IN THE LABOUR COURT OF SOUTH AFRICA
HELD AT JOHANNESBURG

Reportable
Case no: JR 662/06

In the matter between:

STANDARD BANK OF SOUTH AFRICA Applicant

and

THE COMMISSION FOR CONCILIATION,
MEDIATION AND ARBITRATION First Respondent

COMMISSIONER E MYHILL N.O. Second Respondent

D FERREIRA Third Respondent

JUDGMENT

PILLAY D, J

Introduction

1. What must the biggest bank in Africa do to reasonably accommodate

an employee who injured her back in a motor collision whilst on duty? In what circumstances is the dismissal of such an employee fair? On deciding these questions the second respondent arbitrator held that the applicant, Standard Bank Ltd (the Bank), dismissed the third respondent, Deirdre Ferreira (Ferreira) unfairly and awarded her compensation of R49 936.00 being the equivalent of six months' pay. This court has to determine on review whether the arbitrator's award was reasonable.

PART A

The Nature of Ferreira's Jobs

2. Ferreira worked for the Bank for 17 years. After 15 years of a very successful career, tragedy struck. Whilst on duty on 02 February 2002, Ferreira sustained injuries in a motor accident. The injuries developed into severe back pain which was later diagnosed as fibromyalgia.

3. Before the accident, Ferreira was a mobile home loan consultant. This job entailed driving to clients and working away from the Bank's offices. The Bank allowed her to use a dedicated pool car and also gave her a cellular telephone allowance and a fax machine to use from her home.

4. After her accident, Ferreira returned to work as a consultant, but found that her physical condition was deteriorating. Dr Combrink, one of the doctors on the Bank's Corporate Health panel, recommended her for lighter work. The Bank created an administrative position in the mobile home loan consultancy (MHLC). Two months after returning to work, Ferreira started doing lighter administrative work. Lighter duties meant that she had to assist or back-up other employees in the MHLC. She started out putting new loan applications into files and passing them to

someone else to work on. At a later stage, she checked that clients filled in the loan applications correctly.

5. These jobs did not inspire or stimulate Ferreira. As an assistant to other employees, she felt that she did not have a proper job with specific things to do.[1] She went around the office asking other employees to give her work as she did not have enough to do. As a consultant, she had worked under tremendous pressure. By assigning her tasks as an assistant, the Bank made her feel incompetent and *"useless the whole time"*.[2]

6. Ferreira then moved on to confirm the income of the clients. She enjoyed this work.[3] But she had to write while she was on the telephone. This proved painful.

7. One day, she had to relieve another employee, Theresa from Optimax. Ferreira used Theresa's headset for a day or two and found that she had no problems using the telephone and writing simultaneously. Ferreira asked for a position in Optimax but as the Bank assumed that she would only be able to work half a day, it refused to create a half day position in Optimax for her.[4]

8. The Bank had fitted all the telephones with headsets in Optimax, but the headsets were incompatible with the telephone system in MHLC. Ferreira asked Amelia Cochraine, her line manager, for a headset that she could use in MHLC. After some time had passed and there was no sign that the Bank would supply her with a headset, Ferreira ascertained that the cost of the headset was R500.00. She gave

1 P328 of bundle
2 P330; 332 of bundle
3 P366 of bundle
4 P333, L8

Cochraine the quotation. Still, the Bank did not provide her with a headset. Instead, Cochraine assigned Ferreira tasks that did not require her to use a telephone.[5]

9. Ferriera taught herself to enter data onto a computer. She enjoyed this job and did well even in Chochraine's opinion. But using another person's computer password was a workplace offence. To overcome this obstacle, Ferreira took the initiative and had her own password loaded onto a computer. Cochraine instructed her not to use the computer.[6] Whether Cochraine's instruction had anything to do with the cost of installing the password being R7000,00, is unclear from the evidence because Ferreira did not testify about the costs; her representative put the costs to Cochraine in cross-examination only.

10. Cochraine and Hester Jordaan, the human resources consultant, urged Ferreira to accept a position as a switchboard operator. Ferreira declined the demotion to this position.[7] Eventually, Cochraine assigned Ferreira to shred papers, fold files, receive and despatch telefax reports and clear out the office cupboards.[8] This job hurt her.[9] After her first day at the shredder, her back hurt so much that she could hardly walk to her car.

11. Shredding involved picking up heavy boxes of paper, placing them on a table, feeding the shredder with the paper from the box, and then bending to remove the shredded paper from the machine and bag it. Although she got another employee to help her lift the boxes onto the table, she did not want to ask for more help to remove the shredded

5 P205 of bundle
6 P174 of bundle;
7 p163 of bundle
8 Para 5.1.5, p10 of bundle
9 P389 of bundle

paper even though it hurt her back[10] when she bent because she thought that if she could not do such a simple task, the Bank would consider her to be totally useless[11] and dismiss her. Already, the Bank had started describing her performance as poor.[12]

12. Shredding paper was a task that cleaners had performed previously. Folding boxes of files was repetitive.[13] By assigning her these tasks, the Bank made her feel that she was worth nothing; it impaired her self-esteem.[14]

13. On 12 October 2004 the Bank appointed her as a Home Loan Fulfilment Officer. [15] She considered this to be a vote of confidence in her, but her optimism was short-lived, for on 30 November 2004 the Bank informed her that it would dismiss her with effect from 31 December 2004 for incapacity which resulted in high absenteeism and low productivity.[16]

Disability

14. The parties acknowledged Ferreira's disability as a long term physical impairment.[17] After sustaining the injuries, she tried hard to remain in the position she held as consultant prior to the accident, but was unsuccessful. She realised that she could not retain her old job as a consultant and would not cope in a stressful environment like telesales.[18] She could not lift heavy objects, nor could she raise her

10 P335 of bundle
11P336 of bundle
12 P337 of bundle
13 Para 2.9, p411; p334 of bundle
14 P389 of bundle
15 Para 2.10, p411 of bundle
16 P39, 42 of bundle
17 Item 5 of the EEA Code
18 P365 of bundle

arms above a certain height. Therefore, working at a computer for long was painful as the keyboards were too high. Walking, sitting or standing for long was also uncomfortable. Notwithstanding her disability, Ferreira knew she could be useful to the Bank.

15. Ferreira had been a highly motivated consultant in MHLC. Shortly before her accident, she won a trip for being one of the top twelve performers in the Bank nationally.[19] As an employee with a track record cultivated over 15 years of dedicated service, the Bank knew her capabilities and commitment. Cochraine said that she never doubted that Ferreira could add value to the Bank.[20] She recognised that Ferreira was desperate to work and prove herself.[21]

16. But Ferreira's absenteeism was a problem. She was absent for 74 days in 2002, 116 days in 2003 and 59 days in 2004.[22] In addition, she seldom managed to work beyond midday. In the mornings she felt good, but as the day wore on, her condition deteriorated.[23] She often came to work in pain.

17. Even though Jordaan[24] and Cochraine saw that Ferreira was in pain, the Bank insisted on Ferreira proving her incapacity by producing medical reports, and gave her an extension of two months to comply.[25] Without the medical reports, the Bank said that it had to assess Ferreira as if she were an employee of full capacity. [26]

18. Ferreira could not get medical reports that declared her unfit for work

19 p 332, L15 of bundle
20 p172 of bundle
21 p217 of bundle
22 p 162 of bundle
23 p336 of bundle
24 p16, para 5.2.8 of bundle
25 Para 41, p 430 read with para 33, p 474 of bundle
26 Para 11.2, p470 of bundle

because she was not unfit to work. Dr Meyer reported on 5 November 2003 that Ferreira was fit for half day work and on 27 October 2004 he reported that she was unfit for normal work. Orthobond, a panel of Orthopedic surgeons, declared her to be 40% disabled in her work situation. [27] In an email dated 17 May 2004 Rene van Eck of the Bank's Corporate Health department informed Jordaan that pain itself is not sufficient to render a person disabled, that most patients with fibromyalgia are capable of working, often with job modifications and that only a few patients are eventually unable to work.[28]

19. The Principal Officer of the Bank's Group Retirement Fund, G P Stapley, informed Ferreira and Jordaan on 12 November 2004 that according to the Fund's specialist physician and cardiologist, Ferreira was not permanently incapacitated and that it would be in her best interests for her "ultimate health" to "make a special effort to continue working even though this may mean absences on some days". [29] On that basis, the Fund declined Ferreira's application for early retirement.

20. Despite these reports, and notwithstanding her obvious disability which the Bank acknowledged, and the resultant absenteeism, the Bank evaluated Ferreira's performance as if she were a person of full capacity.[30] It assessed her performance as poor, even though it did not know her to be a poor performer.[31] It arrived at this assessment after Ferreira was unable to produce medical reports to prove that she was unfit for work.

Doctors' recommendations

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27 P 411, para 2.11 of bundle
28 P109 of bundle; para 2.7.1, p409 of bundle
29 P 110 of bundle
30 Para 2.13.1, p 412 of bundle
31 Para 11.3, p 470 of bundle

21. Ferreira consulted Drs Combrink and Meyer, who were independent health professionals contracted to serve on the Bank's Corporate Health Panel. Dr Combrink had advised Ferreira during his first consultation with her[32] that an occupational therapist (OT) should report on her work situation.

22. On 30 March 2004, van Eck sent Jordaan an email informing her that Dr Meyer recommended an OT or psychological assessment for Ferreira and that the management of the business unit that engaged Ferreira had to decide on the assessments, the cost of which the business unit would have to pay. Van Eck invited Jordaan to contact Corporate Health for a referral to an OT if the business unit decided to proceed with the assessments.[33]

23. Again on 17 May 2004 van Eck reported that Momentum Collective Benefits was of the opinion that the Bank should contact an OT who would be able to provide Ferreira with adaptations and ergonomical changes to her workstation to enable her to perform her duties with minimal strain to her muscles. [34]

24. On 3 September 2004 Drs Birrel and Bloem of Orthobond, a panel of Orthopaedic surgeons, recommended that the Bank should adjust Ferreira's workstation and that she should undergo posture training.[35] This was the fourth recommendation for adjustments to her workstation.

What the Bank did and did not do

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32 P339, L1 of bundle
33 P 108 of bundle; para 2.7.4, p 410 of bundle
34 P 109 of bundle
35 Para 2.8, p411 of bundle; para 8, p 469 of bundle

25. Seemingly, the Bank was patient, tolerant and even charitable towards Ferreira. It retained her at the same salary level for more than two years. Only after some time had lapsed when it was clear that she did not need a fax machine and the pool car did the Bank withdraw these benefits.

