of opposition filed by it was not in accordance with the labour court Rule 6 governing referrals and that she would proceed to apply for default judgment, which she did on 5 May 2020. No answering affidavit opposing the default judgment application was filed until the beginning of February 2021.
- [7] Although nothing was conveyed to Arnold's attorneys, in June 2020 the department purported to pay Arnold what it believed was the difference in remuneration between what she would have received and what she did receive and she was also translated to the position of Pharmacist Assistant [Post Basic] grade 2, level 11. The department came to be of the view that this resolved Arnold's claim, but never conveyed this review to their attorneys nor asked them to withdraw the referral and default judgment application on that basis. Whether or not the amount of approximately R58,000 paid to Arnold does extinguish any part of the claim she has for unpaid remuneration or benefits, it clearly was not intended to address any claim for damages for unfair discrimination as such.
- [8] On 4 September 2020, in response to a letter from Arnold's attorneys requesting the enrolment of the default judgment application, the court issued a directive requiring the department to file an answering statement to the referral and an answering affidavit to the default judgment application within 10 days of the date of the directive. It was only on 17 December 2020 and on 2 February 2021 that the department filed the answering statement and answering affidavit respectively. It also applied

for condonation for the late filing of both documents and its failure to comply with the court's directive timeously.

- [9] The department claims that it only became aware of the application for default judgment when its Chief Director of Legal Services, Ms K Ditra, received the court directive on 21 September 2020. It is only at that stage that the department communicated with Arnold's attorneys informing them of the steps it had taken to pay her salary and translate her position. They sought clarification on the calculation of the arrear payments and pointed out that the damages claim was not addressed. No answer was forthcoming from the department. However, it then decided to brief counsel a month later on 26 October 2020. It attributes this delay in instructing counsel to the internal procurement processes of the department for obtaining legal services of counsel. By 19 November 2020 counsel was in possession of the various pleadings. The instruction to proceed to oppose the matter was confirmed in the first week in December 2020.
- [10] At no stage during this protracted process since 21 September 2020, had the respondent made any attempt to approach the court to request an indulgence in complying with the directive. There was also no correspondence with Arnold's attorneys about the department's progress in attempting to comply with the directive.
- [11] The department concedes that the period of delay is 'significant' but attributes its failure to respond to its view that there was no real dispute between it and Arnold at all relevant times, more particularly after June 2020 when it had rectified her employment status and paid what it calculated to be arrear remuneration owed to her. On the basis of this it said it 'expected' Arnold would abandon her referral once the translation was affected and the payment made. When it became clear by the beginning of December that this was not the case the department "resolved ... that an attempt should be made to submit its version to the court for purposes of its termination of the application for default judgment and the underlying claim for damages respectively."

- [12] The narrative sketched above which emerges from the department's own affidavit does not square with this explanation, because it is apparent it already knew by late September 2020 that Arnold's claim had not been resolved by the remedial steps it took in June. It is unlikely also that it would have taken steps to brief counsel in October if it believed the matter was on the point of being settled.
- [13] In filing her answering affidavit in the condonation application the applicant was six weeks late. The explanation provided in her answering affidavit was that even though the condonation application was received on 15 January she was only able to consult on the contents thereof during the week of 8 March 2021 owing to her work commitments and her attorney's availability. Counsel had only been available for consultation on the last week of February 2021.

Merits

- [14] The delay of the department in filing its statement of response and opposing the application for default judgment falls into two parts. The first is the period prior to receiving the directive on 21 September 2020 and the second is the period after that until statement of response and answering affidavit were filed.
- [15] Regarding the first period, there was no reason to suppose, in the absence of indications from Arnold through her attorneys, that her claim would be withdrawn merely because the department belatedly rectified her paygrade status and purportedly settled arrear remuneration. What is astonishing is why, if this was indeed the department's perception, there was no communication with her attorneys until late September 2020. It is noteworthy this was only after the department received the court's directive. There is also no explanation why the department had not filed an answering statement earlier and had contented itself with a notice of opposition, despite Arnold's attorney notifying in February 2020 of the deficiency of this response. Similarly, there is no attempt to explain how the default judgment application could have only come to its attention in September when it received the court's directive. The explanation for the

departments inaction after it filed its notice of opposition until 21 September 2020 is inadequate, to say the least.

