

**COURTS' TREATMENT OF DEPRESSION IN THE WORKPLACE: INCAPACITY,  
POOR PERFORMANCE, MISCONDUCT AND DISABILITY**

by

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This research project is submitted in partial fulfilment of the regulations for the LLM Degree at the University of KwaZulu-Natal, College of Law and Management Studies, School of Law.

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## DECLARATION

I, Matilda Mbali Ngcobo declare that:

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## LIST OF ACRONYMS AND ABBREVIATIONS

<b>ADA</b>	-	AMERICAN WITH DISABILITIES ACT
<b>ADAA</b>	-	AMERICAN WITH DISABILITIES AMENDMENT ACT
<b>AfDP</b>	-	AFRICAN CHARTER ON HUMAN AND PEOPLES' RIGHTS ON THE RIGHTS OF PERSON WITH DISABILITES, 2018
<b>AU</b>	-	AFRICAN UNION
<b>BCEA</b>	-	BASIC CONDITIONS OF EMPLOYMENT ACT 75 OF 1997
<b>CCMA</b>	-	COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION
<b>CRPD</b>	-	CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES
<b>EEA</b>	-	EMPLOYMENT EQUITY ACT 55 OF 1998
<b>EQC</b>	-	EQUITY COURT
<b>EQLR</b>	-	EQUALITY LAW REPORTS
<b>IC</b>	-	INDUSTRIAL COURT
<b>ILJ</b>	-	INDUSTRIAL LAW JOURNAL
<b>ILO</b>	-	INTERNATIONAL LABOUR ORGANIZATION
<b>LAC</b>	-	LABOUR APPEAL COURT
<b>LDD</b>	-	LAW, DEMOCRACY AND DEVELOPMENT JOURNAL
<b>LC</b>	-	LABOUR COURT
<b>LRA</b>	-	LABOUR RELATIONS ACT 66 OF 1995
<b>OAU</b>	-	ORGANISATION OF AFRICAN UNITY
<b>PARA</b>	-	PARAGRAPH
<b>PARAS</b>	-	PARAGRAPHS
<b>PELJ</b>	-	POTCHEFSTROOM ELECTRONIC LAW JOURNAL
<b>PER</b>	-	POTCHEFSROOMSE ELEKTRONIESE REGSBLAD
<b>SA</b>	-	SOUTH AFRICAN LAW REPORTS
<b>SADAG</b>	-	SOUTH AFRICAN DEPRESSION AND ANXIETY GROUP
<b>SADC</b>	-	SOUTHERN AFRICAN DEVELOPMENT COMMUNITY
<b>SAJHR</b>	-	SOUTH AFRICAN JOURNAL ON HUMAN RIGHTS
<b>SAJFS</b>	-	SOUTHERN AFRICAN JOURNAL FOR FOLKLORE STUDIES
<b>SAJP</b>	-	SOUTH AFRICAN JOURNAL ON PSYCHIATRY
<b>SALJ</b>	-	SOUTH AFRICAN LAW JOURNAL
<b>SAMERCLJ</b>	-	SOUTH AFRICAN MERCANTILE LAW JOURNAL
<b>TAG</b>	-	TECHNICAL ASSISTANCE GUIDELINES ON THE EMPLOYMENT



OF PERSONS WITH DISABILITIES

- UDHR** - UNIVERSAL DECLARATION OF HUMAN RIGHTS
- UN** - UNITED NATIONS
- WPRPWD** - WHITE PAPER ON THE RIGHTS OF PERSONS WITH DISABILITIES

# CHAPTER 1

## INTRODUCTION

### 1.0 Introduction

This thesis considers South African courts' treatment of depression in the workplace to distinguish between incapacity, poor performance, misconduct and disability. An understanding of the differences between these aspects is needed because of the different legal consequences that attach to them. For both employers and employees with disabilities, as well as professionals involved in the industrial processes, including psychiatrists and occupational therapists, clarity on the differences is vital to ensure that not only the rights of the employee with depression are upheld in processes that unfold in the workplace, but also the concomitant rights of the juristic entity (the employer) to remain a viable enterprise. The positive knock-on effect of accommodation of diversity, including mental illness such as depression, in workplaces for other employees has been noted and clarity on these aspects contributes to workplace morale.<sup>1</sup>

This thesis is doctrinal research – a review of the case law in relation to these categories.

### 1.2 Background

The rising epidemic of depression seems to be a concern both internationally and in the South African workplace. A study conducted in 2014 involving over 1 000 employed or previously employed workers or managers showed almost half of the employees with depression who participated in the study found it challenging to perform their responsibilities as a consequence of difficulty in concentration.<sup>2</sup> The employees felt incompetent, which resulted in low productivity and high absenteeism from work. The South African Depression and Anxiety Group (SADAG) highlights the importance of depression management in the workplace by setting measures in place to encourage and support employees with seeking treatment.<sup>3</sup>

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<sup>1</sup> Holness W, 'The invisible employee: Reasonable accommodation of Psychosocial Disability in the South African Workplace' (2016) 32 (3) *South African Journal on Human Rights (SAJHR)* 510-537, at page 520.

<sup>2</sup> 'The impact of Depression at work, a South African IDeA Report' at [http://www.sadag.org/index.php?option=com\\_content&view=article&id=2391:new-research-on-depression-in-the-workplace&catid=11&Itemid=101](http://www.sadag.org/index.php?option=com_content&view=article&id=2391:new-research-on-depression-in-the-workplace&catid=11&Itemid=101) (undated) (accessed on 19 March 2018)

<sup>3</sup> 'The impact of Depression at work, a South African IDeA Report' at [http://www.sadag.org/index.php?option=com\\_content&view=article&id=2391:new-research-on-depression-in-the-workplace&catid=11&Itemid=101](http://www.sadag.org/index.php?option=com_content&view=article&id=2391:new-research-on-depression-in-the-workplace&catid=11&Itemid=101) (undated) (accessed on 19 March 2018).

People with disabilities are described as people who have a long term or recurring physical or mental impairment which substantially limits their prospects of entry into or advancement in employment.<sup>4</sup> Depression has the same protection which is afforded to disabilities as it is a mental impairment, also known as a psycho-social illness or disability. SADAG list the following as symptoms of depression:

Persistent sad, or 'empty' mood; loss of interest or pleasure in hobbies and activities that were once enjoyed, including sex; feelings of hopelessness and pessimism; feelings of guilt, worthlessness, helplessness and self-reproach; insomnia or hypersomnia, early morning awakening, or oversleeping; appetite and/or weight loss or overeating and weight gain; decreased energy, fatigue and feeling run down; increased use of alcohol and drugs, may be associated but not a criteria for diagnosis; thoughts of death or suicide; suicide attempts; restlessness, irritability, hostility; difficulty concentrating, remembering, making decisions; persistent physical symptoms that do not respond to treatment, such as headaches, digestive disorders, and chronic pain; and deterioration of social relationships.<sup>5</sup>

SADAG lists three types of depression as major depression, dysthymia and bipolar disorder.<sup>6</sup> "It affects cognitive functioning such as decision-making, concentration, memory and problem-solving abilities".<sup>7</sup> Stander *et al.* in a South African study measuring the prevalence of depression in the workplace found the following:

The study provided an insight into the prevalence of depression within the workplace in South Africa, as well as the impact of depression on the employees and employers in terms of sick leave and levels of productivity, especially when the symptoms include cognitive impairment. The study showed that during their last depressive episode, employees took eighteen days off work due to the condition. Non-disclosure of depression as a reason for sick leave was predominantly due to stigma and work security issues. A significant proportion of respondents also believed that their employer would not know how to support them.<sup>8</sup>

Lack of support from employers to persons with depression is noteworthy. South African case law reveals that employers are either not well equipped to deal with or refuse to acknowledge "depression" as a form of disability like other illnesses in the workplace. Employees with

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<sup>4</sup> Section 1 of the Employment Equity Act No. 55 of 1998.

<sup>5</sup> 'What is depression?' at <http://www.sadag.org/images/stories/What%20is%20a%20Depressive%20Disorder.doc> (undated) (accessed on 31 March 2018).

<sup>6</sup> 'Depression, Treatment & Referral Guide' at <http://www.sadag.org/images/brochures/Depression%20Brochure.pdf> (undated) (accessed on 31 March 2018).

<sup>7</sup> 'What is depression' at <http://www.sadag.org/images/brochures/Depression%20Brochure.pdf> (undated) (accessed on 31 March 2018).

<sup>8</sup> Stander M P at al, 'Depression in the South African workplace' (2016) *South African Journal on Psychiatry*, (2016) 22 1-3, at page 1.

depression are either dismissed for misconduct,<sup>9</sup> incapacity,<sup>10</sup> or poor performance.<sup>11</sup> In some instances, the work environment becomes intolerable and employees opt to resign and claim constructive dismissal.<sup>12</sup>

It appears that there is a nexus between depression and psychological disability, despite the lack of consistency and clarity from the courts as will be revealed in Chapter 3 below. In this regard, Article 1 of the Convention on the Rights of Persons with Disabilities (CRPD)<sup>13</sup> describes persons with disabilities to include long-term physical, mental, intellectual or sensory impairment which have an adverse effect on a person's full participation in society on an equal basis with others.<sup>14</sup> Holness contends that mental impairment in Article 1 of the CRPD includes persons with psychosocial disabilities.<sup>15</sup> Furthermore, Holness recognises psychosocial illnesses as including mood disorders such as depression and bipolar disorder.<sup>16</sup>

Welgemoed shares the same sentiments by acknowledging that depression falls under mental impairment.<sup>17</sup> Additionally, Nxumalo asserts that the inclusion of mental impairment in the definition of persons with disabilities in the CRPD make provisions for the protection of employees with mental illness in the workplace which affords them protection as guaranteed by the CRPD.<sup>18</sup> Persons with disabilities including those with psychosocial disabilities are

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<sup>9</sup> 1. *Transnet Rail Engineering v Mienies & Others* (2015) 36 ILJ 2605 (LAC), (Employee dismissed for gross negligence); 2. *Gangram v MEC for the Department of Health, KwaZulu-Natal & Another* (2017) 38 ILJ 2261 (LAC) (Employee dismissed for absenteeism); 3. *Transnet Rail Engineering v Minies & Others* (2015) 36 ILJ 2605 (LAC) (Employee dismissed for gross negligence and poor work performance); 4. *MEC for the Department of Health, Western Cape v Weder; MEC for the Department of Health, Western Cape v DENOSA obo Mangena* (2014) 35 ILJ 2131 (LAC) (Employees dismissed for absenteeism); 5. *EWN v Pharmaco Distribution (Pty) Ltd* (2017) 38 ILJ 2496 (LAC) (Employee dismissed for wilful refusal to carry out instructions or duties when she failed to present herself to a psychiatrist for medical examination).

<sup>10</sup> *Spero v Elvey International (Pty) Ltd* (1995) 16 ILJ 1210 (IC) (Employee dismissed for incapacity); *Niemand v South African Post Office Ltd* (P528/10) [2014] ZALCCPE 9 (16 May 2014) (Employee dismissed for incapacity); *IMATU obo Strydom v Witzenberg Municipality* (2012) 33 ILJ 1081 (LAC) (Employee dismissed for incapacity); *Bennet and Mondipak* (2004) 25 ILJ 583 (CCMA) (Employee dismissed for incapacity).

<sup>11</sup> *New Way Motor & Diesel Engineering (Pty) Ltd v Marsland* (2009) 30 ILJ 2875 (LAC) (Employee dismissed for poor work performance).

<sup>12</sup> *Western Cape Education Department v General Public Service Sectoral Bargaining Council & Others* (2013) 34 ILJ 2960 (LC) (Constructive dismissal); *National Health Laboratory Service v Yona & Others* (2015) 36 ILJ 2259 (LAC).

<sup>13</sup> United Nations Convention on the Rights of Persons with Disabilities adopted by the General Assembly of the United Nations on 13 December 2006 and entered into force on 3 May 2008.

<sup>14</sup> Article 1 of the CRPD.

<sup>15</sup> Holness W (n 1 above), at page 510.

<sup>16</sup> Holness W (n 1 above), at page 510.

<sup>17</sup> Welgemoed B, 'Are employees suffering from depression in the South African workplace protected by the existing disability provisions within employment law?' Student Theses, University of Western Cape, at page 88.

<sup>18</sup> Nxumalo L, 'Does South African Labour Legislation Provide Adequate Protection for Mental illness in the Workplace?' (2018) 39 *Industrial Law Journal* 1436 – 1452, at page 1438.

guaranteed full participation in the workplace as enshrined in the equality clause of the Constitution of the Republic of South Africa, 1996 (the Constitution), and clauses promoting the protection of one's freedom of trade, occupation and profession, as well as the right to fair labour practices.<sup>19</sup> Consequently, it can be said that there is a close connection between depression and psycho-social disability.

South Africa ratified CRPD and is therefore obliged to incorporate it into its national laws.<sup>20</sup> The Employment Equity Act No 95 of 1998 (EEA) defines people with disabilities as people with long-term or recurring physical impairments which substantially limit their prospects of entry into, or advancement in employment.<sup>21</sup> The Code of Good Practice Key Aspects on the employment of persons with disabilities (the Code)<sup>22</sup> describes this definition by providing a definition of what constitutes mental impairment.<sup>23</sup> It describes mental impairment as a clinically recognised condition or illness which affects a person's thought processes, judgment or emotions.<sup>24</sup>

SADAG describes depression as a whole-body illness affecting thought processes, body, mood, appetite and sleep.<sup>25</sup> This is also supported by Welgemoed and Huysamen who assert that depression is a mental illness which affects the entire body and mind.<sup>26</sup> Therefore, these symptoms can have an adverse effect on an employee's ability to perform in terms of a particular job which may necessitate reasonable accommodation. This is in line with the disability code which states that an impairment is substantially limiting if in its nature, duration, or effects it substantially limits the person's ability to perform the essential functions of the job for which they are being considered.<sup>27</sup>

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<sup>19</sup> Holness W (n 1 above), at page 510.

<sup>20</sup> Article 4 of the CRPD.

<sup>21</sup> Section 1 of the EEA.

<sup>22</sup> Code of Good Practice on Employment of Persons with Disabilities, 9 November 2015.

<sup>23</sup> Item 5.3.1(b) of the code.

<sup>24</sup> Item 5.3.1(b) of the code.

<sup>25</sup> 'What is depression?' at

<http://www.sadag.org/images/stories/What%20is%20a%20Depressive%20Disorder.doc> SADAG (undated) (accessed on 31 March 2018).

<sup>26</sup> Welgemoed B & Huysamen E, 'Workplace Protection of Employees Suffering from Depression: A South African Perspective (2019) 40 *Industrial Law Journal* 41 – 59, at page 41.

<sup>27</sup> Item 5.3.3(a) of the Disability Code.

An impairment which lasts or is likely to persist for a period of twelve months is long-term or recurring if it is a chronic constant condition.<sup>28</sup> Depression can either be chronic (lasting over two years) or the person can recover in weeks or months.<sup>29</sup> A study conducted in Cape Town in 2008 notes that teachers who applied for early retirement on psychiatric grounds claimed occupational disability due to work-related stress, and were off work on sick leave for 4 or more years before final adjudication of their claims.<sup>30</sup> South Africa has seen an alarming increase in application for medical disability on psychiatric grounds with depression, anxiety and post-traumatic stress disorder heading the list.<sup>31</sup>

Ngwena and Pretorius argue that most mental and physical impairment would satisfy the test for prima facie discrimination when applying the test in *Harksen v Lane NO & Others*<sup>32</sup> at paragraph 35 of the judgment where the Constitutional Court endorses the notion of substantive equality and the test for unfair discrimination.<sup>33</sup> In terms of the *Harksen* test a differentiation amounts to discrimination, inter alia, if it is on a specified ground, such as disability.<sup>34</sup>

A South African study conducted by SADAG in 2014 reflects that 26 percent of employees are affected by depression.<sup>35</sup> The study, involving 1 060 employed or previously employed workers and managers, provided an insight into the prevalence of depression in the South African workplace.<sup>36</sup> It showed that at least one in four employees has been diagnosed with depression in the age group between 25 and 44 years old which resulted in most of them taking an average of 18 days off work due to the condition.<sup>37</sup> The first point of contact for employees with depression is managers who are more likely to identify employees with depression and refer them to appropriate medical practitioners. However nearly 50 percent of the managers are not aware of how many employees absent themselves from work because

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<sup>28</sup> Item 5.3.2(a) and (b) of the Disability Code.