26. When she reported for work and complained of being in pain, Cochraine often told her that she should have stayed at home for the day. Cochraine readily despatched Ferreira off before midday if she said that she was in too much pain to work. Other MHLC staff were equally concerned and ready to assist her with her duties. They felt deeply for her. In 2003, the Bank gave her four months' sick leave to help her recover.[36]

27. Cochraine offered Ferreira alternative positions as a switchboard operator and moved her around in MHLC to find her a suitable job.

28. But there were many things the Bank did not do.

OT Report

29. The Bank failed to engage an OT to consult with Ferreira and to report on redesigning her workstation. Conflicting evidence emerged on who was responsible for procuring the report and why it was not obtained. Resolving the conflict requires the court to making credibility findings. For that the court tracks the evidence of the witnesses in some detail.

30. Ferreira testified at the arbitration that she was not sure why she did not consult an OT and could not recall whether the Bank had told her to do so.[37] However, she remembered Cochraine telling her that consulting an OT

36 P330, L21
37 P341, L6, 17; p436, para 6

would not be cost effective as they were *"so far in the process already"* [38] and that the report would not make a difference to her disability.[39] Ferreira would definitely have consulted an OT if Cochraine had told her that the Bank would arrange and pay for the consultation as she was desperate to get well.[40]

31. Cochraine and Jordaan testified at the arbitration and Errol Vukosimuni Ndhlovu, the senior manager, industrial relations deposed to the Founding Affidavit in this review that the Bank's policy was not to arrange for its employees to consult doctors,[41] unless employees requested such assistance. The Bank left it to employees to consult doctors of their own choice. Hence, it was up to Ferreira to consult an OT of her choice. [42] The Bank, Ndhlovu testified, had recommended to Ferreira that she consult an OT.[43]

32. Cochraine added that Ferreira had told her that she was planning to see an OT and if Ferreira had consulted an OT and submitted an account, the Bank would have paid it.[44] She emphatically denied refusing to pay for the OT report[45] and said that she doubted that anyone from the Bank would have refused to pay for the OT's costs after going as far as it did to accommodate Ferreira.[46] Cochraine also denied seeing the email from van Eck to Jordaan recording Meyer's recommendations about an OT or psychological assessment. [47]

33. Jordaan also confirmed that the Bank would have paid the account if

38 P342, L3
39 P341, L20 Para 5.3.16, p22; para56, p436 of bundle
40 Para 27, p 425 of bundle
41 Para 25, p473 of bundle
42 Para 5.2.26, p19 of bundle
43 Para 22, p 472 of bundle
44 Para 5.1.22, p13-14 of bundle
45 L20, p186 of bundle
46L12, P182 of bundle
47 Para 5.1. 21, p13 of bundle

Ferreira had consulted an OT, but denied that Ferreira requested a consultation with an OT.[48] Jordaan added that because Ferreira had not placed an OT report before the Corporate Health panel, the panel made its final decision without the report.[49] As shown below, Jordaan was insistent on the panel making its decision without an OT report.

34. Ferreira sought to hold the Bank responsible for procuring the OT report. She persisted that Cochriane must have been aware of Dr Meyer's recommendations because Jordaan was in human resources which worked closely with Cochraine; moreover, despite the Bank denying that Cochraine was aware of van Eck's email to Jordaan,[50] Cochriane admitted at the arbitration[51] that she saw the email that recommended the OT report. [52]

35. The court finds that Cochraine was aware of Dr Meyer's recommendations for the reasons that Ferreira advanced above. In addition, Ferreira's undisputed evidence was that she gave every report to Cochraine as soon as she received it.[53] Cochraine would also have been aware of van Eck's email of 17 May 2004 to Jordaan because Van Eck forwarded this message to Cochraine the following day.[54] This email and the email of 30 March 2004 explicitly requested the Bank as employer to engage an OT.

36. It was also not the evidence of any of the Bank's witnesses that they asked Ferreira to get an OT report. Cochraine's version was that when Ferreira told her that she wanted to consult an OT, Cochraine

48 Para 5.2.24, p19
49 Para 5.2.24, p19
50 Para 24, p473 of bundle
51 L 2, p189
52 Para 25, p423
53 P340, L22
54 P 109 of bundle

recommended it. She assumed that Jordaan must have discussed the matter with Ferreira.[55] She could not say why no one from the Bank referred Ferreira to an OT. [56]

37. On the other hand, Jordaan testified that she would have asked Cochraine to discuss the request for an OT report with Ferreira. [57] As neither Cochraine nor Jordaan asked Ferreira to obtain an OT report, the court finds that on the Bank's own version, it failed to ask Ferreira to obtain an OT report.

38. According to the Bank's Guidelines, Corporate Health had to "*guide the HR or line manager….and discuss alternatives for the employee*".[58] If the Bank's policy was not to arrange medical appointments for its employees, Corporate health should have been aware of such a policy. Surprisingly, Corporate Health seemed unaware of such policy because on at least three occasions the doctors advised the Bank to engage an OT. Irrespective of what its policy was about the logistics of procuring medical reports, the Bank knew from the emails from van Eck, its own Guidelines discussed below and the onus it bore to justify the dismissal that it was responsible for procuring the OT report."[59]

39. Why did the Bank not procure an OT report?

40. Ferreira testified that Cochraine discouraged her from obtaining an OT report firstly because Cochraine said that it would not be cost effective, and secondly, because it would not change her incapacity or enable

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55 L15, P181 of bundle
56 L7, P186 of bundle
57 L14-22, P289 of bundle
58 The Bank's Guidelines at P111 of bundle
59 The Bank's Guidelines at P111 read with the Bank's obligation to arrange assessments discussed at p 115 of bundle; The Bank's Guidelines at P112 of bundle; Item 10 of the LRA Code

her to work longer hours. Cochraine denied this.

41. The court prefers Ferreira's testimony over Cochraine's for three reasons. Firstly, the cost of the report was an issue for Cochraine because MHLC as the business unit that employed Ferreira had to pay for an OT's assessment and report. [60] Secondly, Ferreira would have jumped at the opportunity of obtaining an OT report because she was desperate and because three medical opinions had recommended that she get an OT report. She had already seen twenty-six doctors and was not about to give up. Thirdly, having regard to the type of alternative jobs Cochraine assigned to Ferreira and her reasons for not allowing her to work with a telephone or computer, Cochraine was inclined to exclude Ferreira from the workplace than to tolerate her unproductive and inconvenient presence.

42. Like Cochraine, Jordaan was also not forthright. In her reply on 31 March 2004 to van Eck's email of the previous day, Jordaan ignored altogether Dr Meyer's recommendation of an OT report. Instead, Jordaan referred van Eck to another of Dr Meyer's reports that confirmed that the treatment Ferreira received was not having the expected results and to Ferreira's own admission that her medical condition had not improved. Jordaan then asked van Eck to arrange a final panel sitting to decide the matter based on *"the information at hand"* (Jordaan's underlining),[61] that is, without an OT report. With Dr Meyer's report and Ferreira's own feedback on her deteriorating condition, Jordaan recommended Ferreira's dismissal for poor performance due to incapacity. Obtaining or considering an OT report would have opened other options which, by that stage, the Bank was loath to consider as that would have delayed Ferreira's dismissal further.

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60 p114 of bundle
61 P 108 of bundle

43. As indicated above, Jordaan insisted on Ferreira obtaining a medical report to the effect that she was totally unfit as that would have been stronger justification for dismissing her. The Bank's insistence therefore on Ferreira producing medical reports confirming that she was unfit to work had nothing to do with accommodating her or assessing her performance as a person with a disability.

44. In summary, the Bank had an obligation to procure an OT report to justify its dismissal of Ferreira. It did not procure the report because it wanted to dismiss Ferreira and the report might have directed it to accommodate her which the Bank was not prepared to do.

Headset

45. The Bank failed to supply Ferreira with a headset to operate the telephones comfortably. Ferreira worked comfortably on the telephone when she used a headset. The Bank's case was that it did not allow her to continue working with telephones because the medical recommendations were against it.[62] According to Cochraine it was "*going to be a risk to her*".[63] The evidence shows that there were other reasons for not allowing Ferreira to use the telephone.

46. The Bank admitted that it was not cost effective to supply Ferreira with a headset.[64] Furthermore, it had recently installed a new telephone system and Cochrraine concluded that it would have been costly to use another system temporarily.[65] Because the headset did not fit the telephone system in MHLC, she decided that Ferriera should rather not

62 para 11.6, p470; para 5.1.27-28, p14-15 of bundle
63 L16, p211 of bundle
64 Para 7.3, p 469 of bundle
65 L 7, p211 of bundle

use the telephones. Cochraine did not explain why she regarded Ferreira's use of a headset to be temporary. Without Ferreira trying out a headset for longer than a mere day or two, Cochraine could not conclude with any certainty that Ferreira's use of a headset would be temporary, unless the Bank had already planned to dismiss her.

47. Another reason that Cochraine advanced for not letting Ferreira use a headset was that the volume of loan applications was high, hence confirmation work would have been too hectic for Ferreira. Confirmation was a critical part of processing loan applications. If Ferreira was absent, her confirmation work would have had to be reassigned, [66] which Cochraine, for reasons not disclosed, was reluctant to do.

48. Jordaan had her own reasons for not supplying the headset. She acknowledged that providing Ferreira with a headset would have been an adjustment to her workstation, but it was not an adjustment that the Bank wanted to make because confirmation was a full day job. As Ferreira could not work a full day, she was taken off confirmation because of her unavailability. [67] Besides, in her opinion, Ferreira did not answer the telephones fast enough.[68]

Computer

49. The Bank refused to allow Ferreira to work on its computers. Its case was that the doctors discouraged Ferreira from working with her arms extended for long hours at a computer. Furthermore, Ferreira herself had said that she could not lift files and capture data on the

66 L10-17, p 211 of bundle
67 L4-10, p291 of bundle
68 Para 5.2.23, p18 of bundle

computer.[69] However, other reasons emerged from the cross-examination of the Bank's witnesses.

50. The Bank had to accredit Ferreira to work as an administrator confirming the employment and income of loan applicants, given the sensitivity of the information she would have had to deal with. Ferreira also needed a computer for this task. Cochraine did not doubt Ferreira's ability to do confirmation, but the Bank did not accredit her because she refused to use someone else's password to access a computer.[70] Ferreira could not use another person's password without supervision by that person because she could have been dismissed for breaching a workplace rule. The reason why the Bank did not allocate Ferreira her own password emerges from the following further reasons for not allowing her to use a computer.

