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EMPLOYMENT ALERT

Our programme on Conducting a Disciplinary Enquiry has been accredited by the Services SETA.

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DISABLED EMPLOYEES – A DUTY TO ACT

As soon as an employer considers an employee to be disabled, the employer must take steps to accommodate that employee unless this results in an unjustifiable hardship. In *Smith v Kit Kat Group (Pty) Ltd* (JS787/14) [2016] ZALCJHB 362 (23 September 2016), the employee sustained injuries during a failed suicide attempt. After being termed "cosmetically unacceptable" by his employer, the employee was prohibited from returning to work.



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DISABLED EMPLOYEES – A DUTY TO ACT

Section 10 of the Employment Equity Act, No 55 of 1998 (EEA) which prohibits discrimination based on, among other factors, disability.

Once an employer (not the employee) thinks that a disability may impact an employee's job, the employer must ensure that it does not discriminate against the employee based on disability.



As soon as an employer considers an employee to be disabled, the employer must take steps to accommodate that employee unless this results in an unjustifiable hardship. In *Smith v Kit Kat Group (Pty) Ltd (JS787/14) [2016] ZALCJHB 362 (23 September 2016)*, the employee sustained injuries during a failed suicide attempt. After being termed "cosmetically unacceptable" by his employer, the employee was prohibited from returning to work.

The employee tried to commit suicide during September 2013. Fortunately, he survived but tragically sustained severe facial injuries, which caused a minor speech impediment. The employer considered the employee to be "not facially acceptable" and "cosmetically unacceptable".

From the date that he was released from hospital, the employee did everything in his power to try and resume his duties. Initially, it appeared as though he would be permitted to do so. However, as time progressed it became apparent that the employer had no intention of allowing him to return to work. Although the employer prohibited the employee from returning to work and resuming his duties, he was not dismissed. The employee was effectively left in limbo.

This resulted in the employee referring an unfair discrimination dispute to the Labour Court in terms of s10 of the Employment Equity Act, No 55 of 1998 (EEA) which prohibits discrimination based on, among other factors, disability. In his referral, the employee also relied on the Code of Good Practice on the Employment of People with Disabilities (Code).

In terms of the Code, employers are obliged to reasonably accommodate the needs of people with disabilities. The only exception to this requirement, is when the reasonable accommodation may impose "unjustifiable hardship" on the business of the employer. During the accommodation process, an employer must, at the very least, consult the employee and establish what mechanisms

may be implemented to accommodate the disability. The employer in the *Smith* case failed to do this.

According to the Labour Court, once an employer (not the employee) thinks that a disability may impact an employee's job, the employer must ensure that it does not discriminate against the employee based on disability. In this instance, the court found that the employer adopted the wrong approach. Although the employer did not actively terminate the employee's employment, its refusal to allow the employee to resume his duties was, according to the court, tantamount to a dismissal.

Interestingly, in considering whether or not the existence of an unjustifiable hardship may have warranted the employer's passive approach, the Labour Court held that in assessing the existence of an unjustifiable hardship, the unjustifiable hardships of both parties should be considered, not only that of the employer. The Labour Court awarded compensation and damages amounting to 30 months' remuneration.

It is clear from this judgment that the Labour Court considers a blatant failure to address the needs of a disabled employee in a very serious light. An employer's obligations in terms of the EEA and the Code to accommodate employees who have disabilities, are disregarded at an employer's own peril.

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Gillian Lumb and Anli Bezuidenhout

Employment STRIKE GUIDELINE

Our Employment practice's new
EMPLOYMENT STRIKE GUIDELINE
answers our clients' FAQs.

Topics discussed include strikes, lock-outs and picketing.

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CHAMBERS GLOBAL 2014 - 2016 ranks our Employment practice in Band 2: Employment.

Aadil Patel ranked by CHAMBERS GLOBAL 2015 - 2016 in Band 2: Employment.