<sup>29</sup> Carvalheira R 'Depression, dismissal and disability; depression is increasing in the South African workplace. Do the Labour Relations Act's dismissal categories provide depressed employees with adequate protection from unfair dismissal?' (2011), Unpublished LLM thesis, University of Witwatersrand, at pages 24 – 25.

<sup>30</sup> Mokoka M T, Rataemane S T and do Santos M, 'Disability claims on psychiatric grounds in the South African context: A review' (2012) 18 *South African Journal of Psychiatry* 34-41, at page 43.

<sup>31</sup> Mokoka M T at al (n 30 above), at page 34.

<sup>32</sup> *Harksen v Lane NO & Others* 1997 BCLR 1489 (CC).

<sup>33</sup> Ngwena C & Pretorius L 'Code of Good Practice on Employment of People with Disabilities: An Appraisal' (2003), 24 *Industrial Law Journal* 1817 – 1840, at page 1829.

<sup>34</sup> Ngwena & Pretorius (n 33 above), at page 1829.

<sup>35</sup> 'Depression affects 26% of SA workforce' *Inside Mining* (2015) 8(3) 49, at page 49.

<sup>36</sup> Stander et al (n 8 above), at page 1.

<sup>37</sup> Stander et al (n 8 above), at page 1.

of depression. 24 percent of managers indicated that there is no formal support to handle employees with depression, with a third indicating that they receive support from HR officials.<sup>38</sup>

Ableism and sanism also play a role in how employees with depression are treated in the workplace. Depression is associated with a mental illness resulting in employees being stigmatised, marginalised and discriminated against. There is also a perception that people with mental illnesses are violent in nature, despite studies proving otherwise.<sup>39</sup> Sanism is an irrational prejudice against people with mental illness and is of the same quality and characteristics as other irrational prejudices, such as racism and sexism.<sup>40</sup> One of the reasons for such adverse attitudes towards persons with mental illnesses is the decision making processes in mental law cases where too much reliance is placed on exceptional cases of persons with major mental disorder who are susceptible to violence.<sup>41</sup>

A classic example of such attitudinal prejudice against an employee with depression is the case of *New Way Motor & Diesel Engineering (Pty) Ltd v Marsland*,<sup>42</sup> which is discussed in more detail in Chapter 4 of this research. The employee suffered humiliation at the hands of senior management after he became depressed when his wife left him. The Labour Appeal Court (LAC) found that the discrimination suffered by the employee as a result of his mental illness constituted an egregious attack on his human dignity.<sup>43</sup>

This research sought to address how courts have dealt with or treated cases where employees with depression have been terminated from work. Disability and incapacity are not synonymous under South African labour law. An employee is incapacitated if he is unable to perform his functions, whereas an employee with a disability is suitably qualified and in most instances in a position to perform fundamental duties of the job with some kind of reasonable accommodation.<sup>44</sup> Section 187(1)(f) of the Labour Relations Act (LRA)<sup>45</sup> protects employees

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<sup>38</sup> 'Depression affects 26% of SA workforce' *Inside Mining* 2015, 8(3) 40, at page 49,

<sup>39</sup> 'Ableism, negative attitudes, stereotypes and stigma' Ontario Human Rights Commission at <http://www.ohrc.on.ca/en/policy-preventing-discrimination-based-mental-health-disabilities-and-addictions/5-ableism-negative-attitudes-stereotypes-and-stigma> (undated) (accessed on 29 October 2018)

<sup>40</sup> Michael M & Perlin J D 'Sanism and Law' *AMA Journal of Ethics* (2013) 15(1) 878-885, at page 878.

<sup>41</sup> Michael M & Perlin J D (n 40 above), at page 878.

<sup>42</sup> *New Way Motor & Diesel Engineering (Pty) Ltd v Marsland* (2009) 30 ILJ 2875 (LAC).

<sup>43</sup> At para 26 of the judgment.

<sup>44</sup> Bassuday K & Rycroft A, 'Incapacity or disability? The Implications for Jurisdiction *Ernstzen v Reliance Group Trading (Pty) Ltd* (C727/13) [2015] ZALCCT 42' (2015) 36 *Industrial Law Journal* 2516-2521, at page 2516.

<sup>45</sup> The LRA Act 66 of 1995.

against unfair discrimination in a dismissal where the grounds for the dismissal are based upon an employee's disability. A dismissal because the employee has a disability would therefore automatically be unfair. A dismissal for incapacity may be fair if the employer has a valid and fair reason for dismissal and if the procedures as set out in the LRA are followed.<sup>46</sup>

The forums by which these two reasons for dismissal are referred to are different. The CCMA and Bargaining Councils have jurisdiction to hear matters about alleged unfair dismissals relating to capacity and the Labour Court (LC) has jurisdiction to adjudicate disputes relating to dismissal on the basis of disability.<sup>47</sup> Since employers find it difficult to navigate these grounds – incapacity, disability or poor work performance – it is clear that better guidelines are needed.

### **1.3 Literature Review**

The study's literature review outlines the legal framework applying to depression in the workplace and commentary from authors on the application of this framework in practice. Some authors have considered whether South African legislation in its current format provides adequate protection to employees with depression and whether depression should be treated as a disability, incapacity, poor work performance or misconduct. Authors have not, however, provided a systematic discussion of all of these to illustrate the differences between these occupational categories with different legal consequences.

Christianson differentiates between incapacity and disability and contends that section 187(1)(f) of the Labour Relations Act (LRA) provides protection to employees against unfair discrimination in a dismissal where the grounds for the dismissal is a result of the employee's disability whilst an employee's dismissal for incapacity may be fair if the employer has a valid reason and procedures have been followed.<sup>48</sup> She also provides guidelines on termination of employment relationship as a result of an employee's poor work performance.<sup>49</sup> However, the author does not focus on how the courts treat these categories.

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<sup>46</sup> Christianson M, 'Incapacity and Disability: A Retrospective and Prospective Overview of the Past 25 years' (2004) 25 *Industrial Law Journal* 879-893, at page 879.

<sup>47</sup> Section 191 of the LRA 66 of 1995.

<sup>48</sup> Christianson M (n 46), at page 890.

<sup>49</sup> Christianson M (n 46 above), at pages 886 – 887.



Bassuday and Roycroft,<sup>50</sup> also provide insight into differences between incapacity and disability in their discussion of *Ernstzen v Reliance Group Trading (Pty) Ltd*,<sup>51</sup> although the case dealt with the different dispute resolution forums for dismissal relating to incapacity and disability. The employee's claim for automatically unfair dismissal as a result of discrimination based on disability failed because he could not establish that he had long-term physical impairment which substantially limited his prospects of entry into, or advancement in employment. The court relied on the definition of "persons with disabilities" provided for in item 5 of the Code of Good Practice: Key Aspects on the Employment of People with Disabilities, enacted in terms of the EEA. The case illustrates the difficulty experienced by courts when dealing with disability cases as result of the lack of a definition of a disability which is protected against discrimination under sections 6(1) of the EEA and 187(1)(f) of the LRA. This results in a limited interpretation of what constitutes a disability.

Ngwena highlights a similar problem in *IMATU v City of Cape Town*,<sup>52</sup> where the court confused the disability intended for section 6(1) of the EEA regulating discrimination with the statutory interpretation of the term "people with disabilities" that is intended for affirmative action measures according to Chapter III of the EEA.<sup>53</sup> He argues that focus should be on the conduct of the perpetrator, in this case the employer, instead of the degree or extent of the disability.<sup>54</sup>

Ngwena and Pretorius in their critical appraisal of the Code of Good Practice: Key Aspects on the Employment of People with Disabilities question whether an impairment that can be controlled or corrected substantially to ameliorate or remove its limiting effects should still fall within ambit of a protected disability as contemplated by paragraph 5.1.3 of the Code,<sup>55</sup> and argues that others may still view the affected person as having a disability.<sup>56</sup> Because of the stigma attached to a mental illness, depression is one of those illnesses which is subjected to social oppression. Other people may view a person with depression as having a disability despite taking ameliorating medication, and might be susceptible to discrimination in the

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<sup>50</sup> Bassuday K & Rycroft A (n 44 above), at page 2516.

<sup>51</sup> Bassuday K & Rycroft A (n 44 above), at page 2516.

<sup>52</sup> [2005] 11 BLLR 1084 (LC).

<sup>53</sup> Ngwena C, 'Deconstructing the Definition of 'Disability' Under the Employment Equity Act: Legal Construction' (2007) 23 *South African Journal on Human Rights* 116 – 156, at page 150.

<sup>54</sup> Ngwena C (n 53 above), at page 152.

<sup>55</sup> The term in particular is "substantially limiting".

<sup>56</sup> Ngwena C & Pretorius L, 'Code of Good Practice on the Employment of People with Disabilities: An Appraisal' (2003) 24 *Industrial Law Journal* 1817-1840, at page 1827.

workplace. The authors go on to analyse the concept of “reasonable accommodation” for employees with disabilities and provide examples of such reasonable accommodation.<sup>57</sup>

Holness raises the difficulties in providing reasonable accommodation to employees with psychosocial illnesses because the illness in most instances is not obvious and the fear of disclosure associated with fear of stigmatisation and discrimination.<sup>58</sup> She illustrates the process which is available to persons who disclose their mental illness with the aim of obtaining reasonable accommodation in the workplace under the EEA and the Code of Good Practice on Employment of Persons with disabilities; being: investigation, consultation and reasonable accommodation.<sup>59</sup> She does not, however, distinguish between the treatment of mental illness generally and depression in particular by the courts.

Although the above authors address the issue of persons with disabilities and reasonable accommodation in the workplace, none of them offer an evaluation of how courts treat depression in the workplace resulting in the termination of an employment relationship.

### **1.3.1 International and African Regional Legal Systems**

South Africa signed and ratified the United Nations Convention on the Rights of Persons with Disabilities (CRPD). The rights of “persons with disabilities” to work and be on equal basis with others are recognised by member States.<sup>60</sup> This comprises the right to the prospects of advancing a living by working without restrictions to a preferred or accepted trade in a labour market and work atmosphere that is open, inclusive and accessible to “persons with disabilities”. Member States are to give effect to the recognition of the right to work, including for those who are disabled during the course of occupation, by taking appropriate steps, including through various laws and codes.<sup>61</sup>

The Constitution requires, when interpreting the Bill of Rights, that international law *must* be considered (section 39 (1) (b)). Section 233 states that “when interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with

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<sup>57</sup> Ngwena C & Pretorius L (n 56 above), at page 1832.

<sup>58</sup> Holness W (n 1 above), at page 527.

<sup>59</sup> Holness W (n 1 above), at page 530.

<sup>60</sup> Art 27 of the CRPD.

<sup>61</sup> Art 27(1) of the CRPD.

international law over any alternative interpretation that is inconsistent with international law".<sup>62</sup>

International Conventions and declarations serve as primary sources of the right to equality in the workplace. The International Labour Organization (ILO) aims to improve working conditions as laid down in its Conventions and Recommendations.<sup>63</sup> Article 1 (1) of the ILO Convention 111 concerning discrimination in respect of employment of 1958 (Convention 111),<sup>64</sup> describe discrimination as:

- (a) any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin, which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation;
- (b) such other distinction, exclusion or preference which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation as may be determined by the Member concerned after consultation with representative employers' and workers' organisations, where such exist, and with other appropriate bodies.<sup>65</sup>

Further in respect of Convention 111, article 2 makes provisions that each member state shall pursue a national policy to promote equal opportunity and treatment for employment with a view to eliminating any discrimination.<sup>66</sup> In terms of this convention member states give an undertaking to pursue a policy intended to encourage equality of opportunity and treatment in respect of employment and occupation, with a view to eliminating any discrimination in this context.<sup>67</sup> Convention 111 was ratified by South Africa in March 1997.<sup>68</sup> It prohibits discrimination in the workplace.

Convention 111 is not the only international legal obligation requiring South Africa to abolish all forms of discrimination in employment. There are a number of international and regional treaties that prohibit all forms of discrimination in the workplace, and make provision for reasonable accommodation and procedural fairness in relation to dismissal. The United Nations Universal Declaration of Human Rights (UDHR) of 1948, United Nations Convention on the Rights of Persons with Disabilities the of 2007 (CPRD), the Southern African

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<sup>62</sup> Section 233 of the Constitution.

<sup>63</sup> <http://www.saflii.org/za/journals/AHRLJ/2014/30.html> (accessed on 16 March 2018).

<sup>64</sup> International Labour Organisation Convention 111 of 1958, Discrimination (Employment and Occupation)

<sup>65</sup> Article 1 (1) of International Labour Organisation Convention 111 of 1958.

<sup>66</sup> Article 2 of Convention 111.

<sup>67</sup> Article 2 of Convention 111.

<sup>68</sup> [https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11200:0::NO::P11200\\_COUNTRY\\_ID:102888](https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11200:0::NO::P11200_COUNTRY_ID:102888) 'Ratification for South Africa' (undated) (accessed on 12 August 2019).

Development Community (SADC) Charter of Fundamental Social Rights of 2003, and the African Union's Protocol to the African Charter on Human and People's Rights on the Rights of Persons with Disabilities (AfDP) are some of the treaties which prohibit all forms of discrimination in the workplace. Further treaties will be discussed in more detail in Chapter 2 of the research.<sup>69</sup>

### 1.3.2 Constitutional protections

The Constitution,<sup>70</sup> primarily section 9 entrenches the right to equality of treatment and protection for all people with disabilities. It states that "(1) everyone is equal before the law and has the right of protection and benefit of the law".<sup>71</sup> The equality clause of the Constitution reads as follows: "Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons or categories of persons, disadvantaged by unfair discrimination may be taken".<sup>72</sup> Disability is listed as one of the specific grounds which can constitute discrimination.<sup>73</sup> Prohibition of "unfair discrimination" is the reinforcing process essential in realising "substantive equality" in order to give effect to the right to equality as envisaged by Section 9 of the Constitution.<sup>74</sup>

Section 23(1) of the Constitution,<sup>75</sup> makes provision for rights to fair labour practice. Currie and De Waal propose that the determination of the notion of fairness as envisaged in section 23(1) is restricted.<sup>76</sup> The authors suggest interrogating the purpose of the relevant legislation when determining the fairness of a labour practice.<sup>77</sup> The "unfairness of a labour practice cannot be directly challenged in terms of section 23(1) but must be challenged in terms of common law and the relevant legislation giving effect to the constitutional right to fair labour practices".<sup>78</sup> The focus of "Labour Practices" arises out of an employment relationship.<sup>79</sup> The

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<sup>69</sup> ILO Convention 111 of 1958, ILO Convention 158 of 1982, ILO Code of Practice on Managing Disability in the workplace, 2001.

<sup>70</sup> The Constitution of the Republic of South Africa, 1996.

<sup>71</sup> Section 9 of the Constitution.

<sup>72</sup> Section 9 of the Constitution.

<sup>73</sup> Section 9(3) of the Constitution.

<sup>74</sup> Section 9 of the Constitution.

<sup>75</sup> Section 23(1) of the Constitution.

<sup>76</sup> Currie I and de Waal J, *The Bill of Rights Handbook* Lansdowne: (2005), at page 504.

<sup>77</sup> Currie I and de Waal J (n 76 above), at page 504.

<sup>78</sup> Currie I and de Waal J, (n 76 above), at page 504.