51. In Cochraine's opinion, Ferreira was seriously ill. As she was on medication to the extent that she was *"sort of sleeping at work"*, Ferreira was not herself and she admitted this. As a result, the Bank could not entrust her with the responsibility of working with its computers.[71] Furthermore, to appoint Ferreira to operate a computer when she was unfit for the job could have resulted in Cochraine being disciplined.[72]

52. Cochraine's conclusion that Ferreira was unfit to operate a computer was not reasonable as she did not test Ferreira to assess the effect of her medication on her ability to work with sensitive data on a computer. For the short time that Ferreira did confirmation, there was no evidence that she did not work well. In fact Cochraine conceded the contrary.

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69 p 228, 172 of bundle; Para 5.1. 18, p13; L15, p175 of bundle
70 L18, p210 –L 4, 211 of bundle
71 p174 of bundle
72 p174 of bundle

Chair

53. The Bank refused to buy Ferreira a comfortable chair. Dr Combrink had recommended in the first consultation that Ferreira should use a comfortable chair. Cochraine did not establish what type of chair would be suitable. Instead, she instructed Ferreira to fetch a chair from the storeroom. Ferreira chose a chair that was comfortable, but it turned out to be unsuitable because it broke three times.[73] Even though Ferreira was unhappy with the chair, she did not complain that it was unsuitable.[74] Whenever it broke, she reported it to Cochraine. When Cochraine did nothing about repairing or replacing it, Ferreira had it repaired.[75] Ferreira used one of the chairs from the Bank's stores without complaint[76] because Cochraine gave her no other choice.

Half day job

54. The Bank failed to consider Ferreira for a half-day position. Although the Bank used to have employees working half a day in the past, it now required a full day's productivity.[77] Other than saying that a half day light duty job did not meet the productivity demands and other exigencies of the Bank's business,[78] the Bank gave no further reasons for refusing Ferreira a half day position.

55. Jordan testified that Ferreira did not apply for a half day position,[79] but

73 Para 2.7.3, p410 of bundle
74 Para 5.3.27, p24 of bundle
75 Para 2.13.2, p412 of bundle
76 p178 of bundle
77 p 303 of bundle
78 p 304, p 306 of bundle; Para 42.1, p 475; para 27, p 473 of bundle
79 p 308 of bundle

even if she had, the Bank would not have approved it. If the Bank approved, it would have expected Ferreira to be "*100% productive*". It would have insisted on her working the fixed hours with no time off if she was in pain.[80] So said Jordaan.

56. Ferreira motivated that, in practice, she actually worked only half a day. The Bank should have given her a half day job as a confirmation administrator. As there were about six confirmation administrators, any shortfalls in her productivity could easily have been accommodated by the other administrators. Furthermore, if she used a headset she could have worked longer hours thereby reducing the likelihood of shortfalls. So said Ferreira.

57. The Bank failed to explain why Ferreira's proposal was not a reasonable accommodation or, if it posed an unjustifiable hardship, why it would have been so.

Workstation adjustments

58. The Bank failed to make adjustments to Ferreira's workstation. The only adjustment it did make was to move papers and the fax machine nearer to her desk to do a job for which she was not suited.[81] The Bank did not consider placing her in Optimax where headsets had already been installed to do confirmation. The questions put to Ferreira under cross examination suggested that the Bank considered it a managerial prerogative not to place her in Optimax to do MHLC work. The Bank failed to show why doing MHLC work in Optimax was not a reasonable accommodation and what unjustified hardship, if any, the Bank would have suffered, if it moved her to Optimax.

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80 p 308 of bundle
81 Para 5.2.22, p18; L10-12, p290 of bundle

Non-compliance with the law

59. The Bank failed to apply Item 10 and 11 of Schedule 8 Code of Good Practice: Dismissal under the Labour Relations Act 66 of 1995 ("LRA"), (The LRA Code), the Code of Good Practice on the Employment of People with Disabilities under the Employment Equity Act No 55 of 1998 (EEA) (The EEA Code), the Department of Labour's Code of Good Practice: Key Aspects on the Employment Of People with Disabilities (2002) (The DOL Code) and its own Incapacity Management Guidelines (the Bank's Guidelines). These instruments give effect to the Constitution of the Republic of South Africa Act No 108 of 1996, the LRA, the EEA, international and foreign law and best practice.

PART B

Law and Best Practice

60. The origin of the test for fairness of the dismissal of an employee with disabilities is the Constitution. Various foreign[82] and international

82 Disability Discrimination Act of 1995 as amended in 2005 (UK); Americans with Disability Act of 1990; Disability Discrimination Act 1992 – Australia Act No. 135 of 1992 as amended; Ontario Human Rights Code http://www.e-laws.gov.on.ca/html/statutes/english/elaws_statutes_90h19_e.htm; the Canadian Charter of Rights and Freedoms;

human rights and labour instruments[83] seek to re-enforce the protection of people with disabilities and prevent discrimination against them. The overarching policy underpinning the protection of disabled people is to give effect to human rights.[84] In a claim based on an incapacity dismissal, the intersecting constitutional rights are rights to equality,[85] human dignity,[86]the right to choose a trade, occupation or profession freely[87] and to fair labour practices.[88]

Equality

61. The Constitution, several statutes including the EEA and the LRA and Codes of Practice[89] protect employees with disabilities as a vulnerable group because they are a minority[90] with attributes different from mainstream society. Unemployment, lower wages, poorer working conditions and barriers to promotion plague people with disabilities

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83 Several United Nations instruments including: The Declaration on the Rights of Disabled Persons (1975) and the UN Standard Rules on the Equalisation of Opportunities for People with Disabilities adopted in 1993; ILO Convention No 159: Convention Concerning Vocational Rehabilitation and Employment (Disabled Persons); ILO Recommendation No 99: Recommendation Concerning Vocational Rehabilitation of the Disabled of 1955; ILO Vocational Rehabilitation and Employment (Disabled Persons) Recommendation, R168 of 1983. Article 7 of Part II provides that: "*Disabled persons should enjoy equality of opportunity and treatment in respect of access to, retention of and advancement in employment which, wherever possible, corresponds to their own choice and takes account of their individual suitability for such employment*." Article 11(a) of Part II of Recommendation R168 promotes measures to create job opportunities on the open labour market by making reasonable adaptations to workplaces, job design, tools, machinery and work organisation to facilitate employment.

84 *United Steelworkers of America v Fording Coal* 1999 BCCA 534 (CanLII) *at para 21; Commission scolaire régionale de Chambly v Bergevin* 1994 CanLII 102 (S.C.C.); *Guibord v Canada (T.D.) 1996 CanLII 3880 (F.C.)* http://www.canlii.org/ l

85 s 9 of Constitution

86 s 10 of Constitution

87 s 22 of Constitution

88 s 23 of Constitution

89 EEA Code, LRA Code, The DOL Code

90 Statistics South Africa Community Survey 2007 counted 1916219 people with disabilities representing 4% of the population. Of these, 769772 have physical disabilities other than sight and hearing disabilities.

here and abroad.[91] Their employment rate is less than a third of the general population.[92] Many employers tend to exclude and marginalise 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.[93] 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.[94] 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.

62. Our Constitution, like its Canadian counterpart, strives to inculcate an inclusive mindset towards all vulnerable people.[95] In a case

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91 For a brief account of the South African experience see Charles Ngwena et al *Code of Good Practice on the Employment of People with Disabilities* (2003) 24 ILJ Juta 1816. For the UK experience see Gillian Reynolds, Phillip Nicholls and Catrina Alferoff *Disabled People (Re) Training and Employment: A Qualitative Exploration of Exclusion in Equality, diversity and disadvantage in employment* edited by Mike Noon and Emmanuel Ogbonna (2001) 190. For a summary of the findings of the US Congress on the plight of disabled people, see s 2 of the Americans with Disability Act of 1990; also Anita Silvers *Protection or Privilege? Reasonable accommodation, Reverse Discrimination, and the Fair costs of repairing Recognition for disabled People in the Workforce* 8 J. Gender Race & Just. 561 2004-2005 at 576-579

92 Community Agency for Social Enquiry: *We also count! The extent of moderate and severe reported disability and the nature of the disability experience in South Africa* (2000) referred to by JL Pretorius et al in Employment Equity Law at Issue 5 7-22.

93 *Eldridge v Attorney General of British Columbia* 151 DLR 4th 577 (SCC) 613 para 56

94 Gillian Reynolds, Phillip Nicholls and Catrina Alferoff *Disabled People (Re) Training and Employment: A Qualitative Exploration of Exclusion in Equality, diversity and disadvantage in employment* edited by Mike Noon and Emmanuel Ogbonna (2001) 201-203

95 *Minister of Home Affairs and Others v Fourie and Others* CCT60/04 at para 14; *Eldridge v Attorney General of British Columbia* 151 DLR 4th 577 (SCC) 613

concerning the accommodation of cultural diversity, the Constitutional Court (CC) digressed to endorse an inclusive approach towards people with disabilities. Referring to *Eaton v Brant County Board of Education,*[96] the CC acknowledged how easily disabled people are pushed to the margins of society.[97]

63. In *Eaton v Brant County Board of Education,* the Supreme Court of Canada had to consider the application of s15(1) of the Canadian Charter which, like section 9 of the Constitution, protects against discrimination on the grounds of disability. The court had to decide whether to place a 12 year old child in a special education programme rather than a mainstream class. The child had cerebral palsy, was unable to communicate through speech, sign language or other means, had some visual impairment and used a wheelchair for mobility. A unanimous court per Sopinka J observed:

> "*Exclusion from the mainstream of society results from the construction of a society based solely on "mainstream" attributes to which disabled persons will never be able to gain access. ….(I)t 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. ….It is recognition of the actual characteristics, and reasonable accommodation of these characteristics which is the central purpose of s. 15(1) in relation to disability."*[98]

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96 *Eaton v. Brant County Board of Education*, [1997] 1 S.C.R. 241

97 *MEC for Education: Kwazulu-Natal v Navaneethum Pillay* (unreported CCT 51/06) para 74, 76

98 Although the court acknowledged that integration confers great psychological benefit on disabled children, it accepted the professional opinion of the teachers and assistants that three years experience in a regular classroom had the counter-productive effect of isolating

64. Difference renders people with disabilities incapable of conforming to the norms of mainstream society. Living with a disability must be hard enough without having the additional burden of conforming to mainstream society. The least that mainstream society can do is to adapt to and embrace their difference to achieve substantive equality. After all, the essence of true equality is the accommodation of difference.[99]

Dignity

65. Integration and inclusion in mainstream society aim not only to achieve equality but also to restore the dignity of people with disabilities.[100] Dignity, for employees with disabilities, is about being independent socially, and most of all, economically, about managing their normal day to day activities[101] with minimum hardship for themselves and others and about contributing to and participating in society. It is about self-respect and self worth.[102] Dickson C.J.C summarised the value of work to human life in *Reference re Public Service Employee Relations Act (Alta.)*[103]

"Work is one of the most fundamental aspects in a person's life,

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and segregating the child in the theoretically integrated setting. In the best interests of the child, the court found against her placement in a mainstream school.

