

INSTOPP Webinar 22 October 2020

SUPPORTING EMPLOYEES WITH PERFORMANCE DIFFICULTIES –

the OT Professional's Role and some Key aspects of the Law

Presenter: Peter Strasheim

LLB, BProc (UCT), BA (Psychology & Political Science),

Attorney of the High Court of South Africa (n-p)

Advanced Labour Law (UNISA); MAP (WITS)

Selected Key Practical OT Issues

1. Know the main forms of workplace difficulties:
 - conduct and misconduct
 - work and poor performance
 - health and ill-health / injury
2. Recognise which form of difficulty is involved
3. Identify if a disability could have been the cause of problem conduct
4. Align OT report recommendations with:
 - the workplace facts
 - the available medical / functional reports
 - the performance difficulty
 - the job
 - the working environment
5. Understand the importance of the right to reasonable accommodation in supporting employee work performance



6. Know how and when to recommend an RA to:

- Promote employee rights, performance and job security
- Support and guide employers to comply and provide RAs

7. Writing reports that align with the law

- refer to the RA right and duty
- make effective reasonable practical RA recommendations
- demonstrate that the RA is unlikely to be unjustifiably hard to provide
- support employee performance and employer productivity need

8. Know what to do if a medical recommendation gets ignored

9. Know when to suggest a benefit claim to employee / HR/ TU:

- for a COIDA compensation
- for a UIF Sickness Benefit
- for an application for an insured disability benefit
- for a claim on a private policy of insurance

1 Main forms of workplace difficulties

A physical / mental disability can be linked to dismissal for:

- * Misconduct
- * Poor performance
- * Ill-health or Injury

- * Incompatibility
- * Eccentricity
- * Abscondment

- * Operational Requirements ('Retrenchment')

2 Which form of difficulty is involved

- * Employee **Incapacity**

- * Labour Relations Act
- * Code of Good Practice: Dismissal – section 10

- * Employee **Disability**

- * Employment Equity Act
- * Code of Good Practice on the Employment of Persons with Disabilities

- * Difference between the two:

[94] “An employee is incapacitated if the employer cannot accommodate her of if she refuses an offer of reasonable accommodation”

Standard Bank v CCMA Myhill & Ferreira (JR 662/06) [2007] ZALC 98; [2008] 4 BLLR 356 (LC) (25 Dec 2007)

3 Was a disability the cause of the problematic conduct?

- * The precise cause of the problematic conduct must be identified
- * The true cause of the problem can be ‘mischaracterised’
- * ‘Smokescreening’ / ‘camouflaging’ for ‘ulterior motives’
- * An inapplicable procedure can be used for unfair purposes
- * The correct process must be identified and then used

To identify the “‘dominant’ or most likely cause of the dismissal”, a two-part test is used:

- * Part 1: Test for ‘factual causation’ – ask “*but for*” the disability ...
- * Part 2: Test for ‘legal causation’ / ‘remoteness’ – ask what was the “*main*” / “*dominant*” / “*proximate*” / “*most likely*” cause

Kroukam v SA Airlink (Pty) Limited (JA3/2003) [2005] ZALAC 5 (26 September 2005)
South African Chemical Workers Union and others v Afrox Limited (JA24/98) [1999] ZALAC 8 (23 June 1999)

- * *“It is the duty of a court to ascertain the true nature of the dispute between the parties”*
- * *“a court must look at the substance of the dispute and not at the form in which it is presented”*
- * *“the label given to a dispute by a party is not necessarily conclusive”*

National Union of Metal Workers of South Africa and Others v Bader Bop (Pty) Ltd and Another (CCT14/02) [2002] ZACC 30; 2003 (2) BCLR 182 ; 2003 (3) SA 513 (CC) ; [2003] 2 BLLR 103 (CC) (13 December 2002)

Example: Misconduct / Performance Was the Conduct caused by a disability

Use this test: at the time the conduct took place:

- * Was the employee **suffering from a mental illness?**
- * What was the **mental illness?**
- * What was the **employee's mental / cognitive / emotional state?**
- * Was the **employee able to think clearly / rationally?**
- * What was the **employee's decision-making capacity and ability?**
- * Was the employee **able to make a balanced decision?**
- * Was the employee **able to act with unimpaired volition?**

Road Accident Fund v Russell (656/98) [2000] ZASCA 66; 2001 (2) SA 34 (SCA);
[2001] 1 All SA 160 (A) (24 November 2000)

Minister of Safety and Security and Another v Madyibi (643/08) [2009] ZASCA 95;
2010 (2) SA 356 (SCA); [2010] 1 All SA 139 (SCA) (17 September 2009)

4 Align OT report recommendations

* OT Report Types

- Functional Capacity
- Reasonable Accommodation
- Return to Work
- Eligibility as “disabled” in terms of EEA definition (section 1)

* Content must align with:

- Workplace facts
- Available medical / functional reports
- Performance difficulty presenting
- Post Profile / Description
 - Physical requirements
 - Mental requirements: Cognitive / Conative / Affective)
- Working environment
- Occupational safety and health

5 Reasonable Accommodation Importance

[84] Because it protects against automatically unfair dismissal, reasonable accommodation is more onerous than a general obligation to implement affirmative action.