<sup>79</sup> Cheadle M H et al, *South African Constitutional Law: The Bill of Rights*, (2002) Durban: Butterworths, at page 364.

right to fair labour practice is significant to employees with depression because section 186 of the LRA provides protection against unfair labour practice relating to promotion and demotion. Disputes about promotion are not restricted to claims of discriminatory treatment; employees may also claim that they were overlooked “for some unacceptable irrelevant or invidious purpose”.<sup>80</sup> Demotion on the basis of depression can also amount to an unfair labour practice. However, it can be deemed fair after the employer has followed the procedure outlined in schedule 8 of the LRA in order to avoid dismissal for incapacity.<sup>81</sup>

### **1.3.3 Legislative protections**

#### **1.3.3.1 Employment Equity (Act 55 of 1998)**

The Employment Equity Act<sup>82</sup> (EEA) (as amended) aims to bring about transformation in the workplace. The EEA comprises two elements: “a) the elimination of unfair discrimination and b) the implementation of affirmative action and measures to enable equitable representation of employees from different race, gender and disability groups in the workplace”.<sup>83</sup> The Act describes people with disabilities as people who have a long-term or recurring physical or mental impairment which substantially limits their prospect of entry into, or advancement in employment.<sup>84</sup> This study will primarily focus on Chapters I and II of the EEA which provides protection against discrimination of employees with disabilities. The EEA,<sup>85</sup> gives effect to the provisions of the Constitution against unfair discrimination to people with disabilities. In this regard, section 6 of the EEA in particular prohibits unfair discrimination either directly or indirectly against employees with disabilities.<sup>86</sup>

Section 28 of the EEA created a statutory body called the Commission for Employment Equity (CEE). The CEE’s purpose is to provide advice to the Minister of Labour on any matters pertaining to the EEA. The Commission’s responsibilities also include making policy recommendations in relation to implementation aimed at realising the objectives of the EEA. The CEE is required to submit an annual report to the Minister of Labour in terms of Section

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<sup>80</sup> Grogan J, *Workplace Law*, Eleventh Edition Claremont: Juta (2017), at page 81.

<sup>81</sup> Grogan J (n 80 above), at page 85 (with reference to *A-B v SA Breweries Ltd* (2001) 22 ILJ 495 (CCMA)).

<sup>82</sup> Act 55 of 1998.

<sup>83</sup> ‘Employment Equity Act (55/1998): Code of Good Practice: Key Aspects on the Employment of People with Disabilities’ at <http://www.workinfo.org/index.php/legislation/item/1115-employment-equity-act-55-1998-code-of-good-practice-key-aspects-on-the-employment-of-people-with-disabilities> 6 June 2015 (accessed on 18 March 2018).

<sup>84</sup> Section 1 of the EEA 55 of 1998.

<sup>85</sup> EEA 55 of 1998.

<sup>86</sup> Section 6 of the EEA.

33 of the EEA. This annual report serves as a monitoring tool for evaluation of progress towards attaining the purposes of the EEA.<sup>87</sup> The EEA,<sup>88</sup> 1998 was enacted to give effect to section 9(2) of the Constitution.

### **1.3.3.2 Employment Equity (Act 55 of 1998): Code of Good Practice on Employment of Persons with Disabilities, 9 November 2015**

The code provides guidance to employers and employees on complying with the prescript of the EEA which prohibits discrimination against employees with disabilities. It also provides guidance for “reasonable accommodation” of employees with disabilities in the workplace.<sup>89</sup>

### **1.3.3.3 The Labour Relations (Act 66 of 1995)**

Section 187(1) (f) of the LRA provides that:

a dismissal is automatically unfair if the reason for the dismissal is a result of the employee’s discrimination directly or indirectly, on any arbitrary ground, including but not limited to race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, political opinion, culture, language, marital status or family responsibility.<sup>90</sup>

### **1.3.3.4 The Code of Good Practice: Dismissal (Schedule 8 of the LRA)**

Schedule 8 of the LRA makes provisions for guidance to employers for dealing with cases relating to misconduct, poor work performance and incapacity as a result of ill-health and injury.<sup>91</sup>

### **1.3.3.5 Technical Assistance Guidelines**

The Technical Assistance Guidelines on the employment of Persons with Disabilities (Disability TAG), which describes the Disability Code, was first published in 2003 by the Department of Labour. Subsequent to the adoption of the United CRPD and the revision of the Code of Good Practice on the Employment of Persons with Disabilities in 2015, the Disability TAG was aligned accordingly. The Disability TAG describes the Disability Code and serves as both a management and technical tool to guide employers in dealing with “disability”

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<sup>87</sup> ‘Commission for Employment Equity Annual Report 2016-2017’ at <http://www.workinfo.org/index.php/articles/item/1804-commission-for-employment-equity-annual-report-2016-2017> 11 May 2017 (accessed on 16 March 2018)

<sup>88</sup> EEA No. 55 of 1998

<sup>89</sup> Employment Equity Act 55 of 1998, Code of Good Practice on Employment with Disabilities, 9 November 2015.

<sup>90</sup> Section 187 (1) (f) of the LRA No. 66 of 1195.

<sup>91</sup> The Code of Good Practice: Dismissal (Schedule 8 of the LRA).

in the workplace when engaging new employees, during the employment relationship and when terminating the employment relationship.<sup>92</sup>

It is noted in the Commission for Employment Equity Report for the period 2016 to 2017 that the pace of transformation in respect of people with disabilities has been slow, notwithstanding the comprehensive legal framework in place and the enactment of the EEA. The disability representation across all occupational levels remains very low, not only in respect of this reporting period, but in the previous reporting periods as well.<sup>93</sup> The Commission observed that amongst contributing factors is resistance by employers to effectively implement employment equity and to recognise it as a business tool required to change the working environment. As a result, it is not part of the business plan designed to foster parity. Furthermore, there are no effective monitoring mechanisms designed to measure implementation of the EEA targets as set out in the plan.<sup>94</sup>

The EEA obliges employers to take measures to eliminate unfair discrimination in the workplace and implement affirmative action measures to ensure that suitably qualified people from designated groups have equal employment opportunities and are equitably represented in all occupational categories and levels in the workforce of a designated employer.<sup>95</sup> This includes reasonable accommodation, preferential treatment, and identifying and removing barriers which may impede the progression and advancement of people with disabilities in the workplace.<sup>96</sup> The definition of the designated group includes people with disabilities.<sup>97</sup>

The above-mentioned sections of the EEA are in line with the CRPD,<sup>98</sup> Southern African Development Community (SADC) Charter of Fundamental Social Rights<sup>99</sup> and the African

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<sup>92</sup> 'Technical Assistance Guidelines on the Employment of Persons with Disabilities' at <http://www.workinfo.org/index.php/legislation/item/1833-technical-assistance-guidelines-on-the-employment-of-persons-with-disabilities> 30 July 2017 (Accessed on 18 March 2018).

<sup>93</sup> 'Commission for employment equity report 2016-2017' at [www.labour.gov.za/DOL/documents/annual-reports/](http://www.labour.gov.za/DOL/documents/annual-reports/) (undated) (Accessed on 18 March 2018).

<sup>94</sup> 'Commission for employment equity report 2016-2017' at [www.labour.gov.za/DOL/documents/annual-reports/](http://www.labour.gov.za/DOL/documents/annual-reports/) (undated) (Accessed on 18 March 2018).

<sup>95</sup> Section 15 (1) of the EEA.

<sup>96</sup> Section 15 (2) of the EEA.

<sup>97</sup> Section 1 of the EEA.

<sup>98</sup> Article 27 of the CRPD, 2007.

<sup>99</sup> Article 9 of the SADC Charter of Fundamental Social Rights, 2003.

Charter on Human and People's Rights on the Rights of Persons with Disabilities (AfDP) of 2018.<sup>100</sup>

#### 1.4 Statement of the Problem

Evidence indicates that employees with depression are either terminated from the workplace for misconduct, incapacity or poor performance and in some instances employees resort to resigning from work and then refer constructive dismissal disputes. Employers are often perplexed about how to deal with an employee who is away from work, purportedly due to depression.<sup>101</sup> This is illustrated in the case of *PSA obo Makae and Department of Education WC*<sup>102</sup> where, after the applicant employee had been absent from work due to depression almost continuously over a period of five years, she applied to be medically boarded. Some of the applicant's leave during this period had been paid, and some not. After the applicant was discharged, she claimed that, in terms of the applicable collective agreement, she should have been granted paid temporary incapacity leave as provided for in the agreement, and that the Department had failed to follow the required procedure before deciding not to pay her during the periods in question. The case was dealt with by the arbitrator as incapacity rather than disability, and it was held that temporary incapacity leave is not a form of social insurance which must be continued indefinitely.<sup>103</sup>

It is problematic that employers do not appear to know how to handle cases of employees with depression: whether to initiate incapacity, disciplinary proceedings, poor performance or treat depression as a disability. Further, disability, misconduct, poor performance and misconduct processes are dealt in different codes and schedules of legislation which provide employers with guidelines on how to deal with them in their respective forms.

Holness explains that persons with disabilities are faced with challenges in accessing and keeping meaningful employment; South Africa is failing to meet some of its obligation in terms of the CRPD; and there are limitations in the formation of disability as provided for in the EEA.<sup>104</sup>

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<sup>100</sup> Article 1 of the AfDP.

<sup>101</sup>[http://www.worklaw.co.za/SearchDirectory/Unfair\\_Discrimination/Discrimination\\_and\\_Employment\\_Equity\\_Part2.asp#Disability](http://www.worklaw.co.za/SearchDirectory/Unfair_Discrimination/Discrimination_and_Employment_Equity_Part2.asp#Disability), (accessed on 5 March 2018).

<sup>102</sup> *PSA obo Makae and Department of Education WC* (2007) 16 PSCBC.1.1.1.

<sup>103</sup>[http://www.worklaw.co.za/SearchDirectory/Unfair\\_Discrimination/Discrimination\\_and\\_Employment\\_Equity\\_Part2.asp#Disability](http://www.worklaw.co.za/SearchDirectory/Unfair_Discrimination/Discrimination_and_Employment_Equity_Part2.asp#Disability), (accessed on 5 March 2018).

<sup>104</sup> Holness W (n 1 above), at page 512.



There is a perception amongst employers that employees suffering from psychosocial illnesses are inclined to become violent. However, the opposite is true. The likelihood is that most persons with psychological illness are victims of violence. This misconception results in the health and safety of this group of employees not being prioritised.<sup>105</sup> This results in employers seeking an easier route by terminating employment of employees with depression rather than accommodating them. The situation is exacerbated because the medical definition of a “disability” imposes stigmatisation and reinforces the impression that persons with disabilities do not possess characteristics which are viewed as “normal” and expected by society.<sup>106</sup>

Ngwena contends that in *IMATU v City of Cape Town*<sup>107</sup> the court was wrong in its approach by ascribing the meaning of “persons with disabilities” to “disability”. The court confused “disability” intended for Section 6 (1) of the EEA regulating discrimination to the statutory interpretation of term “people with disabilities” intended for affirmative action measures.<sup>108</sup> The court made a pronouncement that disability in the workplace must not be constructed on the basis of the medical model of disability but instead based on what influence the impairment has on the employee acquiring meaningful employment and progressing in such employment.<sup>109</sup>

The definition of the word “disability” causes confusion and limitations to effective implementation of legislation and execution of policies and legislation.<sup>110</sup> Although, the South African legislative framework forbids unfair discrimination against persons with disabilities, various stakeholders responsible for implementing the law fail to implement it appropriately. This nullifies the value of the said legislation.<sup>111</sup> A recommendation is thus made for the

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<sup>105</sup> Holness W (n 1 above), at page 514 (where she makes reference to an article by H Stuart, ‘Violence and Mental Illness: An overview’ (2003) 2 World Psychiatry 121 – 2).

<sup>106</sup> Ngwena C, ‘Deconstruction of ‘Disability’ Under the Employment Equity Act: Social Deconstruction’ (2006) 22(4) *South African Journal on Human Rights* 613-646, at page 627.

<sup>107</sup> [2005] 11 BLLR 1084 (LC).

<sup>108</sup> Ngwena C (n 53 above), at page 150.

<sup>109</sup> Bassuday K & Rycroft A (n 44 above), at page 2516.

<sup>110</sup> Cole E C and van der Walt A, ‘The effect of Labour Legislation in the Promotion and Integration of Persons with Disabilities in the Labour Market’ (2014) 35(3) *Obiter* 506-538, at page 510.

<sup>111</sup> Cole E C & van der Walt A (n 110 above), at page 537.

enactment of a separate set of legislation tailored to specifically address the needs of employment of “persons with disabilities”.<sup>112</sup>

From the literature, legislation and case law reviewed in Chapters 3 and 4 of this research, the focus will be on legislation and codes do not provide clear guidelines whether or not depression falls under the term disability. The study will also consider whether or not South African courts are reluctant to categorise depression as a disability and opt to describe discrimination on the basis of depression as an impairment to human dignity.<sup>113</sup> Recommendations will be made on how South African legislation can be further developed to provide more protection to employees suffering from depression.

## 1.5 Rationale

The rationale for this study is that, although legislation prohibits unfair discrimination against persons with disabilities in the workplace, it not clear whether South African legislation in its current form provides adequate protection to employees with depression.

The United Nations’ CRPD does not attempt to define disability per se, but rather recognises disability as an evolving concept.<sup>114</sup> The reason for not defining disability is because it is an evolving concept resulting from attitudinal and environmental barriers hindering participation of persons with disabilities in society.<sup>115</sup> Consequently, the notion of disability is not fixed and can alter depending on the prevailing environment from society to society. Faisal also notes the lack of a definition for disability in the CRPD which only offers a definition of discrimination on the basis of disability.<sup>116</sup> The word disability is also not defined in either the EEA, or the code of good practice on employment of persons with disabilities.

South Africa does not have a harmonised definition of disability and the definition depends on the statute at issue and is tied to the specific entitlements provided for in the legislation, an example being the definition of persons with disabilities in the EEA which is partly informed by a medical model approach and focuses on the individual’s physical or mental impairment.<sup>117</sup>

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<sup>112</sup> Cole E C & van der Walt A (n 110 above), at page 537.

<sup>113</sup> *New Way Motor & Diesel Engineering (Pty) Ltd v Marsland* (2009) 30 ILJ 2875 (LAC), at paras 25 – 26.

<sup>114</sup> White Paper on the Rights of Persons with Disabilities, Vol 609, No 39792, 9 March 2016, at page 4.

<sup>115</sup> Preamble of the CRPD.

<sup>116</sup> Faisal B, ‘Disability Equality Rights in South Africa: Concepts, Interpretation And the Transformation Imperative’ (2009) 25(2), *South Africa Law Journal on Human Rights*, 218 – 245, at page 228.

<sup>117</sup> Faisal B (n 116 above), at page 229.

The Social Security Act<sup>118</sup> and the Mental Health Care Act<sup>119</sup> both adopt a medical conception of disability which places emphasis on the existence of a diagnosed medical condition with no room for subjective consideration of social aspects of the person's relationship with their environment.<sup>120</sup> The Social Assistance Act<sup>121</sup> also adopts a medical model where a disability grant is payable to a person who, amongst others requirements, has a significant measure of functional impairment which renders them unable to physically or mentally perform the functions of a given job.<sup>122</sup> There is a lack of international consensus on the definition of disability.<sup>123</sup> The various rights-based definitions of disability, however, share certain common elements although worded differently.<sup>124</sup> The elements which are common consist of the presence of impairment, internal and external limitations or barriers which hinder full and equal participation, person-focused disability, loss or lack of opportunities due to environmental barriers and/or negative perceptions and society attitudes.<sup>125</sup> Inclusive in these various definitions is that the disability can be respectively permanent, temporary or episodic.<sup>126</sup> The paradigms to which people subscribe regarding disability have an influence on how they perceive and treat persons with disabilities.<sup>127</sup>

The two opposing views on disability studies as advocated by different paradigms is firstly a viewpoint locating the disability in the person concerned.<sup>128</sup> This view pays little or no attention to the physical or social environment and is referred to as the "medical model" of disability.<sup>129</sup> The second view is referred to as the "social model" where disability is perceived as a social construct which results from the inability of the physical and social environment to accommodate the needs of individuals within a particular group.<sup>130</sup> The definition of persons with disabilities in the CRPD has its roots in the social model.<sup>131</sup> Ngwena and Albertyn contend that the CRPD constitutes a paradigm shift in normative approaches to disability by creating

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<sup>118</sup> Social Security Act 9 of 2004.

<sup>119</sup> Mental Health Care Act No. 17 of 2002.

<sup>120</sup> Faisal B (n 116 above), at page 229.

<sup>121</sup> Social Assistance Act No. 13 of 2004.

<sup>122</sup> Ngwena C (n 106 above), at page 621.

