

CASE LAW UPDATE:

*the OMP, Employer and Employee
Key Legislation, Code of Good
Practice and Case Law*

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PRESENTATION OVERVIEW

- Some CCMA stats on disputes
- Why employers get health issues wrong
- Employment Equity Act
- Who is “disabled” – the EEA and the Courts
- The key right: “reasonable accommodation”
- When employers get things badly wrong:
 - Labour Court: Marsland v New Way Engineering
 - Labour Court: Smith v Kit Kat Group

CCMA Statistics 2016 / 2017

- 745 disputes are received every working day
- 22 offices across 9 provinces
- 77% unfair dismissal; 9% unfair labour practice
- 75% of all cases that are referred get settled
- 26% more based on Employment Equity Act
- 0.5% more on Basic Conditions of Employment Act
- 68% of all disputes get settled at the conciliation stage
- Caseload increase:

– 1997 / 1998	67,312
– 2014/ 2015	171,854
– 2016 / 2017	188,449
- Now more dismissals for retrenchment than for misconduct

CCMA 2016 / 2017 Sector Stats

- Cases / Disputes by sector:
 - Business and professional Services 24%
 - Retail 12%
 - Safety Security (Private) 11%
 - Domestic 8%
 - Building Construction 8%
 - Food Beverage (Manufacturing) 4%
 - Agriculture 4%
 - Mining 4% (a 1% drop from previous financial year)

Why Employers Get Health Issues Wrong

- Infrequency
- Overconfidence
- Discomfort
- No policies and procedures
- Inexperience
- No OMP / Wellness / OT support
- Dismissal as default option
- Impatience
- Decision-making errors

Overconfidence



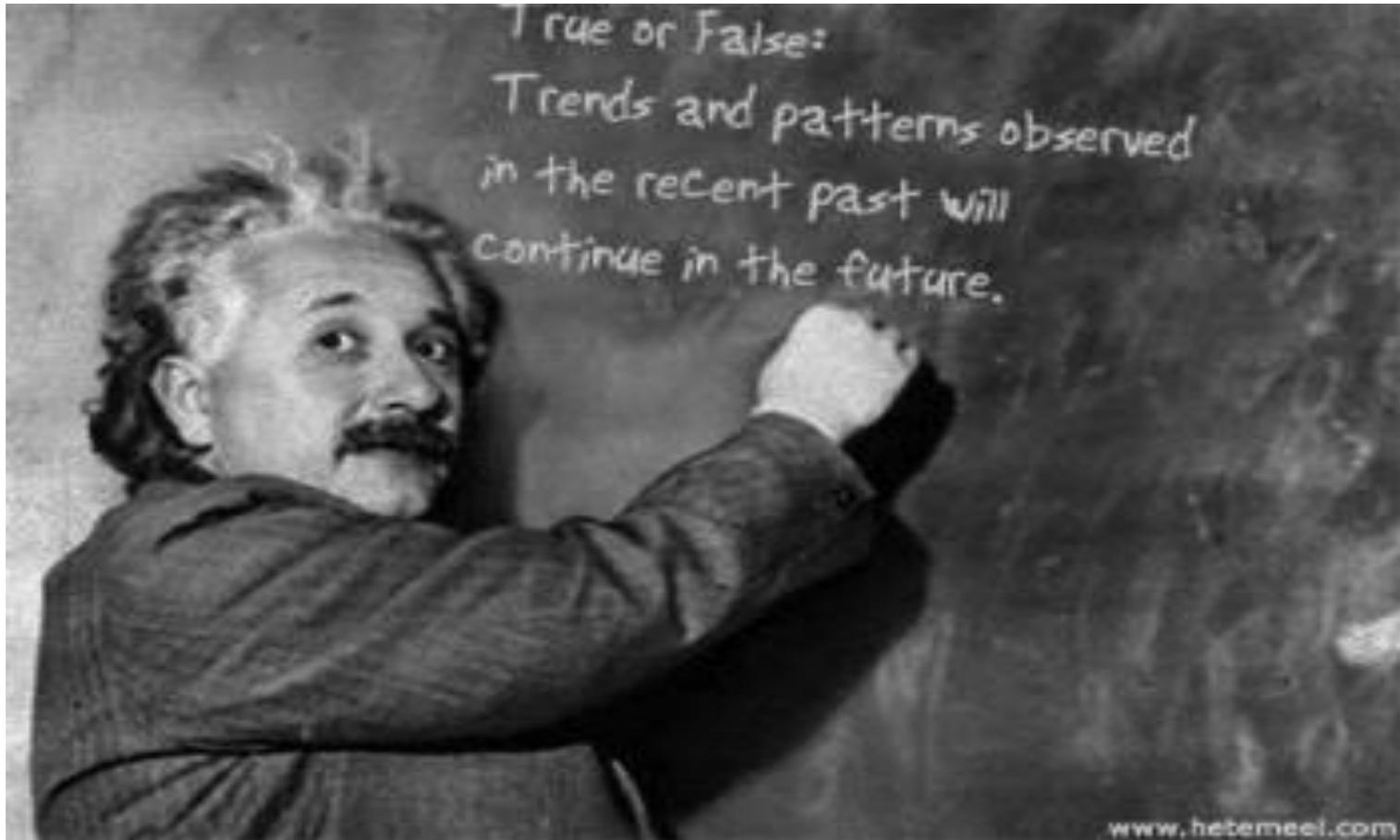
Over-estimating your own decision-making ability and wrongly assuming the future on present uncertainties

