# THE DEFENCE OF INHERENT REQUIREMENTS OF THE JOB: A BLANKET BAN FOR MEDICAL REASONS NOT JUSTIFIABLE

**IMATU v City of Cape Town**
**(2005) 14 LC 6.12.2***

## 1 Introduction

The Labour Court was faced with the question of whether the respondent in this case was justified in imposing a blanket ban on the employment of diabetics in the position of firefighters on the basis that the condition in itself posed a serious risk for the sufferer, as well as the public at large, where the individual was called upon to work in hazardous and stressful conditions.

## 2 Facts

The facts of the case were that the second applicant, one Mr Murdoch, was employed as a law enforcement officer in the department of Protection Services of the South Peninsula Municipality, the respondent. He had, however, been a volunteer reservist firefighter, actively involved in firefighting, for a period of some 13 years, and it remained his dream to become a fireman. He had previously applied for an internal transfer to the Department of Fire and Emergency Services, but since there were no vacancies in the relevant department, his application was not successful. Therefore, when a vacancy arose in the municipality's fire department at the end of 2002, the second applicant saw the potential to realise his dreams and again applied for an internal transfer.

Occupational medical practitioners, employed by the respondent and called upon to assess the medical fitness of employees to perform tasks assigned to them, examined the second applicant as one of the applicants for the position, and found him to be medically unsuitable for the position of firefighter. They reached this conclusion on the basis that Murdoch was a diabetic, notwithstanding the fact that he was not individually assessed. The fact of his insulin usage rendered Murdoch unsuitable in that he represented an unacceptable safety risk to himself, other employees and the general public.

Consequently the second applicant's request was refused on the basis that he was an insulin-dependent diabetic.

* As yet unreported in printed format. The reference refers to the website http://www.irnetwork.co.za.

The second applicant rejected this decision on the basis that it was discriminatory and that the imposition of a blanket ban on the employment of diabetics as firefighters amounted to unfair employment discrimination. Acting on his behalf, his trade union, IMATU (the first applicant), referred a dispute regarding unfair discrimination in terms of section 10 of the Employment Equity Act, 1998 (hereinafter "the EEA") to the CCMA for conciliation. A certificate of non-resolution was issued and the matter was referred to the Labour Court for adjudication.

## 3 Issue to be decided

The issue to be decided was whether the imposition of the blanket ban on the appointment of firefighters who are insulin-dependent diabetics was fair and justified on the basis of the inherent requirements of the job of a firefighter.

The court held that there was only one issue to be decided upon: could the stressful work environment together with the unpredictable effects of decreased blood glucose levels brought on by the insulin injections, create unacceptable risks in emergency situations, thus rendering the applicant, as a diabetic, medically unsuitable for the position of firefighter?

## 4 Decision of the court

In considering the substantial medical and other evidence placed before it, the court came to the conclusion that the respondent had failed to prove that a blanket ban on diabetics was justifiable. Although the respondent's concerns about public liability were real, the constitutional principle of non-discrimination was paramount. The ban as such, and in particular its specific application to the second applicant, who was in all respects a well-controlled diabetic, was unjustified and constituted unfair discrimination in terms of the EEA. The court ordered the respondent municipality as employer to assess each applicant individually on the basis of the employee's own merits and objective criteria. Only after an individual assessment could a decision be reached on the suitability or not of an individual for the position applied for. The respondent was ordered to second the second applicant to Fire and Emergency Services in the position of learner firefighter.

The matter before the court had to be determined in terms of section (6) of the Employment Equity Act which reads as follows:

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

Furthermore, section 6(2) provides as a defence that it is not unfair discrimination to distinguish, exclude or prefer any person on the basis of an inherent requirement of the job and where unfair discrimination is alleged, section 11 places the onus on the employer concerned to prove that such discrimination is fair.

The court considered the assertion of the respondents with regard to the question of whether the blanket ban on the employment of diabetics was justified on the basis of the inherent requirements of the job of a firefighter. Although a legitimate means of ensuring the safety of the public, and in fact the relationship of the differentiation to that objective was fair, the question arose as to whether there was a rational connection between the differentiation and a legitimate purpose. The court decided in the affirmative. However, the imposition of a blanket ban on the appointment of insulin-dependent firefighters amounted to unfair discrimination and was not justified on the basis of the inherent requirements of the job.

## 5 Discussion

### *5 1 Medical evidence*

A great deal of medical evidence was adduced at the trial. The evidence of the respondent municipality claimed that diabetics are subject to severe hypoglycaemic episodes when blood sugar levels drop too low. The occupational health medical practitioners who testified for the respondent accordingly favoured a blanket ban on the employment of diabetics in positions as firefighters as the surest method of avoiding risk to which they may be subjected. They believed that the blanket ban was appropriate because of the unpredictability of the hypoglycaemic effects of the decreased blood sugar glucose level possibly occasioned by insulin intake. While the risk was less in well-controlled diabetics, and it could be further minimized by "running high" (*ie* eating sufficient glucose before attending an incident), it was still considered that there was a real risk, principally because a firefighter is not always in a position to take supplements while engaged in firefighting (par 56).

