

disability v incapacity: the employer's obligations

by liezl-mari mouton

Section 9 of the 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. In terms of 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 incapacity 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 she incapacitated?

Disability and incapacity are not synonymous. You can be disabled and incapacitated but being disabled does not necessarily mean that you are 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.

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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 thus 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.

These were the facts that led to the decision. The employee in question

injured her back in a motor collision whilst 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 whilst on the telephone without a headset. 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 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, it impaired her self-esteem. The employee was then appointed as a home loan fulfilment officer, a function she could perform. Yet, almost one 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.

she was injured in a motor collision whilst on duty

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-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 any other suitable work is available.

Reasonable accommodation and unjustifiable hardship

The court said that the Employment Equity Act elaborates on what "reasonable accommodation" is and defines it as '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.'

As 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.

when implementing an incapacity process, first establish whether the employee has a disability

big brother on the bus

by anton steenkamp

We recently had a very interesting arbitration award. Interesting, mainly, because it was an interest arbitration – most unusual in the labour arena. Usually, disputes of right (such as unfair dismissal) are referred to arbitration. Disputes of interest are sorted out through power play.

In this case, though, the employer and the trade union agreed to refer the dispute to arbitration after a series of unprotected strikes and after talks had deadlocked.

an unusual arbitration over a dispute of interest

The issue in dispute concerned the use of “drivecams” in commuter buses. This is a device designed to assist with driver monitoring and performance, and to enhance public safety and reduce the incidents of accidents.

The camera constantly records and erases footage of the road ahead of the bus and of the driver. If there is a sudden incident such as excessive braking or swerving, a 12 second record – 4 seconds before and 8 seconds after the incident – is kept.

The trade union objected to the employer installing drivecams in 150 buses at one depot as part of a pilot project. The employer's plan is to roll out the use of drivecams over the rest of its fleet of some 1000 buses.

The union claimed that the use of drivecams for disciplinary processes at a single depot was inconsistent.

the union objected to the use of drivecam footage in disciplinary proceedings

We represented the employer at arbitration. The union's attorney conceded that the installation of the drivecam fell within management's prerogative. However, the union objected to the use of drivecam footage in disciplinary proceedings.

The arbitrator noted that, in an interest dispute, he must place himself in the position of the parties and he must “arbitrate the gap” between them regarding the issue on the basis of fairness and equity.

The arbitrator was persuaded that the drivecam is a device that can not only assist drivers in improving their performance, but it can enhance the safety of passengers, drivers and the public.

the award recognises the prerogative of management to use such devices

He also accepted our argument that its use does not constitute either victimisation or discrimination. Being used for disciplinary hearings is but one of the many uses of the device, and not its primary purpose.

The arbitrator did accept that it would be “a good idea, rather than a legal

necessity” for the parties to try and negotiate an addendum to its disciplinary code in order to guide the use of drive cam footage in disciplinary proceedings.

The arbitrator found that:

- The company is entitled as of right to install and implement drivecams throughout all of its depots. This falls within the company's management prerogative and is in the interests of workers as well as the public.
- The company is entitled to use drivecams as evidence in disciplinary hearings, subject to the following conditions:
 - The company must suspend the use of drivecams in disciplinary action for a period of four weeks;
 - During this period, the parties must attempt to reach agreement with regard to an addendum to the disciplinary code which will set out the procedural and related aspects of the use of drivecams in disciplinary hearings;
 - At the end of the period, the company may use drivecams as evidence in disciplinary hearings, with or without an agreed addendum.

The award is useful because it recognises the prerogative of management to use devices such as this where there is a valid reason for it.

It also highlights the usefulness of an unusual procedure, i.e. an interest arbitration, in order to get finality without having to resort to power play.

can a commissioner dismiss the case when a party does not attend conciliation?

by suemeya hanif

In the case of *Premier of Gauteng and others versus Ramabulana NO and others*, the court had to decide whether a conciliator has the authority to dismiss a matter at conciliation stage. It found that a conciliator cannot do so.

The facts

The third respondent was employed by the Gauteng Provincial Government in the Department of Social Services and Population Development. Within 30 days of his dismissal he referred a dispute in accordance with the council rules to the bargaining council. However, the third respondent, as well as his union, failed to attend the conciliation set down by the bargaining council. The employer was present at the conciliation meeting and the conciliator, after satisfying himself that the third respondent's union had been notified of the conciliation, dismissed the matter.