Hugo Pienaar ranked by CHAMBERS GLOBAL 2014 - 2016 in Band 2: Employment.

Fiona Leppan ranked by CHAMBERS GLOBAL 2016 in Band 3: Employment.



Michael Yeates named winner in the **2015** and **2016 ILO Client Choice International Awards** in the category 'Employment and Benefits, South Africa'.



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BAND 2
Employment



2009-2016

Ranked Cliffe Dekker Hofmeyr

TIER 2
FOR LABOUR AND
EMPLOYMENT

2015 RANKED #1 BY
DEALMAKERS
FOR M&A DEAL FLOW
7 YEARS IN A ROW
1st by General Corporate
Finance Deal Flow

2014 1st by M&A Deal Flow
1st by M&A Deal Value
1st by General Corporate Finance
Deal Flow

2013 1st by M&A Deal Flow
1st by M&A Deal Value
1st by Unlisted Deals - Deal Flow

2012 1st by M&A Deal Flow
1st by General Corporate Finance
Deal Flow
1st by General Corporate Finance
Deal Value
1st by Unlisted Deals - Deal Flow

DealMakers

2015
1ST

South African law firm and
12th internationally for Africa
& Middle East by deal value

2ND

South African law firm and
2nd internationally for Africa
& Middle East by deal count

1ST

South African law firm and
15th internationally for Europe
buyouts by deal value



NO.1

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YEARS IN A ROW
for client service excellence

#6YearsInARow



OUR TEAM

For more information about our Employment practice and services, please contact:



Aadil Patel
National Practice Head
Director
T +27 (0)11 562 1107
E aadil.patel@cdhlegal.com



Gillian Lumb
Regional Practice Head
Director
T +27 (0)21 481 6315
E gillian.lumb@cdhlegal.com



Fiona Leppan
Director
T +27 (0)11 562 1152
E fiona.leppan@cdhlegal.com



Hugo Pienaar
Director
T +27 (0)11 562 1350
E hugo.pienaar@cdhlegal.com



Nicholas Preston
Director
T +27 (0)11 562 1788
E nicholas.preston@cdhlegal.com



Samiksha Singh
Director
T +27 (0)21 481 6314
E samiksha.singh@cdhlegal.com



Gavin Stansfield
Director
T +27 (0)21 481 6313
E gavin.stansfield@cdhlegal.com



Michael Yeates
Director
T +27 (0)11 562 1184
E michael.yeates@cdhlegal.com



Anli Bezuidenhout
Senior Associate
T +27 (0)21 481 6351
E anli.bezuidenhout@cdhlegal.com



Kirsten Caddy
Senior Associate
T +27 (0)11 562 1412
E kirsten.caddy@cdhlegal.com



Ndumiso Zwane
Senior Associate
T +27 (0)11 562 1231
E ndumiso.zwane@cdhlegal.com



Sipelelo Lityi
Associate
T +27 (0)11 562 1581
E sipelelo.lityi@cdhlegal.com



Anelisa Mkeme
Associate
T +27 (0)11 562 1039
E anelisa.mkeme@cdhlegal.com

BBBEE STATUS: LEVEL THREE CONTRIBUTOR

Cliffe Dekker Hofmeyr is very pleased to have achieved a Level 3 BBBEE verification under the new BBBEE Codes of Good Practice. Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

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JOHANNESBURG

1 Protea Place, Sandton, Johannesburg, 2196. Private Bag X40, Benmore, 2010, South Africa. Dx 154 Randburg and Dx 42 Johannesburg.
T +27 (0)11 562 1000 F +27 (0)11 562 1111 E jhb@cdhlegal.com

CAPE TOWN

11 Buitengracht Street, Cape Town, 8001. PO Box 695, Cape Town, 8000, South Africa. Dx 5 Cape Town.
T +27 (0)21 481 6300 F +27 (0)21 481 6388 E ctn@cdhlegal.com

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