THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Reportable

Case no: JS 787 / 14

In the matter between:

JOHANNES DIEDRICK SMITH **Applicant**

and

THE KIT KAT GROUP (PTY) LTD **Respondent**

Heard: **22, 23 and 24 August 2016**

Delivered: **23 September 2016**

Summary: Discrimination – disability – meaning of – employee having disability

Discrimination – what constitutes – conduct of the employer towards the employee – discrimination based on disability

Discrimination – what constitutes unfair discrimination – principles of accommodation and hardship considered – conduct of employer considered – discrimination unfair

Discrimination – relief afforded to applicant – principles considered – meaning

of damages and compensation – damages and compensation awarded

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JUDGMENT

SNYMAN, AJ

Introduction

[1] This matter was borne out of a tragic event, which, instead of being resolved on the basis of compassion and good sense, escalated into unfortunate litigation on the basis of discrimination. 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] The above being said by way of introduction, I turn to the case at hand. In this matter, the applicant brought a claim to the Labour Court in terms of Section 10 of the Employment Equity Act ('the EEA')[1]. The claim is founded on conduct by the respondent towards the applicant which the applicant contends is discriminatory because it is based on his disability which resulted from a personal tragedy. The applicant brought this claim by way of statement of claim filed on 2 September 2014.

[3] As to the relief the applicant sought, this initially included a prayer that the respondent be directed to allow the applicant to resume his duties, but this relief was abandoned by the applicant at the commencement of trial before me on 22 August 2016. In addition, the primary relief sought by the applicant at the commencement of trial was amended to a prayer that the applicant be paid his normal remuneration from 26 February 2014 until 10 December 2018, by the respondent.

[4] The respondent, on the other hand, contended that the applicant was not discriminated against, and that it was simply not operationally possible or

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[1] Act 55 of 1998

feasible to allow the applicant, at that point in time being 2014, to resume his duties at the respondent.

[5] I will now decide this matter by first setting out the relevant factual matrix, which, fortuitously, was mostly either common cause, or established by undisputed evidence.

The relevant background

[6] The applicant commenced employment with the respondent on 2 June 2005. The applicant, at the time, had a wealth of experience in the procurement, stock and then resale of non-food consumer products. The applicant was employed as the general manager – non-food, at the respondent.

[7] The respondent conducts business as a general wholesaler and retailer of consumer goods. It operates a number of stores in Pretoria and surrounds. The applicant was stationed at the respondent's head office which was in Pretoria West.

[8] It was common cause that the applicant always properly fulfilled his duties, and that he was a valued and senior employee of the respondent. The applicant in fact reported directly to the respondent's proprietors, being the Gani family, and in particular to the joint CEO, Ahmed Gani ('Ahmed'). Also, it was clear that the applicant had a very good working relationship with his fellow employees and was respected by them.

[9] The applicant, in evidence, gave an undisputed blow by blow account of his normal working day. He stated that he would come to work at about 07h30, having planned his day the previous day. He would then spend about an hour on the non-food shop floor, and interact with the staff on the floor. He also interacted with the various department managers. He had two buyers directly reporting into him, which he managed. The applicant also regularly met with suppliers in the course of the day and interacted with these suppliers. The applicant would also give regular feedback on the operations he attended to, to the senior management of the respondent. The applicant's working day normally ended at about 18h00.

[10] On 13 September 2013, the applicant attempted suicide after having left his workplace. He did this by placing a firearm in his mouth and pulling the trigger. The attempt was fortunately unsuccessful, but it left the applicant severely injured and his face disfigured. No evidence was presented as to why the applicant did this. The applicant was hospitalized, and spent some time in hospital. The applicant also underwent some facial reconstruction surgery. The applicant suffered no other physical injuries other than to his face.

[11] I interpose by stating that I observed the applicant when he testified in Court. The disfigurement to his face was clearly apparent, but was not of such a nature so as to instil a sense of involuntary shock by a casual observer. He also spoke slowly, which was laboured, because of the damage to his mouth, but fortunately I had little difficulty in understanding him. Overall, however, it is so that the applicant was left permanently physically disabled to some extent by his attempted suicide.

[12] Returning then to the chronology, the applicant's brother-in-law, Frans Van Der Walt ('Van der Walt') immediately stepped into the breach for the applicant after the event. Van Der Walt met with the chairman of the respondent, Abdul Gani ('Abdul'), Ahmed, and the HR manager, Bilkies Mohamed ('Mohamed'), on 17 September 2013. In this meeting, Abdul told Van Der Walt that the applicant was a valued employee, was actually part of the family, and could come back to work as soon as the applicant was ready. In a further meeting on 8 October 2013, Abdul confirmed that as soon as the applicant had recovered, he could come back to work.

[13] The applicant left hospital in November 2013. According to the applicant, and having left hospital, he was able to do all the things he would normally be able to do prior to the tragedy. According to the applicant, even though he was physically ready to return to work in November 2013, he still had some remnants of emotional trauma he needed to overcome and was concerned he would not then be able to cope at work. The applicant was however adamant that he wanted to return to his normal life and go back to work. He said that he was good at his work, and enjoyed it, and it was important to him.

[14] As to the applicant being paid following his absence from work as from 14 September 2013, the respondent attributed all available leave and sick leave to the absence, resulting in the applicant being paid in full for September and October 2013, and part paid for November 2013.

[15] The applicant, together with Van Der Walt to assist him, met with Abdul on 13 December 2013. The applicant in fact attended at the respondent's head office, where he worked, on that day. According to the applicant, he met with a number of staff members, who all wished him well and asked when he was coming back to work. The applicant testified that no one appeared disgusted or uncomfortable as a result of his appearance and speech. Even Mohamed, who came to testify in Court, stated that she had no particular difficulty with the applicant's appearance. In the meeting on 13 December 2013, Abdul offered the applicant a loan of R80 000.00 to tie him over, as he was not earning an income because he was not working. Abdul said that the respondent needed the applicant back at work.

[16] By the beginning of February 2014, the applicant was ready to return to work. Van der Walt met with Mohamed on 11 February 2014 to facilitate this return. Mohamed informed Van der Walt that he had to send an e-mail to Riaz Gani ('Riaz'), the other joint CEO of the respondent, indicating when the applicant would report for work, and Riaz would in turn confirm that in writing.

[17] On 12 February 2014, Van Der Walt wrote to Riaz, confirming that the applicant was physically and mentally ready to return to work. Van der Walt confirmed that the respondent would be provided with a psychiatrist's report before the applicant came to work, confirming that he was mentally fit to resume his duties. Van Der Walt stated that the applicant was ready to resume duties on 26 February 2014. That date came about based on a recommendation by Mohamed that the applicant start on the commencement of the new pay cycle, which was 26 February 2014.