<sup>123</sup> WPRPWD, at page 17.

<sup>124</sup> WPRPWD, at page 17.

<sup>125</sup> WPRPWD, at page 17.

<sup>126</sup> WPRPWD, at page 17.

<sup>127</sup> Sone E M & Hoza M, 'Re-engaging cultural perspectives on disability discourse: An analysis of the Bakossi and Isixhosa oral traditions' (2017) 27 *Southern African Journal for Folklore Studies (SAJFS)* 10 – 29, at page 12.

<sup>128</sup> Sone E M & Hoza M (n 127 above), at page 12.

<sup>129</sup> Sone E M & Hoza M (n 127 above), at page 12.

<sup>130</sup> Sone E M & Hoza M (n 127 above), at page 13.

<sup>131</sup> Sone E M & Hoza M (n 127 above), at page 13.

a new vision that finds concrete expression in the duty to accommodate difference under conditions of equality and human dignity.<sup>132</sup> This results in the CRPD serving as a complimentary reference point for any juridical discourse at the intersection between disability and equality.<sup>133</sup>

The White Paper on the Rights of Persons with Disabilities (WPRPWD) proposes that persons with disabilities should be defined within the context of defining the beneficiary group.<sup>134</sup> Some guidelines should be developed to provide for a clear distinction between a disability as a prohibited ground in terms of Section 6 of the EEA and a disability for the purposes of affirmative action measures as outlined in Chapter 3 of the EEA. A problem arises when employers and courts use the definition provided for in section 1 of the EEA which defines persons with disabilities and which has an additional requirement that the impairment must substantially limit the prospects of entry into, or advancement in employment. In some instances, a disability is successfully managed when an employee is receiving medical treatment and attention which does not hinder the employee from performing their functions.

A good example of such an instance is the case of *Pharmaco Distribution (Pty) Ltd v EWN*.<sup>135</sup> The employee was a pharmaceutical sales representative who was dismissed for repeated wilful refusal to carry out legal instructions or perform duties after having refused to subject herself to a psychiatrist for medical examination. There was a provision in her contract of employment for such medical examination. The employer had become aware that the employee suffered from bipolar disorder. The employee submitted proof from her counselling psychologist that the disorder was well managed and she was receiving therapy. There was no evidence presented by the employer that the employee's condition had an impairment in the performance of her duties. The LAC found that the dismissal was automatically unfair on the basis of the employee's disability. It also found the dismissal to be an act of unfair discrimination in terms of section 6 (1) of the EEA on the basis of a disability.

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<sup>132</sup> Ngwena C & Albertyn C, 'Special Issue on Disability: Introduction' (2014) 30(2) *South African Journal on Human Rights* 214 – 220, at page 214.

<sup>133</sup> Ngwena C & Albertyn C (n 132 above), at page 214.

<sup>134</sup> WPRWD, at page 18.

<sup>135</sup> *Pharmaco Distribution (Pty) Ltd v EWN* (2017) 38 ILJ 2496 (LAC).

However, the Labour Appeal Court (LAC) took a different view in *New Way Motor & Diesel Engineering (Pty) Ltd v Marsland*.<sup>136</sup> An employee with depression was dismissed for poor performance. The LAC held that the question when assessing whether discrimination had occurred on arbitrary grounds was whether the conduct of the employer impaired the dignity of the employee on the grounds of the characteristics of the employee, “in this case depression, have the potential to impair the fundamental human dignity”<sup>137</sup> although the court acknowledged that depression is a form of a mental illness. The reasoning behind the court’s view was that depression “did not limit the employee’s ability to perform his essential functions for the job”. The poor performance resulted because of the employer’s refusal to provide the employee with adequate tools of trade to perform his functions. I am of the view that the question that should have been asked by the court was whether the employee was discriminated against because of his disability, which in this case was depression. This view is also supported by Rangata and Lehutjo who assert that “the case highlighted the fact that an employee may not be dismissed purely on the grounds that he or she suffers from depression”.<sup>138</sup>

This is indicative of the need for proper guidelines and legal development on matter of depression in the workplace. Despite this gap employers are not without avenues available to them when confronted with an employee with depression. The code of good practice on employment of persons with disabilities provides guidance and obliges employers to reasonably accommodate the needs of persons with disabilities in the workplace, if this does not impose unjustifiable hardship on the employer.<sup>139</sup> Employees may be required to disclose evidence confirming the disability and the accommodation needs if the disability is not self-evident, such as depression.<sup>140</sup> Clause 11 of the schedule 8 of the LRA also provides guidelines to employers on how to address cases of employees who acquire an illness or injury. It mandates employers to accommodate employees with a disability which includes adapting duties and offering alternative employment.<sup>141</sup>

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<sup>136</sup> *New Way Motor & Diesel Engineering (Pty) Ltd v Marsland* (2009) 30 ILJ (LAC), at page 2875.

<sup>137</sup> *New Way Motor & Diesel Engineering (Pty) Ltd v Marsland* (2009) 30 ILJ (LAC), at page 2875.

<sup>138</sup> Rangata B and Lehutjo M, ‘The “invisible” illness challenge’ (2015) 15(10) *Without Prejudice* 12, at page 12.

<sup>139</sup> Clause 6, Code of Good Practice on Employment of Persons with Disabilities, 9 November 2015.

<sup>140</sup> Clause 14.2.3 of the Code of Good Practice on Employment of Persons with Disabilities.

<sup>141</sup> Clause 11, Schedule 8 of the LRA.

## **1.6 Purpose of the Research**

The purpose of this research was to investigate the status of depression in the South African workplace and whether the current legislative framework provides adequate protection to employees with depression. The study also reviewed cases of employees with depression, who were terminated from work and how the judiciary categorised depression. In addition, the research addressed whether depression falls under the scope of a “disability” as defined by various pieces of legislation, codes and case law within the South African workplace context in order to identify particularly how courts treat depression: as incapacity, poor performance, disability or misconduct.

The purpose of the research, through a review of literature and analysis of how South African courts have addressed the issue of depression in the workplace, should illustrate the gaps which exist in the legislation or the courts’ interpretation thereof. The aim is thus to provide recommendations flowing from the case reviews that will assist both employers and employees and the legal profession in how to appropriately approach these aspects.

## **1.7 Research Question**

The main research question for this thesis is: “How do South African courts treat depression in the workplace: as disability, incapacity, poor performance or misconduct?”

### **1.7.1 Research Sub-Questions**

1. What is the current international, regional and domestic legal framework dealing with disabilities (especially depression) in the workplace in relation to each category (incapacity, poor performance, disability or misconduct)?
2. How do South African courts approach dismissal cases of employees with depression?
3. Is the legal framework and jurisprudence providing clear and sufficient guidelines to employers, and employees with depression, on how various categories (disability, incapacity, poor work performance or misconduct) apply in relation to depression?

## 1.8 Research Methodology

This is a qualitative study conducted as desktop research (doctrinal).<sup>142</sup> The qualitative study analysed international law; the South African statutory framework; textbooks; journal articles; relevant cases; and related materials.

## 1.9 Chapter Breakdown

### Chapter 2 International and Regional Law

Chapter 2 commences with an exposition on international law relating to disability in the workplace, including a definition of the terms “disability” or “persons living with disabilities”. International conventions serve as the primary source of the right to equality in the workplace. South Africa was a member of ILO from 1919 to 1966, and again from 26 May 1994.<sup>143</sup> South Africa was re-admitted to the UN in 1994 following its transition into a democracy.<sup>144</sup> Reference is made to the United Nations UDHR (10 December 1948), which although not a treaty of the UN, however places an obligation requiring South Africa to abolish all forms of discrimination in the workplace;<sup>145</sup> the United Nations Standard Rules on the Equalization of Opportunities for Opportunities for Persons with Disabilities (20 December 1993), which although not a binding document, provides guidance to member states regarding equal opportunities for persons with disabilities; the United Nations Convention on the Rights of persons with Disabilities (13 December 2006) which was signed by South Africa on 30 March 2007 and ratified on 20 November 2007<sup>146</sup> and has become the primary international law instrument in attaining the rights of persons with disabilities; the International Labour Organisation Convention 111 of 1958 (Convention 111), ratified by South Africa on 5 March 1997,<sup>147</sup> which makes provision for a definition of discrimination;<sup>148</sup> the International Labour Convention 158 of 1982 (Convention 158), which although not ratified by South Africa,

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<sup>142</sup> Doctrinal research is a research methodology that interprets, assesses and develops concepts, rules and principles on which a field of enquiry is based. It is basically research into law and legal principles. Duncan, N. J. & Hutchinson, ‘Defining and describing what we do: Doctrinal legal research’ (2012) 17(1) *Deakin Law Review* 83 – 119, at page 85.

<sup>143</sup> [http://www.ilo.org/dyn/normlex/en/f?p=1000:11110:0::NO:11110:P11110\\_COUNTRY\\_ID:102888](http://www.ilo.org/dyn/normlex/en/f?p=1000:11110:0::NO:11110:P11110_COUNTRY_ID:102888) ‘South African membership to the ILO’ (undated) (accessed on 19 April 2018).

<sup>144</sup> <http://www.southafrica-newyork.net/pmun/> ‘Permanent mission of South Africa to the United Nation’ (undated) (accessed on 19 April 2018).

<sup>145</sup> Du Toit D & Potgieter M, *Unfair Discrimination in the workplace*, Cape Town: Juta (2014), at page 13.

<sup>146</sup> ‘Ratification of Convention No. 111 of 1958’ at

[https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-15&chapter=4&lang=\\_en&clang=\\_en](https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-15&chapter=4&lang=_en&clang=_en) (undated) (accessed on 19 April 2018).

<sup>147</sup> ‘South African membership to the ILO’ at

[http://www.ilo.org/dyn/normlex/en/f?p=1000:11200:0::NO:11200:P11200\\_COUNTRY\\_ID:102888](http://www.ilo.org/dyn/normlex/en/f?p=1000:11200:0::NO:11200:P11200_COUNTRY_ID:102888) (undated) (accessed on 19 April 2018).

<sup>148</sup> Article 1 (1) of Convention 111 of 1958.

provides guidance on termination of employment; and the ILO code of practice on managing disability in the workplace.

### **Chapter 3 South African Domestic Law**

Chapter 3 sets out the legal position pertaining to disability and dismissal in the workplace. Reference is made to the Constitution, the LRA 66 of 1995, Schedule 8 of the LRA, the EEA 55 of 1998, Code of Good Practice on Employment of Persons with Disabilities, 2015, the Disability TAG and White Paper on the Rights of Persons with Disabilities. This chapter seeks to address whether the South African legislative framework in its current format provides sufficient guidelines to employers and protection to employees with depression in the workplace.

### **Chapter 4 Case law review**

This chapter seeks to evaluate judgments of the courts in relation to how they interpret cases referred to them as a result of termination of employment relationships in respect of employees with depression. Employers do not seem to know how to deal with cases of employees suffering from depression. There is also an indication that courts are reluctant to define depression as disability when they are presented with adjudication of these cases.

The following is a list of cases which will be considered in this chapter, where employees with depression were terminated from the workplace, under the following sub-headings and categories:

#### **4.1. Employees terminated for misconduct**

- *Transnet Rail Engineering v Minies & Others*;<sup>149</sup>
- *Gangaram v MEC for The Department of Health, KwaZulu-Natal & another*;<sup>150</sup>
- *MEC for the Department of Health, Western Cape v Weder; MEC for the Department of Health, Western Cape v Democratic Nursing Association of SA on behalf of Mangena*;<sup>151</sup>
- *EWN v Pharmaco Distribution (Pty) Ltd*;<sup>152</sup>
- *Jansen v Legal Aid South Africa*;<sup>153</sup> and

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<sup>149</sup> *Transnet Rail Engineering v Minies & Others* (2015) 36 ILJ 2605 (LAC).

<sup>150</sup> *Gangaram v MEC for The Department of Health, KwaZulu-Natal & another* (2017) 38 ILJ 2261 (LAC).

<sup>151</sup> (2014) 35 ILJ (LAC) p 2131.

<sup>152</sup> (2017) 38 ILJ (LAC), p 2496.

<sup>153</sup> *Jansen v Legal Aid South Africa (C 678/14) [2018] ZALCCCT 17* (16 May 2018).



- *L S v Commission for Conciliation, Mediation and Arbitration & Others*.<sup>154</sup>

#### 4.2. Employees terminated for incapacity

- *Bennet v Mondipak*;<sup>155</sup>
- *Spero v Elvey International (Pty) Ltd*;<sup>156</sup>
- *IMATU obo Strydom v Witzenberg Municipality*;<sup>157</sup>
- *Hendricks v Mercantile & General Reinsurance Co of SA Ltd*;<sup>158</sup> and
- *Rikhotso v MEC for Education*.<sup>159</sup>

#### 4.3. Employees charged with poor work performance

- *New Way Motor & Diesel Engineering (Pty) Ltd v Marsland*;<sup>160</sup> and
- *Transnet Rail Engineering v Minies & Others*.<sup>161</sup>

#### 4.4. Constructive dismissal cases

- *National Health Laboratory Services v Yona & Others*,<sup>162</sup> and
- *Western Cape Education Department v General Public Service Sectoral Bargaining Council & Others*.<sup>163</sup>

### Chapter 5 Conclusion

This chapter provides a conclusion and recommendations.

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<sup>154</sup> *L S v Commission for Conciliation, Mediation & Arbitration & Others* (2014) 35 ILJ 2205 (LC).

<sup>155</sup> *Bennett v Mondipak* (2004) 25 ILJ 583 (CCMA).

<sup>156</sup> *Spero v Elvey International (Pty) Ltd* (1995) 16 ILJ 1210 (IC).

<sup>157</sup> *IMATU obo Strydom v Witzenberg Municipality* (2012) 33 ILJ 1081 (LAC).

<sup>158</sup> *Hendricks v Mercantile & General Reinsurance Co of SA Ltd* (1994) 15 ILJ 304 (LAC).

<sup>159</sup> *Rikhotso v MEC for Education* (2004) 25 ILJ 2385 (LC).

<sup>160</sup> *New Way Motor & Diesel Engineering (Pty) Ltd v Marsland* (2009) 30 ILJ 2875 (LAC).

<sup>161</sup> *Transnet Rail Engineering v Minies & Others* (2015) 36 ILJ 2605 (LAC).

<sup>162</sup> *National Health Laboratory Service v Yona & Others* (2015) 36 ILJ 2259 (LAC).

<sup>163</sup> *Western Cape Education Department v Genera Public Service Bargaining Council & others* (2013) 34 ILJ 2969 (LC).

## CHAPTER 2 INTERNATIONAL LAW

### 2.1 Introduction

This chapter attempts to describe the relevant international law dealing with incapacity, poor performance misconduct and disability, especially depression, in the workplace. This is done by identifying the relevant treaties with particular emphasis on the CRPD. Also shown is how the South African courts have relied on Convention 158 in a number of instances. Other treaties considered are:

- Universal Declaration of Human Rights of 1948;
- United Nations Declaration on the Rights of Disabled Persons, 1975;
- United Nations Standard Rules on the Equalization of Opportunities for Persons with Disabilities, 1993;
- United Nations Convention on the Rights of Persons with disabilities (CRPD), 2007;
- ILO Convention 111 of 1958 (Discrimination);
- ILO Convention 159 of 1983 (Vocational Rehabilitation and Employment of Disabled Persons);
- ILO Code of Practice on Managing Disability in the workplace, 2001;
- SADC Charter of Fundamental Social Rights, 2003 especially art. 9;<sup>164</sup>
- African Union Protocol to the African Charter on Human and Peoples Rights on the Rights of Persons with Disabilities, 2018;
- Declaration on Employment and Poverty Alleviation in Africa, 2004; and
- African Union Continental Plan of Action for the Decade of Persons with Disabilities, 2010.

Section 233 of the Constitution makes provisions for the recognition of international law when courts interpret any legislation.<sup>165</sup> Within the workplace context, Hlongwane asserts that international instruments should be consulted and used as the main source on parity matters.<sup>166</sup> The ILO aims to improve working conditions as laid down in its conventions and

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<sup>164</sup> Nkowitz Z, 'When Elephants Dance, The SADC Charter of Fundamental Social Rights, a Beacon of Hope or Confusion Compounded?' (2007) 33(1) *Commonwealth Law Bulletin* 41-54.