The expert witness for the applicants was Prof Bonnici, South Africa's leading authority on diabetes who is also an accredited expert internationally. Prof Bonnici had also treated the second applicant for almost 20 years. Prof Bonnici was at the cutting edge of modern advances regarding the employment of diabetics in hazardous occupations and he regarded the fears of employers as overcautious and unnecessarily restrictive (par 63). Prof Bonnici shared the view of Vaile and Pyke ("Diabetes Mellitus and Thyroid Disorders" in Cox *et al Fitness for Work: The Medical Aspects*) who wrote as follows:

> "Despite recent advances in the control of diabetes the condition remains poorly understood and it is sometimes feared by employers and even by their medical advisers. As a result, some diabetics still encounter unjustifiable difficulties in finding and keeping work because of their condition. There is a paucity of published scientific data on the work experience of diabetics in general or in particular situations, eg in shift work, but their under representation in the work place suggests that there is continuing prejudice against their employment. The risk of hypoglycaemia and visual impairment may legitimately debar *poorly controlled* insulin dependent diabetics from jobs where safety or vigorous physical effort is an important factor, but diabetics are not invalids and most can work normally and should not be discriminated against in job selection" (par 43 of the judgment).

Prof Bonnici also held the view that the guideline of the South African Society of Occupational Medicine of 1996 was unscientific and simply incorrect. This guideline entails that:

> "Diabetics controlled on diet or on diet oral agents are generally not prone to attacks of hypoglycaemia. They can therefore be safely employed in almost every situation exactly like a non-diabetic. They are not however allowed to become commercial airline pilots.
>
> Insulin dependant diabetics may be prone to hypoglycaemia but these attacks can be minimized with the help of a physician skilled in the management of diabetes.
>
> In general, insulin dependent diabetics should not be employed where they may inadvertently injure themselves or others in the event of a hypoglycaemia attack. They should not work on scaffolding, with heavy machinery or drive heavy-duty vehicles. They should not normally engage in underground mining or where easy access to food and medical help is denied. Insulin dependent diabetics should not normally work at heights ie in cranes or roofs. They should not work near open fires or furnaces or near high voltage installations. They should not work near unguarded moving machinery."

Prof Bonnici held the view that those diabetics on oral agents may suffer more attacks as they tend to be less controlled and more poorly managed.

In the United Kingdom the government recommends the use of Diabetes UK's *Guidelines for Employment of Insulin-Treated Diabetic Persons in Potentially Hazardous Occupations* (par 52).

These criteria are:

- Physical and mental fitness in accordance with non-diabetic standards.
- Diabetes should be under regular (at least annual) specialist review.
- Diabetes should be under stable control.
- Diabetic persons should monitor their blood glucose and be well educated and motivated in diabetes self-care.
- There should be no disabling hypoglycaemia and the person should have normal awareness of individual hypoglycaemic symptoms.
- There should be no advanced retinopathy or nephropathy, nor severe peripheral or autonomic neuropathy.
- There should be no significant coronary heart disease, peripheral vascular disease or cerebrovascular disease.
- Suitability for employment should be re-assessed annually by both an occupational and diabetes specialist physician (par 52).

This report also identifies specific coping strategies to be adopted by diabetic firefighters to minimise the risk of hypoglycaemic attacks and safely maintain a normal work pattern. These are:

- In-depth knowledge of diabetes and self-care strategies.
- Commitment and motivation.
- Frequent and sensible self blood glucose monitoring.
- The ability to react appropriately to particular blood glucose levels.

- Multiple insulin injection treatment (4 times per day).
- Use of analogue insulin which reduces hypoglycaemic risks.
- Available supply of short-acting and long-acting carbohydrate food on person.
- Running high (in terms of blood glucose) on duty, for example perhaps 4-10mmol/l off duty, but 6-12mmo1/l on duty (par 53).
- Taking carbohydrate food in the appliance on the way to an incident.

It was apparent that the respondent's occupational medical practitioners did not use these tools of assessment in regard to the second applicant. The second applicant had always been a perfect diabetes patient and during his 13 years service as a voluntary firefighter he had never required the emergency antidote he always carried.

## *5 2 The reality of the risk*

The court pointed out that the precise risk facing an employer who employed a diabetic firefighter was in essence that the firefighter under strenuous conditions of firefighting a fire may suffer a severe "hypo" (hypoglycaemic attack) that required third party intervention resulting in injury to himself, his colleagues or members of the public (par 65). All the medical experts accepted that there was some risk. However this risk was not greater than that of employees who suffer from other conditions or even those who are apparently healthy but who might fall victim to unpredictable conditions like seizures, strokes or embolisms. In addition a poorly controlled diabetic is at greater risk than an optimally controlled one. An optimally controlled type 1 diabetic is at less risk than an undiagnosed or poorly managed type 2 diabetic (par 65).