99 *Andrews v Law Society of British Columbia* [1989] 1 S.C.R. 143 at 169

100 *President of the Republic of South Africa and Another v Hugo* 1997 (4) SA 1 (CC)

101 Normal day to day activities include (a) mobility; (b) manual dexterity; (c) physical co-ordination; (d) continence; (e) ability to lift, carry or otherwise move everyday objects; (f) speech, hearing or eyesight; (g) memory or ability to concentrate, learn or understand; or (h) perception of the risk of physical danger. (Extracted from Item 4 of Schedule 1 of British Disability Discrimination Act of 1995

102 *Brock v Tarrant Film Factory Ltd 2000 CanLII 20858 (ON H.R.T.);*
Rodriguez v British Columbia (Attorney General) 1993 CanLII 75 (S.C.C.)

103 *Reference re Public Service Employee Relations Act (Alta.)* (1987), 87 C.L.L.C. par. 14,021 (S.C.C.), at p. 12,180

> 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."*

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.[104]

Freedom of trade, occupation and fair labour practices

67. Both the employer and the employee have the right to choose a trade, occupation and profession freely[105] and to fair labour practices.[106] Only an employee has the right not to be dismissed unfairly. The LRA, the EEA and their Codes enable the parties to strike the appropriate balance between their respective rights by providing processes for avoiding unfair dismissal. Reasonable accommodation of the employee and unjustified hardship to the employer operate as countervailing forces to balance the respective rights of the parties. If the employer cannot reasonably accommodate the disabled employee without unjustifiable hardship, the employer may dismiss the employee.

Defining disability

104 *Hoffmann v South African Airways* 2001 (1) SA 1 (CC) at para 52
105 s 22 of Constitution
106 s 23 of Constitution

68. The first question to ask in an incapacity investigation is: Is the employee a person with disabilities in that she has a long term recurring physical or mental impairment which substantially limits her prospects of entry into or advancement in employment?[107] 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[108] and to find work.

69. This enquiry is usually factual but can become legal if interpretation disputes arise. To cast the interpretive net widely, Australia[109] and Canada[110] 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.[111] 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,[112] or if a diabetic is not a person with disabilities

107 s 1 of EEA – definition of disability. The EEA definition of "disability" emulates substantially the British Disability Discrimination Act of 1995. Item 5.1 of the EEA Code dismantles the definition of disability to further define certain elements of it.

108 Item 5.1 of the EEA Code; Marylyn Christianson *Essential Employment Discrimination Law 163*

109 S (k) of definition of disability in The Disability Discrimination Act of 1992 of Australia

110 Section 15 of the Canadian charter read with provincial legislation such as s 3(l) of the Human Rights Act of Nova Scotia. Chapter 214 of the Revised Statutes, 1989 **amended** 1991, c. 12

111 *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Montréal (City); Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Boisbriand (City), 2000 SCC 27 (CanLII)*

112 *Sutton v United Airlines* 527 US 471 (1999) *Murphy v United Parcel Service Inc* 527 UC 516 (1999) *Albertson's Inc v Kirkingburg* 527 US 555 (1999); *Archibald v. Fife Council* [2004]

because he mitigates his condition with medication,[113] the protection against discrimination will be lost to many disabled people.

The LRA Guidelines for incapacity dismissal

70. As an employer bears the onus of proving an employee's incapacity to justify dismissing her,[114] the LRA Guidelines for incapacity dismissal contemplates a four-stage enquiry before an employer effects a fair dismissal. The Bank's Guidelines also imported the LRA Guidelines.

71. An enquiry to justify an incapacity dismissal may take a few days or years, depending mainly on the prognosis for the employee's recovery, whether any adjustments work and whether accommodating the employee becomes an unjustified hardship for the employer. To justify incapacity, the employer has to "*investigate the extent of the incapacity or the injury… (and)…. all the possible alternatives short of dismissal*."[115]

72. Stage One: The employer must enquire into whether or not the employee with a disability is able to perform her work.[116] If the employee is able to work, that is end of the enquiry; the employer must restore her to her former position or one substantially similar to it. Where possible, the job should correspond to the employee's own choice and take account of her individual suitability for it.[117] If the

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UKHL 32 (1 July 2004) URL: *http://www.bailii.org/uk/cases/UKHL/2004/32.html* 2004 GWD 23-505, [2004] UKHL 32, [2004] ICR 954, [2004] IRLR 651, 2004 SLT 942, [2004] 4 All ER 303 para 48

113 *IMATU v City of Cape Town* (2005) 10 BLLR 1084 (LC)

114 Section 192(2) of the LRA

115 Item 10(1) of LRA Code

116 Item 11 of the LRA Code

117 ILO Vocational Rehabilitation and Employment (Disabled Persons) Recommendation, R168 of 1983. Article 7 of Part II

employee is unable to perform her work and her injuries are long term or permanent, [118] then the next three stages follow.[119]

73. Stage Two: The employer must enquire into extent to which the employee is able to perform her work. This is a factual enquiry to establish the effect that her disability has on her performing her work. The employer may require medical or other expert advice to answer this question.

74. Stage Three: The employer must enquire into the extent to which it can adapt the employee's work circumstances to accommodate the disability. If it is not possible to adapt the employee's work circumstances, the employer must enquire into the extent to which it can adapt the employee's duties. Adapting the employee's work circumstances takes preference over adapting the employee's duties because the employer should, as far as possible, reinstate the employee.

75. During this stage, the employer must consider alternatives short of dismissal. The employer has to take into account relevant factors including "*the nature of the job, the period of absence, the seriousness of the illness or injury and the possibility of securing a temporary replacement*" for the employee. [120]

76. Stage Four: If no adaptation is possible, the employer must enquire if any suitable work is available.

Reasonable Accommodation

118 Item 10(1) of LRA Code; Bank's Guidelines p112 of bundle
119 Item 11(b) of the LRA Code
120 Item 10(1) of LRA Code

77. Many jurisdictions require employers to use reasonable accommodation to achieve substantive equality and prevent discrimination against people with disabilities. Accommodating disability as difference operates to prevent adverse effect discrimination flowing from employment rules, procedures or standards.[121] For instance, in the US the definition of "discrimination" includes not making reasonable accommodations.[122]

78. The EEA elaborates on the adaptations referred to in the LRA Guidelines. It defines "reasonable accommodation" as *"any modification or adjustment to a job or to a working environment that will enable a person from a designated group to have access to or participate or advance in employment".*[123] The EEA Code expatiates on ways of accommodating people with disabilities.[124]

79. Although neither the EEA nor the EEA Code define discrimination, the EEA Code recognises that unfair discrimination is perpetuated in several ways.[125] Furthermore, people with disabilities constitute a

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121 *United Steelworkers of America v Fording Coal* 1999 BCCA 534 (CanLII) at para 21*;*

122 Definition of "discrimination" in section 102(5)(A) of the Americans with Disabilities Act 42 USCA of 1990 : "*not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity;*".

123 S 1 of EEA

124 Item 6.9 of EEA Code:

Reasonable accommodation include but not limited to -

(i) adapting existing facilities to make them accessible;

(ii) adapting existing equipment or acquiring new equipment including computer hardware and software;

(iii) re-organizing workstations;

(iv) changing training and assessment materials and systems;

(v) restructuring jobs so that non-essential functions are re-assigned;

(vi) adjusting working time and leave; and

(vii) providing specialized supervision, training and support in the workplace.

125 Including: " *Unfounded assumptions about the abilities and performance of job*

designated group.[126] Members of designated groups enjoy enhanced protection under the EEA especially in the form of affirmative action. The Constitution and the EEA prohibit discrimination on the grounds of disability. Dismissal on a prohibited ground of discrimination is automatically unfair.[127] Implicit, therefore, in the duty to accommodate employees is the employer's obligation to prevent discrimination.

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. Similarly, the UK defines discrimination by an employer to include treatment of a disabled person that the employer cannot justify.[128] An employer cannot justify treatment of a disabled person that amounts to direct discrimination.[129] An employer also discriminates against a disabled person if it fails to make reasonable adjustments and cannot show that its failure is justified.[130]

82. In *Nottinghamshire County Council (NCC) v Meikle,* unjustified

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applicants and employees with disabilities;

•Advertising and interviewing arrangements which either exclude people with disabilities or limit their opportunities to prove themselves;

•Using selection tests which discriminate unfairly;

•Inaccessible workplaces; and

•Inappropriate training for people with disabilities."