Confirmation Bias



Making decisions based on looking for or focusing on information that confirms existing preconceptions

Recency Bias



Making decisions based on on how a recent similar event was, or how unusual or emotionally charged it was

Anchoring Bias



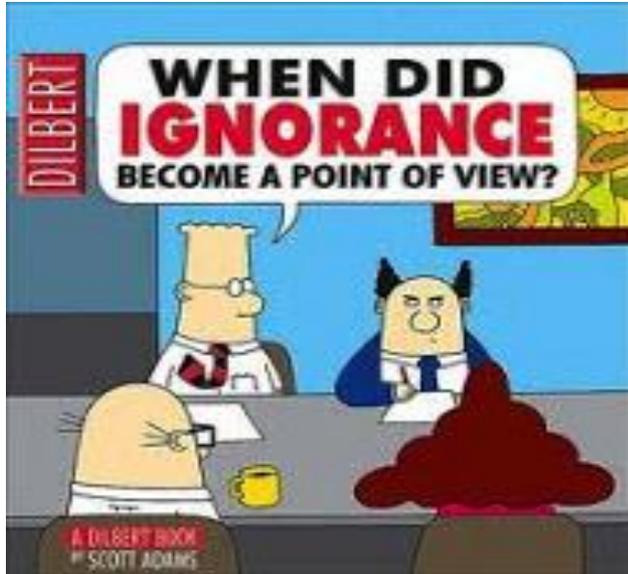
Making decisions by relying too heavily on only one bit of information – usually the first bit that was acquired

Familiarity Bias



Deciding the present situation on the basis that it looks similar to the past one (regressing to the state of mind of the last situation)

Dunning - Kreuger Bias



- Not recognizing one's own ignorance / inability
- Happens when we don't have the training / knowledge / skills to be able to identify our own competencies and incompetencies
- *'Not Knowing that You Don't Know'*

Some Key Principles for OMPs

Vulnerability

Ethical Treatment

Individualized Assessment

Recognize Vulnerability

- **Duty to Take Account of Vulnerability of Group**
President of the Republic of South Africa and Minister of Correctional Services v Hugo
"groups who are **particularly vulnerable** in our society"
- **Duty to Protect Vulnerable Minority Group Members**
Standard Bank v CCMA & Myhill & Others (2008)
61 The Constitution, several statutes including the EEA and the LRA and Codes of Practice protect **employees with disabilities as a vulnerable group** because they are a **minority with attributes different from mainstream** society.