## *5 3 Applying the discrimination formula*

The approach to unfair discrimination in our courts was established in the Constitutional Court in *Harksen v Lane NO* (1998 1 SA 300 (CC)). The approach was set out as follows:

> "Firstly, does the differentiation amount to 'discrimination'? If it is on a specified ground, then discrimination will have been established. If it is not on a specified ground, then whether or not there is discrimination will depend upon whether, objectively, the ground is based on attributes and characteristics which have the potential to impair the fundamental human dignity of persons as human beings or to affect them adversely in a comparably serious manner …
>
> If [the differentiation] has been found to have been on a specified ground, then unfairness will be presumed. If on an unspecified ground, unfairness will have to be established by the complainant. The test of unfairness focuses primarily on the impact of the discrimination on the complainant and others in his or her situation. If at the end of this stage of the enquiry, the differentiation is found not to be unfair, then there will be no violation …" (325A).

It was admitted that the respondent differentiated by imposing a blanket ban on the appointment of insulin-dependent diabetics. The differentiation,

as such, can be seen as a legitimate method of guaranteeing public safety and bears a rational relationship to that objective. The respondent has a legitimate government purpose in taking steps to reduce the risk of harm to employees in its fire service.

In the present matter it was the court's view that a diabetic was not regarded as a person with a disability (which is a listed ground in section 6 of the EEA).There was therefore no proof of differentiation on a listed ground. According to the formula in *Harksen v Lane NO* (*supra*) the applicants had to prove that the ground of differentiation was based on attributes and characteristics having the potential to impair the second applicant's dignity so as to amount to discrimination (par 92). The court concluded that the policy impaired the second applicant's dignity. Controlled diabetics seek dignity with the demand that their capacity to function as normal members of society be recognised to the extent that modern pharmacological and technical advances make this possible.

If discrimination occurs on an unspecified ground in terms of the Bill of Rights by virtue of section 9(5) of the Constitution, the onus to prove unfairness transfers to the complainant who alleges discrimination on an unspecified, analogous ground. However, in the present matter the case was brought in terms of the EEA and the court held that section 11 does not provide for a similar transfer of onus in terms of the EEA. In other words, whether or not the ground is specified the onus remains on the respondent throughout to prove fairness once discrimination is shown. In the context of the EEA section 6(2)(b) also permits justification on the basis of the inherent requirement of a job, in which event the discrimination is deemed not to be unfair. The onus in this respect is also on the employer (par 81). Since the blanket ban was an over-reach, it and its specific application to the second applicant constituted *unfair* discrimination.

The justification for discrimination on the basis of the inherent requirements of the job is also to be found in article 3 of Convention No 111 of the International Labour Organisation in the following terms:

> "Any distinction, exclusion or preference in respect of a particular job based on the inherent requirements thereof shall not be deemed to be discrimination."

This justification is to be restrictively interpreted (see Dupper and Garbers "Employment Discrimination: A Commentary" in Thompson and Benjamin *South African Labour Law* (2004)). The respondent failed to justify its unfair discrimination (in the form of a blanket ban). Without denying that firefighting is by its nature hazardous, to simply exclude insulin-dependent diabetics from the occupation on this ground is not justifiable on the ground of inherent requirements of the job (par 112).

This view is in line with the Constitutional Court judgment in *Hoffmann v SA Airways* (2000 ILJ 2357 (CC)) where the court confirmed that an individualised assessment, rather than a blanket ban, should be followed in cases where the employer seeks to differentiate on health grounds in an employment policy or practice.

## 6 Concluding remarks

This case draws attention to the defence of inherent requirements of the job and an employer's obligations in assessing risk. But it also provides an example of a detailed and lucid application of the test in *Harksen v Lane NO* (*supra*) in an employment discrimination case. The following non-exhaustive issues that arise from the case are notable and are accordingly emphasised in conclusion.

Firstly, the Labour Court held that, unlike the position in terms of section 9 of the Constitution, where the onus to prove unfairness remains with the claimant in cases where an unlisted ground is proved, in a case brought under the EEA the onus shifts to the employer to prove fairness. Unlike the Bill of Rights in the Constitution section 11 of the EEA does not transfer the onus to prove fairness to the claimant. Whether or not the ground is specified the onus remains on the respondent throughout to prove fairness once discrimination is shown.

Secondly, the judgment emphasises that illness as a ground of discrimination does not necessarily fall under the listed ground of disability, but may be an unlisted ground.

Thirdly, unfair discrimination on the basis of an illness needs to be justified on an individualised basis and a blanket ban on the appointment of persons suffering from a certain illness will not establish justification on the basis of inherent requirements of the job.

Finally, the extensive consideration of medical evidence and the position in countries like the UK provides employers with valuable guidelines to be used in the individual assessment of applicants with diabetes.

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