<sup>165</sup> Section 233 of the Constitution.

<sup>166</sup> Hlongwane N, 'Commentary on South Africa's position regarding equal pay for work of equal value' (2007) 11(1) *Law Development and Democracy* 69-84, at page 70.

recommendations.<sup>167</sup> The ILO sets “labour standards, develop policies and devise programmes promoting decent work for all women and men”.<sup>168</sup> The main aims of the ILO are “to promote the rights at work, encourage decent employment opportunities, enhance social protection and strengthen dialogue on work-related issues”.<sup>169</sup> South Africa was a member from 1919 to 1966 and again from 26 May 1994.<sup>170</sup> It has adopted several conventions and recommendations, including the Code of Good Practice on Managing disability in the workplace.<sup>171</sup>

South Africa was one of the 51 founding members of the United Nations in 1954. The United Nations General Assembly suspended South Africa on 12 November 1974 from participating in its work due to international opposition to the policy of apartheid. South Africa was re-admitted to the United Nations in 1994 following its transition to a democracy.<sup>172</sup> With the advent of democracy and South Africa’s return to the international fold, Christianson argues that South Africa, in line with the imperative to promote the rights of persons with disabilities, enacted first the Constitution of the Republic of South Africa in 1996 (including the interim Constitution in 1993) and then the EEA in 1998. Both the Constitution and the EEA seek to eliminate discrimination against people with disabilities and to implement equal opportunity, particularly in the employment of persons with disabilities.<sup>173</sup>

## **2.2 United Nations Treaties**

### **2.2.1 Universal Declaration of Human Rights (UDHR) of 1948.**

The UDHR is one of the most significant contributions of the UN to the rights of all to earn a living, including persons with disabilities.<sup>174</sup> It places an obligation requiring South Africa to abolish all forms of discrimination in the workplace. It prohibits discrimination in the

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<sup>167</sup> Cohen T & Moodley L, ‘Achieving “decent work” in South Africa?’ (2012) 15(2), *Potchefstroom Electronic Law Journal* 319-344, at page 320.

<sup>168</sup> ‘About the ILO’ <http://www.ilo.org/global/about-the-ilo/lang--en/index.htm> (undated) (accessed on 16 March 2018).

<sup>169</sup> ‘About the ILO’ at <http://www.ilo.org/global/about-the-ilo/lang--en/index.htm> (undated) (accessed on 16 March 2018).

<sup>170</sup> ‘South African membership to ILO at [http://www.ilo.org/dyn/normlex/en/f?p=1000:11110:0::NO:11110:P11110\\_COUNTRY\\_ID:102888](http://www.ilo.org/dyn/normlex/en/f?p=1000:11110:0::NO:11110:P11110_COUNTRY_ID:102888) (undated) (accessed on 19 April 2018).

<sup>171</sup> Christianson (n 21 above), at page 290.

<sup>172</sup> ‘Permanent mission of South Africa to the United Nations’ at <http://www.southafrica-newyork.net/pmun/> (undated) (accessed on 25 April 2018).

<sup>173</sup> Christianson (n 21 above), p 290.

<sup>174</sup> Cole E C & van der Walt A (n 110 above), at page 512.

workplace.<sup>175</sup> Article 7 provides for equality before the law and protects people against any kind of discrimination.<sup>176</sup> Article 23 makes provision for choice of employment and protection against unemployment.<sup>177</sup> It became the first document in which member states proclaimed human rights. It is significant and the foundation of human rights protection.<sup>178</sup> The UDHR lacks the status of a treaty of the UN and is therefore not binding on member states. Some of its principles have, however, achieved recognition as customary international law.<sup>179</sup>

### **2.2.2 United Nations Declaration on the Rights of Disabled Persons, 1975<sup>180</sup>**

Disability was historically based on the medical model which viewed persons with disabilities as having deficiencies which should be diagnosed, treated and if possible cured towards the move for protection of persons with disabilities in terms of treatment and rehabilitation.<sup>181</sup> The inherent recognition of dignity for people with disabilities was first recognised in the UN Declaration on Rights of Disabled Persons.<sup>182</sup> The Declaration defines a disabled person as “any person unable to ensure by himself or herself, wholly or partly, the necessities of a normal individual and/or social life, as a result of deficiency, either congenital or not, in his or her physical or mental capabilities”.<sup>183</sup>

It was the first international instrument which sought to provide protection and proclaimed human dignity for all persons with disabilities. It further makes provisions for their involvement in all affairs related to disability policy, including social and economic planning<sup>184</sup> and a right to earn a living by engaging in meaningful employment.<sup>185</sup> It is significant in that it bars discrimination against persons with disabilities and proclaimed their right to the full enjoyment of the declaration.<sup>186</sup> Although South Africa did not adopt this declaration, as it was suspended by the UN in 1974, section 39 of the Constitution provides that the courts and other legal bodies, when interpreting the Bill of Rights, must consider international law and may consider

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<sup>175</sup> D Du Toit & M Potgieter (n 145 above), at pages 12-13.

<sup>176</sup> Article 7, Universal Declaration of Human Rights, 1948.

<sup>177</sup> Article 23, Universal declaration of Human Rights, 1948.

<sup>178</sup> Christianson (n 21 above) p 289.

<sup>179</sup> Cheadle H, 'Reception of international labour standards in common-law legal systems' (2012) 1 *Acta Juridica*, Volume 348-364, at page 356.

<sup>180</sup> Proclaimed by General Assembly resolution 3447 of 9 December 1975.

<sup>181</sup> Faisal B (n 116 above), at page 223.

<sup>182</sup> Faisal B (n 116 above), at page 227.

<sup>183</sup> <http://www.ohchr.org/EN/ProfessionalInterest/Pages/RightsOfDisabledPersons.aspx> 'Declaration on the Rights of Disabled Persons' (undated) (accessed\_on 25 April 2018).

<sup>184</sup> Faisal B (n 116 above), at page 227.

<sup>185</sup> Article 7 of the Declaration on the Rights of Disabled Persons.

<sup>186</sup> Article 2 of the Declaration on the Rights of Disabled Persons.

foreign law.<sup>187</sup> In *S v Makwanyane*<sup>188</sup>, Chaskalson Chief Justice stated that public international law would include binding as well as non-binding law and that both may be used as tools of interpretation.<sup>189</sup>

### **2.2.3 United Nations' Standard Rules on the Equalization of Opportunities for Persons with Disabilities, 1993<sup>190</sup>**

Although the above resolution is not a binding document, the standard rules on the equalisation of opportunities for person with disabilities (standard rules) provides guidance to member states for equal opportunities for persons with disabilities in terms of implementation measures and policymaking.<sup>191</sup> Rule 7 recognises the elimination of discrimination against people with disabilities and their integration, especially in the employment field.<sup>192</sup> What is significant for these rules, is the definition of a disability which is provided for in rule 17. Disability is summarised as a permanent or temporary functional limitation in any population in any country of the world which can either be physical, intellectual, sensory impairment, medical condition or mental illness.<sup>193</sup>

Handicap is described as the loss or limitation of opportunities to take part in the life of the community on an equal level with others.<sup>194</sup> The definition places emphasis on the shortcomings in the environment and societal activities which prevent persons with disabilities from participating on equal terms.<sup>195</sup> The use of the two terms disability and handicap, as defined in rules 17 and 18 above, should be viewed in the light of modern disability history. The use of the terms disability and handicap interchangeably resulted in confusion with consequential poor guidance for policy making and political action. The terminology reflected a medical and diagnostic approach, which ignored the imperfections and deficiencies of the surrounding society.<sup>196</sup> Carvalheria refers to Weiten's assertion that the definitions bring about clarity between disability, which is medical in nature, and handicap which refers to the social

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<sup>187</sup> Section 39 of the Republic of South Africa, 1996.

<sup>188</sup> *S v Makwanyane* 1995 3 SA 391 (CC).

<sup>189</sup> At para 35 of the judgment.

<sup>190</sup> Adopted at the 48<sup>th</sup> Session, 20 December 1993 (Resolution 48/96), Part II.

<sup>191</sup> The Standard Rules on the Equalization of Opportunities for Persons with Disabilities (the Standard Rules).

<sup>192</sup> Rule 7 of the standard rules on the equalization of opportunities for persons with disabilities.

<sup>193</sup> Rule 17 of the Standard Rules.

<sup>194</sup> Rule 18 of the Standard Rules.

<sup>195</sup> Rule 18 of the Standard Rules.

<sup>196</sup> Rule 19 of the Standard Rules.

aspect of a disability.<sup>197</sup> Weiten argues that depression falls within the definition of disability as it is a mental illness, since although temporary in nature, it may recur several times in an individual's lifetime.<sup>198</sup>

#### **2.2.4 United Nations Convention on the Rights of Persons with Disabilities, 2007**

The United Nations Convention on the Rights of Persons with Disabilities (CRPD) is the most important contribution by the UN to address the management of disability.<sup>199</sup> The CRPD was adopted by the General Assembly in December 2006.<sup>200</sup> South Africa signed on 30 March 2007 and ratified it on 20 November 2007. The Convention has become the primary international law instrument in attaining the rights of persons with disabilities, inclusive of the right to an adequate standard of living.<sup>201</sup> Its preamble makes provisions for the recognition of a disability as an “evolving concept” and “that disability results from the interaction between persons with impairment and attitudinal and environmental barriers that hinder their full and effective participation in society on equal basis with others”.<sup>202</sup> It also take into consideration that discrimination against any person because of a disability is an infringement of the inherent dignity and value of a person.<sup>203</sup>

In terms of article 1 of the CRPD “persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others”.<sup>204</sup> The CRPD explains discrimination on the basis of disability as:

any distinction, exclusion or restriction on the basis of disability which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise, on equal basis with others, of all human rights and fundamental freedom in the political, economic, social, cultural, civil or any other field. It includes all forms of discrimination, including denial of reasonable accommodation.<sup>205</sup>

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<sup>197</sup> Weiten W *Psychology: Themes and Variations* 5 ed (2001) ch 14 cited in R Carvalheira ‘Depression, dismissal and disability: depression is increasing in the South African workplace. Do the Labour Relations Act's dismissal categories provide depressed employees with adequate protection from unfair dismissals?’ (2011) University of Witwatersrand LLM thesis, at page 63.

<sup>198</sup> Weiten (n 194 above), at page 63.

<sup>199</sup> Cole E C & van der Walt A (n 110 above), at page 512.

<sup>200</sup> UN CRPD resolution / adopted by the General Assembly, 24 January 2007, A/RES/61/106.

<sup>201</sup> Basson Y ‘State obligations in international law related to the right to an adequate standard of living for persons with disabilities’ (2017) 21 *Law, Democracy and Development*, 21, 68-83, at page 69.

<sup>202</sup> Preamble of the CRPD.

<sup>203</sup> Preamble of the CRPD.

<sup>204</sup> Article 1 of the CRPD.

<sup>205</sup> Article 2 of the CRPD.

It also makes provisions against discrimination on the basis of disability and provides guarantees for equal and effective legal protection against discrimination on all grounds.<sup>206</sup>

Article 27 of the CRPD enjoins member states to take appropriate steps in eliminating discrimination on the basis of disability in the workplace.<sup>207</sup> Article 27 further promotes the right to equality for persons with disabilities.<sup>208</sup> Article 5 takes cognisance of the rights of persons with disabilities to equality before the law and abolishes all forms of discrimination on the basis of disability.<sup>209</sup> Ngwena and Albertyn assert that the CRPD serves as a complementary reference point for any judicial discourse at the intersection between disability and equality by creating a new vision of disability which cements the duty to accommodate difference under human dignity and equality.<sup>210</sup>

## **2.3 ILO Treaties**

### **2.3.1 ILO Convention 111 of 1958 (Discrimination)**

Convention 111 was ratified by South Africa on 5 March 1997. In its preamble, it reaffirms the pronouncement by the Declaration of Human Rights that discrimination constitutes a violation of human rights. The convention calls for the abolition of discrimination in the workplace.<sup>211</sup> Discrimination is defined as:

- (a) any distinction, exclusion or preference made on the basis of race, colour sex, religion, political opinion, national extraction or social origin, which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation;
- (b) such other distinction, exclusion or preference which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation as may be determined by the Member concerned after consultation with representative employers' and workers' organisations, where such exist, and with other appropriate bodies.<sup>212</sup>

The convention obligates all member states to declare and pursue a national policy for implementing the convention and to enact legislation designed to safeguard the acceptance and adherence to the policy.<sup>213</sup> South Africa accepted the above definition of discrimination.

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<sup>206</sup> Article 5(2) of the CRPD.

<sup>207</sup> Article 27(1) (a) of the CRPD.

<sup>208</sup> Articles 27(1) (b) and (c) of the CRPD.

<sup>209</sup> Article 5 of the CRPD.

<sup>210</sup> Ngwena C & Albertyn C (n 132 above), at page 214.

<sup>211</sup> Preamble of Convention 111.

<sup>212</sup> Article 1(1) of Convention 111.

<sup>213</sup> du Toit & Potgieter (n 145 above), at page 11.

The Industrial Court<sup>214</sup> made decisions<sup>215</sup> that discrimination against employees on the basis of race, sex and trade union membership are unfair labour practice.<sup>216</sup> The prohibition against discrimination contained in the Constitution and EEA mirrors the prohibition against discrimination as contemplated by Convention 111. The discrimination in section 6(1) of the EEA must be given the same meaning as the description in article 1(1) of Convention 111.

### **2.3.2 ILO Convention 158 of 1982 (Termination of Employment)**

Convention 158 provides guidelines on termination of employment. It sets out three broad reasons for termination of an employment relationship, which are capacity, conduct and operational requirements.<sup>217</sup> Article 4 of the Convention prohibits the termination of an employee unless it is for a valid reason relating to the capacity or conduct of the employee.<sup>218</sup> It further prohibits termination of employment without a valid reason connected with the employee's capacity, conduct or based on operational requirements.<sup>219</sup> Section 188 of the LRA replicates the grounds for dismissal as contained in the convention, save for the difference in phrasing or words used. In terms of section 188(1) of the LRA, a dismissal is automatically unfair if the employer fails to prove that the dismissal is for a fair reason relating to either the employee's conduct, capacity or based on the employer's operational requirements after following a fair process.<sup>220</sup>

The only difference between the two instruments is that the LRA uses the word "unfair", whereas the Convention uses the term "invalid". The main principles which were extracted by South Africa from Convention 158 are that "[t]here must be a valid reason for dismissal; a worker must be afforded an opportunity to defend himself or herself at the workplace against the allegations made by the employer; and every worker should be entitled to an opportunity

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<sup>214</sup> Established in terms of the previous LRA Act 28 of 1956, the Industrial Court had jurisdiction to determine 'unfair labour practices' disputes between 1980 and 1996.

<sup>215</sup> In *Chamber of Mines v Mineworkers Union* (1989) 10 ILJ 133 (IC), the Industrial Court held that refusal by racially exclusive union to allow members to train employees of different race constituted an unfair labour practice and in *George v Liberty Life Association of Africa Ltd* (1996) 17 ILJ 571 (IC), the court held, in a promotion dispute, that negative racial discrimination constituted an unfair labour practice, *Mazibuko v Mooi River Textiles Ltd* (1989) 10 ILJ 875 (IC), *Administrator of Transvaal & Others v Traub* (1989) 10 ILJ 823 (A), *East Rand Gold & Uranium v NUM* (1989) 10 ILJ 683 (LAC).

<sup>216</sup> du Toit and Potgieter (n 145 above), at page 9.

<sup>217</sup> Convention 158.

<sup>218</sup> Article 5 of Convention 158.

<sup>219</sup> Article 4 of Convention 158.

