

IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG

DATE: 23 June 2000

CASE NO. J3915/99

In the matter between:

SCHETZ, RHONA

Applicant

and

TEDELEX TRADING (PTY) LTD

Respondent

J U D G M E N T

LANDMAN, J:

[1] The applicant, Ms Schetz, was employed by Tedelex Trading (Pty) Ltd during August 1980. She remained in employment and during January 1998 she was contacted by a director who advised her that she was being transferred to the Toy Division. She happily accepted this position.

[2] On 26 November 1998 the director visited her at home and handed her a letter advising her that she is being retrenched and that her notice period would terminate on 31 January 1999. There was no attempt to comply with the terms of the severance pay agreement of the Iron, Steel,

Engineering and Metallurgical Industry, nor was there any attempt to comply with section 189 of the Labour Relations Act 66 of 1995.

[3] Ms Schetz left the services of her employer on 29 December although the notice expired on 28 January 1999. She was advised that she need not work the final month.

[4] On her departure she was advised that all her monies would be paid to her in December. She left for Israel on 29 December and returned on 2 February 1999. When she returned she discovered that the lump sum payment have not been made to her. She made various enquiries and on 11 February she attended at her previous employer's premises to collect the monies owing to her. While she was there it became apparent to her that, despite her retrenchment, other persons with fewer skills and less service had remained in the employment of her employer.

[5] She sought legal advice and a dispute was referred to the CCMA on 11 March 1999. It transpired, however, that there was a bargaining council having jurisdiction and on 18 March the referral was sent to that council together with an application for the condonation of the late referral of her dispute.

[6] On 10 May she was advised that the condonation had been refused. Reasons were requested and it was then discovered that Tedalex Trading (Pty) Ltd had opposed her application for condonation by way of a letter dated 9 April 1999. She had been unaware of this letter. This letter is attached to the papers. It is to the effect that Mrs Schetz was a personal friend of the managing director, that she was acquainted with the directors and with senior management. She had assisted in running the industrial relations programme and she knew what retrenchment was

about. She had been through various retrenchment exercises with her firm. And then it is said:

"It has been the view that Mrs Schetz was happy when she left Tedelex, according to her then immediate superior, Mr H Cohen (brother of the managing director). It must be assumed that she had been told otherwise by someone else at a much later stage during her absence from Tedelex".

[7] The conciliator assigned to consider the question of condonation on behalf of the bargaining council has provided written reasons for his decision. He has taken into account all the elements which he should take into account, such as the degree of lateness, the prospects of success and the question of prejudice. The conciliator was of the opinion that it could not be said that she did not have good prospects of success because he found that her prospects were as good as those of her former employer and that both parties would suffer prejudice.

[8] Essentially then this turns on the question of whether or not the late referral, which was 49 days late, should have been condoned. This is tied up with the explanation for the lateness. In my opinion, the commissioner committed a gross irregularity by admitting evidence in the form of the letter, which I have set above by her former employer without affording her an opportunity to deal with it. She was entitled to the benefit of the audi alteram partem rule. This was withheld from her and it constitutes a gross irregularity. In the result I am free to intervene because of this defect in the decision.

[9] In my opinion the conciliator should have taken into account, in deciding whether or not the explanation was a good one, the fact that the date of dismissal was not the main event which triggered her

complaint. True in law her dismissal is the ground of her complaint but, almost as in a delict situation, she only became aware that she had grounds for complaint when she attended at the offices of her former employer and found that despite the down sizing other people were still employed and that this constituted in her opinion an unfair dismissal. She has described this event in the papers that served before the commissioner. He should have taken cognisance of it. If he did take cognisance of it he would have known that she referred her dispute to the CCMA within 30 days. She however, erred and within a further seven days it was referred to the bargaining council. That constitutes, in my opinion, a good explanation and in the circumstances I am of the opinion that she has shown good cause for the late referral.

1. In the circumstances therefore the decision of the first respondent not to grant condonation is reviewed and set aside and replaced with the decision that condonation is granted.
2. The bargaining council is directed to convene a conciliation meeting as soon as practicable.
3. The second respondent is ordered to pay the costs in this application.

DATED AT JOHANNESBURG ON THIS THE DAY OF JULY 2000

JUDGE A A LANDMAN

MS RUTH EDMONDS

: Ruth Edmonds Attorney

: MR STEVEN HARDIE

: Edward Nathan & Friedland

23 JUNE 2000