Treat Ethically

- **Duty of Ethical Conduct in Employment**

SA Vereniging van Munisipale Werknemers (Nie-Politiek) & 'n Ander v Ventersdorp Munisipaliteit

- *"A person's point of departure should be to **treat others as you would wish to be treated** in similar circumstances."*
- *"A person must be vigilant against treating people like inanimate work implements."*
- *"To go out of your way to meet half-way with an employee in such circumstances, can only have a positive influence on the other employees"*

Individualize, Don't Generalize

McLean v SASOL Mine (Pty) Ltd Secunda Colliery

“40] ... there is a need for an individualized assessment to ensure that unfounded generalizations ... are not made.

Where a rule or a practice makes generalizations about people solely on the basis of disability without regard to the particular circumstances of the specific class of individuals affected, ... this is ... entirely unfair to the individuals.

... for there to be true individualization, a close assessment should be made of the individual in question since even persons with the same disability vary markedly in how they personally function and cope with their affliction, or vary in the degree of impairment because of different stages of their infirmity.”

Some Key EEA Aspects for OMPs

Who is Disabled – EEA Definition?

Who is Disabled – Court case?

Who is Incapacitated?

Employment Equity Act (1998)

Affirmative Action Measures

*15(1) Affirmative action measures are measures designed to ensure that suitably qualified people from designated groups have **equal employment opportunities** and are **equitably represented** in all occupational categories and levels in the workforce of a designated employer.*

15(2) Affirmative action measures implemented by a designated employer must include-

(d) Subject to subsection (3), measures to-

(i) ...

*(ii) **retain and develop** people from designated groups ...*

EEA Definition: Who are “disabled”?

EEA definition of “people with disabilities” in s1

“People with disabilities means “people who have a long-term or recurring physical or mental impairment which substantially limits their prospects of entry into, or advancement in, employment”

Deciding Eligibility to EEA: Steps

- Decide EEA eligibility to EEA definition
- Use these steps (Disability Code section 5):
 - 1 - is the diagnosed condition “*physical or mental*”?
 - 2 - is the diagnosis an “*impairment*”?
 - 3 - is the impairment “long-term” (1 year or more)?
 - 4 - is the impairment “*substantially limiting*”?
 - 5 - assess the “*nature, duration or effects*”?
 - 6 - assess if the impairment can be “*so easily controlled, corrected or lessened, that [it has] no limiting effects*”?
 - 7 – assess “*if medical treatment or other devices would control or correct the impairment so that its adverse effects are prevented or removed*”?
 - 8 - consider whether the impairment impacts “*prospects of entry into, or advancement in, employment*”?

Who is Disabled? Eligibility on Attributes & Characteristics - Court case steps

DISCRIMINATION on an UNSPECIFIED GROUND can be

Disability-related

Impairment-related

and can happen due to **ATTRIBUTES** the person has

Which have the potential to impair the fundamental dignity of persons as human beings

Which have the potential to to affect them adversely in a comparably serious manner

or can happen due to **CHARACTERISTICS** the person has

Which have the potential to impair the fundamental dignity of persons as human beings

Which have the potential to to affect them adversely in a comparably serious manner

Does “Disability” = “Incapacity”?

Standard Bank v CCMA, Myhill * & Ferreira

Pillay, J clarified the difference between “incapacity” in the LRA and “disability” in the EEA like this:

“94. **Disability is not synonymous with incapacity.**

Under Canadian law adjudicators may not find a person incapable unless they are satisfied that the needs of the person cannot be accommodated except with undue hardship.

An employee is incapacitated if the employer cannot accommodate her or if she refuses an offer of reasonable accommodation.

Dismissing an employee who is incapacitated in those circumstances is fair but dismissing an employee who is disabled but not incapacitated is unfair.”

EEA: “Reasonable Accommodation”

EEA s1: definition: “*reasonable accommodation*”

- “ ‘reasonable accommodation’ means *any modification or adjustment to a job or to the working environment that will enable a person from a designated group to have access to or participate or advance in employment*”;

Reasonable Accommodation: Disability

- MEC for Education: KwaZulu-Natal & Others v Pillay, with Governing Body Foundation & Others

“74 ... it is the failure to make reasonable accommodation, to fine-tune society so that its structures and assumptions do not result in the relegation and banishment of disabled persons from participation, which results in discrimination against them.

