

A review of the Government Gazette and new developments in law

## Incapacity must be determined

**T**HE constitution provides protection against discrimination on the ground of disability. This right not to be discriminated against is further given effect to by codes of practice in both the Employment Equity Act and the Labour Relations Act.

Dismissal on a prohibited ground of discrimination, such as disability, is not merely unfair, but automatically unfair.

Under the Labour Relations Act, a court may order compensation of up to 24 months of the dismissed employee's remuneration.

The Labour Relations Act guidelines for dismissal do, however, make provision for the dismissal of an employee based on incapacity, provided that a fair procedure is followed.

But when is an employee disabled and when is he or she incapacitated?

Disability and incapacity are not synonymous. One can be disabled and incapacitated but being disabled does not necessarily mean that one is incapacitated.

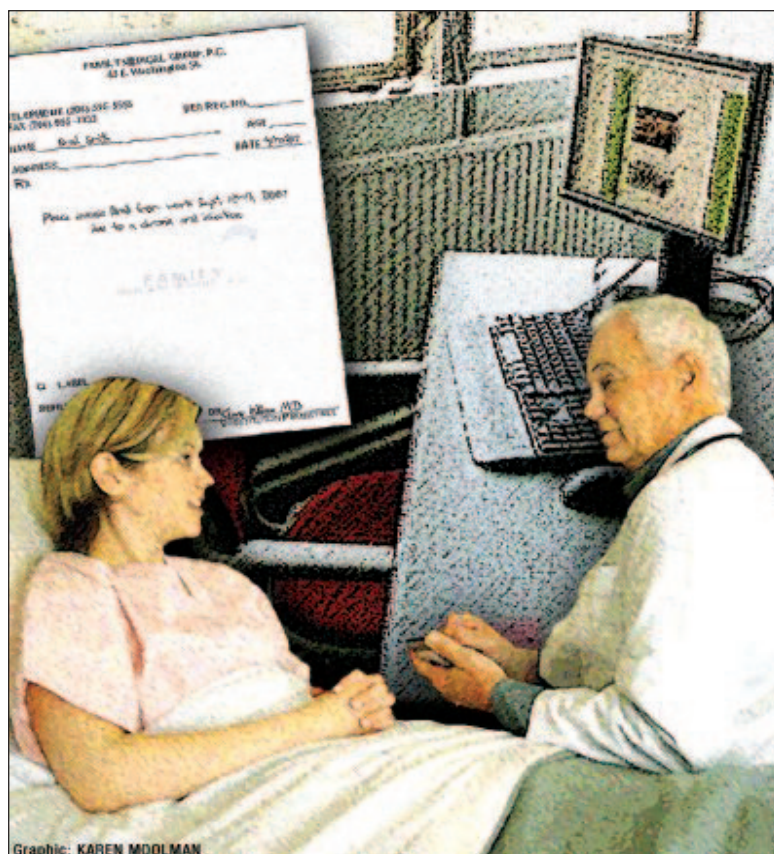
Section 1 of the Employment Equity Act provides the definition of a person with disabilities to be someone with "long-term recurring physical or mental impairment which substantially limits her prospects of entry into or advancement in employment". If an employee is disabled then the employer has a duty to reasonably accommodate her.

The Labour Court in the recent

case of *Standard Bank of South Africa v CCMA & others* said that if the employer cannot accommodate a disabled employee or if she refuses an offer of reasonable accommodation then she may be dismissed for incapacity. Dismissing an employee in those circumstances is fair. However, dismissing an employee who is disabled but who could be accommodated without undue hardship is automatically unfair.

When considering dismissal of an employee for incapacity it is important to ask firstly whether the employee has a disability. The decision of the Labour Court in the *Standard Bank* case is instructive for employers wanting to dismiss an employee for incapacity where such an employee has a disability.