[66] When employers accommodate employees effectively, they restore dignity to employees.

Restoring the dignity of employees is also about returning the employee to the same job if possible. By returning Hoffman to his job as cabin attendant for South African Airways, the Constitutional Court aimed specifically at restoring his dignity.

Standard Bank v CCMA, Myhill & Ferreira (JR 662/06) [2007] ZALC 98; [2008] 4 BLLR 356 (LC) (25 December 2007)

[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.

MEC for Education: Kwazulu-Natal and Others v Pillay (CCT 51/06) [2007] ZACC 21; 2008 (1) SA 474 (CC); 2008 (2) BCLR 99 (CC) (5 October 2007)

[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.”


Standard Bank v CCMA, Myhill & Ferreira (JR 662/06) [2007] ZALC 98; [2008] 4 BLLR 356 (LC) (25 December 2007)

6 How & when to recommend an RA

Code of Good Practice on the Employment of Persons with Disabilities – section 6

6.1. Employers should reasonably accommodate the needs of people with disabilities. The **aim of the accommodation** is to reduce the impact of the impairment of the person's capacity to fulfil the essential functions of a job.

6.2. Employers may adopt the most **cost-effective means** that is consistent with effectively removing the barriers to perform the job, and to enjoy equal access to the benefits and opportunities of employment.



6.3 Reasonable accommodation requirement **applies to** applicants and employees with disabilities who are suitably qualified for the job and may be required –

- during the recruitment and selection processes;
- in the working environment;
- in the way work is usually done, evaluated and rewarded; and
- in the benefits and privileges of employment.

6.4 The obligation to make reasonable accommodation may arise when an applicant or employee **voluntarily discloses** a disability related accommodation need or when such a need is **reasonably self-evident** to the employer.

6.5. Employers must also accommodate ... when work or the **work environment changes or impairment varies** which affects the ... ability to perform the essential functions of the job.

7 Report alignment with the law

- * Confirm that your report takes account of the applicable law
- * Never give legal advice / recommendations
- * Whether “disabled” (EEA) / incapacitated (LRA)
- * Refer to the legislation or LRA / EEA code
- * Refer to extracts from cases
- * Reasonable accommodation strategy (“W-W-W-W-H-BWM”)
 - * What – use Job Accommodation Network
 - * Why - nature of impairment’s functional limitations
 - * How - OT with HR and line management and colleagues
 - * When - immediate, after RTW, after rehab
 - * by what Means – support / assistive devices / access / accessibility
- * Unjustifiable hardship – ease of implementation / cost / difficulty

- * Refer to authoritative sources
- * Quote selectively from EEA and Disability Code
- * Cite medical books on functional capacity and law:
 - * *Fitness for Work: the Medical Aspects*
 - * *Palmer, Cox, RA & Brown, I (eds)*
 - * 4th edition 2007
- * Cite articles on how to reasonably accommodate employees with the disability you are making recommendations about
- * The findings and recommendations sections are the key parts
- * The employee is usually entitled to ask for the report
- * Who paid for / asked for the report does not determine access



8 If a recommendation is ignored

[43] In my view, it follows that the respondent had knowledge that the applicant was a person with a disability. For this reason, the respondent was under a duty to reasonably accommodate him. The respondent failed to comply with its duty in this regard.

Jansen v Legal Aid South Africa (C678/14) [2018] ZALCCT 17 (16 May 2018)

[91] The search for accommodation is a multi-party inquiry. 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.

Standard Bank v CCMA, Myhill & Ferreira (JR 662/06) [2007] ZALC 98; [2008] 4 BLLR 356 (LC) (25 December 2007)

9 When to suggest a benefit claim

Know when to suggest a benefit claim to employee / HR / TU for:

- * Extended sick leave
- * UIF Sickness Benefit
- * COIDA compensation
- * Application for an insured disability benefit
- * Claim on a private policy of insurance due to disability
- * Claim on credit life insurance cover (if person has debt)

If a dismissal has happened, remember these may be possible:

- * Social Grants
- * Ability to retire early / after 55 (if fund benefit not withdrawn)

Thank You for Your Time and Attention

Questions?

Peter Strasheim

Admitted Attorney of the High Court of SA (np)

BA (Psy) LLB BProc (UCT)

Advanced Labour Law (UNISA) MDP (WITS)