75 While the extent of this exclusion is most powerfully felt by the disabled, the same exclusion is inflicted on all those who are excluded by rules that fail to accommodate those who depart from the norm.”

RA & Automatically Unfair Dismissal

Standard Bank v CCMA, Myhill and Ferreira

- “80 Consequently, if an employer fails to reasonably accommodate an employee with disabilities, the dismissal of that employee is not merely unfair but automatically unfair. 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.*
- 81 An employer cannot justify treatment of a disabled person that amounts to direct discrimination. An employer also discriminates against a disabled person if it fails to make reasonable adjustments and cannot show that its failure is justified.*
- 86 What the modification or adjustment should be calls for a pragmatic common sense approach to explore, perhaps even experiment, to establish what will work best in the particular circumstance of the employee, the nature of her post and the configuration of the workplace.”*

Importance of Work & Work Conditions

Standard Bank v CCMA, Myhill and Ferreira

“65 Work is one of the most fundamental aspects in a person’s life, providing the individual with a means of financial support and, as importantly, a contributory role in society.

A person’s employment is an essential component of his or her sense of identity, self-worth and emotional well-being.

Accordingly, the conditions in which a person works are highly significant in shaping the whole compendium or psychological, emotional and physical elements of a person’s dignity and self-respect.”

Marsland v New Way Engineering

Constructive Dismissal
Automatically Unfair Dismissal –
mental illness

Nervous Breakdown

- In December 2001 - on leave - nervous breakdown
- Christmas holiday in KZN - wife left after 24-yr marriage
- After receiving a letter from ex-wife – packed up - drove to Joburg
- On 28 December 2001 - found in his motor car by sister
- Medical assistance – hospitalised - heavily medicated
- Had a complete breakdown - anxiety & depression
- On day to return to work - notified nervous breakdown - hospitalised
- Manager inquired if anything he could do for him / family
- Manager's son and another employee visited him in hospital
- On leaving hospital - meds and regular visits to his Psychiatrist.

Exclusion

- Initially treated with sympathy and understanding
- This changed – later *“like I had a contagious disease”*.
- Manager - crude remarks re ex-wife: *“forget about the b****h”, “find yourself a s**t and get over it”, “let us organise that and go and sort this b*****d ...”*
- Excluded from things done in past - given menial tasks
- Told he needed a break – visited distant customers
- Excluded from decision-making previously involved in
- Instructed to not attend sales / production meetings
- When these challenged - told it did not concern him
- Excluded from arranging a product conference

Inability to Access Workplace or Work

- Workstation and belongings had moved and placed
- Never given the key to his filing cabinet - remained locked
- Receptionist - not allowed to receive any sales calls
- All calls were to be recorded
- Management – will not "*waste time and money on [him]*"
- Prevented from doing work supposed to perform
- Tried to look busy doing nothing
- Whenever he inquired what to do - told to get busy

Verbal Abuse

- Was asked if had permission to attend monthly consultation with his psychiatrist, to take place that day
- Was sworn at: he was talking "*f***ing bull**it*" and that he was a "*c**t head*", a "*f***ing liar*", and a "*f***ing c**t*"
- Was told he was "*despised*", was "*hated*", that if he ever saw him talking on his cell phone again he would "*smash it*" and he would "*smash*" his "*f***ing c**t*" of a face
- Other employee told to "*sort this f***ing c**t head out*"
- An employee was asked if "*this f***ing ba***rd*" had spoken to him about his doctor's appointment
- On his appeal called "*a f***ing b***rd*", "*a c**t head*" and "*a piece of s**it*"

Was 'Automatically Unfair' Dismissal Proved?