Item 1 of EEA Code

126 S 1 of the EEA –definition of "designated group"

127 S 187(1)(f) of the LRA; Marylyn Christianson *Incapacity and Disability: A Retrospective and Prospective Overview of the Past 25 years* (2004) 25 ILJ 890-1

128 S 5(1)(b) of Disability Discrimination Act of 1995 (UK) http://www.opsi.gov.uk/acts/acts1995/

129 S 3A(4) of Disability Discrimination Act of 1995 (UK) http://www.opsi.gov.uk/acts/acts1995/

130 S 5(2) read with s 6 of Disability Discrimination Act of 1995 (UK) http://www.opsi.gov.uk/acts/acts1995/

unfavourable treatment combined with unjustified failure to accommodate Meikle resulted in unlawful discrimination. Without accommodating Meikle in anyway, the NCC had reduced her sick pay by fifty per cent after one hundred days absence from work. That, the Supreme Court of Judicature agreed with Employment Appeal Tribunal, amounted to discrimination under the UK's Disability Discrimination Act, 1995. Discrimination was the "last straw" that triggered Meikle's constructive dismissal. [131] In contrast, the Employment Appeal Tribunal applied a "range of reasonable responses test to hold in *British Gas Services Ltd v McCaull* that an employer who offered the only suitable alternative employment available but which involved a reduction in pay of up to 30% was reasonable.[132]

83. Although the German Constitution does not list disability as a ground of discrimination, under the German Protection against Dismissal Act (KSchG) dismissal is still considered to be socially unjustifiable and therefore unlawful if the worker can be transferred to a comparable job.[133] The employer has to allocate part time or easier work or work that suits the employee's physical condition. The German Federal Labour Court declared dismissal for sickness valid in only two situations other than a decline in efficiency with intolerable operational consequences. The first situation is when the illness is permanent and it entails unreasonable consequences for the employer. The second situation is when the illness causes the employee to be absent frequently with no prospect of recovery; in that situation, the periods of illness must amount to an unreasonable operational and economic burden for the employer.[134]

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131 *Nottinghamshire County Council v Meikle* [2004] EWCA Civ 859 (08 July 2004) URL: *http://www.bailii.org/* Cite as: [2004] 4 All ER 97, [2004] EWCA Civ 859 para 27

132 *British Gas Services Ltd v McCaull* [2000] EAT 379_99_2809 (28 September 2000) URL: *http://www.bailii.org/uk/cases/UKEAT*

133 Termination of Employment Digest ILO 2000 ISBN 92-2-110842-2 at 157

134 Halbach et al *Labour Law in Germany* – Published by the Federal Ministry for Labour and Social Affairs (1994)

84. Because it protects against automatically unfair dismissal, reasonable accommodation is more onerous than a general obligation to implement affirmative action. Although reasonable accommodation is sometimes used synonymously with affirmation action, in relation to accommodating people with disabilities to avoid dismissal it is a term of art with most jurisdictions defining it similarly. Reasonable accommodation of people with disabilities is also more onerous than accommodating religious and cultural beliefs. Practicing religious and cultural beliefs is a freedom whereas disability is an imposition. Furthermore, people with disabilities are a cost to the economy while vulnerable religious and cultural groups are not obviously so.[135] Hence the jurisprudence on reasonable accommodation for religious and cultural beliefs and possibly other vulnerable groups may not apply to disability.

85. Another difference between an employer's obligations to implement affirmative action and reasonably accommodate people with disabilities

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135 section 504*section 504 of the Rehabilitation Act, 29 U.S.C. § 794section 504 of the Rehabilitation Act, section 504 of the Rehabilitation Act, at D;* ***section 504 of the Rehabilitation Act, at D; Nelson v Thornburghsection 504 of the Rehabilitation Act, at D; Nelson v Thornburgh section 504 of the Rehabilitation Act, at D; Nelson v Thornburgh 567 F.Supp. 369 D.C.Pa.,1983 at Dsection 504 of the Rehabilitation Act, at D; Nelson v Thornburgh 567 F.Supp. 369 D.C.Pa.,1983 at D where the court recalled the US Congress' acknowledgement that the "section 504 of the Rehabilitation Act, at D; Nelson v Thornburgh 567 F.Supp. 369 D.C.Pa.,1983 at D where the court recalled the US Congress' acknowledgement that the "failure to accommodate handicapped individuals also imposes real costs upon American society and the American economysection 504 of the Rehabilitation Act, at D; Nelson v Thornburgh 567 F.Supp. 369 D.C.Pa.,1983 at D where the court recalled the US Congress' acknowledgement that the "failure to accommodate handicapped individuals also imposes real costs upon American society and the American economy".*** ***section 504 of the Rehabilitation Act, at D; Nelson v Thornburgh 567 F.Supp. 369 D.C.Pa.,1983 at D where the court recalled the US Congress' acknowledgement that the "failure to accommodate handicapped individuals also imposes real costs upon American society and the American economy".***

is that measures to affirm employees apply generally to all employees within the group, whereas to accommodate employees with disabilities the employer has to tailor modifications and adjustments for the specific disabilities of each employee.[136]

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. The following standard adopted in Ontario is worth importing into our jurisprudence:

> "*The most appropriate accommodation is one that most respects the dignity of the individual with a disability, meets individual needs, best promotes integration and full participation and ensures confidentiality.*[137]

87. As the employer bears the onus of proving that it made attempts at accommodating the employee, the employer must consider all options.[138] The employer has to properly motivate whatever accommodation is tendered or refused. In *Guibord v Canada the Treasury Department* refused to accommodate the employee, a document cataloguer, on a half day basis because the Department would have had to hire someone else for half days for approximately

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136 In *McGill University Health Centre (Montreal General Hospital) v Syndicat des employés de l'Hôpital général de Montréal* [2007] 1 S.C.R. 161, 2007 SCC 4http://www.canlii.org/ where a collective agreement allowed employees to rehabilitate for up to three years the Canadian Supreme Court held that in light of the individualized nature of the accommodation process, the parties cannot definitively establish the length of the period for accommodation in advance. Notwithstanding such agreement, the employer still had to investigate each case.

137 *The Ontario paragraph 3.3 of the Human Rights Commission's Policy and Guidelines on Disability and the Duty to Accommodate quoted at Ontario Public Service Employees Union v Ontario (Ontario Human Rights Commission) 2003 CanLII 52924 (ON G.S.B.)* http://www.canlii.org/

138 ***Arneson v. Heckler*** 879 F.2d 393 C.A.8 (Mo.),1989.

three-months. It would have taken one month to train anyone. At a time when the Department had to "do more with less", hiring another person was not an option.[139] The Department advanced persuasive evidence for not pursuing the half day option for operational reasons.

88. Whereas granting paid leave of absence to recuperate may be an undue hardship for some medium and small-sized enterprises, for large corporations that contribute generously to social investment projects, protracted paid leave should pose no hardship. In *McGill University Health Centre (Montreal General Hospital) v Syndicat des employés de l'Hôpital général de Montréal*,[140] where the parties had collectively agreed on a rehabilitation period of three years, the employer was not absolved of its duty to accommodate the employee. The Supreme Court of Canada held that the right to equality is a fundamental right, and the parties could not agree to a level of protection that is lower than the one to which employees are entitled under human rights legislation.[141]

89. Reasonable accommodation includes adapting the way performance is measured.[142] In Australia, it is indirect discrimination on the ground of disability to require a person to comply with a requirement or condition with which persons without the disability are able to comply but with

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139 *Guibord v. Canada (T.D.), 1996 CanLII 3880 (F.C.)* http://www.canlii.org/eliisa/highlight.do?text=reasonable+and+accommodation&language=en&searchTitle=Search+all+CanLII+Databases&path=/en/ca/fct/doc/1996/1996canlii3880/1996canlii3880.html

140 *McGill University Health Centre (Montreal General Hospital) v Syndicat des employés de l'Hôpital général de Montréal* [2007] 1 S.C.R. 161, 2007 SCC 4http://www.canlii.org/

141 In the particular circumstances of that case the employee was still deemed incapable of returning to work by her own doctor after three years of absence due to illness and the court upheld her dismissal.

142 Item 6.10 of the EEA Code: An employer may evaluate work performance against the same standards as other employees but the nature of the disability may require an employer to adapt the way performance is measured.

which a disabled person is not able to comply.[143] In Canada, a Trial Division Court rejected the merit principle applied to a job applicant afflicted with multiple sclerosis, because the Transport Department failed to discern the specifics of the applicant's situation.[144]

90. Reasonable accommodation prevents absenteeism and unemployment. In a dispute about a non-culpable dismissal for excessive absenteeism caused by disability, the question is whether an employee's absenteeism is caused by the disability or whether an employer has fulfilled its duty to accommodate to the point of hardship.[145]The Employment Appeal Tribunal in the UK found in *Paul v National Probation Service* that refusing to employ Paul, who had a chronic depressive illness, was unjustified because if the employer had made reasonable adjustments it might have employed him.[146] All the evidence in *Nottinghamshire County Council (NCC) v Meikle* pointed towards lengthy absence by Meikle, a teacher, being a result of her employer, the NCC, failing for a long time to take appropriate steps to cope with her disability.[147]

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143 S 6 Disability Discrimination Act 1992 – Australia Act No. 135 of 1992 http://wallis.kezenfogva.iif.hu/eu_konyvtar/projektek/vocational_rehabilitiation/austral/aus

144 *Tremblay v Canada (Attorney General) (T.D.)* 2003 FCT 465 (CanLII) http://www.canlii.org/

145 *United Steelworkers of America v Fording Coal* 1999 BCCA 534 (CanLII) *at para* 78*;*

146 Paul v. National Probation Service [2003] UKEAT 0290_03_1311 (13 November 2003)
URL:*http://www.bailii.org/uk/cases/UKEAT/2003* at 29.

147 *Nottinghamshire County Council v Meikle* [2004] EWCA Civ 859 (08 July 2004) *URL:http://www.bailii.org/* Cite as: [2004] 4 All ER 97, [2004] EWCA Civ 859 para 67

91. The search for accommodation is a multi-party inquiry.[148] Although the principal responsibility for conducting the enquiry rests with the employer,[149] at the very least the employer must confer with the disabled employee, her trade union or workplace representative.[150] 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.[151]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.[152]

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

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148 *Central Okanagan School District No. 23* v Renaud *above; Ontario Human Rights Commission and O'Malley* v. *Simpsons-Sears Ltd.*, 1985 CanLII 18 (S.C.C.), [1985] 2 S.C.R. 536

149 *Guibord v. Canada (T.D.), 1996 CanLII 3880 (F.C.)* http://www.canlii.org/eliisa/

150 *Commercial Bakeries Corp. v Retail Wholesale Canada/Caw Local 462, 2003 CanLII 52702 (ON L.A.)*http://www.canlii.org/: *"the Union has the right to represent members in their dealings with the employer in cases where an employee is injured or disabled and there are attempts to accommodate the employee with modified work, and where there is any kind of adjustment being made with respect to the employee's hours of work and working conditions, including remuneration. Also, the Union is entitled to represent employees where an issue arises concerning the employees return to work. The basis of my decision derives from both the Union's exclusive right to represent employees as well as its duty under Human Rights legislation concerning an employee's right to be accommodated because of a disability."*

151 *Ontario Liquor Boards Employees' Union v Ontario (Liquor Control Board of Ontario) 2002 CanLII 45765 (ON G.S.B.)* http://www.canlii.org/

152 *Ontario Liquor Boards Employees' Union v Ontario (Liquor Control Board of Ontario) 2002 CanLII 45765 (ON G.S.B.)* http://www.canlii.org/ ILoulseged v Akzo Nobel, Inc 178F.3d 731 (5Th Cir 1999 736 referred to by Charles Ngwena Interpreting Aspects of the Intersection Between Disability, Discrimination and Equality: Lessons for the Employment Equity Act from Comparative Law Part ii: Reasonable Accommodation (2005) 16 Stell LR 534 at 556

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. Otherwise, the employer who tenders a reasonable accommodation discharges its duty if the employee rejects it unreasonably. [153] If the employee rejects the tender, the employer may lawfully dismiss the employee on the grounds of her incapacity.