[18] On 16 February 2014, the respondent was then provided with a report from Prof Bettie Wiechers, the psychiatrist treating the applicant, confirming that the applicant's speech had improved to the extent that he could make himself understood, and that he was mentally and intellectually stable and intact. Prof

Wiechers gave the opinion that it was unlikely that the unfortunate circumstances would re-occur.

[19] As far as the applicant was concerned, all was now in place for him to report for work on 26 February 2014. However, and on 17 February 2014, Riaz answered to the contrary. Riaz indicated that although the applicant had physically recovered and was mentally able to work, he was 'not facially acceptable', and his presence would remind employees of the unfortunate event. It was intimated that the applicant pursue a disability claim and the issue of returning to work be revisited end March 2014. Riaz concluded by writing 'Please note that JD is always welcome back'. The applicant testified that this response left him rather disappointed.

[20] As a result of what seemed to be a change of heart on the part of the respondent, the applicant and Van Der Walt then met with Abdul and Mohamed on 12 March 2014. In this meeting, Abdul then said that he (Abdul) had been generous in saying the applicant was free to come back to work, intimating that he said what he said just to be kind. According to Abdul, the applicant was 'cosmetically unacceptable' to come back to work, and the other employees would be traumatized if he came back to work. Abdul suggested that the applicant pursue a disability claim with the provident fund, and even made recommendations as to how to complete and lodge the claim to overcome the benefit exclusion of self inflicted disability in the fund. But Abdul made it clear that the applicant was not welcome back at work.

[21] In the end, the applicant decided not to pursue a disability claim on the basis as proposed by Abdul, as it would amount to fraud. Van Der Walt advised the respondent accordingly on 17 March 2014. On 19 March 2014, Van der Walt telephoned Mohamed, and advised that the applicant was tendering his services and was ready to come back to work. Mohamed undertook to revert.

[22] On 4 April 2014, Van Der Walt received a telephone call from one Gwen Prinsloo ('Prinsloo'). Prinsloo said she was the head of HR at the respondent, and that she was still busy submitting a disability claim on behalf of the applicant. Prinsloo said that she was not in possession of a doctor's letter indicating the applicant was fit to resume his duties. Van Der Walt made it clear to Prinsloo that the applicant did not want to pursue a disability claim and

that the applicant was not going to resign. Van Der Walt recorded this conversation in an e-mail to Mohamed on 4 April 2014, and asked for an urgent response as to what was going to happen, going forward.

[23] On 7 April 2014, the respondent was then presented with a further report by Prof Wiechers (the report is dated 5 April 2014) that the applicant was fit for work. The applicant also obtained a medical report by the applicant's medical practitioner Dr Magdie Hartmann (the report is dated 3 April 2014) that he was able to go back to work, which was later presented to the respondent. Nothing was heard from the respondent.

[24] Van Der Walt then sent an e-mail to Mohamed on 10 April 2014, recording that nothing further had been heard from the respondent and that the applicant was still an employee, was fit and ready to work, and would be reporting for duty on 15 April 2014 at 07h30, as normal. When no answer was received, Van Der Walt followed this up in a further e-mail on 12 April 2014, confirming that the applicant would report for work on 15 April 2014.

[25] The persistence of Van Der Walt finally yielded a response. On 14 April 2014, Mohamed forwarded to Van Der Walt a letter dated 7 April 2014 authored by Prinsloo. This letter recorded that the applicant allegedly admitted that he was unable to perform work or physical activity. When the applicant allegedly so admitted is unclear, and this statement certainly does not accord with what had gone before. Reference is made to a report by a Dr I Munshelele that the applicant cannot perform his duties. The letter concluded that the applicant was not able to perform his job functions and that he was required to pay back the R80 000.00 loan. In what can only be described as cynical, the letter concludes by wishing the applicant well and trusting that with proper care he will be able to resume normal life.

[26] To make matters worse, and about an hour later, an e-mail, this time directly from Prinsloo, was sent to Van Der Walt, recording that the respondent had not received the medical report from Dr Magdie Hartmann, and that the respondent cannot allow the applicant to resume his duties until the respondent was assured that the applicant would give '100% performance', and then only will a final decision be made. The contradiction to the earlier letter the same day from the same author is apparent.

[27] Van Der Walt, the same evening of 14 April 2014, then tries to put everything into perspective in a lengthy e-mail. He sets out the backgrounds events up to the applicant being ready to return to work on 26 February 2014. He refers to the meeting on 12 March 2014 where Abdul said the applicant was 'cosmetically unacceptable' to return to work. Van Der Walt made it clear the applicant will not resign, wanted to return to work, and it was the respondent that did not want him back at work. He further stated that it was incorrect to state that the applicant was unable to perform his job functions. Finally, he undertook to send the report from Dr Magdie Hartmann the next day. The applicant himself then sent this report to the respondent on 15 April 2014.

[28] Needless to say, the applicant was not allowed to resume his duties on 15 April 2014. A meeting was then set up with the respondent on 29 April 2014, in order to finally try and resolve the matter. The meeting was attended by the applicant and Van Der Walt. This time, the respondent was represented by one Johan Prinsloo ('Johan'), who also introduced himself as HR manager of the respondent. I may add that Johan testified in Court, and stated that he knew nothing at all of the matter prior to this meeting, and he was only tasked by the management of the respondent to try and resolve the matter in the meeting on that day.

[29] What actually happened in the meeting on 29 April 2014 is the only realm of disputed evidence in this case. I was presented with a purported minute of the discussion on 29 April 2014, prepared by Johan. The applicant disputed several parts of what is contained in the minute. But in the end, what clearly emerged from the discussion on 29 April 2014 is that the respondent considered that due to 'cosmetic circumstances' and the fact that one could only understand '70 to 80%' of what he was saying, the applicant could not return to work. The reason given was that these circumstances meant he was not capable of fulfilling his duties, in full.

[30] According to Johan, the parties then agreed that the applicant's contract of employment be terminated. The applicant, and Van Der Walt who was present in the meeting, disputed that such an agreement was ever concluded. I, however, do not believe that any such agreement was ever concluded, for the reasons I will elaborate on more fully later in this judgment.

[31] The upshot of the meeting on 29 April 2014 was that the applicant was left in limbo, so to speak. According to the respondent he could not come back to work and it considered the matter, as recorded by Johan in his minute of 29 April 2014, to be 'closed'. But the respondent never actually went about dismissing the applicant by way of notice or even simply informing him his employment was terminated. The respondent, in effect, simply adopted the position the applicant cannot come back to work and left matters there.

