

Medical Incapacity, Disability and Discrimination

By Kellie Hennessy

Employers often walk a tight-rope of uncertainty surrounding fear of discrimination in the realm of medical incapacity. Discrimination occurs when people are not treated as individuals; or when characteristics assigned to people amount to generalised assumptions about people or groups of persons [*Leonard Dingler Employee Representative Council v Leonard Dingler (Pty) Ltd* (1998) 19 ILJ 285 (LC) at 289 E-F]. Section 6 of the Employment Equity Act No 55 of 1998 ("EEA") is a statutory prohibition against unfair discrimination in the workplace. The *Harksen v Lane* test [1997 (11) BCLR 1489 (CC)] is used to determine whether differentiation amounts to discrimination. The test has two legs: Firstly, (i) whether a specific instance of differentiation amounts to discrimination (is it based on a listed ground); and if so (ii) whether the discrimination is unfair, either based on a specified ground [*as listed in section 6 of the EEA*]; or an unspecified ground, which objectively is based on attributes which have the potential to impair the human dignity of a person.

The Employment Equity Amendment Act No 47 of 2013 ("EEAA") introduced an amendment to section 6 of the EEA modifying the listed grounds of discrimination to add a catch-all "*or on any other arbitrary ground*". The interpretation of "arbitrary ground" has been construed in the context of section 187(1)(f) of the Labour Relations Act No 66 of 1995 ("LRA"). The Labour Appeal Court held the test per Zondo JP in *New Way Motor & Diesel Engineering (Pty) Ltd v Mars land* [2009] 12 BLLR 1181 (LCA) at para 24 – 25 : "*did the conduct of the appellant objectively analysed on the ground of the characteristics of the respondent, in this case depression, have the potential to impair the fundamental human dignity of respondent?*"

A medical condition is not a specified ground in terms of section 6. However, if an employee is faced with *arbitrary* treatment as a result of a medical condition, and is differentiated against based solely on his medical condition, applying the test would mean such conduct amounts to unfair discrimination. [*Municipal & Allied Workers v City of Cape Town* 2005 26 ILJ 1404 (LC)]. Often the overlap exists between a medical condition, like depression, which may be deemed as a 'disability'. Whether or not a court considers the interpretation, the inclusion of any arbitrary ground requires an employer to treat each instance fairly and to tread carefully. This may place an employer in danger of direct discrimination as such is based on a specified ground, such as disability. The LRA protects employees against unfair dismissal on the basis of disability discrimination. Such a dismissal would be automatically unfair.

The EEA defines disability as: "*people who have a long term or recurring physical or mental impairment which substantially limits their prospects of entry into, or advancement in, employment.*" A Code of Good Practice on the Employment of People with Disabilities ("**Disability Code**") was published on 19 August 2002. It aims to protect people with disabilities against unfair discrimination in the work place and directs employers to implement affirmative action measures to redress discrimination. It provides greater insight into the definition of disability.

"Impairment"

The Disability Code further defines an "*impairment*" as "*either ..physical or mental*". A physical impairment means a partial or total loss of a bodily function or part of the body. It includes sensory impairment such as being deaf, hearing impaired, or visually impaired. Mental impairment means a clinically recognised condition or illness that affects a person's thought processes, emotion or judgment.

"Long term or recurring"

Long-term means the impairment has lasted or is likely to persist for at least twelve months. A Recurring Impairment is one that is likely to happen again and be substantially limiting.

Substantially Limiting

An impairment is substantially limiting if, in its nature duration or effects, it substantially limits the person's ability to perform essential functions of the job for which they are being considered.

The LRA distinguishes between two forms of incapacity: poor work performance and ill health or injury. Considering the wide definition of 'people with disabilities' as contemplated above, there exists a clear overlap between the classification of 'medical incapacity' with disability. The Code of Good Practice : Dismissal ("**the Dismissal Code**") sets out at item 10 incapacity for ill health or injury, wherein brief references are made to the disabled. Upon even a conservative interpretation it would not unjustifiably extend the scope of item 10 to include 'people with disabilities' as defined in the EEA. The overlap is explainable by the fact that the Dismissal Code was published prior to the EEA's enactment and deals generally with dismissals. [*National Education Health & Allied Workers Union obo Lucas* (2004) 25 ILJ 2091 (BCA)].

However, it is unlikely that the intention of the legislature was to conflate the term 'incapacity for ill health or injury' with 'disability'. One should resist the temptation to use these terms interchangeably. Disability has a very specific meaning for the purposes of equality in the workplace. Whereas, incapacity implies that an employee is unable to perform the essential functions of the job. Incapacity is a fair reason for dismissal if effected in accordance with fair procedure. [Section 188 of the LRA]. The overlap occurs when considering a 'fair procedure'. An employee with a disability is suitably qualified and generally able to perform the essential functions of the job albeit with some form of reasonable accommodation. [*Wylie and Standard Executors & Trustees* (2006) 27 ILJ 2210 (CCMA) at 2220]. The purposive approach adopted in *Lucas* is as follows:

"the general objective of the statutory arrangements –both the LRA and EEA– is to promote procedural and substantive fairness in relation to people with disabilities and to encourage employers to keep people with disabilities in employment if these can be reasonably accommodated....disability status is not to be considered only as a sword to claim special treatment under the affirmative action provisions...it should also be considered as a shield to protect a person who has a disability from being dismissed from employment for a reason related to that disability."

The solution seems clear cut. Items 10 and 11 of the Dismissal Code require an employer to first establish whether an employee who is suffering from a medical condition, falls into the category of a 'person with disability'. If the employee is found to fall within this category of persons, red flags must be raised and that employee must be subjected to strict scrutiny. Item 11 sets out the evaluation. It must be established:

"(a) whether or not the employee is capable of performing the work; and

(b) if the employee is not capable-

(i) the extent to which the employee is able to perform the work;

(ii) the extent to which the employee's work circumstances might be adapted to accommodate disability, or, where this is not possible, the extent to which the employee's duties might be adapted; and

(iii) the availability of any suitable alternative work."

The case of *Standard Bank of South Africa v CCMA & Others [2006] (LC)* set the precedent that there exists a duty to accommodate disabled employees. Failure to do so results in discrimination and dismissal on this basis is automatically unfair. An employer who unreasonably refuses to accommodate a disabled employee and is unable to satisfy the court of undue hardship; or refuses to give reasons as to why it did not act to accommodate the employee; acts in a manner as to unfairly discriminate against an employee on grounds of disability. If, however, an employer cannot accommodate a disabled employee, after following the four stage enquiry as set out in item 11; then the disabled employee may be fairly dismissed for incapacity.

Determining the nature of a medical condition will address this first hurdle. If the condition is in fact a disability, incapacity may not be established until an employer has exhausted all avenues to reasonably accommodate such a person. If a medical condition is not a disability per se, incapacity may be established if the employee is unable to perform the inherent requirements of the job. Employers are cautioned to ensure that item 10 & 11 of the Dismissal Code be strictly adhered to in this regard. Failure to follow a fair procedure would lead to discrimination. Furthermore, indirect discrimination occurs where an employer uses a medical condition to act as an arbitrary bar or exclusion of an employee from the workplace, without the employer first considering the nature and extent of the incapacity or ability to perform the essential functions of the job as an *individual*. Knowing these tricks will ensure an employer keeps its balance amongst these various scenarios, avoiding altogether falling into the consequences of discrimination.

By Kellie Hennessy - Johanette Rheeder Inc.

www.jrattomeys.co.za / www.laboursmart.co.za / info@laboursmart.co.za