- was Applicant 's mental health problems and later the exercising of his rights in terms of the Act the dominant or principal reason that caused the respondent to discriminate against him, such discrimination causing an intolerable working environment such that the applicant was forced to terminate the employment contract?
- If the applicant's mental health problems and the exercising of his rights under the Act were not the dominant or principal reasons that caused the respondent to discriminate against him, did they play a significant role in causing the respondent to discriminate against the applicant?

- *“In my view, the conduct of the respondent towards the applicant as set out above, amounted to unfair discrimination against the applicant, on the grounds of his mental illness. The discriminatory conduct did not end there.”*
- *“This discrimination against the applicant had the effect of making his working environment intolerable, such that he was forced to leave the respondent's employ.”*
- *“The respondent's discriminatory conduct towards the applicant was directly related to the fact that the applicant suffered mental health problems.”*

Smith v Kit Kat Group

Disability Discrimination

Cosmetically Unacceptable to Customers

Failure to permit medically recommended return to work

Return to Work Principles

Smith v Kit Kat Group (Pty) Ltd (Sept 2016)

[1] I am still surprised how often employers can be short sighted where it comes to personal circumstances of their employees. The employment relationship, in the modern constitutional era, is akin to a marriage, and as an employer one has to ask yourself how you would treat your spouse in the case of personal tragedy, and then act accordingly.

- [2] *“... Applicant brought a claim to the Labour Court in terms of Section 10 of the Employment Equity Act (‘the EEA’)¹ is founded on conduct ... the applicant contends is discriminatory because it is based on his disability which resulted from a personal tragedy.”*
- [6] *“The applicant ... had a wealth of experience in the procurement, stock and then resale of non-food consumer products. [He] was employed as the general manager – non-food, at the respondent.”*
- [7] *“The applicant was stationed at the respondent’s head office which was in Pretoria West.”*

Cause of Impairment & Effect

[10] “Applicant attempted suicide - firearm in his mouth and pulling the trigger - attempt was fortunately unsuccessful, - severely injured and his face disfigured – hospitalized - time in hospital - facial reconstruction surgery - no other physical injuries other than to his face.”

[11] “... I observed the applicant when he testified in Court - disfigurement to his face was clearly apparent - not of such a nature so as to instil a sense of involuntary shock - also spoke slowly, which was laboured, because of the damage to his mouth - I had little difficulty in understanding him - Overall, ... the applicant was left permanently physically disabled to some extent ...”

Intent to Return to Work

- [12] “[The employer said he] could come back to work as soon as [he] was ready ... and confirmed that as soon as [he] had recovered, he could come back to work.”
- [13] “... having left hospital, he was able to do all the things he would normally be able to do prior to the tragedy.”
- [14] “[He] was adamant that he wanted to return to his normal life and go back to work [and] that he was good at his work, and enjoyed it, and it was important to him.”
- [15] “... no one appeared disgusted or uncomfortable as a result of his appearance and speech [and the employer] stated that she had no particular difficulty with the applicant’s appearance.”

Was the Discrimination Fair?

[57] *“Accordingly, and since it has been established that discrimination exists in casu based on the applicant’s disability, the respondent had the onus to prove that the discrimination was fair. The case offered by the respondent in this regard appeared to be founded on some or other justification defence which, as said in SA Airways, is not permitted.”*

[58] *“The [employer] contended that because of his speech impediment, which made it difficult to understand [him], [he] was not able to ‘fully’ do his job. [but if] ... the [employer] concerns ... [were] justified, [it] presented no evidence and conducted no process to justify or ... substantiate [this].*

What the [employer] needed to do was to have conducted a proper incapacity investigation into what consequences this speech impediment would have on [his] ability to discharge his duties.

The [employer] needed to properly and objectively assess to what extent [his] ability to interact with fellow employees or suppliers was impacted upon ([he] had little dealings with customers). ... and if there was an impact, it needed to be explored how [he] could possibly be accommodated.

But what the [employer] did was to simply assume that disability automatically equates to incapacity, which is not so.”

Does 'Disability' = 'Incapacity'?

