Incapacity must be determined

...
Term or permanent, then the next three stages follow.

Stage 2:
The employer must enquire into the extent to which the employee is able to perform her work. This is a factual enquiry to establish the extent that her disability has on her performing her work. The employer may require medical or other expert advice to answer this question.

Stage 3:
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, reintegrate the employee. During this stage, the employer must consider alternatives short of dismissal.

Stage 4:
If no adaptation is possible, the employer may acquire other suitable work available.

The court said that the Employment Equity Act elaborates on what "reasonable accommodation" is and defines it as being "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." A dismissal on a prohibited ground of discrimination is automatically unfair, this implies the duty of the employer to accommodate employees in order to prevent discrimination.

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. The Employment Equity Code sets a threshold that balances an employer’s obligation to accommodate employees with the employer’s circumstances. Unjustified hardship is the threshold at which employers are relieved of their obligation to accommodate disabled employees. (This means that the threshold would be higher for a large, financially sound employer.) The Employment Equity Act 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."

The Employment Equity Code sets a threshold that balances an employer’s obligation to accommodate employees with the employer’s circumstances. Unjustified hardship is the threshold at which employers are relieved of their obligation to accommodate disabled employees. (This means that the threshold would be higher for a large, financially sound employer.) The Employment Equity Act 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."

The court found that the employer in the Standard Bank case refused to reasonably accommodate the employee and as such discriminated against her which was automatically unfair. The employee, however, had only referred an unfair dismissal dispute. Therefore although the court found the dismissal to be automatically unfair she could not get an increased compensation award.

When considering implementing an incapacity process, it is important to first establish whether the employee has a disability. If so, one must tread lightly so as not to discriminate against such an employee. Employers need to follow the guidelines provided in the Labour Relations Act and Employment Equity Act Code.