- [16] Regarding the second period, I have already mentioned that the explanation that it was expecting Arnold to abandon her claim and only realised that she was not in early December, contradicts its own version that it knew of her attitude at the end of September and was taking steps to instruct counsel in October. Moreover, it is astonishing that it could have adopted this view without any suggestion from Arnold's attorney that this might be the case during the entire preceding year. After receiving notice of the directive, and knowing that it could not comply with the time period for filing the statement of response and answering affidavit stipulated in the directive it should, at the very least, have approached the court for an indulgence in this regard. There is no sense that the department engaged in preparing the documents in question with any sense of urgency, which is what was required in the circumstances. The directive, at best, served merely as a reminder to the department of its obligations.
- [17] If it were only for the factors of delay and the explanation for the delay, the department would not deserve an opportunity to defend itself against Arnold's claim. In essence its defence to the claim that it unfairly discriminated against Arnold is fourfold. Firstly, it claims that she cannot rely on an arbitrary ground of discrimination because that is something which was encompassed in her unfair labour practice claim that was dismissed. Secondly, it claims that the cause of her differential treatment was simply a result of the idiosyncratic application of policies and regulations by different administrative staff and was unrelated to her gender or race. Thirdly, it claims that even if the court were to find that it had unfairly discriminated against Arnold, the court would not be in a position to determine the quantum of damages for unfair discrimination without evidence of that. Fourthly, the respondent contends that it is not sufficient for the applicant to merely claim that because she was a white female and the comparators, who were more favourably treated, were black males that a rebuttable claim of unfair discrimination is established.

Arnold would have to lead evidence to at least demonstrate that there was a link between her race and gender and the differential treatment.¹

- [18] Some of these issues are ones involving significant disputes of fact and the prejudice suffered by Arnold in not being able to finalise her claim earlier on account of the respondent dragging its heels in the litigation must be weighed against the inability of the department to effectively advance evidence in its defence, as well as the serious nature of the claim as an alleged breach of important constitutional rights. The court also cannot ignore the fact that the department has at least in one significant respect sought to redress the wrong suffered by Arnold, which indicates it has not been entirely indifferent to her complaint, even if it was painfully slow in addressing it.
- [19] It is difficult to assess the prospects of either party succeeding on the substantive merits of the claim. The department has advanced a defence which might prove to have merit, and whether Arnold might be able to establish something approaching a *prima facie* the case that the grounds of discrimination she relies on are causally linked to her differential treatment is practically very difficult to evaluate on what is before the court. In the circumstances it would be rash of the court to pronounce with any confidence that the prospects of success appear to favour one party rather than the other. Under these circumstances, in my view it would not be in the interests of justice to deny the department an opportunity to defend itself against the claim in a trial.
- [20] In so far as Arnold's answering affidavit was late, there was no material prejudice suffered by the department and the lateness in question hardly compares with its own dilatoriness.
- [21] To the extent that Arnold has been put to unnecessary expense of bringing a default judgment application and because the court's directive was treated with a woeful lack of urgency by the department, this can be addressed by an appropriate cost award on an attorney own client scale,

¹ See. e.g *Minister of Correctional Services & others v Duma* (2017) 38 ILJ 2487 (LAC)2495-6, paras [21] – [25].

notwithstanding that the default judgment application is ultimately unsuccessful.

Order

[22] The late filing of the Respondent's statement of response and answering affidavit in the referral and default judgment application respectively is condoned.

[23] The Applicant's late filing of her answering affidavit in the condonation application is condoned.

[24] The application for default judgment is dismissed.

[25] The parties must conclude and file a *pre-trial* minute by 30 June 2021.

[26] The respondent must pay the applicant's costs of the default judgment application and of opposing the condonation application, excluding the costs of drafting the late answering affidavit in the condonation application, on an attorney own client scale.

Lagrange J
Judge of the Labour Court of South Africa

Appearances/Representatives

For the Applicant: **T Mokwayi instructed by Phatsoane Henney Inc.**

For the Respondent: **A Lechwano**
instructed by State Attorney

Bloemfontein

LABOUR COURT