93. In some circumstances refusing to accommodate a person with a disability is not discrimination. For instance, if several employees compete for a post, the one amongst them who wears spectacles does not qualify for special treatment in the form of an accommodation for as long as the disability is not a disqualifying criterion. However, a person who wears spectacles is visually impaired and is by definition a person with a disability.[154]

94. Disability is not synonymous with incapacity. Under Canadian law[155] 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

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153 *Central Okanagan School District No. 23 v Renaud* [1992] 2 S.C.R. 970; *1992 CanLII 81 (S.C.C.)*
Ontario Human Rights Commission and O'Malley v Simpsons-Sears Ltd., 1985 CanLII 18 (S.C.C.), [1985] 2 S.C.R. 536; Eagleson Co-Operative Homes Inc. v. Théberge, 2006 CanLII 29987 (ON S.C.D.C.)para 32

154 Contrast with *Archibald v. Fife Council* [2004] UKHL 32 (1 July 2004)
URL: *http://www.bailii.org/uk/cases/UKHL/2004/32.html* 2004 GWD 23-505, [2004] UKHL 32, [2004] ICR 954, [2004] IRLR 651, 2004 SLT 942, [2004] 4 All ER 303 para 48

155 S 17(2) of the Human Rights Code of Ontario of 1990 as amended in 2006

not incapacitated is unfair.[156]

Unjustifiable Hardship

95. *Arising from stage three of a fair dismissal process under the LRA Code, the EEA Code sets the threshold to balance the employer's obligation to accommodate with the employer's circumstances. Unjustifiable hardship is the threshold at which employers are relieved of their obligation to accommodate disabled employees.*[157]

96. The EEA Code defines "(u)njustifiable hardship" as

> "action that requires significant or considerable difficulty or expense. This involves considering, amongst other things, the effectiveness of the accommodation and the extent to which it would seriously disrupt the operation of the business."[158]

97. The EEA Code also acknowledges that an accommodation that is an unjustifiable hardship for one employer at a specific time may not be so for another or for the same employer at a different time. [159]

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156 Marylyn Christianson Incapacity and Disability: A Retrospective and Prospective Overview of the Past 25 years (2004) 25 ILJ 879 at 889

157 Item 6.12 of EEA Code; *Central Okanagan School District No. 23 v Renaud*[1992] 2 S.C.R. 970; *1992 CanLII 81 (S.C.C.)*

158 Item 6.12 of EEA Code

159 Item 6.13 of EEA Code

98. *Unjustifiable hardship means "(m)ore than mere negligible effort".*[160] *Just as the notion of reasonable accommodation imports a proportionality test,*[161] *so too does the concept of unjustifiable hardship.*[162] *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.*[163] *An employee's demand to be retained in a mail room post where he was accommodated after he sustained a back injury as a cargo handler could be unjustified hardship to other employees, if they are entitled to compete for the mail room post in terms of collective agreements.*[164] *To succeed, the employee has to prove special circumstances, for example, that the employer has deviated from the agreements previously.*

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160 *Rejecting the de minimis test* followed in *Trans World Airlines, Inc.* v *Hardison*, 432 U.S. 63 (1977), an American case which preceded the ADA, Sopinka J in *Central Okanagan School District No. 23 v. Renaud,* [1992] 2 S.C.R. 970; *1992 CanLII 81 (S.C.C.)*

161 *MEC for Education: Kwazulu-Natal v Navaneethum Pillay* (unreported CCT 51/06) para 76

162 In the European Union, Article 5 of the General Framework Directive for Equal Treatment in Employment and Occupation (The Framework Directive) sets the threshold for accommodation as "a disproportionate burden".

163 *Central Okanagan School District No. 23 v Renaud* [1992] 2 S.C.R. 970; *1992 CanLII 81 (S.C.C.)*

164 ***US Airways, Inc. v. Barnett*** 535 U.S. 391, 122 S.Ct. 1516 U.S.,2002.

99. *No hard and fast rule can be set as to what constitutes undue hardship. Each case has to be determined on its own facts. Consequently, it is not a hard and fast rule that hiring two people instead of one, hiring an assistant for the disabled employee*[165] *or creating a post when a vacancy does not exist will amount to undue hardship.*

100. *The Bank refused to accommodate Ferreira on three grounds: the costs of the accommodation, the risk to Ferreira's health and Ferreira's admission that she could not work. How have these defences to the duty to accommodate fared in other jurisdictions?*

101. *When a Department of Public Welfare refused to pay for readers for three of its blind social workers, a US District Court*[166] *recognised the "very real budgetary constraints" under which the Department operated and that accommodating these employees would impose a further financial burden "upon an already overtaxed system of delivery of welfare benefits". But, the court said, the financial burden was "a minute fraction" of the personnel budget. In its opinion, the Department had discriminated against the blind employees by refusing to provide them with half-time readers or their mechanical equivalent.*[167]

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165 ***Arneson v. Heckler*** 879 F.2d 393 C.A.8 (Mo.),1989. ***Arneson v. Heckler*** 879 F.2d 393 C.A.8 (Mo.),1989.

166 ***Nelson v. Thornburgh*** 567 F.Supp. 369 D.C.Pa.,1983 at D.

167 section 504section 504 section 504 of the Rehabilitation Act, 29 U.S.C. § 794section

102. Health and safety as a defence was raised when the US Supreme Court had to interpret section 504 of the Rehabilitation Act [168] for the first time. It ruled against a licensed practical nurse who was denied admission to a college's nursing program because of a bilateral, sensori-neural hearing loss. The effect of her impairment was that she could not distinguish sounds sufficiently to understand normal spoken speech; she had to also use her lip-reading skills. This could have interfered with her safely caring for patients. Based on an audiologist's findings, the District Court had concluded that the impairment prevented the nurse from safely performing in both her training program and her proposed profession. Powell J found that the college's unwillingness to make major adjustments in its nursing program was not discrimination.

103. In another case,[169] the Department of Transportation, Pennsylvania withdrew the licence of a driver of a school bus because he had a hearing impairment. Even though the driver wore a hearing aid that corrected to within the decibel range considered to be normal hearing, given the limitations, uncertainties, and deficiencies of hearing aids, the safety of other riders and drivers was at risk.

104. All three cases cited differ significantly on the facts and the law from Ferreira's case. On the law, the US cases were decided under the Rehabilitation Act which espoused a *de minimis* test for accommodation. The Americans with Disability Act of 1990 (ADA) has since adopted a more expansive approach. Nevertheless one should take care to observe this distinction between pre and post ADA cases and between the different historical developments between South African disability discrimination law and the law of other jurisdictions.

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504 of the Rehabilitation Act, section 504 of the Rehabilitation Act, ;

168 ***Southeastern Community College v Davis*** 442 U.S. 397, 99 S.Ct. 2361 U.S.N.C.,1979.

169 ***Strathie v. Department of Transp. Com. of Pa.*** 547 F.Supp. 1367 D.C.Pa., 1982.

The factual differences between these cases and Ferreira's are discussed below.

105. With regard to the third leg of the Bank's defence, namely Ferreira's admission that she could not work, *MacNeill v Canada (Attorney General)*[170] offers a comprehensive answer.

> "*Thus, Ms. MacNeill's admission that she is incapable of performing the duties of her position does not, ….prevent her from being a victim of a discriminatory refusal to continue to employ her. The question under the CHRA*[171] *is not whether she is incapable but whether she is losing her employment by reason of her disability, and if so, whether the employer has fulfilled its duty to attempt to accommodate her. The law does not require that employers hire or continue to employ persons who are or have become disabled; it does, however, oblige them to examine whether an appropriate and not unduly burdensome change in the work environment would allow such persons to do, or to continue doing, their job."* [172]

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170 *MacNeill v Canada* (Attorney General) (C.A.) 1994 CanLII 3496 (F.C.A.)

171 Canadian Human Rights Act

172 In coming to this conclusion the court applied the *Canadian Human Rights Act* (hereinafter CHRA) R.S.C., 1985, c. H-6 Subsection 3(1) lists "disability" as a prohibited ground of discrimination s 7 of which reads as follows:

7. It is a discriminatory practice, directly or indirectly,

(*a*) to refuse to employ or continue to employ any individual, or

(*b*) in the course of employment, to differentiate adversely in relation to an employee,

on a prohibited ground of discrimination.

PART C

The Bank's non-compliance with EEA, LRA, Codes and Guidelines

106. When interpreting the EEA and its Code, the LRA and its Code, the DOL Code and the Bank's own Guidelines the court must have regard to the constitutional values and best practice discussed above. Ferreira's condition indisputably met the definition of "disability". The Bank still had to prove Ferreira's incapacity to justify dismissing her.[173] Neither Ferreira's admission that she could not work nor her omission to lodge a formal grievance, absolves the Bank of this onus.[174]

Duty to investigate

107. The obvious starting point of such an incapacity investigation was to carry out the recommendations of three medical experts to obtain an OT report. [175] Without an OT report, the Bank could not undertake any of these investigations to decide whether and how it should accommodate Ferreira or to dismiss her. In all the foreign disability cases cited in this judgment, medical or other expert opinion was indispensable for making decisions about people with disabilities.

108. The Bank therefore had to require Ferreira to undergo an OT assessment and to bear the costs.[176] Insofar as the Bank regarded an OT report as not being cost effective, the Bank was unreasonable and unfair. The Bank, being the largest in Africa, could well afford the cost of an OT report. Furthermore, the critical need for the report out-

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173 Section 192(2) of the LRA
174 Para 39, p 429; p 162 of bundle
175 Item 10(1) of LRA Code
176 Item 8.1.5 of EEA Code; The Bank's Guidelines p 61 of bundle

weighed its cost. The consequences of not having an OT report for Ferreira, namely, her dismissal, outweighed the costs of the report. Equally, the consequences for the Bank, that is, of having its decision to dismiss her declared unfair, also outweighed the costs.

109. Neither the Bank and Ferreira nor the court can say whether an OT assessment would have recommended changes that would have diminished her incapacity or allowed her to work longer hours. However, without obtaining and possibly implementing the report, the Bank could not dismiss it as being irrelevant or not cost effective.