In the case in issue, the employee injured her back in a motor collision while on duty. As a result of the injury, she suffered from severe back pain and found it difficult to perform her functions as a mobile home loan consultant. The employer assigned lighter administrative work to her that made her feel "incompetent and useless". The employee then moved on to confirm the income of clients, which she enjoyed. She found, however, that she required a headset as she found it painful to write while on the telephone. The employer refused to obtain a headset and again assigned tasks to her that did not require her to use a telephone. This aggravated her



Graphic: KAREN MOOLMAN

pain and she was often off sick or only worked half days. In addition, by assigning her these tasks the bank made her feel that she was worth nothing and impaired her self-esteem. The employee was then appointed as a home loan fulfillment officer, a function she

could perform. Yet, a month later, the employer informed her that she would be dismissed for incapacity as a result of her high rate of absenteeism and low productivity.

In what circumstances is the dismissal of such an employee fair?

The court had the following to say about the dismissal of an employee who has a disability:

"The origin of the test for fairness of the dismissal of an employee with disabilities is the constitution. The overarching policy underpinning the protection of disabled people is to give effect to human rights. In a claim based on an incapacity dismissal, the intersecting constitutional rights are rights to equality, human dignity, the right to choose a trade, occupation or profession freely and to fair labour practices."

The court said that "defining disability in relation to employment shifts the focus from the diagnosis of the disability to its effect on both the employee's ability to work and to find work". This enquiry is usually factual.

The onus to prove that an employee's dismissal based on incapacity is fair rests on the employer. The court said that the Labour Relations Act guidelines for incapacity dismissal contemplate a four-stage enquiry:

**Stage 1:** "The employer must enquire into whether or not the employee with a disability is able to perform her work. If the employee is able to work, that is the end of the enquiry; the employer must restore her to her former position or one substantially similar to it. If the employee is unable to perform her work and her injuries are long-

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# Disability and incapacity

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term or permanent, then the next three stages follow.”

**Stage 2:** “The employer must enquire into the extent to which the employee is able to perform her work. This is a factual enquiry to establish the effect that her disability has on her performing her work. The employer may require medical or other expert advice to answer this question.”

**Stage 3:** “The employer must enquire into the extent to which it can adapt the employee’s work circumstances to accommodate the disability. If it is not possible to adapt the employee’s work circumstances, the employer must enquire into the extent to which it can adapt the employee’s duties.

“Adapting the employee’s work circumstances takes preference over adapting the employee’s duties because the employer should, as far as possible, reinstate the employee. During this stage, the employer must consider alternatives short of dismissal.”

**Stage 4:** If no adaptation is possible, the employer must enquire if other suitable work is available.

The court said that the Employment Equity Act elaborates on what “reasonable accommodation” is and defines it as being “any modification or adjustment to a job or to a working environment that will enable a person from a designated group to have access to or participate or advance in employment”.

**A**S DISMISSAL on a prohibited ground of discrimination is automatically unfair, this implies the duty of the employer to accommodate employees in order to prevent discrimination. An employer who unreasonably refuses to make any accommodation that falls short of unjustified hardship or refuses to give reasons for not making an accommodation is irrational. The Employment Equity Code sets a threshold that balances an employer’s obligation to accommodate with the employer’s circumstances. Unjustifiable hardship is the threshold at which employers are relieved of their obligation to accommodate disabled employees. (This means that the threshold will be higher for a large, financially sound employer.)

The Employment Equity Act Code defines “(u)njustifiable hardship” as:

“Action that requires significant or considerable difficulty or expense. This involves considering, amongst other things, the effectiveness of the accommodation and the extent to which it would seriously disrupt the operation of the business.”

The court found that the employer in the Standard Bank case refused to reasonably accommodate the employee and as such discriminated against her which was automatically unfair. The employee, however, had only referred an unfair dismissal dispute. Therefore although the court found the dismissal to be automatically unfair she could not get an increased compensation award.

When considering implementing an incapacity process, it is important to first establish whether the employee has a disability. If so, one must tread lightly so as not to discriminate against such an employee. Employers need to follow the guidelines provided in the Labour Relations Act and Employment Equity Act Codes.

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