

# Unlocking Labour Laws

In each edition *Labour Bulletin* takes queries from unionists and workers on labour law matters. Here **Mohammed Chavoos** answers a query about incapacity in the workplace.

**A**re there any cases that could guide us in representing members who become disabled? There is a person at my workplace who is having problems around the company accommodating his disability.

In this, it is useful to look at the ruling of the Labour Court in the case between *Standard Bank of South Africa v CCMA & Others* [2008]. Here the Standard Bank challenged an arbitration award which said that the dismissal of a Mrs Ferreira, on the basis of disability, was unfair.

Ferreira was employed with the Bank for a period of 17 years prior to her dismissal and had an excellent service record as a mobile home loan consultant. She had won numerous recognition awards prior to sustaining serious back injuries diagnosed as fibromyalgia, in a car accident. This happened in 15th year of her employment with the bank.

On return to work the bank's doctor recommended that it give her light work. It put Ferreira in an administrative position where she was assigned menial tasks such as filing and assessing whether home-loan applications were correctly completed by clients.

She felt useless and so the bank

moved her to a different job where she had to confirm clients' incomes. She enjoyed this except for the pain as a result of writing while on the phone. She found a solution to this problem while relieving another employee on Optimax where she used a phone headset.

She asked the bank to move her to Optimax, but it refused to create a half-day position here. Ferreira's persistent requests for the bank to supply her with a headset were ignored. The bank eventually gave her tasks that did not require a phone.

Ferreira thereafter captured data onto a computer, a task which she performed well and enjoyed. Subsequently she was instructed not to use the computer as her superior feared that she would capture incorrect data because of the side effects of her medication which made her drowsy.

The bank urged Ferreira to accept a position as a switchboard operator which she declined, seeing it as a demotion. It then gave her the job of shredding papers, folding files and clearing out office cupboards. These tasks gave her pain and impaired her self-esteem.

Later Ferreira was appointed a home-loan fulfilment officer which she saw as a vote of confidence in her. A month later however she was

dismissed on the grounds of incapacity because of high absenteeism and low productivity.

Ferreira was absent for 74 days in 2002, 116 days in 2003 and 59 days in 2004. She had difficulty working beyond midday and was often sent home as a result of her medical condition. Yet the bank still required Ferreira to prove her incapacity.

## DOCTORS' REPORTS

In 2003 a doctor's report declared her fit for half-day work and a panel of orthopaedic surgeons declared her 40% disabled for work.

In 2004, Standard Bank's Group Retirement Fund's physician and cardiologist confirmed that it would be in Ferreira's best interest to "make a special effort to continue even though this may mean absences on some days." In the light of this, the bank declined her application for early retirement.

The bank made the mistake of evaluating Ferreira as if she was fully abled. It ignored recommendations from its health panel that she consult with an occupational therapist (OT). Further, the bank ignored recommendations from its insurers that it consult an OT on adaptations to Ferreira's work station to help her perform with minimal strain.

### LABOUR COURT OPINION

The Labour Court accepted that the bank allowed Ferreira to leave early when she was in distress, it granted her four months sick leave, and it offered her an alternative position as a switchboard operator and moved her around to find a suitable position. All this showed a patient, tolerant and charitable employer.

However, the Court found that the bank failed to engage an OT specialist as recommended because it was not cost effective to do so. The failure of the bank to provide a headset for Ferreira was also because of cost considerations as well as believing that the work required a full-time person.

The bank refused to buy a comfortable chair for Ferreira despite a doctor's recommendation. Instead it instructed her to choose a chair from the storeroom where she found one which was broken and she then repaired.

The bank also failed to consider the alternative of allowing Ferreira to work half day and have her workstation adjusted. According to the Court the bank failed to show why it did not move her to Optimax.

### NON-COMPLIANCE WITH LAW

In examining the definition of disability in the LRA's *Code of Good Practice: Employment of People with Disabilities*, the Court accepted that Ferreira had a disability.

The Court noted the bank's non-compliance with the Department of Labour's *Code Of Good Practice: Key Aspects on the Employment of People with Disabilities*. According to the Court, the bank also did not follow its own guidelines relating to incapacity dismissals.

Further, the bank infringed Ferreira's constitutional rights concerning discrimination on the grounds of disability, the right to dignity, the right to equality and the

right to freedom of trade, occupation and fair labour practice.

The Court emphasised the four stages of enquiry in the LRA Code of Good Practice. Is the employee capable of performing her work? What is the extent to which the employee can perform her work (this involves an enquiry to establish the effect of the disability on the person's work which could include medical input)? The extent to which work circumstances may be adapted to accommodate the disability. If they cannot be adapted then the employer must consider the extent to which the person's duties can be adapted taking into account the nature of the job, period of absence, seriousness of illness and securing a temporary replacement.

If adaptation is not possible, the employer must consider alternative work.

In terms of the Employment Equity Code, reasonable accommodation is "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 participate or advance in employment."

According to the Court, implicit in the employer's duty to accommodate is its obligation to prevent discrimination. So failure to accommodate an employee with a disability is automatically unfair. The Court believed that disregarding medical advice to accommodate the employee amounted to discrimination.

The Employment Equity Code sets out 'Unjustifiable Hardship' for the employer when it becomes too difficult to accommodate an employee because it "requires significant or considerable difficulty or expense. This involves, considering... the effectiveness of the accommodation and the extent to which it would seriously disrupt

the operations of the business." The Court did not consider it 'unjustifiable hardship' for the bank to hire two employees instead of one, or an assistant to Ferreira, or to create a new post for her.

### COURT'S FINDINGS

The Court found that the bank had unreasonably refused to accommodate Ferreira and had failed to consult with experts and the employee meaningfully to get relevant information. The bank was mainly concerned with its own operations and tolerated Ferreira's reduced performance because it was easier than finding a long-term solution.

The bank failed to show that it suffered 'unjustifiable hardship' in keeping her in employment. According to the Court, Ferreira being a health risk was not tested by the bank. It also discriminated against her by adjusting the workstation of another employee but failing to adjust hers.

The Court also emphasised that Ferreira's performance was incorrectly compared with other employees rather than assessed in terms of her disability.

It remarked that the Standard Bank, one of the largest banks in South Africa had assets exceeding one trillion rand and so it could hardly allege undue hardship as a result of Ferreira's disability. It noted the bank's pettiness in refusing to incur the cost of an OT, in exploring alternatives and in adjusting her workstation.

Ferreira's case sends out a message to employers, particularly employers with good bank balances, that they must explore all alternatives to accommodate disabled employees prior to dismissal. LB

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