[32] The applicant then sought legal assistance. On 19 May 2016, Graham Damant from the attorneys' firm Bowman Gilfillan (the applicant's current attorneys of record) sent an e-mail to both Mohamed and Riaz, recording that the applicant had been tendering services as from 26 February 2014, and had still not been allowed to resume his duties. It was confirmed in this e-mail that the applicant was able to resume his normal duties, and wanted to do so. Payment of the applicant's salary from 26 February 2014 to end April 2014 was demanded. The applicant's tender to return to work was repeated. Once again, no response was received from the respondent.

[33] As a result, the applicant then referred an unfair labour practice dispute to the CCMA on 3 June 2016. The unfair labour practice was described in the referral as an unfair suspension, based on a case that the applicant has not been dismissed, but nonetheless had not been allowed to return to work by the respondent.

[34] It, subsequent to this referral, further came to the attention of the applicant that the respondent had given instructions to the provident fund administrators to withdraw his benefits, an issue the applicant then challenged in an e-mail by his attorneys on 12 June 2014.

[35] The unfair labour practice dispute was set down in the CCMA on 23 June 2014. On that day, the CCMA issued a ruling to the effect that as the dispute was referred late to the CCMA, without an application for condonation, the CCMA had no jurisdiction to entertain the matter. The applicant left the matter there, and did not pursue the unfair labour practice dispute further by seeking to file a condonation application.

[36] On 3 July 2014, the applicant then referred a discrimination dispute to the CCMA in terms of Section 10 of the EEA. The CCMA conciliated this dispute on 22 July 2016, unsuccessfully, and issued a certificate of failure to settle on that date. The applicant's Labour Court statement of claim, as referred to above, then followed.

Was the applicant discriminated against by the respondent?

[37] On the evidence, it is untenable that as a result of the applicant's attempted suicide, his face was left disfigured, and he now had a speech impediment as a result of physical damage cause to his mouth and jaw. These are permanent conditions. These disabilities are also apparent to any third party observer.

[38] In my view, the injuries suffered by the applicant and the consequent effect thereof left the applicant with a disability as contemplated by the EEA, which defines[2] 'people with disabilities' as meaning '… people who have a long-term or recurring physical or mental impairment which substantially limits their prospects of entry into, or advancement in, employment'. In the Code of Good Practice on employment of people with disabilities published in terms of the EEA[3] ('the Code'), it is reflected that the scope of protection for persons with disabilities in employment focuses on the effect of a disability on the person in relation to the working environment**,** and not on the diagnosis or the impairment per se. The Code defines persons with disabilities as being persons that:

> '(a) have a physical or mental impairment;
> (b) which is long term or recurring; and
> (c) which substantially limits their prospects of entry into, or advancement in employment.'

[39] As to the meaning of "impairment', the Code[4] says that an impairment may be either be physical or mental or a combination of both, and that a 'physical'

[2] In Section 1 of the EEA.
[3] First published under GN 1345 in *Government Gazette* 23702 of 19 August 2002, and subsequently amended by way of GN 1085 in *Government Gazette* 39383 of 9 November 2015.
[4] Para 5.3.1.

impairment means a partial or total loss of a bodily function or part of the body. As to the impairment being long term, the Code[5] provides that 'long-term' means the impairment has lasted or is likely to persist for at least twelve months. As to the final consideration of 'substantially limiting', the Code[6] provides that this exists where the impairment is in its nature, duration or effect such so as to substantially limit the person's ability to perform the essential functions of the job.

[40] The applicant is not relying on any mental impairment, and the evidence in fact was that he was mentally fit and able in all respects. In this instance, the applicant has suffered what can be considered be a loss of part of his body, considering the disfigurement of his facial features. Further, he has a clear speech impairment, with speech being a bodily function. There can be no doubt that this condition is permanent. Finally, as to the issue of 'substantially limiting', the very basis of the respondent's case and why the applicant was not allowed to resume his normal duties was because the respondent considered this impairment to be substantially limiting the applicant's ability to do his job. It is clear that what lies at the foundation of this case is the disability which the applicant now has following his attempted suicide.

[41] In *Standard Bank of SA v Commission for Conciliation, Mediation and Arbitration and Others*[7] the Court dealt with a situation where the employee sustained injuries in a motor accident, and this resulted in fibromyalgia, which was a long-term physical impairment which indeed impacted her ability to do the work she was employed for. The Court accepted that this was a disability as contemplated by the EEA.[8] Accepting for the moment the respondent's version of events, the current matter now before me would on the same basis be a disability on the part of the applicant as contemplated by the EEA. As the Court said in *Standard Bank*:[9]

> '… Defining disability in relation to employment shifts the focus from the diagnosis of the disability to its effect on both the employee's ability to work and to find work.

[5] Para 5.3.2.
[6] Para 5.3.3.
[7] (2008) 29 ILJ 1239 (LC).
[8] At para 14.
[9] Id at paras 68 – 69.

> This enquiry is usually factual but can become legal if interpretation disputes arise. To cast the interpretive net widely, Australia and Canada define 'disability' to include respectively 'imputed' and 'perceived' impairment. The Supreme Court of Canada found that a gardener and a policeman to whom the City of Montreal had refused employment merely because of a handicap deserved protection against discrimination. Their handicap was an anomaly of the spinal column which did not prevent them from performing their normal duties. If disability is interpreted restrictively rather than purposively the entire purpose of preventing discrimination may be thwarted. For instance, if a severely myopic job applicant who is refused a job as a pilot is considered not to have a disability because she corrects her sight with spectacles, or if a diabetic is not a person with disabilities because he mitigates his condition with medication, the protection against discrimination will be lost to many disabled people.'

[42] The simple point is that where it comes to protection against discrimination in the case of a disability, it is of little relevance what the employee may think about his or her ability to fulfil the obligations and duties of the position. It is about what the employer perceives the disability to cause. Once the employer thinks that because an employee had a disability and this disability impacts on the employee's ability to do the job, the discrimination protection against people with disabilities must apply. As stated, there is no doubt that the respondent thinks that the applicant's disability would impact on his job. This means that this matter must be decided on the basis of this disability and the protections associated with it.

[43] Therefore, and accepting that the applicant has a disability as contemplated by the EEA, what was then done to him by the respondent as a result of this disability? The simple answer is that he was not allowed to return to work and his salary payment was stopped as a result. The respondent has made it clear that the only reason why it refused to allow the applicant to return to work was because he was 'cosmetically unacceptable' and his speech impediment made it hard to understand him. This conduct of the respondent is thus directly motivated by the applicant's disability.

[44] There was never any doubt that the applicant was mentally and physically fit and able to work, and since 26 February 2014 consistently tendered service. The applicant was adamant he wanted to work, and at least until 12 March 2014 the respondent indicated it wanted the applicant back as soon as he recovered. It is rather sad that when the time came for the applicant to come back to work, the respondent then did such a turnaround. It would seem the respondent was being nothing else but hypocritical when seeking to assure the applicant that he was welcome back at any time. This further confirms that happened to the applicant was squarely founded on his new disability.