Duty to consult

110. When investigating reasonable accommodation the Bank had to allow Ferreira the opportunity to state a case in response[177] and to consult with technical experts to establish appropriate mechanisms to accommodate her,[178] especially as her injury was the reason for her frequent absence from work.[179] The Bank failed to consult meaningfully with Ferreira and technical experts to assess if her disability could be reasonably accommodated.[180] It made no genuine effort to re-integrate her into work or to minimise the impact of her disability.[181]

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177 Item 10(2) of LRA Code

178 Item 6.6 of the EEA Code: "*The employer should consult the employee and, where reasonable and practical, technical experts to establish appropriate mechanisms to accommodate the employee."*

179 Item 11.4 of the EEA Code: "*If an employee is frequently absent from work for reasons of illness or injury, the employer should consult the employee to assess if the reason for absence is a disability that requires reasonable accommodation*."

180 Item 11.2 of EEA Code: "*If an employee becomes disabled, the employer should consult the employee to assess if the disability can be reasonably accommodated."*
The Bank's Guidelines p 62

181 Item 11.1 of EEA Code: *"Employees who become disabled during employment should, where reasonable be re-integrated into work. Employers should seek to minimize the impact of the disability on employees."*

111. For consultations to be meaningful, the Bank and Ferreira firstly had to have sufficient relevant information. Without the technical expertise of the OT, neither party could found the consultations on a sound, objective and factual basis. Nor could the Bank justify as rational its decision to dismiss her instead of accommodating her appropriately. Secondly, the Bank had to keep an open mind to suggestions from Ferreira and the experts. It did not do so.

112. The failure to consult Ferreira and an OT meaningfully renders the decision to dismiss her unreliable because the Bank did not test its decision with them.

Duty to accommodate

113. 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.[182] It also bore a reverse onus of ensuring that it did not compel Ferreira or encourage her to terminate her employment.[183] From the following it emerges that the Bank did encourage her to leave.

114. Soon after her return to work, discussions began about her early retirement. According to the Bank, Ferreira raised the issue first with Cochraine in 2003.[184] According to Ferreira, Cochraine suggested that she apply for early retirement. [185] The court prefers Ferreira's evidence as she was highly motivated towards remaining employed.

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182 The Bank's Guidelines p 111

183 Item 11.5 of EEA Code: "*If reasonable, employers should explore the possibility of offering alternative work, reduced work or flexible work placement, so that employees are not compelled or encouraged to terminate their employment.*"

184 Para 5.1.6, p 10 of bundle

185 L 6, p 343 of bundle

Besides, Dr Meyer had advised her to work.The court finds that Cochraine urged Ferreira to apply for early retirement.

115.No less than four applications were made over two years; all were refused.[186] After the Corporate Health panel doctors refused to support the first three applications, Dr Combrinck informed Ferreira that she could apply personally to the Board of Trustees of the pension fund.[187] When applying herself, Ferreira informed the Fund that the Bank's medical board of which Dr Combrinck was a member, had suggested that she approach the Fund for early retirement.[188] Applying for early retirement was therefore not Ferreira's personal and preferred option.

116.The Bank also encouraged her to accept a demotion to the position of a switchboard operator, another position which was not commensurate with Ferreira's skills and intellectual capabilities. Ordinarily, a demotion could be a ground for constructive dismissal.

117.The Bank rejected outright suggestions that Ferreira be allowed to use a headset and a computer with her own password. Furthermore, it would not have considered allowing her to work half day even if she had requested to do so before her dismissal, assuming that she had not made that request.

118.Instead, it chose alternative work that was physically, intellectually and morally debilitating. It made Ferreira feel worthless. She testified that if the Bank had accommodated her reasonably, she would have been able to work for longer hours. Using a comfortable chair, headset and computer for a few days corroborated her contention. Confirmation

186 P 92 of bundle
187 P 91 of bundle
188 P 94 of bundle

work stimulated her mentally. Dr Meyer had recommended that she should work to keep her mind occupied to distract her from the pain. As the Bank failed to investigate whether Ferreira would work longer if it supplied her with a suitable chair, a headset and computer and employed her as a confirmation administrator on a half day basis, it cannot refute Ferreira's testimony.

119. The kind of risk that Ferreira posed to herself if she had used a computer or telephone came no where close to the risks in ***Southeastern Community College v Davis*** **and** ***Strathie v Department of Transp. Com. of Pa.***[189] Those risks were life-threatening. The risks for Ferreira were firstly never fully investigated. Secondly, all the medical opinion recommended that she continue working in an adjusted environment. Thirdly, any adverse effects of working with a computer and telephone were likely to be gradual. Further adjustments could have been made before her condition deteriorated. Insofar as Cochraine suggested that Ferreira was a risk to the Bank if she worked on its computers whilst under medication, this too was not fully investigated. There was no evidence that she made serious mistakes because of her condition. Lastly, if Ferreira impaired the moral of other employees, another defence which was not fully investigated or attested to, the Bank had an obligation to intervene to ameliorate the situation by, for example, counselling the affected employees and Ferreira. The Bank did not do this.

120. A bald refusal to allow a half day work demonstrates such a high degree of inflexibility about a frequent form of accommodation that the court is fortified in its conclusion that the Bank had no intention of retaining her in its employ from the outset. The Bank was preoccupied

189 ***Strathie v Department of Transp., Com. of Pa.*** 547 F.Supp. 1367 D.C.Pa., 1982. ***Southeastern Community College v Davis*** 442 U.S. 397, 99 S.Ct. 2361 U.S.N.C.,1979.

with its own needs rather than investigating how Ferreira could be accommodated. If it seriously wished to persuade the court that a half day job was unjustified, it should have motivated fully. 190

121. Having regard to Ferreira's disability, the Bank could not rationally or fairly measure her performance on the same standard as other employees. That is precisely what the Bank did. The Bank assessed her as a poor performer and dismissed her on that basis. 191

122. The degree of Ferreira's incapacity was relevant to the fairness of her dismissal.192 Ferreira's incapacity was partial. In the opinion of the doctors, as she was not totally unfit for work, they did not recommend her dismissal. On the contrary, Dr Meyer had recommended that she continues working to keep her mind off the pain.193 His recommendation imposed a specific obligation on the Bank to continue to employ Ferreira to ease her discomfort and to encourage her recovery. If not a basic duty, then this was the "greater duty" that the Bank bore towards Ferreira. Furthermore, the bank should have taken into account not only wages and other financial benefits but also the non-monetary rewards of employment before it dismissed her.194

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190 *Guibord v. Canada (T.D.), 1996 CanLII 3880 (F.C.)* http://www.canlii.org/eliisa/highlight.do?text=reasonable+and+accommodation&language=en&searchTitle=Search+all+CanLII+Databases&path=/en/ca/fct/doc/1996/1996canlii3880/1996canlii3880.html

191 Item 6.10 of the EEA Code; S 6 Disability Discrimination Act 1992 – Australia Act No. 135 of 1992 http://wallis.kezenfogva.iif.hu/eu_konyvtar/projektek/vocational_rehabilitiation/austral/aus

192 The Bank's Guidelines p 112; Item 10(3) of LRA Code "*The degree of incapacity is relevant to the fairness of any dismissal.*"

193 P 94 of bundle

194 *Ontario Liquor Boards Employees' Union v Ontario (Liquor Control Board of Ontario)*

123. In her application for early retirement[195] and in discussions with the Bank,[196] Ferreira acknowledged that her condition was deteriorating. She admitted to the human resources manager, Mr Pretorius, in May 2003 that she could not work.[197] To succeed in applying for early retirement, Ferreira had to persuade the trustees of the fund that she was unfit for work. Ferreira's admission that she could not work must be seen in the context of the Bank's persistent refusal to accommodate her reasonably. The medical reports and Ferreira's own experience of her disability showed that she could not work without the Bank adapting her workstation and duties. The "*sole reason*" why she felt that she was "*no longer able to work was because none of the doctor's recommendations had been followed*." Instead, she was given physical work that aggravated her incapacity resulting in her dismissal,[198] facts which the Bank admitted.[199] If the Bank had implemented Drs Combrink's and Meyer's recommendations, Ferreira might have been able to continue working and there might have been no need to apply for early retirement.[200]

124. The Bank's reliance on *The Royal Bank of Scotland v Mrs S McAdie*[201] is therefore misplaced. *McAdie* is similar to this case in that

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2002 CanLII 45765 (ON G.S.B.)

195 P 94 of bundle

196 E.g. Ferreira's letter to Human Resources on 19 August 2003 at P 92 of bundle

197 p 321 of bundle

198 Para 60, p 438; para 2.14, p 412; para 2.17.3, p 44; para 9.2, p 417 of bundle

199 Para 2.14, p 412 read with para 12, p 470 of bundle

200 Para 40, p 429 of bundle; *Paul v National Probation Service* [2003] UKEAT 0290_03_1311 (13 November2003)URL:*http://www.bailii.org/uk/cases/UKEAT/2003/0290_03_1311.html* 29; *Nottinghamshire County Council v Meikle* [2004] EWCA Civ 859 (08 July 2004) URL:*http://www.bailii.org/* Cite as: [2004] 4 All ER 97, [2004] EWCA Civ 859 para 67

201 *The Royal Bank of Scotland v Mrs S McAdie* Appeal No. UKEAT/0268/06

both employees admitted that they could not work any longer. That is where the similarity ends.

125. Firstly, McAdie was medically fit. An occupational health doctor had diagnosed McAdie to have a severe adjustment disorder arising from a workplace grievance. She had been offended by the authoritarian and unsympathetic way in which a senior manager had spoken to her. Finding that she was not disabled in the long-term, the doctor diagnosed that the primary reason for her absence was an unresolved employment dispute. Otherwise, she was medically fit to work. She was unable to return to work due to her continued ill-feeling and disagreement with the resolution of her grievance. The doctor recommended that no further referral to occupational health or medical treatment was likely to alter her situation.

126. Secondly, in *McAdie* the Royal Bank was keen to have McAdie back, but she wanted the employment to end. The reverse is true in Ferreira's case.

127. In *McAdie* the Employment Appeal Tribunal agreed with two earlier decisions[202] that an employer who is responsible for an employee's incapacity should "*go the extra mile*" in accommodating the employee. It found that there was nothing more that the Royal Bank could do. In this case, the Bank owed Ferreira a greater duty to accommodate her as she was injured on duty.[203]

128. As an example of going the extra mile, *McAdie*[204] suggests that the

202 *Edwards v Governors of Hanson School* [2001] IRLR 132 and *Frewin v Consignia Ltd* (unreported EAT/0981/02); para 4 of *McAdie*

203 Para 59, p 437; 115 of Banks Guidelines; Item 10(4) of LRA Code: "*Particular consideration should be given to employees who are injured at work or who are incapacitated by work-related illness. The courts have indicated that the duty on the employer to accommodate the incapacity of the employee is more onerous in these circumstances*."