<sup>220</sup> Section 188 of the LRA 66 of 1995.



to lodge an appeal to an impartial tribunal or court against the decision to dismiss him or her”.<sup>221</sup>

The above indicates how the Convention has been used by South Africa as a guideline in the LRA in crafting provisions against the unfair dismissal of employees, although South Africa did not ratify this convention. In this vein, the purpose of the LRA is “to advance economic development, social justice, labour peace and the democratisation of the workplace by fulfilling the primary objects of the act, and one of them is to give effect to obligations incurred by the Republic as a member state of the International Labour Organisation”.<sup>222</sup> Section 3(c) of the LRA enjoins any person interpreting its provisions to conform to the public international law obligations of the Republic.<sup>223</sup>

The convention also became the foundation for the Industrial Court’s jurisprudence on unfair labour practices in general, and unfair dismissal disputes in particular.<sup>224</sup> An example of such a case is *Spero v Elvey International (Pty) Ltd*.<sup>225</sup> The employee was dismissed on the basis of a psychiatrist’s report of severe depression and the impulsive effects of medication on his performance. The Industrial Court found the dismissal to be unfair because the employer had reacted to only part of the psychiatric report; elsewhere it had stated that the incapacity was temporary and that the employee would improve.<sup>226</sup> The court found that, notwithstanding the finding of unfairness, there was no guidance in South African law on the correct approach to misconduct, poor performance or incapacity of employees who are affected by psychological stress or by medicinal dependence or abuse, and the respondent should therefore not be unduly penalised for their conduct.<sup>227</sup> The court made reference to the principle in article 6 of the Convention for guidance, which provides that “temporary absence from work because of illness or injury shall not constitute a valid reason for termination”.<sup>228</sup> The employee was reinstated retrospectively.

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<sup>221</sup> Smith P and van Eck B P S, ‘International perspective on South Africa’s unfair dismissal law’ (2010) 43(1) *Comparative and International Law Journal of Southern Africa* 46-67, at page 50.

<sup>222</sup> Section 1 (b) of the LRA 66 of 1995.

<sup>223</sup> Section 3 (c) of the LRA 66 of 1995.

<sup>224</sup> Christianson (n 21 above) p 882.

<sup>225</sup> *Spero v Elvey International (Pty) Ltd* (1995) 16 ILJ 1210 (IC).

<sup>226</sup> At page 1218 of the judgment.

<sup>227</sup> At page 1223 of the judgment.

<sup>228</sup> *Spero v Elvey International (Pty) Ltd* (1995) 16 ILJ 1210, at page 1218.

Termination of an employee for being absent from work temporarily as result of an illness is also precluded by the Convention.<sup>229</sup> The definition of what constitutes temporary absence from work requiring a medical certificate is determined in accordance with collective agreements, arbitration awards, court decisions, national practice, legislation and regulations.<sup>230</sup> The Convention provides the employee with a right to defend themselves before the dismissal,<sup>231</sup> and makes further provisions for appeal against alleged unfair termination to “an impartial body, such as court, labour tribunal, arbitration committee or arbitrator”.<sup>232</sup> What is significant is that the Convention provides for some kind of a hearing or consultation before a dismissal. Failure to do this might render the dismissal procedurally unfair.<sup>233</sup> It would appear that the essential requirements for fairness in a dismissal which appear in the Convention have been recognised by South African Courts and labour tribunals on a regular basis.<sup>234</sup>

In *Mahlangu v CIM Deltak, Gallant v CIM Deltak*,<sup>235</sup> an unfair dismissal case, the Industrial Court found that the interview conducted by the employer before the dismissal of the employees could not be equated with the kind of enquiry contemplated by ILO Termination of Employment Convention 158 as the reasoning behind the type of questioning was to extort admission from the employees that they were implicated in the thefts. The court made reference to article 7 of Convention 158. Article 7 prohibits termination of employment without affording the employee the right to be heard. The court held that it would be unfair to decide the guilt of the employee prematurely without affording the employee an opportunity to be heard.<sup>236</sup>

In *Avril Elizabeth Home for the Mentally Handicapped v CCMA & Others*,<sup>237</sup> an application for review of an arbitration award, the court made reference to the right of appeal provided for in Convention 158, and stated that “this was not the right of appeal to a higher level of

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<sup>229</sup> Article 6(1) of C 158 of 1982.

<sup>230</sup> Articles 1 and 6(2) of Convention 158 of 1982.

<sup>231</sup> Article 7 of Convention 158 of 1982.

<sup>232</sup> Article 8 (1) of Convention 158 of 1982.

<sup>233</sup> Christianson M (n 46 above), at page 883.

<sup>234</sup> Mosito K E & Mohapi T, A Comparative evaluation of the law on remedies in cases of unfair dismissal for employee misconduct: Lesotho and South Africa in perspective, *Lesotho Law Journal*, Volume 24, Issue 1, Jan 2016, at page 137.

<sup>235</sup> *Mahlangu v CIM Deltak, Gallant v CIM Deltak* (1986) 7 ILJ 346 (IC).

<sup>236</sup> At para 24 of the judgment.

<sup>237</sup> *Avril Elizabeth Home for the Mentally Handicapped v CCMA & Others* (2006) 27 ILJ 1644 (LC).

management that the criminal justice model required, but a right of recourse to an independent tribunal when the substantive merits of a decision to dismiss were challenged, and that it was met by those provisions of the LRA that require the arbitration or adjudication of disputed dismissals".<sup>238</sup> The court sought reliance on Convention 158 in its interpretation of the application of the LRA, although the convention was not ratified by South Africa.<sup>239</sup> Reference to Convention 158 is also made in *Sidumo & Another v Rustenburg Platinum Mines Ltd & Others*,<sup>240</sup> where the Constitutional Court held that the commissioner should determine a dismissal dispute as an impartial adjudicator, as required by article 8 of Convention 158, and not from the employer's perspective.<sup>241</sup> The LRA also imported article 9 of the Convention, which determines that the onus of proof in whether the termination of employment is justified rests with the employer.<sup>242</sup> Section 192 (2) of the LRA has a similar provision which requires the employer to prove that the dismissal was for a fair reason.<sup>243</sup> Article 10 of the Convention also makes provisions for payment of compensation as a relief for a termination of employment which has been declared invalid by labour tribunals.<sup>244</sup> Section 193 of the LRA provides similar relief as a remedy for unfair dismissal.<sup>245</sup>

Valid reason before terminating a contract of employment, opportunity to be heard and a right to appeal against the employer's decision to terminate to an impartial external body, are three essential elements for a fair dismissal from Convention 158 that Smit and van Eck identified as having been imported into the LRA.<sup>246</sup>

### **2.3.3 ILO Convention 159 of 1983 (Vocational Rehabilitation and employment of disabled persons)**

The declaration of 1981 by the United Nations as an International Year of Disabled Persons made way for the adoption of new international standards ensuring equality of opportunities and treatment of disabled persons in the workplace.<sup>247</sup> The ILO Convention 159 (Convention 159) describes a "disabled person" as "an individual whose prospects of securing, retaining

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<sup>238</sup> At para 148 of the judgment.

<sup>239</sup> *Avril Elizabeth Home for the Mentally Handicapped v CCMA & Others* (2006) 27 ILJ 1644 (LC).

<sup>240</sup> *Sidumo & another v Rustenburg Platinum Mines Ltd & others* [2007] 12 BLLR 1097.

<sup>241</sup> At para 61 of the judgment.

<sup>242</sup> Article 9. 2(a) of Convention 158.

<sup>243</sup> Section 192(2) of the LRA 66 of 1995.

<sup>244</sup> Article 19 of Convention 158.

<sup>245</sup> Section 193(1)(c) of the LRA 66 of 1995.

<sup>246</sup> Smith P and van Eck BPS (n 221 above), at page 64.

<sup>247</sup> Preamble of Convention 159.

and advancing in suitable employment are substantially reduced as a result of a duly recognised physical or mental impairment”.<sup>248</sup> The convention requires employers to consider the purpose of vocational rehabilitation as being to enable a disabled person to secure, retain and advance in suitable employment to further their integration into work.<sup>249</sup>

### **2.3.4 ILO Code of Practice on Managing Disability in the Workplace, 2001**

The principles contained in this code are informed by the labour standards contained in Convention 159.<sup>250</sup> Although not a binding document, it has been designed to provide guidance to employers in the management of disability related issues in the workplace.<sup>251</sup>

The phrases “disabled person” and “persons with disabilities” are used interchangeably in the code.<sup>252</sup> A “disabled person” is described as “an individual whose prospects of securing, returning to, retaining and advancing in suitable employment are substantially reduced as a result of duly recognised physical, sensory, intellectual or mental impairment”.<sup>253</sup> The code defines impairment as “any loss or abnormality of a psychological or physical function, including the systems of mental function”.<sup>254</sup> Depression fits neatly into this description as it is a form of psychological impairment which affects mental function. The code enjoins on employers to retain employees on the same or different duties or conditions of service and makes provision for support when the employee returns to work after an absence due to illness.<sup>255</sup> The code recommends that employers should develop disability management strategies for equal opportunities and job retention for employees with disabilities and for communicating these strategies to employees.<sup>256</sup> The strategies should include early intervention, referral to suitable amenities and procedures for gradual resumption of work.<sup>257</sup>

Discrimination is described as:

Any distinction, exclusion or preference based on certain grounds which nullifies or impairs equality of opportunity or treatment in employment or occupation. General standards that

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<sup>248</sup> Article 1 of Convention 159.

<sup>249</sup> Article 1 of Convention 159.

<sup>250</sup> Clause 1.2.1 of the Code of practice on managing disability in the workplace, 2001.

<sup>251</sup> Cole E C & van der Walt A (n 110 above), at page 514.

<sup>252</sup> Clauses 1.3(vi) and 1.4 of the Code of practice on managing disability in the workplace.

<sup>253</sup> Clause 1.4 of the Code of practice on managing disability in the workplace.

<sup>254</sup> Clause 1.4 of the Code of practice on managing disability in the workplace.

<sup>255</sup> Clause 1.4 of the Code of practice on managing disability in the workplace.

<sup>256</sup> Clauses 2.1 and 6.1 of the Code of practice on managing disability in the workplace.

<sup>257</sup> Clause 6.1 of the Code of practice on managing disability in the workplace.

establish distinctions based on prohibited grounds constitute discrimination in law. The specific attitude of a public authority or a private individual that treats unequally persons or members of a group on a prohibited ground constitutes discrimination in practice. Indirect discrimination refers to apparently neutral situations, regulations or practices which in fact result in unequal treatment of persons with certain characteristics. Distinction or preferences that may result from application of special measures of protection and assistance taken to meet the particular requirements of disabled persons are not considered discriminatory.<sup>258</sup>

## **2.4 African Regional Legal Systems**

### **2.4.1 SADC**

#### **2.4.1.1 SADC Charter of Fundamental Social Rights, 2003.**

South Africa has been a member state of the SADC since 30 August 1994.<sup>259</sup> Member states to the SADC Charter committed to creating an enabling environment for “persons with disabilities” and creating measures relating to the organisation of work and workplaces designed to improve their social and professional integration.<sup>260</sup> “Persons with disabilities” are given “priority in the charter irrespective of their origin and nature of their disablement”.<sup>261</sup> Olivier and Mpedi are of the view that article 9 is one of the principles laid down by the charter that could be used as a guideline for developing and improving social protection systems and models in the region.<sup>262</sup> Smit goes further and asserts that article 9 provides protection to persons with disabilities against discrimination in the workplace and enjoins employers to make special effort to accommodate them.<sup>263</sup> Although the charter provides for regular reporting in article 16(3), it does not make provisions for sanctions for non-compliance with the charter.<sup>264</sup>

### **2.4.2 African Union**

#### **2.4.2.1 Declaration on Employment and Poverty Alleviation in Africa (2004).**

South Africa has been a member state of the African Union since 27 April 1994.<sup>265</sup> This Declaration was adopted in September 2004 and sought to address challenges faced by Africa in respect of poverty, unemployment and under-employment.<sup>266</sup> It also raised concerns about

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<sup>258</sup> Clause 1.4 of the Code of practice on managing disability in the workplace.

<sup>259</sup> <https://www.sadc.int/member-states/> ‘SADC member States’ (undated) (accessed on 15 August 2018).

<sup>260</sup> Article 9 (1) of Charter of Fundamental Social Rights in SADC.

<sup>261</sup> Olivier M P and Mpedi L G, ‘Co-ordinating and integration of social security in the SADC region: developing the social dimension of economic co-operation and integration’ (2003) 28(3) *Journal for Juridical Sciences* 10-39, at page 16.

<sup>262</sup> Olivier and Mpedi, (n 261 above), at page 22.

<sup>263</sup> Smit P, ‘Regional Labour Standards in the SADC: Is it Possible, given the EU Experience’ (2015) 2(1) *Journal of Law, Society and Development* 165 – 188, at page 178.

<sup>264</sup> Smit P (n 263 above), at page 178.

<sup>265</sup> <https://au.int/memberstates> ‘African Union member States profiles’ (undated) (accessed on 29 August 2018).

<sup>266</sup> Clause 1 of the Declaration on Employment and Poverty Alleviation in Africa.

lack of social protection affecting people with disabilities.<sup>267</sup> However the Declaration does not specifically address disability as a prohibited ground of discrimination but acknowledges that persons with disabilities who are discriminated against have limited access to education, training opportunities as well as to the labour market.<sup>268</sup> One of the most significant commitments by member states is to promote and implement international labour standards and fundamental principles and rights at work.<sup>269</sup> Member states also committed to implementing the African Decade of Disabled Persons.<sup>270</sup>

#### **2.4.2.2 African Union Continental Plan of Action for the Decade of Persons with Disabilities**

The Labour and Social Affairs Commission of the Organisation of African Unity (OAU) took a decision to proclaim the African Decade for Disabled People in April 1999 which was adopted in July 2000 which came with the Continental Plan of Action (CPA) for the African Decade of Persons with Disabilities (ADPD).<sup>271</sup> Its aim is the full participation, equality and empowerment of persons with disabilities.<sup>272</sup> It was initially for a period of 1999-2009 but was extended for a second period from 2009 to 2019 because of slow progress in the commencement of activities under the Continental Plan of Action.<sup>273</sup>

The most relevant strategic areas of implementation by member States for this research are non-discrimination, equality before the law and freedom from exploitation and cruel treatment of persons with disabilities,<sup>274</sup> and promoting inclusion of persons with disabilities in all sectors of society.<sup>275</sup> Member states are enjoined to ascertain and abolish national laws that are discriminatory against persons with disabilities and provide non-discrimination legislation with policies for monitoring processes.<sup>276</sup>

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<sup>267</sup> Clause 8 of the Declaration.

<sup>268</sup> Clause 22 of the Declaration.

<sup>269</sup> Clause 4(i) of the Declaration.

<sup>270</sup> Clause 8(g) of the Declaration.

<sup>271</sup> Appiagyei-Atua K, 'A comparative analysis of the United Nations Convention on the Rights of Persons with Disability and the Draft Protocol on the Rights of Persons with Disabilities' (2017) 21 *Law Democracy & Development* 153-175, at page 157.

<sup>272</sup> van Reenen T P & Combrinck H, 'The UN Convention on the Rights of Persons with Disabilities in Africa: Progress after 5 Years' (2011) 8 *International Journal on Human Rights* 133 – 207, at page 138.

<sup>273</sup> van Reenen T P & Combrinck H (n 272 above), at page 139.

<sup>274</sup> Plan 2.4 of the CPA, at page 16.

<sup>275</sup> Plan 2.7 of the CPA, at page 22.

<sup>276</sup> Plan 2.4.1 of the CPA, at page 16.

### **2.4.2.3 African Union Protocol to the African Charter on Human and Peoples Rights on the Rights of Persons with Disabilities (AfDP)**

Following the adoption of the CRPD, Appiagyei-Atua argues that there were compelling reasons to adopt a charter for persons with disabilities that was African specific rather than working with the CRPD. An African treaty would enable Africa to capture and include some peculiar concerns that persons with disabilities face in Africa, which will make room for provision of the appropriate context to disability rights in Africa.<sup>277</sup> The African Union called for inclusion of poverty, HIV/AIDS, conflict, resource scarcity, low levels of development, communitarian context of African societies and albinism to the CRPD.<sup>278</sup> These issues were however not incorporated into the CPRD.<sup>279</sup>

The charter was adopted by the African Commission on Human and People's Rights in February 2016 which aims to address exclusion, harmful practices and discrimination affecting persons with disabilities.<sup>280</sup> It deals exclusively with the rights of persons with disabilities in Africa.