[45] In terms of Section 6(1) of the EEA:

> 'No person may unfairly discriminate, directly or indirectly, against an employee, in any employment policy or practice, on one or more grounds, including race, gender, sex, pregnancy, marital status, family responsibility, ethnic or social origin, colour, sexual orientation, age, disability, religion, HIV status, conscience, belief, political opinion, culture, language, birth or on any other arbitrary ground.' (emphasis added)

Discrimination based on disability is thus a directly listed ground.

[46] The discrimination must take place or exist in the context of an employment policy or practice, which is defined in the EEA as follows:[10]

> ''employment policy or practice' includes, but is not limited to-
> *(a)* recruitment procedures, advertising and selection criteria;
> *(b)* appointments and the appointment process;
> *(c)* job classification and grading;
> *(d)* remuneration, employment benefits and terms and conditions of employment;
> *(e)* job assignments;
> *(f)* the working environment and facilities;
> *(g)* training and development;
> *(h)* performance evaluation systems;
> *(i)* promotion;
> *(j)* transfer;
> *(k)* demotion;

[10] Section 1.

(l) disciplinary measures other than dismissal; and

(m) dismissal.'

[47] In the current instance, it appears that the respondent's approach was in effect one of avoiding coming to grips with the difficulty it had with the applicant's disability. It did not want the applicant back at work, but equally did not want to deal with the issue of the applicant's continued employment. It encouraged the applicant to pursue a fraudulent disability claim, which the applicant was not up for. It repeatedly asked for medical reports, which were provided. The respondent suggested the applicant was not able to fulfil his normal job functions, but implemented no process in order to assess whether this was in fact so and then determine the issue of continuing of the employment relationship. It was only due to the applicant's persistence in continuing tendering services that the respondent even engaged the applicant. And then, right at the end on 29 April 2014, the respondent tried to procure an agreed separation with the applicant, which did not come to pass. Added to this, and from end November 2013, the applicant had not been receiving a salary.

[48] The manner in which the respondent dealt with this matter in nothing else but unacceptable. The moment when the applicant tendered service, the respondent should have accepted him back into service. If the respondent believed that the applicant was substantially impaired from doing his job because he was 'cosmetically unacceptable' and had a speech impediment, it needed to deal with this either by way of incapacity proceedings or conducting the kind of enquiry envisaged by the EEA as will be elaborated on hereunder. But first the applicant should have been allowed to report for work, and then return to work.

[49] The respondent could not adopt the approach of simply refusing the applicant's tender to return to work, especially after informing the applicant, in writing no less, that he was free to came back to work when he recovered from his injuries. The respondent's conduct was tantamount to a repudiation of the applicant's contract of employment, which was at that time still in existence. In

National Union of Metalworkers of South Africa and Others v Abancedisi Labour Services[11] the Court said the following:

> 'A refusal to allow an employee to do the work he was engaged to do may constitute a wrongful repudiation and a fundamental breach of the employment contract which vests the employee with an election to stand by the contract or terminate it. Here, Abancedisi did not just leave the employees to languish in idleness after their exclusion from Kitsanker. It also did not pay them wages. Thereafter, nothing even slightly resembling the characteristics of an employment relationship remained between the parties ….'

[50] The point I make is that the respondent, by way of its conduct, effectively terminated the employment of the applicant. Now it is so that the applicant in its statement of claim and in terms of the case it brought to Court did not rely on the fact that the applicant was dismissed, *per se*. But not attaching this particular 'dismissal' label to the case is not that important, considering that the statement of case specifically records that one of the grounds of the applicant's unfair discrimination case is that the applicant was not allowed to return to work, which case is echoed in the pre-trial minute. Failing to allow the applicant to return to work, in the circumstances of this matter, is tantamount to termination of employment.

[51] In Section 1 of the EEA, 'dismissal' is defined as having the meaning assigned to it in Section 186 of the LRA. Section 186(1)(a) of the LRA in turn defines a dismissal as being where 'an employer has terminated a contract of employment with or without notice'. As stated above, no notice of termination emanated from the respondent. In *Trio Glass t/a The Glass Group v Molapo NO and Others*[12] the Court dealt with a situation where an employee on the evidence was never informed that she had been dismissed, and said:

> '… by definition the existence of a dismissal can be established by conduct. An objective assessment of the evidence must be made in order to establish whether the conduct of the employer is such as to establish a termination of the employment contract, be it with or without notice. …'

[11] [2013] 12 BLLR 1185 (SCA) at para 15.
[12] (2013) 34 ILJ 2662 (LC) at para 36. See also *Ismail v B & B t/a Harvey World Travel Northcliff* (2014) 35 ILJ 696 (LC) at paras 27 – 28.

Similarly, the Court in *Ouwehand v Hout Bay Fishing Industries*[13] referred specifically to Section 186(1)(a) and held that:

> 'This formulation would appear to contemplate that the employer party to the contract of employment undertakes an action that leads to the termination. In other words, some initiative undertaken by the employer must be established, which has the consequence of terminating the contract, whether or not the employer has given notice of an intention to do so.'

Finally and in *Marneweck v SEESA Ltd*[14] the Court said:

> '… as a matter of principle, an employment contract can be regarded as terminated based on the objective construction of the employer's conduct which unequivocally repudiates the contract.'

[52] Of application *in casu* is the following *dictum* from the judgment in *Heath v A & N Paneelkloppers*[15]:

> '… Where the employer conducts itself in such a fashion that has the cause of bringing the employment relationship to an end, it must equally be considered to be a dismissal.'

In evaluating whether such conduct existed, the Court then held:[16]

> '… the question to answer is whether there were some overt actions by the respondent as employer that were the proximate cause of such termination of employment of the applicant on 1 February 2012. The applicant has the onus to show this. In answering this question, regard must not just be had to what happened on that day, but all the circumstances leading up to the events on that day must also be considered. In short, did the respondent seek to repudiate the employment contract …'

[13] (2004) 25 *ILJ* 731 (LC) at para 14
[14] (2009) 30 *ILJ* 2745 (LC) at para 31.
[15] (2015) 36 ILJ 1301 (LC) at para 31.
[16] Id at para 33.

[53] In summary, and based on what I have set out above, I have little hesitation in concluding that the conduct of the respondent, considered as a whole, was of the nature that seeks to bring about the termination of the employment relationship, and is certainly a repudiation of the employment contract of the applicant. This conduct includes representing to the applicant that he was welcome to return to work when this was in reality not the case, refusing his tender of work when it was first made, seeking to persuade him to pursue a disability claim, telling him that he is 'cosmetically unacceptable' and his presence traumatizes the other employees, informing him that he unable to do his 'full work' without conducting any process to determine this, and suggesting that he leave whilst ignoring the medical reports that the applicant was fit to work, and finally seeking to negotiate his exit. The applicant was entitled to consider the employment relationship as terminated, which he ultimately did by the time this matter came to trial.