Subsequent to this, the union referred the dispute to the bargaining council for conciliation for a second time. That referral was outside the 30 day period from the date of dismissal and it was accompanied by an application for condonation. The condonation application was opposed by the employer on the basis that the initial referral had been dismissed and therefore the bargaining council did not have jurisdiction to entertain the second referral as well as the condonation application. Despite this, a conciliator of the bargaining council granted the union's condonation application. The matter then went to the Labour Court on review. The Labour Court decided the matter on the basis that the union's condonation application had to be treated as an application for rescission of the first conciliator's decision in the light of the fact that the bargaining council rules did not make provision for rescission applications, and concluded that the conciliator was correct in granting the condonation (rescission) application. The employer appealed to the Labour Appeal Court.

What did the Labour Appeal Court say?

At the Labour Appeal Court it was found that if a bargaining council or CCMA receives a referral from a dismissed employee within the 30 day period or, if it is after the 30 day period, receives a referral with an accompanying condonation application, the bargaining council has an obligation to attempt to conciliate the dispute. The court said that it is not necessary for the parties to be physically present at the conciliation meeting and that their failure to attend a conciliation meeting cannot give rise to a dismissal of the matter on that basis. The Labour Relations Act does not empower a conciliator or bargaining council to dismiss a matter because of the employee's failure to attend the conciliation. Even though the CCMA rules provide for dismissal of a dispute should the referring party not attend, the court held that the CCMA rules are ancillary to the Act and in the event that they are in conflict or inconsistent with the provisions of the Act, the rule will be *ultra vires*. The reasoning behind this is that a conciliating commissioner has no power to deal with the merits of the dispute in the sense of deciding whether or not a dismissal is fair and, therefore, the conciliator cannot simply dispose of the dispute by dismissing it due to the non attendance of the employee at the conciliation meeting. The CCMA rule must be construed to mean that the matter was dismissed for purposes of conciliation only and was therefore capable of being referred again to the CCMA or bargaining council.

Section 191(4) provides that the council or commission must attempt to resolve the dispute through conciliation. Since this judgment, the CCMA has not been consistent in interpreting the decision. However, in many instances if one of the parties is absent or if both parties are absent the conciliating commissioner now simply issues a certificate of outcome

certifying that the matter was unresolved and that it can be referred to arbitration or adjudication depending on the facts of the case, without making any attempts to conciliate the dispute.

It could be argued that the rationale for a conciliation process has been undermined as dismissed employees can now refer a dispute to the CCMA alleging unfair dismissal, fail to attend the conciliation meeting and despite this have the matter set down for arbitration. However, it could also be argued that if the arbitrating commissioner conciliates or attempts to conciliate the dispute prior to proceeding with the arbitration, section 191(4) has been complied with.

Further difficulties and concerns

This judgement may present further difficulties at the CCMA in that if conciliating commissioners are not authorised to dismiss matters at conciliation stage then they may take the view that preliminary points which, if granted, will dismiss the matter, for example jurisdictional points, cannot be entertained at the conciliation stage. This may result in a certificate of outcome being issued that effectively confers jurisdiction on the council or commission to arbitrate the matter or the Labour Court to adjudicate the matter, depending on the type of case involved. The earlier judgement of the LAC in *Fidelity Guards Holdings (Pty) Ltd v Epstein NO & Others* (2000) 21 ILJ 2382 (LAC) says that jurisdictional points cannot be raised at arbitration/adjudication stage if a valid certificate of outcome has been issued. In those circumstances a review to set aside the certificate would be required in order to raise the preliminary point.

We will have to monitor how the CCMA and bargaining councils deal with these situations henceforth in the light of the *Ramabulana* judgement.

consultation in retrenchments when you have multiple unions

by susan stelzner

With whom must the employer consult when contemplating retrenchment? This is not always an immediately straightforward issue especially where the employer has multiple unions in the workplace.

In the recent case of *Maluleke and Others v Johnson Tiles (Pty) Ltd** the Labour Court was called on to consider whether the employer had been obliged to consult with individual employees and / or their union where the union was a minority union and the employer had only consulted with the majority union in accordance with the provisions of a collective agreement.

The facts

During 1999 Johnson Tiles suffered a major down-turn in profitability because of extremely low cost imported tiles becoming increasingly available in South Africa. It also found that its traditional plant which used to manufacture wall tiles was outdated and inefficient. It therefore took a decision to upgrade its other manufacturing facility by installing a highly sophisticated and mechanized production line and to close down the traditional plant completely.

BCAWU represented some 80% of the employees. The applicants in this case were members of UPUSA which represented no more than 2% of the employees. BCAWU was also the recognised trade union and had concluded both a collective agreement and an agency shop agreement with the company. BCAWU bargained collectively with the company on behalf of all employees in the bargaining unit including UPUSA members.