The charter describes discrimination on the basis of disability as:

Any distinction, exclusion or restriction on the basis of disability which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise, on an equal basis with others, of all human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field, including denial of reasonable accommodation.<sup>281</sup>

It also recognises inclusion of mental impairments as a form of a disability<sup>282</sup> and makes provisions for reasonable accommodation.<sup>283</sup> In this context, persons with disabilities:

includes those who have physical, mental, intellectual, developmental or sensory impairments which in interaction with environmental, attitudinal or other barriers hinder their full and effective participation in society on an equal basis with others.<sup>284</sup>

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<sup>277</sup> Appiagyei-Atua K, (n 271 above), page 159.

<sup>278</sup> Appiagyei-Atua K (n 271 above), at page 159.

<sup>279</sup> Appiagyei-Atua K (n 271 above), at page 159.

<sup>280</sup> Paragraph 3.2 of SA Human Rights Commission Research Brief on Disability and Equality in South Africa, 2013 – 2017, page 9.

<sup>281</sup> Article 1(d) of the Charter.

<sup>282</sup> Article 1(g) of the Charter.

<sup>283</sup> Article 1(i) of the Charter.

<sup>284</sup> Article 1(g) of the Charter.

Member states are obliged to take proper and effective measures in ensuring protection and promotion of rights and dignities of persons with disabilities through legislation and policymaking.<sup>285</sup> The most relevant reaffirmed rights in the AfDP for this paper are equality and non-discrimination<sup>286</sup> and the right to work.<sup>287</sup> The charter recognises equality for persons with disabilities in the performance of their responsibilities<sup>288</sup> and obliges member states to provide assistance and support where necessary and to reasonably accommodate them.<sup>289</sup>

The AfDP in its preamble reminds the member states that the rights of persons with disabilities are protected and reaffirmed in the CRPD.<sup>290</sup> The reaffirmation indicates that the rights of persons with disabilities did not begin with the adoption of the CRPD but is founded on the origins of disability.<sup>291</sup> The definitions of discrimination and reasonable accommodation in the AfDP mirror the definitions provided for in article 2 of the CRPD. However, it is worth noting that whilst the definition of persons with disabilities in the CRPD include the term “long-term” in defining the impairment, the AfDP is devoid of such a term.<sup>292</sup> This basically means that any impairment qualifies as a disability even if it is on a temporary basis.<sup>293</sup> Further, the AfDP includes a new concept of “developmental” impairment in its definition.<sup>294</sup> This treaty will only come into force when sufficient countries have ratified the treaty – none has done so to date.

## 2.5 Conclusion

South Africa adopted a dualist approach toward recognising international treaties and incorporating them into domestic law by enacting enabling legislation. Section 231 of the Constitution recognises the binding nature of international law.<sup>295</sup> Section 232 enjoins the courts, when interpreting legislation, to be consistent with interpretation that is in keeping with international law over any alternative.<sup>296</sup>

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<sup>285</sup> Article 2 of the Charter.

<sup>286</sup> Article 3 of the Charter.

<sup>287</sup> Article 15 of the Charter.

<sup>288</sup> Article 26(1) of the Charter.

<sup>289</sup> Article 26(2) of the Charter.

<sup>290</sup> Preamble of the AfDP.

<sup>291</sup> Appiagyei-Atua (n 271 above), at page 161.

<sup>292</sup> Appiagyei-Atua (n 271 above), at page 172.

<sup>293</sup> Appiagyei-Atua (n 271 above), at page 172.

<sup>294</sup> Article 1(g) of the Charter.

<sup>295</sup> Section 231 of the Constitution.

<sup>296</sup> Section 232 of the Constitution.



International law laid a foundation for the realising of protection against discrimination of persons with disabilities in the workplace. The various international definitions of what constitute persons with disabilities and discrimination have been imported into South African domestic law by promulgation of various instruments and legislation which will be covered in Chapter 3 of this research.

The case law reviewed under the auspice of the Industrial Court before the enactment of the LRA indicate that the court sought guidance from the Convention 158 in determining the fairness of a dismissal, although the same was not ratified by South Africa. Even after the enactment of the Constitution and the LRA, the Constitutional Court sought guidance from the Convention 158 in *Sidumo & Another v Rustenburg Platinum Mines Ltd & Others*.<sup>297</sup>

Grobbelaar-du Plessis and Nienaber agree with the South African Human Rights Commission (SAHRC) that although section 9 of the Constitution guarantees the rights of persons with disabilities to equality and the protection afforded by the EEA against discrimination, the lack of specific disability legislation weakens the effect of the CRPD in South Africa.<sup>298</sup> The CRPD has not been incorporated into South African law in terms of section 231 of the Constitution.<sup>299</sup> Megret and Msipa contend that despite many states ratifying the CRPD, it suffers from incomplete and cursory implementation as it has not been incorporated into legislation in some of the countries.<sup>300</sup> Van Reenen and Combrinck identify that South Africa is one of the countries which does not have all-inclusive disability legislation.<sup>301</sup>

The authors believe that including disability in a general anti-discrimination legislation addressing employment or social security renders it invisible.<sup>302</sup> I share the view with the authors' expression of their disappointment in South Africa not having yielded more in the form of disability jurisprudence, despite its fairly progressive constitutional and legal framework.<sup>303</sup>

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<sup>297</sup> *Sidumo & Another v Rustenburg Platinum Mines Ltd & Others* [2007] 12 BLLR, at par 61.

<sup>298</sup> Grobbelaar-du Plessis I & Nienaber A, 'Disability and Reasonable Accommodation: HM v Sweden Communication 3/2011 (Committee on the Rights of Persons with Disabilities)' (2014) 30(2) *South African Journal on Human Rights* 366-379, at pages 371 – 372.

<sup>299</sup> van Reenen T P & Combrinck H (n 272 above), at page 146.

<sup>300</sup> Megret F & Msipa D, 'Global Reasonable Accommodation: How the Convention on the Rights of Persons with Disabilities changes the way we think about equality' (2014) 30(2) *South African Journal on Human Rights* 252 – 274, at page 260.

<sup>301</sup> van Reenen T P & Combrinck H (n 272 above), at page 146.

<sup>302</sup> van Reenen T P & Combrinck H (n 272 above), at page 144.

<sup>303</sup> van Reenen T P & Combrinck H (n 272 above), at page 146.

Van Reenen and Combrinck recommend a comprehensive disability legislation in order for South Africa to fully incorporate the CRPD into domestic law.<sup>304</sup> It is somewhat disconcerting to note that these international instruments do not assist in distinguishing between dismissal for incapacity or disability. Article 4 of the Convention 158 only provides guidance for termination of employment relating to capacity.

In conclusion, this chapter demonstrated that the CRPD has made significant inroads towards the realisation of the rights of persons with disabilities which also include persons with psychosocial illnesses as revealed by the article 1 of the CRPD. Persons with depression, falling under the category of persons with a psychosocial disability, enjoy protection under the CRPD. The inclusion of mental impairment in the definition of persons with disabilities in the CRPD makes provision for the protection of employees with depression in the workplace.

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<sup>304</sup> van Reenen T P & Combrinck H (n 272 above), at page 153.

## CHAPTER 3 DOMESTIC LAW

### 3.1 Introduction

This chapter seeks to review relevant local legislation that provides protection to employees with depression against unfair dismissal and unfair discrimination in the workplace. The starting point is the Constitution of the Republic of South Africa, 1996 (the Constitution) and the enabling legislation, the LRA 66 of 1995 and its schedule, the EEA 55 of 1998 together with relevant codes and guidelines. The chapter considers whether the South African legislative framework in its current format provides sufficient guidelines to employers and protection to employees with depression. More pertinently, in this chapter, the legal framework as it applies to a person with depression in the four different categories (disability, discrimination, incapacity, and poor work performance) is distinguished.

### 3.2 The South African Constitution

Persons with disabilities are considered as a vulnerable group in society whose members are exposed to discrimination. The Constitution seeks to protect persons with disabilities against unfair discrimination. Section 9 of the Constitution provides guarantees to the right to equality, dignity and freedom for all people.<sup>305</sup> Unfair discrimination by anyone, including the state is precluded by sections 9(3) and (4).<sup>306</sup> Section 9(3) lists disability either directly or indirectly as a ground for unfair discrimination.<sup>307</sup> Christianson advocates that the equality clause against discrimination in the Constitution is the provision which underpins the statutory protection for persons with disabilities in employment in the LRA and the EEA.<sup>308</sup>

In *Minister of Health & Another v New Clicks SA (Pty) Ltd & Others*<sup>309</sup>, the Constitutional Court spelled out another fundamental principle: where Parliament has enacted a statute to regulate and give effect to a basic right guaranteed by the Constitution, anyone seeking to enforce that right must rely on the statute in question and no longer directly on the Constitution itself. This

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<sup>305</sup> Section 9 of the Constitution.

<sup>306</sup> Section 9 (3) & (4) of the Constitution.

<sup>307</sup> Section 9 (3) of the Constitution.

<sup>308</sup> Christianson M, 'People with disabilities inside (and outside) the South African workplace: The current status of the constitutional and statutory promises', 2012 (1) *Acta Juridica*, 286 – 305, at page 291.

<sup>309</sup> *Minister of Health & Another v New Clicks SA (Pty) Ltd & Others* 2006 (2) SA 311 (CC), at para 437.

means that the EEA, and not section 9 of the Constitution, must be applied to claims of discrimination by employees.<sup>310</sup>

The Constitutional Court has developed substantial jurisprudence on the interpretation of sections 9(3) and (4) of the Constitution which makes provisions for unfair discrimination.<sup>311</sup> A three stage approach was set out by the Constitutional Court in *Harksen v Lane No (Harksen)*<sup>312</sup> for establishing unfair discrimination. The first question is whether the differentiation amounts to discrimination, secondly whether it is fair, and thirdly whether it arises out of law of general application, and finally whether it is justified.<sup>313</sup> This test for unfair discrimination is the one that would apply to persons with disabilities who allege that they have been discriminated against on the basis of their disability in contexts where the EEA or other relevant legislation does *not* apply.

For example, in the case of *Singh v Minister of Justice and Constitutional Development and Others*<sup>314</sup> the EEA did not apply, as the aspirant magistrate who alleged unfair discrimination on the basis of her visual impairment, relied on the Promotion of Equality and Unfair Discrimination Act<sup>315</sup> (PEPUDA) for her claim as the magistracy does not fall under the EEA. The unfair discrimination test from *Harksen* applies when there is a breach of the equality right through unfair discrimination on an analogous ground that impacts on a person's right to human dignity or that affects them in a comparatively serious manner. The right to equality and prohibition of unfair discrimination applies equally to persons with disabilities.<sup>316</sup>

The Constitution further entrenches the right to dignity, which is fundamental to the protection and freedom of persons with disabilities.<sup>317</sup> Section 10 of the Constitution provides that everyone has the right to have their inherent dignity respected and protected.<sup>318</sup>

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<sup>310</sup> du Toit D & Potgieter P (n 145 above), at page 14.

<sup>311</sup> Cheadle M H et al (note 79 above), at page 85.

<sup>312</sup> *Harksen v Lane NO & Others* 1997 (11) BCLR 1489 (CC).

<sup>313</sup> Cheadle M H et al (note 79 above), at page 85.

<sup>314</sup> *Singh v Minister of Justice and Constitutional Development and Others* 2013 (3) SA 66 (Eqc).  
<sup>315</sup> 4 of 2000.

<sup>316</sup> Section 9 of the Constitution.

<sup>317</sup> Christianson M (n 308 above), at page 290.

<sup>318</sup> Section 10 of the Constitution.

The right to dignity is viewed as pre-eminent of all the fundamental rights. The recognition of the intrinsic dignity of all human beings informs, animates and directs all fundamental rights.<sup>319</sup> Haysom recognises the right to dignity as playing an important role in Chapter 2 of the Constitution as it assists in reinforcing other rights and underwriting their significance. The Constitutional Court has made frequent use of it as “it is a critical tool in interpreting or giving purpose and meaning to those other fundamental rights”.<sup>320</sup> The United Nations also recognises the significance of human dignity in the preamble of the Universal Declaration of Human Rights and commits its member states to the protection of this right.<sup>321</sup> The proclamation of the right to have inherent dignity respected and protected is also expressed in the African Charter on Human and People’s Rights.<sup>322</sup>

Haysom proposes three different concerns which emerge as key elements to the right to dignity<sup>323</sup> which is subject to the question being addressed. Firstly, dignity implies respect for a level of autonomy in the individual. In this sense, the subject’s worth as a self-actualising being must be protected. Secondly, dignity implies the right to be protected from conditions or treatment which are abusive, degrading or demeaning. A term often used in describing such treatment is that such conduct treats the subject as non-human or as objects. Thirdly, there is a strain of jurisprudence which places emphasis on the notion that all humans are to be recognised as having equal worth and value. This emphasis goes beyond, but certainly encompasses, indignity resulting from inequality in treatment or from unfair discrimination.<sup>324</sup>

Persons with disabilities also have the right to their human dignity being protected and respected inherent in the Constitution.<sup>325</sup> Marumoagae asserts that “it is desirable that society at large and government work together in eradicating cultural, social, physical and other barriers that continue to prevent persons with disabilities from enjoying their constitutional rights to equality, freedom and dignity”.<sup>326</sup> Creating access to opportunities, resources and technical aids provide most persons with disabilities independence and productive lives.<sup>327</sup>

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<sup>319</sup> Cheadle M H et al (n 79 above), at page 123.

<sup>320</sup> Cheadle M H et al (n 79 above), at page 123.

<sup>321</sup> Preamble, Universal Declaration of Human Rights, 1948.

<sup>322</sup> Section 5 of The African Charter on Human and People’s Rights

<sup>323</sup> Cheadle M H et al (n 79 above), at page 123.

<sup>324</sup> Cheadle M H et al (n 79 above), at page 131.

<sup>325</sup> Section 10 of the Constitution.

<sup>326</sup> Marumoagae M C, ‘Disability and the right of disabled persons to access the labour market’ (2012) 15 *Potchefstroom Electronic Law Journal* 345 - 428, at page 346.

<sup>327</sup> Marumoagae M C (n 326 above), at pages 346 – 347.

For persons with disabilities, the right to inherent dignity is very important in the workplace in relations with colleagues and employers because they sometimes find themselves to be victims of discrimination and suffer degrading treatment due to their disability.<sup>328</sup> In *New Way Motor & Diesel Engineering (Pty) Ltd v Marsland*,<sup>329</sup> the LAC took the right to human dignity approach in its determination of whether the employee was unfairly discriminated against on the basis of his health status (or disability). An employee with depression was dismissed for poor work performance. The LAC stated that the question, when assessing whether discrimination has occurred on arbitrary grounds, is whether the conduct of the employer *impaired the dignity of the employee* on the grounds of the characteristics of the employee, in this case depression. On these facts, the LAC held that conduct had the potential to impair the fundamental human dignity of the employee and acknowledged that depression is a form of mental illness.<sup>330</sup> It however held that the basis for discrimination was the impairment of human dignity. It did not make a finding in relation to “disability” of the employee but rather the “health” status of the employee.<sup>331</sup>

A similar approach was adopted by the LC in *Ndudula & Others v Metrorail – Prasa (Western Cape)*<sup>332</sup> when it was faced with interpreting the addition of the phrase in section 6(1) of the EEA “or any other arbitrary grounds” in an alleged unfair discrimination case. The EEA had been amended<sup>333</sup> to include this phrase and the contention by the applicants was whether listed grounds (such as disability and HIV status), unlisted or analogous grounds as well as a third category, “arbitrary grounds”, would now be the basis on which the employee could challenge discriminatory conduct. The court concluded that it was not the intention of parliament “to introduce a third category of grounds upon which an employee could challenge the conduct of the employer”.<sup>334</sup>

The court was correct in that the employee bears the burden of proof when relying on “any arbitrary ground” which has to be defined. This interpretation has been praised by lawyers in practice as providing protection to employers that this is not a “one-size-fits-all” or “catch-all”

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<sup>328</sup> *Marsland v New Way Motor & Diesel Engineering* (2009) 30 ILJ 2875 (LAC).

<sup>329</sup> *New Way Motor & Diesel Engineering (Pty) Ltd v Marsland* (2009) 30 ILJ 2875 (LAC).