[54] Therefore, and based on what is set out above, the employment practice context within which the respondent discriminated against the applicant is one of dismissal. In addition, and after 26 February 2014, it is also in the context of an employment practice relating to remuneration, as the applicant was not being paid. Finally, and because the definition of an employment practice in the EEA also includes unlisted grounds, I consider that the approach adopted by the respondent in dealing with the applicant's disability, *per se*, to be discrimination in the context of an employment practice. In the end, there can be no doubt that discrimination in the context of an employment practice was committed by the respondent towards the applicant.

[55] Once discrimination in an employment practice is found to exist, the next enquiry is whether that discrimination is unfair. This question must be considered against the backdrop of certain fundamental principles. In *Standard Bank*[17] the Court said:

> '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. Unemployment, lower wages, poorer working conditions and barriers to

[17] (*supra*) at para 61.

promotion plague people with disabilities here and abroad. Their employment rate is less than a third of the general population. Many employers tend to exclude and marginalize employees with disabilities not merely because the disability impairs the employee's suitability for employment, but also because the employer regards the disability as an abnormality or flaw. When the attitude that disability is the problem of the disabled individual, not society, that the workplace is hazardous for disabled people and that they need to be looked after combines with paternalism, charitableness, ignorance and misinformation about disabilities, the result is that more disabled people are dismissed than accommodated. Some employers may find it more convenient to budget for a disability dismissal than to attempt to accommodate an employee. When these attitudes feature in decisions about people with disabilities, they can obscure innate prejudice, stereotyping and stigma. Able people are more inclined to bear such attitudes than disabled people.'

[56] Following on, and in *SA Airways (Pty) Ltd v Jansen van Vuuren and Another*[18] the Court said:

'Two of the main objects of the EEA are to promote and protect the employee's constitutional rights to equality and dignity and to eliminate unfair discrimination in employment. In terms of s 5 of the EEA, every employer is obliged to promote equal opportunity in the workplace and to eliminate any unfair discrimination in any employment policy or practice.'

The Court further held:[19]

'What is clear is that in considering the issue of fairness under the EEA, the position and interests of the employee and employer must be considered and balanced, and that the objectives of the EEA must be the guiding light in applying a value judgment to established facts and circumstances. The determining factor, however, is the impact of the discrimination on the victim.

Unlike in the case of an equality analysis under s 9 of the Constitution which also allows for a further step, namely a justification analysis in terms of s 36 where one is dealing with the law of general application, the EEA does not allow for justification of unfair discrimination. Its language is clearly prohibitive.

[18] (2014) 35 ILJ 2774 (LAC) at para 28.
[19] Id at paras 44 – 45.

> Section 6(2) does not contain justifications for unfair discrimination. The Act provides that it would not be unfair discrimination to take affirmative measures consistent with the purposes of the EEA or to distinguish, exclude or prefer any person on the basis of an inherent requirement of a job. They are complete defences to an allegation of unfair discrimination. In s 11, the EEA recognizes that there may be considerations other than those specifically referred to in s 6(2) which may render discrimination fair.'

Because the EEA does not allow for justification of discrimination, it is thus critical to decide whether such discrimination would be fair or unfair, and as to how this must be done, the Court concluded:[20]

> 'The employer has an onus to establish fairness on a balance of probabilities. An enquiry into fairness contemplated in the EEA will necessarily involve more than a consideration of the moral issues and the impact of the discriminatory action on the complainant. It will also include a consideration and require a balancing of the defences raised by the employer for the discrimination as well as issues such as proportionality of the measure, the nature of the complainant's right that he alleges has been infringed, the nature and purpose of the discriminatory measure, and the relation between the measure and its purpose.
>
> Since the onus is upon the employer to prove the fairness of the discriminatory measure, it would be incumbent upon it to ensure that all the necessary material and evidence is before the court in order to enable it to make a finding of fairness. As stated earlier, the onus is only discharged if fairness is found on a balance of all the relevant factors and evidence. …'

[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. I shall however give the respondent the benefit of the doubt and decide this matter on the basis that what the respondent was saying is that it acted fairly in refusing to allow the applicant not to return to work.

[20] Id at paras 46 – 47.

[58] The respondent contended that because of his speech impediment, which made it difficult to understand the applicant, the applicant was not able to 'fully' do his job. Assuming for the purposes of argument that the respondent's concerns in this regard, at least on a *prima facie* basis, may have been justified, the fact is that the respondent presented no evidence and conducted no process to justify or even remotely substantiate this point of view. What the respondent needed to do was to have conducted a proper incapacity investigation into what consequences this speech impediment would have on the applicant's ability to discharge his duties. The respondent needed to properly and objectively assess to what extent the applicant's ability to interact with fellow employees or suppliers was impacted upon (the applicant had little dealings with customers). Further, and if there was an impact, it needed to be explored how the applicant could possibly be accommodated. But what the respondent did was to simply assume that disability automatically equates to incapacity, which is not so. As the Court said in *Standard Bank*:[21]

> '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[22], which reads as follows:

> 'Employers must reasonably accommodate the needs of persons 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. …
>
> The employer must consult the employee, and where reasonable and by agreement with the employee, acquire the services of technical experts to establish appropriate mechanisms to accommodate the employee.'

[21] (*supra*) at para 94.
[22] Paras 6.1 and 6.6.

[60] The applicant was adamant that his speech impediment did not stand in the way of him doing his job. As I have said above, other than general statements by Mohamed and Johan, the only witnesses for the respondent, that they had difficulty understanding the applicant, there respondent did not present proper evidence to counter what the applicant believed to be the case. Johan did not even have day to day dealings with the applicant, and only came into the case at the end when facilitating one meeting. I also find it strange that no one from the senior management of the respondent came to testify to justify the respondent's views, such as Riaz, or Abdul or even the applicant's immediate superior, Ahmed. As I said earlier in this judgment, I observed the applicant and listened to him testifying. It is so that his speech on occasion was laboured and not entirely clear, but overall I had little difficulty in understanding him. From my own observations, I do not believe that the applicant's speech impediment is such so as to stand in the way of him fully discharging his duties, with minimal accommodation on the part of the respondent.

[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 *Standard Bank*[23], 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. The process should be interactive, a dialogue, an investigation of alternatives conducted with a give and take attitude. Outright refusal to accommodate shows a degree of inflexibility contrary to the spirit and purpose of the duty to accommodate.

[23] (*supra*) at paras 91 – 92.

