



## **Pitfalls in dealing with health related incapacity**

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Item 11 of the Code of Good Practice: Dismissal (Schedule 8 to the LRA) outlines the guidelines an employer has to follow when dealing with health related incapacity which may result in a dismissal. Employers frequently battle with the question what are expected from them to reasonably accommodate employees with protracted medical problems resulting in frequent absenteeism. With reference to the requirements of item 11 of the Code of Good Practice: Dismissal, the court in *Standard Bank of SA v CCMA & others* [2008] 4 BLLR 356 (LC) emphasized the fact that there is a four-stage enquiry that an employer has to follow in order to ensure fairness:

- The first stage is for the employer to enquire into whether or not the employee with a disability is able to perform his/her work;
- If the employee cannot perform his/her work, the employer must then enquire into the extent to which the employee is able to perform his/her work, a factual enquiry to establish the effect the disability has on the employee's ability to work. Medical opinion may be necessary in this step.
- The third stage is for the employer to enquire into the extent to which the employee's work circumstances can be adapted to accommodate the employee's disability. If the work circumstances (such as the employee's chair and workstation) cannot be changed, the employer must then consider ways of adapting the employee's duties. Adapting the work circumstances naturally takes precedence over adapting the employee's duties because, as a matter of principle, the employer should reinstate the employee as far as possible. The employer will also be required to show that it considered alternatives to dismissal.
- The final stage is for the employer to enquire if any suitable alternative work is available.

Even though the Court does not say as much, it is presumably only after this fourth stage that a dismissal may be fair. The Court's views on the employer's duty to reasonably accommodate employees with a disability also have to be noted. According to the Code of Good Practice: Key Aspects on the Employment of People with Disabilities, an employer need not accommodate an employee with a disability if this would cause 'an unjustifiable hardship' on the business of the employer. An 'unjustifiable hardship' is defined as being action that requires significant or considerable difficulty or expense. This would probably constitute a consideration of the costs such accommodation would entail as well as the

effectiveness of the assistance that is required. From the court's approach it is also clear that large employers may have to ask probing questions as to the detail of what they did, what they failed to do and why. It seems as if employers may have to rely on the evidence or involvement of medical and technical experts, occupational therapists, psychologists etc. depending on the facts of the case, in deciding how to reasonably accommodate an employee with a disability.

Furthermore, all of this has to take place in consultation with the employee during which it will be expected from the employer to show a high degree of flexibility.

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*November 2008*