Because the entire traditional plant was being closed all employees in that plant became redundant. The company notified all employees who would potentially be affected by the closure

by attaching copies to their payslips and by posting on notice boards. The company commenced a process of consultation with BCAWU. All employees were advised that they could approach management individually if they had any enquiries or they could attend the general meetings held. None of the applicants availed themselves of these invitations. All relevant topics in respect of the retrenchment exercise as required by law were discussed with BCAWU. It was also specifically agreed that the selection criteria to be applied were to be primary key skills and education levels and only thereafter LIFO. The applicants did not fall within any of the key skills positions identified and nor did they meet the required educational standard. They were dismissed purely on application of LIFO.

The company and BCAWU concluded a written retrenchment agreement in terms of which some 165 employees were to be retrenched across the board.

Retenchees were selected from the entire operation. The applicants' case was that they ought not to have been retrenched because there were employees with lesser service who were not retrenched.

The company did not consult with either UPUSA or the other minority union in light of the fact that it had concluded a collective agreement with BCAWU. It advised UPUSA in writing that its position was that it had no legal obligation to consult with UPUSA in light of the collective agreement. The company also produced management and audited accounts in support of the poor financial position. An inspection in loco revealed that the traditional plant had not only been closed down but completely demolished.

What did the court say?

The court was satisfied that a fair and valid reason existed for the

retrenchment. It then went on to consider the key issue which was whether or not an employer can consult only with a majority union in respect of a retrenchment. It pointed out that s189(1) of the LRA quite deliberately renounces dual consultation in favour of the single level of consultation. It is only where there is no collective agreement in existence which regulates consultations in respect of a retrenchment that an employer is under an obligation to consult with another registered union or individual employees. The court therefore concluded that where an employer consults in terms of agreed procedures with the recognised union (in this case BCAWU) in terms of a collective agreement which requires consultation over retrenchment, the employer has no obligation in law to consult with any other union nor with any individual employee. Furthermore, if the consultations culminate in a collective agreement which complies with the requirements for a collective agreement as set out in the LRA, non-union members are bound by the terms of that agreement. This is exactly what happened in this case.

The outcome

The dismissal of the individuals was found to be both substantively and procedurally fair and the claim was dismissed. Because of the circumstances in which the union and the employees had persisted with the case and the instances which emerged in evidence where both the union and the applicants had been disingenuous, the court made an order that the individual applicants and UPUSA were required to pay the costs, jointly and severally, on an attorney client scale.

* ENS represented the employer in this case

who is a designated employee under BEE and EE legislation?

by jacques van wyk and liezl-mari mouton

Under the Apartheid regime South Africans of Chinese descent were classified as “non-whites”. They were subject to discrimination in almost every facet of their lives. They were also subject to the iniquitous and degrading permit system which allowed the then government to determine where they could study, live, work, carry on a business and travel.

under the apartheid regime south africans of chinese descent were classified as non-whites

Post-1994 with the advent of democracy and the passing into law of the Employment Equity Act and

Broad-based Black Economic Empowerment Act uncertainty prevailed as to whether Chinese South Africans were to be regarded as “black” for purposes of employment equity and affirmative action. As a consequence Chinese South Africans were not generally afforded the benefits which the aforementioned Acts conferred and which are designed to address the historical injustices which they had suffered in the past.

In a landmark ruling*, the High Court of Pretoria has now ruled that Chinese South Africans are included within the definition of “black people” in the Employment Equity and Broad-Based Black Economic Empowerment Acts.

This ruling may necessitate the review of current policies and procedures (and Employment Equity Plans) where

“black people” are defined as including only Africans, Coloureds and Indians so as to also include Chinese South Africans. However, a proper understanding of the import and scope of this decision is required. Please contact someone in the ENS employment law department should you require additional advice and assistance on this issue.

the high court has now ruled that chinese south africans are included within the definition of black people

** ENS represented the applicant (CASA) in this case*

arbitration and pending reviews: what to do in practice

by suemeya hanif

What does a party to a dispute do when the dispute has been set down for arbitration at the CCMA and there is a review application relating to the same dispute which is pending at the Labour Court and which will have to be decided before the arbitration is heard?

Normally the practice has been that the Applicant in the review application will approach the Labour Court on an

the applicant must apply for a postponement in terms of rule 23 of the CCMA rules

urgent basis to stay the arbitration proceedings at the CCMA pending the

outcome of the review application. This practice has changed as the Labour Court now refuses to grant applications to stay proceedings on the basis that the Applicant must apply for a postponement in terms of Rule 23 of the Rules for the Conduct of Proceedings before the CCMA. This alternative remedy must be exhausted first. If the CCMA refuses the postponement then only may an Applicant approach the Labour Court.

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