> Finding an accommodation and proving it to be reasonable is an onus resting on the employer. So is the onus of proving that a reasonable accommodation is unjustifiable. For her part, an employee with disabilities must prove that an accommodation that she proposes is reasonable on the face of it. She must also accept a reasonable accommodation and facilitate its implementation, even if it is a less than perfect or preferred solution.'

I cannot agree more. Applying this *dictum* in the current matter before me, there was no proper interactive dialogue, simply because of the attitude the respondent adopted. The respondent seemed to completely ignore the medical reports the applicant provided to it.[24] The respondent simply outright refused any accommodation of the applicant, without any basis for doing so. As far the applicant's participation in the inquiry is concerned (if the meetings with the respondent can even be seen as some sort of inquiry), he was adamant he could work as normal and in effect asked the respondent to allow him to establish this by being allowed to work, which is a more than reasonable accommodation on his part. Finally, it was clear that it was the applicant, and not the respondent, that was driving the process to facilitate his return to work. What the respondent did, where it came to issue of accommodation and conducting a process to consider it, was in my view completely unfair.

[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[25] where it is stated:

> 'The employer need not accommodate a qualified applicant or an employee with a disability if this would impose an unjustifiable hardship on the business of the employer.
>
> 'Unjustifiable hardship' is action that requires significant or considerable difficulty or expense. This involves considering, amongst other things, the

[24] There was one medical report by Dr I Munshelele dated 18 February 2014 that recorded that the applicant could not perform his duties like he used to. I however attach little value to this report, as it appeared to be part of the aborted disability claim and was overtaken to several medical reports to the contrary from medical practitioners still actively treating the applicant.
[25] Paras 6.11 and 6.12.

> effectiveness of the accommodation and the extent to which it would seriously disrupt the operation of the business.'

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

[64] If the applicant, once he started working, is then found not to be able to perform or fulfil his duties to the 'full' extent as was concerning to the respondent, then the respondent could simply subject the applicant to incapacity proceedings under the LRA, and if needs be, then terminate his services. Such an approach would allow the applicant to be effectively accommodated, with very little downside for the respondent. There can be no unjustifiable hardship for the respondent in this. But by simply refusing to allow the applicant to return to work and then not even dealing with him, causes the applicant substantial hardship. He is not being paid whilst all this labours on. He is prevented from working and earning an income when he clearly wants to do this. The applicant testified that it was very important to him to return to a normal daily life prior to the unfortunate events, and working was a critical component of this. In *Standard Bank*, the Court held:[26]

> '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 to the applicant cannot be considered to be fair.

[26] Id at para 98.

[65] The respondent also tried to establish some or other hardship based on the applicant's facial features. The respondent suggested that it traumatized the applicant's fellow employees. There was no evidence to justify this suggestion. Both Johan and Mahomed, the only witnesses to testify for the respondent, stated that they had no concerns about the applicant's facial features. It remains a complete mystery to me why the respondent, on several occasions, would describe the applicant as 'cosmetically unacceptable'. I, in any event, find such an approach to be appalling. To in effect exclude the applicant from working because of how he looked, especially considering he was not employed as a runway model for a fashion house, is simply inexplicable. I consider any reliance by the respondent on the concept of the applicant being 'cosmetically unacceptable' to be patently unfair.

[66] In the end, the respondent had a duty to accommodate the applicant, where it believed that his disability would impact on his ability to do his normal work. It failed to discharge this duty. Added to that, it was clear that the respondent actively sought to encourage the applicant to leave. It did this by suggesting that he make a disability claim, and then, in April 2014, saying that as far as the respondent was concerned he was not able to work and he was wished well for his future. I am once again compelled to refer to *Standard Bank*, where the Court said:[27]

> 'The bank's duty to accommodate stems from its overriding obligation not to discriminate. Quite simply, the bank had a legal obligation to accommodate Ferreira to ensure that she could continue to work. It also bore a reverse onus of ensuring that it did not compel Ferreira or encourage her to terminate her employment. …'

The exact same considerations apply *in casu*, and equally, the respondent acted in breach of the same.

[67] A final consideration remains. The respondent sought to suggest, when presenting its case in Court that the applicant had agreed in the meeting on 29 April 2014 to the termination of his employment. There is an immediate

[27] (*supra*) at para 113.

obstacle in the way of seeking to advance such a case, being that the case was never pleaded. As was said in *Imprefed (Pty) Ltd v National Transport Commission*[28]:

> 'At the outset it need hardly be stressed that:
> "The whole purpose of pleadings is to bring clearly to the notice of the Court and the parties to an action the issues upon which reliance is to be placed." (*Durbach v Fairway Hotel Ltd* 1949 (3) SA 1081 (SR) 1082.)
>
> This fundamental principle is similarly stressed in Odgers' "*Principles of Pleading and Practice in Civil Actions in the High Court of Justice*" (22nd ed) 113:
> "The object of pleading is to ascertain definitely what is the question at issue between the parties; and this object can only be attained when each party states his case with precision.'

The Court further held:[29]

> '…. Particularly in this context, it goes without saying that a pleading ought not to be positively misleading by referring explicitly to certain clauses of the contract as identifying the cause of action when another is intended or will at some later stage-in this case at the last possible moment-be relied upon. As it was put by Milne J in *Kali v Incorporated General Insurances Ltd* 1976 (2) SA 179 (D) at 182A:
> ". . .a pleader cannot be allowed to direct the attention of the other party to one issue and then, at the trial, attempt to canvass another."'

[68] In the end, the following dictum in *Knox D'Arcy AG and another v Land and Agricultural Development Bank of South Africa*[30] is directly applicable *in casu*:

> 'It is trite that litigants must plead material facts relied upon as a basis for the relief sought and define the issues in their pleadings to enable the parties to the action to know what case they have to meet. And a party may not plead

[28] [1993] 2 All SA 179 (A) at 188.
[29] Id at 189.
[30] [2013] 3 All SA 404 (SCA) at para 35. See also *Naidoo v Minister of Police and Others* [2015] 4 All SA 609 (SCA) at para 30; *Minister of Safety and Security v Slabbert* [2010] 2 All SA 474 (SCA) at para 11.

> one issue and then at the trial, … attempt to canvass another which was not put in issue and fully investigated. …'

[69] Because the respondent did not plead such a case, it should not be even be considered. But even if this case is considered, it has no merit. What the evidence revealed is that in the meeting of 29 April 2014, and when faced with the *fait accompli* that the respondent did not want him back, the applicant was willing to consider an agreed separation, with the *proviso* that the parties could reach consensus on an appropriate separation package. Johan testified that he had no mandate to agree to a settlement amount, and had to take any proposal back to the respondent's management. According to Johan, the respondent was unwilling to agree to the package the applicant wanted. It is clear that no agreement came about. Johan disingenuously suggested that because the applicant was willing to terminate his employment with the respondent, it constituted an agreement to terminate employment, even if the parties could not agree on a settlement amount. Such a contention is preposterous. An agreement cannot come about unless the parties agree on all of its terms. Clearly, the *quid pro quo* for an agreed termination was an agreed settlement package. The one cannot exist without the other. No agreement came about.