- [58] *As the Court said in the Standard Bank decision:*
'Disability is not synonymous with incapacity. An employee is incapacitated if the employer cannot accommodate her or if she refuses an offer of reasonable accommodation. Dismissing an employee who is incapacitated in those circumstances is fair but dismissing an employee who is disabled but not incapacitated is unfair.'
- [59] *"The issue of accommodation and consulting the employee about it, is in fact a critical component where it comes to deciding whether discrimination based on a disability could be considered to be fair. This is evident from the Code ... [paras 6.1 and 6.6]"*

Need to Look for Ways to Accommodate

[61] *“The point is that the respondent did absolutely nothing where it came to exploring with the applicant, if accepting that his disability impacted on his abilities, could be accommodated. Such an exercise was essential for any discrimination against the applicant to be considered fair. In [the] Standard Bank [decision], it was held:*

‘The search for accommodation is a multi-party enquiry. Although the principal responsibility for conducting the enquiry rests with the employer, at the very least the employer must confer with the disabled employee, her trade union or workplace representative ...

To the extent that the employer needs information that it does not have, such as medical reports, it must also consult with medical or other experts and possibly other employees. Disregarding medical advice to accommodate an employee is discrimination.”

Unjustifiable Hardship Analysis - 1

[62] *“The next issue to consider is whether there would there be unjustifiable hardship on the respondent to allow the applicant to return to work. This consideration is also reflected in the Code.”*

[63] *“I cannot accept that accommodating [him] would constitute unjustifiable hardship for the respondent, especially considering the approach adopted [him], being that he is fit for normal work. What possible hardship can the [employer] suffer by just allowing [him] to prove this, in him simply returning to his normal duties? Also, and considering that no one had been appointed in [his] position, there simply could be no disruption in the [employer’s] business if [he] was allowed to work.”*

Unjustifiable Hardship Analysis - 2

[65] *"The [employer claimed] ... hardship based on [his] facial features [in] that it traumatized ... fellow employees [but] ... the [employer's own] witnesses ... stated that they had no concerns about [his] facial features. It remains a complete mystery to me why the [employer] ... would describe the applicant as 'cosmetically unacceptable'. I [find this] appalling. To ... exclude ... because of how he looked, [when] not employed as a runway model for a fashion house, is simply inexplicable. ... reliance ... on the concept of [him] being 'cosmetically unacceptable' [is] patently unfair."*

[66] *"... the [employer] had a duty to accommodate [him], where it believed that his disability would impact on his ability to do his normal work. It failed to discharge this ... the [employer] actively sought to encourage [him] to leave ... suggesting that he make a disability claim, and ... saying that ... he was not able to work and he was wished well for his future."*

If after RTW there is an Inability to Perform

[64] *If, ... [he] is then [unable] to perform ... the [employer] could [follow] incapacity proceedings under the LRA, and if needs be, then terminate his services. [This] would allow [him] to be effectively accommodated, with very little downside for the [employer]. There can be no unjustifiable hardship ... in this. In [the] Standard Bank [case] the Court held:*

'Unjustifiable hardship means '[m]ore than mere negligible effort'. Just as the notion of reasonable accommodation imports a proportionality test, so too does the concept of unjustifiable hardship. Some hardship is envisaged. A minor interference or inconvenience does not come close to meeting the threshold but a substantial interference with the rights of others does.'

This balancing of hardships (proportionality) equally convinces me that what happened ... cannot be considered to be fair. ⁴⁴

Was there Unfair Discrimination?

[70] In all of the above circumstances, the discrimination by the respondent against the applicant would resort comfortably within the realm of what can be described to be unfair discrimination.

I am thus satisfied that the respondent, by refusing to allow the applicant to return to work, by failing to pay him despite his tender of services, and the manner in which it dealt with him once he was ready to come to work, all of which was based on his disabilities, committed unfair discrimination against the applicant.

As such, the applicant is entitled to relief, which I will turn to next.

Labour Court Court Award

- 24 months salary (as for an 'automatically unfair' dismissal)
- 6 months salary (as a 'solatium')
- Total money award of R1 540 199.40
- Costs in favour of the employee

Thank You

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