204 Para 5 of *McAdie*

employer should put up with a longer period of absence than would otherwise be reasonable. Keeping Ferreira employed for more than two years and allowing her extended recuperation time is hardly "*going the extra mile*" when the Bank failed in its basic duty to procure an OT report and to accommodate her in a sustainable way.

129. *McAdie* is therefore more damaging than supportive of the Bank's case.

130. Another case that Mr Matyolo, attorney for the Bank, relied on was *Trident Steel Limited v Metal Industries Bargaining Council*,[205] the only, and as yet unreported, case to come before the Labour Appeal Court (LAC) post the promulgation of the EEA.[206] The employee in that case also had back pain and needed similar adjustments as Ferreira – substantial time off, a comfortable chair, a headset to use the telephone simultaneously with an adjusted computer and a half day job. The difference was that, except for the half day job, the employer accommodated the employee in all other respects on medical advice. A half day job in telesales was not operationally feasible and the employer dismissed her. On these and other facts the Labour Appeal Court held unanimously that the employer had "*acted reasonably*".[207]

131. That case does not apply in this instance. Unjustified hardship and its interdependency with reasonable accommodation were apparently not issues in that case as the LAC made no mention of them in its judgment. Insofar as Mr Matyolo advanced a case that the Bank's conduct was reasonable, that is not the test in South Africa as it is in

205 *Trident Steel Limited v Metal Industries Bargaining Council* (Case No DA14/05) at para 25
206 The court has not considered other LAC cases to which Mr Matyolo referred as they predate the EEA.
207 Trident Steel Limited v Metal Industries Bargaining Council (Case No DA14/05) at para 25

the UK[208] for dismissals both for misconduct and incapacity. The LAC[209] and subsequently the Constitutional Court[210] resoundingly rejected the reasonable employer test. The test in this case is about the reasonableness of the accommodation of Ferreira. If this court were to decide the matter on the reasonableness of the Bank's conduct, it will fail in its duty to properly balance Ferreira's right to reasonable accommodation to avoid her dismissal with the Bank's protection against unjustified hardship.[211]

132. Mr Matyolo also relied on the unreported case of *Kim Wylie v Standard Bank*[212] in support of the following submission:

> "The Court found that the Commissioner had misdirected himself in dealing with the matter as if it were a disability matter when clearly Ms Wylie had been incapacitated and could not continue to operate in terms of the employment contract"

133. After much wasted effort in trying to get a copy of the judgment, it turned out that the court merely issued an order without giving reasons. Furthermore, the matter was unopposed. *Kim Wylie v Standard Bank* also does not assist the Bank.

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208 E.g. Archibald v. Fife Council [2004] UKHL 32 (1 July 2004) URL: *http://www.bailii.org/uk/cases/UKHL/2004/32.html;* 2004 GWD 23-505, [2004] UKHL 32, [2004] ICR 954, [2004] IRLR 651, 2004 SLT 942, [2004] 4 All ER 303 para 23; *British Gas Services Ltd v McCaull* [2000] EAT 379_99_2809 (28 September 2000) URL: *http://www.bailii.org/uk/cases/UKEAT/2000/ para 50*; s 57(3) of Employment Protection (Consolidation) Act of 1978

209 *Engine Petroleum Ltd v CCMA and Others* (2007) 8 BLLR 707 LAC

210 *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* (CCT 85/06) [2007] ZACC 22 (5 October 2007) para 68, 69 and 79

211 *Paul v National Probation Service* [2003] UKEAT 0290_03_1311 (13 November 2003) at para 25 and 30 URL: *http://www.bailii.org/uk/cases/UKEAT/2003l*

212 *Kim Wylie v Standard Bank* (Case No P126/06)

134. Finally, the Bank had to *"fully document"* its attempts to accommodate Ferreira. [213] The Bank produced no documents of any attempt to accommodate her. No documents were produced because no genuine attempt was made to accommodate her. The only written record kept was of the time off allowed to Ferreira.

135. The Bank was principally concerned with its own operations in trying to place Ferreira where she would cause minimal disruption.[214] Tolerating Ferreira's diminished performance for more than two years was more convenient than creatively searching for a sustainable solution to keep her employed.

136. In the circumstances the Bank failed to reasonably accommodate Ferreira, thereby making it difficult for her to continue to work. Instead, it compelled and encouraged her to terminate her employment by seeking early retirement. When this failed, it dismissed her.

Undue Hardship

137. The Bank did not pertinently raise undue hardship as a defence. Its primary defence was that Ferreira was not fit to work. Costs as an issue arose during the evidence in response to Ferreira's testimony that the Bank refused to supply her with a headset and obtain an OT report because they were not cost effective. For the largest bank in Africa, employing 42 265 employees, having total assets exceeding R1 trillion[215] and making substantial donations to arts, culture, sport and education,[216] the costs of a headset and OT report would have been

213 p113 of bundle
214 Para 29, p 425; for denial see para 26, p 473 of bundle
215 Stock Exchange Handbook October 2007-January 2008
216 http://www.standardbank.co.za/SBIC/Frontdoor_02_02/0,2454,10293765_10295730_0,00.html

infinitesimal.[217]

138. Insofar as her frequent absence posed an unjustifiable hardship, the Bank led no evidence about why the hardship was unjustified. The Bank proved the number of days that Ferreira was absent and that this had resulted in a loss of productivity, which is to be expected. Why it became unjustifiable hardship to keep her longer, the Bank did not say. For any financially sound institution, proving unjustifiable hardship is hard. Hence the push for reasonable accommodation is stronger and is a better option for addressing the mutual interests of the parties.

Discrimination

139. All five jurisdictions[218] discussed in this judgment have adopted in varying ways the push-pull dynamic of the right of an employee to reasonable accommodation and the protection of an employer against unjustified hardship. This model is the principal means of not only balancing the economic rights of the parties but also of avoiding discrimination.

140. Having failed to accommodate Ferreira and discharge the onus of proving that any of the suggested adjustments would be unjustified hardship, the court finds that the Bank discriminated against Ferreira. Ferreira felt discriminated. When she returned to work after four months leave and found that two sections of the Bank had been renovated, she lamented that she was *"not worth a chair,….a telephone or a headphone."* [219] Furthermore, the Bank precluded her from using the section that was equipped with headsets.[220] That, she

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217 See e.g. *Coca Cola Fortune Sa (Pty) Ltd v Harold Van Wyk* (unreported Case No: JR2166/04)
218 Australia, Canada, Germany, US and UK
219 p331,L9
220 p331, 41

said, made her feel the discrimination.

141. The Bank adjusted the workstation of another employee, Abigail. It explained that Abigail "*still had use of her hands and arms*" whereas Ferreira was discouraged from extending her arms.[221] As Ferreira pointed out, Dr Meyer had said that extending her arms "*may*" aggravate her condition. Since the Bank did not test her out, it could not prove that she could not work on a computer if it were adjusted. Besides, in a modern age when all manner of adjustments are made to computers to enable people with disabilities to use them, it is inconceivable that the Bank could not find a way of adjusting a key board and workstation so that Ferreira did not have to extend her arms or lift files.

142. The Bank also dismissed Ferreira in bad faith. *Keays v Honda Canada Inc.*[222] is similar on the facts to this case. In that case, Honda dismissed a dedicated employee for insubordination for disregarding an instruction to see Honda's doctor. The court found that the instruction was merely a "*set up for failure*" because the doctor had already made up his mind that the employee's condition, Chronic Fatigue Syndrome ("CFS"), was bogus.

143. Similarly, Ferreira was set up for failure but through an incapacity dismissal process. Cochraine and Jordaan deliberately disregarded the advice of the doctors given on four occasions to procure an OT report. Furthermore, they were less than forthright about their reasons for not supplying Ferreira with a headset and computer.

144. Contrary to the Bank's stated[223] intention of placing her in a

221 Para 35, p 475 of bundle

222 *Keays v Honda Canada Inc.* 2005 CanLII 8730 (ON S.C.) para 40-44

223 L 14, p 316 of bundle

sympathetic environment, Ferreira found Cochraine's attitude "*negative and morale-breaking*".[224] Cochraine removed Ferreira from computer related jobs that were intellectually stimulating to shred paper, distribute faxes and clean cupboards, jobs that were physically more demanding and intellectually debilitating.

145. The Bank's altruism was more apparent than real. In making this finding the court is in respectful disagreement with the arbitrator who found that the Bank went to "*great lengths*"[225] to assist Ferreira.

146. The court's finding that the Bank discriminated against Ferreira does not assist her on review because that is not the case she asked the arbitrator to consider. That she was discriminated emerged incidentally from the evidence at the arbitration and the arbitrator was not obliged to respond to it. If Ferreira wanted to refer a claim based on discrimination she would have had to refer it to this court, not to arbitration.

Procedure

147. The Bank inverted the four stage process by first adapting her duties and offering her alternative work as a switchboard operator instead of instating her in a position commensurate to her training, experience and intellectual ability as the primary means of accommodating her. Ferreira's dismissal was therefore procedurally unfair. When an employer follows a flawed procedure to dismiss a disabled employee, it is impossible to divorce discrimination from

224 Para 61, p 438-9 of bundle
225 P79, para 50

the duty to accommodate.[226] The court agrees with the arbitrator that the procedure was inextricably connected to the dismissal which was substantively unfair.

The award

148. Notwithstanding the court's difference of opinion with the arbitrator on the Bank's conduct, the award is sustainable. On the material facts that the arbitrator found proved, his award is reasonable.

Order

149. The application for review is dismissed with costs.

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PILLAY D, J

Judge of the Labour Court

Date of Hearing: 26 October 2007

Date of Judgment: 25 December 2007

APPEARANCES:

For the Applicant: Mr Matyolo

Instructed by: Perrott, Van Niekerk, Woodhouse & Matyolo Inc.

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226 *Archibald v. Fife Council* [2004] UKHL 32 (1 July 2004)
URL: *http://www.bailii.org/uk/cases/UKHL/2004/32.html* 2004 GWD 23-505, [2004] UKHL 32, [2004] ICR 954, [2004] IRLR 651, 2004 SLT 942, [2004] 4 All ER 303 para 31