[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.

<u>The issue of relief</u>

[71] Considering that the applicant was indeed unfairly discriminated against by the respondent, this Court has the following powers, in terms of Section 50(2) of the EEA:

> 'If the Labour Court decides that an employee has been unfairly discriminated against, the Court may make any appropriate order that is just and equitable in the circumstances, including-
> *(a)* payment of compensation by the employer to that employee;
> *(b)* payment of damages by the employer to that employee …'

[72] As referred to above, the applicant is seeking payment of his salary from 26 February 2014 until 10 December 2018, as relief for the unfair discrimination committed towards him. The date of 10 December 2018 would have been the applicant's normal retirement age. Is this claim competent?

[73] In *SA Airways*[31] the Court held:

> '…The EEA draws a distinction between 'compensation' and 'damages', and does not regard them as the same.
>
> … The intention must have been that they connote different kinds of award. In my view, the only rational meaning that can be given to the terms is that 'damages' connotes a monetary award for patrimonial loss and 'compensation' connotes a monetary award for non-patrimonial loss (including a 'solatium').'

The Court concluded:[32]

> 'In the EEA, 'damages' refer to an actual or potential monetary loss (ie patrimonial loss) and 'compensation' refers to the award of an amount as a solatium (ie to non-patrimonial loss). It is conceivable that cases of unfair discrimination may involve actual (or patrimonial) loss for the claimant, as well as injured feelings (or non-patrimonial loss).
>
> Thus, an award for damages in respect of the patrimonial loss and a compensation award for the injured feelings may, depending on the facts and circumstances of the case, be justified. It is a matter for the discretion of the Labour Court, which discretion must be exercised in the light of all the relevant facts and circumstances. Most importantly, as provided in s 50(1) of the EEA, the order must be 'appropriate' and in terms of s 50(2) must be 'appropriate' and 'just and equitable in the circumstances'. Interpreting s 38 of the

[31] (*supra*) at paras 75 – 76.
[32] Id at paras 78 – 80

> Constitution in the *Hoffmann* matter, the Constitutional Court held that the term 'appropriate relief', as used in that section, must be purposively interpreted in the light of s 172(1)*(b)* of the Constitution and that it meant that the relief must be 'fair and just in the circumstances of the particular case'.
>
> The purpose of an award of damages for patrimonial loss by means of a monetary award, is to place the claimant in the financial position he or she would have been in had he, or she, not been unfairly discriminated against. This is the common purpose of an award of damages for patrimonial loss in terms of the South African law in both the fields of delict and contract. In the case of compensation for non-patrimonial loss, the purpose is not to place the person in a position he or she would have otherwise been in, but for the unfair discrimination, since that is impossible, but to assuage by means of monetary compensation, as far as money can do so, the insult, humiliation and indignity or hurt that was suffered by the claimant as a result of the unfair discrimination.'

[74] The applicant did not indicate in his statement of case whether his claim of salary is based on a claim for damages or compensation, or both. The claim certainly has a component of patrimonial loss, being salary not earned as a result of the unfair discrimination. But then the applicant also pleaded and presented evidence to the effect that be was humiliated and hurt as a result of the conduct of the respondent towards him, especially considering that the respondent initially told him that he was welcome back at work whenever he was ready. I will however accept that the applicant is claiming both damages and compensation. The damages claim would the claim to make good the patrimonial loss suffered as a result of the unfair discrimination and would span the period from 26 February 2014 to at least the end of August 2016 when this matter was heard. The compensation part of the claim would be a *solatium* for the humiliation and hurt suffered as a result of the unfair discrimination, and would account for the period until 10 December 2018.

[75] In deciding an appropriate quantum to be awarded for either damages, or compensation, or both, I have to exercise a discretion which has at its

foundation the overriding consideration of any award having to be fair to both parties.[33] In *SA Airways*[34] the Court said the following:

> 'In *Hoffmann* it was held that 'fairness' in a labour context requires a consideration of the interests of both the employee and the employer as well as the interest of the community which resides in the recognition of the inherent dignity of all human beings and the eradication and prevention of all forms of discrimination. Moreover, the determination of appropriate relief in unfair discrimination cases calls for the balancing of all the interests that will be affected by the remedy. The same considerations will apply when the court has to decide on an appropriate remedy in an unfair discrimination matter which is to be determined in terms of the EEA.'

[76] In *Christian v Colliers Properties*[35] the Court considered Section 50 of the EEA and held:

> 'Section 50(1) of the Equity Employment Act requires the court to make an order which is appropriate. The determination of appropriate relief requires that the court duly consider various interests, including the need to redress the wrong caused by the infringement, the deterrence of future violations, the dispensation of justice which is fair to all those who might be affected, and the necessity of ensuring that the order can be complied with. …'

The Court then specifically considered the awarding of compensation, and concluded:[36]

> 'In the assessment of damages for compensation resulting from unfair discrimination, useful guidance is to be found in the case of *Alexander v Home Office* (1988) IRLR 190 (CA), where the court said the following:
> 'The objective of an award for unlawful racial discrimination is restitution. For the injury to feelings, for the humiliation, for the insult, it is impossible to say what is restitution and the answer must depend on the experience and good sense of the judge and his assessors. Awards should not be minimal, because

[33] See *Kemp t/a Centralmed v Rawlins* (2009) 30 *ILJ* 2677 (LAC) at para 27 where it was said: '…. The court has to consider all the relevant circumstances and make such order as it deems fair to both parties in the light of everything ...'.
[34] (*supra*) at para 81.
[35] (2005) 26 ILJ 234 (LC) at 240E-G.
[36] Id at 240G – 241B.

this would tend to trivialise or diminish respect for the public policy to which the Act gives effect. On the other hand, just because it is impossible to assess the monetary value of injured feelings, awards should be restrained. To award sums which are generally felt to be excessive does almost as much harm to the policy and the result which it seeks as do nominal awards.'

Our courts should strive to achieve this balance. On the one hand, awards should give effect to the qualities and purposes which underlie the anti-discriminatory measures in the Employment Equity Act. An award should be sufficiently high to deter the defendant and other persons from similar behaviour in the future - *Buthelezi v Poorter* 1975 (4) SA 608 (W) at 617. On the other hand, awards should not be so exorbitant or excessive that they induce a sense of shock, or lead to a situation where even litigants who have suffered minor consequences as a result of unfair discrimination reap financial benefits far in excess of what could, in any normal economic sense, be regarded as their loss. There is good reason for the conservative approach traditionally adopted by our courts …'

[77] Where the unfair discrimination is connected with a termination of employment, there is also a punitive component to an award of compensation that needs to be considered.[37] In *Chemical Energy Paper Printing Wood and Allied Workers Union and Another v Glass and Aluminium 2000 CC*[38] the Court specifically dealt with the issue of the award of compensation in the case of an automatic unfair dismissal in terms of Section 187 of the LRA and said the following:[39]

'…. It is a dismissal that undermines the fundamental values that the labour relations community in our country depends on to regulate its very existence. Accordingly such a dismissal deserves to be dealt with in a manner that gives due weight to the seriousness of the unfairness to which the employee so dismissed has been subjected.

[37] See *Heath* (supra) at para 71; *Naude v Member of the Executive Council, Department of Health, Mpumalanga* (2009) 30 *ILJ* 910 (LC) at para 113; *Allpass v Mooikloof Estates (Pty) Ltd t/a Mooikloof Equestrian Centre* (2011) 32 *ILJ* 1637 (LC) at para 77; *University of South Africa v Reynhardt* (2010) 31 *ILJ* 2368 (LAC) at para 14 and the Court a quo judgment in *Reynhardt v University of South Africa* (2008) 29 *ILJ* 725 (LC) at para 145; *Viney v Barnard Jacobs Mellet Securities (Pty) Ltd* (2008) 29 *ILJ* 1564 (LC) at paras 81–82.
[38] (2002) 23 *ILJ* 695 (LAC).
[39] Id at paras 48–49. The Court at para 50 also set out some of the factors that have to be considered in exercising the discretion in determining the quantum of compensation.

> In considering whether or not to award compensation in such a case, the court must consider that not to award any compensation at all where reinstatement is also not awarded may give rise to the perception that dismissal for such a reason is being condoned. This may encourage other employers to do the same. It must also take into account the fact that such a dismissal is viewed as the most egregious under the Act. Accordingly, there must be a punitive element in the consideration of compensation.'

[78] The Court in *ARB Electrical Wholesalers (Pty) Ltd v Hibbert*[40] said:

> '… The determination of the quantum of compensation is limited to what is 'just and equitable'. The determination of what is 'just and equitable' compensation in terms of the LRA is a difficult horse to ride.

The Court then held that the following principles should be used as a guideline in deciding appropriate compensation to be awarded:[41]

> 'the nature and seriousness of the injuria, the circumstances in which the infringement took place, the behaviour of the defendant (especially whether the motive was honourable or malicious), the extent of the plaintiff's humiliation or distress, the abuse of a relationship between the parties, and the attitude of the defendant after the injuria had taken place'.

[79] Applying all the above considerations, I accept that the respondent was actually *mala fide*. It made the applicant a promise of being able to return to work which it did not intend to keep. The respondent ignored the applicant's personal circumstances by behaving in a manner that was completely insensitive. The only good thing the respondent in the end did was to give the applicant a loan of R80 000.00. But the moment the applicant's leave and sick leave ran out, his salary stopped. The applicant did all he could to facilitate his return to work, but the respondent kept shifting the goal post. But, and worse still, the respondent called the applicant 'cosmetically unacceptable' and used this as a basis for preventing him from returning to work. The respondent

[40] (2015) 36 ILJ 2989 (LAC) at para 24.
[41] Id at paras 24 – 25. The Court was quoting from the judgment in *Minister of Justice and Constitutional Development and Another v Tshishonga (Tshishonga)* (2009) 30 *ILJ* 1799 (LAC) at para 18.

sought to justify its behaviour in a manner that had no substance, especially considering that there was no process applied to determine the applicant's alleged incapacity and no attempt made to accommodate him. And all of this happened in circumstances where the applicant was ready and willing to resume his normal work.

[80] I accept that the applicant was hurt and humiliated as a result of the treatment meted out to him by the respondent. The respondent did its level best to have the applicant leave employment, but without the actual step of terminating the employment of the applicant itself. But in the end, the respondent did repudiate the contract of employment of the applicant, and this also brings the punitive component associated with dismissals into play. I also consider that the applicant was employed by the respondent for close on nine years when he finally left employment, and until the unfortunate event in this case, had always properly fulfilled his duties.

[81] There was no evidence of what effect a substantial compensation / damages award may have on the business of the respondent. In fact, I find it concerning that none of the senior management of the respondent even came to Court to take responsibility and testify. There appeared to have been no acknowledgement of any wrongdoing on the part of the respondent, and the attitude that if the problem is ignored, it would go away, persisted. The compensation awarded must also serve as a deterrent.

[82] Based on a consideration of all these factors as set out above, I believe that an appropriate damages award in terms Section 50(2) of the EEA is an amount equivalent to 24(twenty four) months' salary, which is comparable to the maximum compensation award for an automatic unfair dismissal in terms of Section 194(3) of the LRA. As to an appropriate award of compensation as a solatium, I consider that an additional award of 6(six) months' salary would be appropriate. Overall, in exercising by discretion, I believe this to be fair to both parties, considering what happened as a whole.

[83] Accordingly, and based on the applicant remuneration of R51 339.98, as extracted from the applicant's last normal pay slip, for a total period of

30(thirty) months, the applicant is awarded R1 540 199.40 in damages and compensation.

[84] Because the applicant initially pursued a claim that he be allowed to return to work, the payment of the applicant's provident fund has not been processed to date. The applicant has asked that that an order be given that the respondent take all the steps necessary to attend to the applicant's withdrawal from the fund, and to pay the proceeds to the applicant, as he no longer wanted to return to work.

[85] As to costs, it must be considered that the applicant was successful in showing that unfair discrimination to exist. I accept that it is appropriate that a costs order be made against the respondent as a result. Applying the broad discretion I have with regard to the issue of costs in terms of Section 162 of the LRA, I consider it fair and appropriate to award the applicant costs on the party and party scale in opposed trial proceedings, including the costs of counsel.

Order

[86] For all of the reasons as set out above, I make the following order:

1. The applicant was unfairly discriminated against by the respondent based on his disabilities.

2. The respondent is ordered to pay damages and compensation to the applicant in an amount of R1 540 199.40 (one million five hundred and fourty thousand one handed and ninety nine rand fourty cents), which amount shall be paid to the applicant by the respondent within 10(ten) days of date of handing down of this judgment.

3. The respondent is ordered to take all steps necessary and complete all documents so as to facilitate the applicant's withdrawal from the respondent's provident fund and procure payment of the applicant's proceeds from such fund to the applicant.

4. The respondent is ordered to pay the applicant's costs.

_____

S Snyman

Acting Judge of the Labour Court

Appearances:

For the Applicant:	Adv K D Iles
Instructed by:	Bowman Gilfillan Inc
For the Respondent:	Thesigan Pillay of Pillay Thesigan Inc