<sup>330</sup> *New Way Motor & Diesel Engineering (Pty) Ltd v Marsland* (2009) 30 ILJ (LAC), at para 24.

<sup>331</sup> At para 24 of the judgment.

<sup>332</sup> *Ndudula & Others v Metrorail – Prasa (Western Cape)* (2017) 38 ILJ 2565 (LC).

<sup>333</sup> 16 January 2014.

<sup>334</sup> At para 27 of the judgment.

category for employees to rely on.<sup>335</sup> Redelinghuys explains, with reference to obesity as an example, that there is simply “not an automatically negative presumption of unfairness” made and it is not “excluded as a discriminatory ground”. Rather, the *Harksen* test applies to establish whether differentiation exists.<sup>336</sup> Section 23(1) of the Constitution guarantees a right to fair labour practices to everyone.<sup>337</sup> The use of the word “everyone” should be interpreted to mean the entitlement of such rights where there is a relationship between employer and employee.<sup>338</sup> “The LRA and the Basic Conditions of Employment Act<sup>339</sup> (BCEA) gives effect to some fair labour practices on the part of the employee as regards their employer.”<sup>340</sup> A right to a dispute resolution in a fair and impartial manner is also guaranteed by the Constitution,<sup>341</sup> which must take into consideration any international law when interpreting the Bill of Rights.<sup>342</sup> The right to fair labour practices applies equally to persons with disabilities in the workplace.

### 3.3 Employment Equity Act

The EEA is the enabling act giving protection enshrined in section 9(3) of the Constitution against discrimination in the workplace. Section 6(1) of the EEA prohibits discrimination, either directly or indirectly, against an employee in any employment policy or practice, on one or more grounds (listed and unlisted), including disability or “on any other arbitrary ground”.<sup>343</sup> The Act seeks to promote and achieve equity in the workplace.<sup>344</sup> It specifically prohibits the unfair discrimination against employees on the grounds of disability.<sup>345</sup>

The EEA does not make provisions for a definition of disabilities which are protected against discrimination but provides for a definition of “people with disabilities” in section 1 of the Act. “People with disabilities” are described as “people who have a long-term or recurring physical

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<sup>335</sup>Van der Merwe JD & Yeates M ‘Discrimination on “arbitrary grounds”. What does it mean?’ at <https://www.cliffedekkerhofmeyr.com/en/news/publications/2017/employment/employment-alert-10-april-discrimination-on-arbitrary-grounds-what-does-this-mean-.html> Cliffe Dekker Hofmeyer 10 April 2017 (accessed on 8 December 2018).

<sup>336</sup>Redelinghuys M ‘Addressing obesity in the workplace: the role of employers’ (2018) LLM Thesis, University of Pretoria, 49.

<sup>337</sup>Section 23 (1) of the Constitution.

<sup>338</sup>Cheadle M H et al (n 79 above), at pages 364 – 365.

<sup>339</sup>75 of 1997.

<sup>340</sup>Cheadle M H et al (n 79 above), at page 376.

<sup>341</sup>Section 34 of the Constitution.

<sup>342</sup>Section 233 of the Constitution.

<sup>343</sup>Section 6(1) of the EEA.

<sup>344</sup>Section 2 of the EEA.

<sup>345</sup>Section 2 of the EEA.

or mental impairment which substantially limits their prospects of entry into, or advancement in, employment".<sup>346</sup>

Depression has protection that is afforded to disabilities as it is a mental impairment, also known as a psycho-social illness. In *New Way Motor & Diesel Engineering (Pty) Ltd v Marsland*, the LAC acknowledged that depression is a form of mental illness.<sup>347</sup> The EEA clearly makes provisions for protection of persons with disabilities against discrimination in the workplace. A dismissal on the basis of a person's disability, which is not based on incapacity in terms of the LRA constitutes an automatically unfair dismissal.<sup>348</sup> Section 213 of the LRA also does not define what constitutes a disability for the purposes of section 187(1)(f). Reliance is placed on the definition of "people with disabilities" as provided for in section 1 of the EEA.

The case of *NEHAWU obo Lucas and Department of Health (Western Cape)*<sup>349</sup> (*NEHAWU*) provides an insight into whether or not the terms incapacity for ill health or injury and disability are interchangeable. An employee injured on duty was terminated for incapacity when she could not cope with the workload. In answering a question whether the LRA incapacity provisions include disability, Arbitrator A Christie said that it is trite that an employer should make a determination if an incapacitated employee falls within the definition of persons with disabilities under the EEA.<sup>350</sup> The purposive interpretation of the EEA and the LRA is to promote procedural and substantive fairness in relation to persons with disabilities in order to promote the retention of these employees if they can be reasonably accommodated.<sup>351</sup> The disability status should not only be considered for affirmative action measures, but should also give protection to employees with disabilities against unfair dismissal because of their disability.<sup>352</sup>

In *NEHAWU*, a general worker employed by a hospital was unable to bend and lift heavy objects following an injury on duty. She was terminated for incapacity. The arbitrator reinstated the employee because he found that the employer had not considered reasonable

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<sup>346</sup> Section 1 of the EEA.

<sup>347</sup> *New Way Motor & Diesel Engineering (Pty) Ltd v Marsland* (2009) 30 ILJ 2875 (LAC), at para 24.

<sup>348</sup> Christianson M (n 308 above), at page 288.

<sup>349</sup> (2004) 25 ILJ 2091 (BCA).

<sup>350</sup> At para 28 of the judgment.

<sup>351</sup> At para 28 of the judgment.

<sup>352</sup> At para 28 of the judgment.



accommodation. It was found that the employer has a duty to accommodate an employee with a disability.<sup>353</sup>

Similarly, in *Wylie and Standard Executors & Trustees*<sup>354</sup> (*Wylie*), the CCMA Commissioner was required to make a determination whether or not the terms incapacity for ill health or injury and disability are interchangeable. An employee diagnosed with multiple sclerosis, a degenerative disorder was terminated for incapacity when she could not cope with the work load. The CCMA sought guidance from the EEA into what constitutes a disability protected against unfair discrimination which requires reasonable accommodation in terms of the Act. The Commissioner analysed the definition of people with disabilities contained in section 1 of the EEA and concluded that the employee had a disability. The CCMA followed with approval a decision in *NEHAWU*<sup>355</sup> in answering the question whether the LRA incapacity provisions include disability. The Commissioner held that the respondent had not treated the applicant as a person with a disability but as a poor performer, therefore denying her prospects of reasonable accommodation prior to dismissal. Grogan asserts an employee's dismissal is automatically unfair if the reason for dismissal is related to their disability even in circumstances where the employee is dismissed under the LRA for incapacity after counselling and in the absence of reasonable alternatives.<sup>356</sup>

One of the first reported cases where the court had to interpret what constitutes a disability that is protected against unfair discrimination under section 6(1) of the EEA is *IMATU & Another v City of Cape Town*.<sup>357</sup> The City of Cape Town refused to employ an insulin dependent applicant as a firefighter, relying on its policy which bans employment of diabetics to such positions. The applicant challenged this as direct discrimination on the grounds of disability, in violation of the EEA. The City argued that the blanket ban was fair and justified on the basis of the inherent requirements of the job of a firefighter. There was medical evidence in support of the fact the diabetes was under control because of medication. The LC noted the lack of a definition of disability in the EEA.<sup>358</sup> It was however provided for in item 5 of the disability code which puts emphasis on the effect of a disability on a person in relation

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<sup>353</sup> *NEHAWU obo Lucas and Department of Health (Western Cape)*, at para 37.

<sup>354</sup> (2006) 27 ILJ 2210, CCMA.

<sup>355</sup> (2004) 25 ILJ 2091 (BCA).

<sup>356</sup> Grogan J (n 80 above), at page 147.

<sup>357</sup> (2005) 26 ILJ 1404 LC.

<sup>358</sup> *IMATU & Another v City of Cape Town* (2005) 26 ILJ 1404 LC, at para 90.

to the working environment and limiting effect to entry into, or advancement in employment and not on the medical diagnosis.<sup>359</sup>

It however found that the conduct of the employee amounted to unfair discrimination on an analogous ground and held that the complainant did not have a disability.<sup>360</sup>

Ngwena contends that in *IMATU v City of Cape Town*,<sup>361</sup> the court was wrong in its approach by ascribing the meaning of persons with disabilities to disability. The court confused disability intended for section 6(1) of the EEA regulating discrimination to the statutory interpretation of the term persons with disabilities intended for affirmative action measures.<sup>362</sup> Adopting the definition of persons with disabilities in the EEA without modification or considering the description provided for in the disability code as an equivalent of disability in section 6(1) of the EEA results in the protected class being unduly restricted.<sup>363</sup> Section 6(1) is not intended to confer protection on the basis of the limiting effect of a disability, but is intended to provide protection against unfair treatment on the basis or grounds of a disability as part of respecting the individual's right to equality and eliminating negative attitudinal stereotyping which results in persons with disabilities being disadvantaged.<sup>364</sup> Disability should enjoy the same protection afforded to other grounds such as race and gender as long as there is a connection between the employer's aversive reaction to the disability without it being substantially limiting.<sup>365</sup>

I share sentiments with Ngwena's view because ascribing the definition of people with disabilities to a disability protected against discrimination in terms of section 6(1) of the EEA deprives complainant's protection against being discriminated against on the basis of a disability if the condition is under control as a result of medical intervention. Renal failure which results in an employee undergoing dialysis treatment three times a week, thus limiting their ability to carry out their duties amounted to a disability which necessitated reasonable accommodation.<sup>366</sup>

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<sup>359</sup> At para 90 of the judgment.

<sup>360</sup> At para 90 of the judgment.

<sup>361</sup> [2005] 11 BLLR 1084 (LC).

<sup>362</sup> Ngwena C (n 53 above), at page 150.

<sup>363</sup> Ngwena C (n 53 above), at page 150.

<sup>364</sup> Ngwena C (n 53 above), at page 150.

<sup>365</sup> Ngwena C (n 53 above), at page 150.

<sup>366</sup> *Abels and Dialogue Group (Pty) Ltd* (2009) 30 ILJ 2167 (CCMA).

Section 6(4) of the EEA provides protection regarding being discriminated against or treated differently in terms of provision of terms and conditions of employment between employees of the same employer performing similar functions on the basis of a disability.<sup>367</sup> This provision against unfair discrimination seeks to protect and promote the right of equal participation in the workplace.<sup>368</sup> Although Chapter II of the EEA affords protection to employees regarding being discriminated against on the basis of disability amongst other things, it does not define what constitutes discrimination. The Constitutional Court held that unfair discrimination denotes differential treatment which impairs a person's fundamental dignity as a human being.<sup>369</sup> Conduct constitutes discrimination on an unspecified ground, if it is primarily based on attributes or traits "which have the potential to impair the fundamental dignity of persons as human beings, or to affect them adversely in a comparably serious manner."<sup>370</sup>

### **3.4 Employment Equity Act No. 55 of 1998: Code of Good Practice on Employment of Persons with Disabilities, 9 November 2015**

The code provides guidance to employers and employees on complying with the prescript of the EEA which prohibits discrimination against employees with disabilities. It also provides guidance for reasonable accommodation of employees with disabilities in the workplace.<sup>371</sup> It provides guidance to employers on their commitment to promote the right of persons with disabilities to work and earn a living, including the right to dignity.<sup>372</sup>

Although the code is not authoritative, it does oblige employers to recognise the rights of persons with disabilities and act as guidance in considering and interpreting the Act.<sup>373</sup> The relevant guiding principles for this research are human rights, respect for human dignity and non-discrimination.<sup>374</sup> Discrimination on the basis of disability is described as:

any distinction, exclusion or restriction on the basis of disability which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise, on an equal basis with others, of all human rights and fundamental freedoms in the political, economic, social, cultural, civil or

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<sup>367</sup> Section 6 (4) of the EEA.

<sup>368</sup> Basson Y (n 459 above), at page 12.

<sup>369</sup> *Harksen v Lane NO* 1998 (1) SA 300 (CC), at para 46.

<sup>370</sup> At para 46 of the judgment.

<sup>371</sup> Employment Equity Act 55 of 1998, Code of Good Practice on Employment with Disabilities, 9 November 2015.

<sup>372</sup> Clause 2.5 of the Code.

<sup>373</sup> Clause 3.1 of the Code.

<sup>374</sup> Clause 4(a) and (c) of the Code.

any other field. It includes all forms of discrimination, including denial of reasonable accommodation.<sup>375</sup>

The above definition of discrimination is in line with the definition provided for in the CRPD and the AfDP and excludes the substantial limitation phrase contained in the EEA.<sup>376</sup> Denial of reasonable accommodation also constitutes discrimination. It is more relevant where the disability does not impact on the employee's ability to perform the essential functions of the job if the disability, for example, is under control as a result of medical intervention. I am of the view that discrimination against an employee on the basis of a disability should be construed as discrimination that is protected under section 6 of the EEA. The above definition is an improvement on the 2002 Disability Code and EEA which do not describe the term discrimination on the basis of disability.

The scope of protection for persons with disabilities in employment focuses on the effect of a disability on the person in relation to the working environment, and not on the diagnosis or impairment as stated in clause 5.3 of the Code. Clause 5.3.1(b) of the Code describes mental impairment as "a clinically recognized condition or illness that affects a person's thought processes, judgment or emotions".<sup>377</sup> Depression falls neatly into this definition as it affects a person's thought processes, judgment and emotions. However, in order to qualify as a disability, the mental impairment must either be long-term, likely to last for twelve months or recurring, i.e. likely to happen again, and is substantially limiting or progressive.<sup>378</sup>

Clause 5.3.3 (a) highlights effects that the impairment should have in the person's ability to perform the essential functions of the position considered, which must have a limiting effect.<sup>379</sup> While clause 6 makes provisions for a reasonable accommodation for persons with disabilities in order to reduce the impact of the disability in the fulfilment of the essential functions of the job, unless it imposes unjustifiable hardship on the employer.<sup>380</sup> Clause 6.10 ensures protection of persons with disabilities against being terminated for poor work performance.<sup>381</sup> A good example where such protection was highlighted is *Standard Bank of SA v CCMA*,<sup>382</sup>

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<sup>375</sup> Clause 5.1 of the Code.

<sup>376</sup> Article 2 of the CPRD and article 1 of the AfDP.

<sup>377</sup> Clause 5.3.1(b) of the Code.

<sup>378</sup> Clause 5.3.2 of the Code.

<sup>379</sup> Clause 5.3.3(a)

<sup>380</sup> Clause 6 of the Code.

<sup>381</sup> Clause 6.10.

<sup>382</sup> (2008) 29 *ILJ* 1239 (LC).

when an employee with a disability was dismissed for poor work performance. The court found that the bank could not rationally or fairly measure her performance by the same standard as other employees.<sup>383</sup> The Code promotes retention of employees who become disabled during employment and recommends reasonable accommodation which includes providing alternative work, reduced work or flexible working hours after consultation with the employee.<sup>384</sup> The employer may however terminate the employee if unable to retain them in terms of clause 11 of the Code.<sup>385</sup> Persons with disabilities are entitled to keep their disability status confidential,<sup>386</sup> however in cases of employees with depression it may be important for an employee to disclose his condition to the employer, especially where accommodation is required because depression is not self-evident.<sup>387</sup>

Incapacity proceedings in terms of items 10 and 11 of schedule 8 of the LRA can be followed if it appears that an ill employee is not able to perform a job.<sup>388</sup> The employer has an obligation to assist an employee who is either temporarily or permanently disabled to access employee benefits either through the Compensation for Occupational Injuries Act or relevant employee benefit scheme.<sup>389</sup> The Code exists to assist employers in the management of disability; failure to observe the Code does not in itself render a person liable in any proceedings.<sup>390</sup>

### **3.5 White Paper on the Rights of Persons with Disabilities (WPRPWD)**

The WPRPWD was approved by the Cabinet on 9 December 2015. It is a policy document with the intention of accelerating transformation and redress in respect of inclusion, integration and equality for persons with disabilities. It applies to government institutions, the judiciary, law and policymakers.<sup>391</sup> The White Paper highlights that the CRPD does not define the word “disability” but recognises it as an evolving concept.<sup>392</sup> It however describes discrimination on the basis of disability as:

Any distinction, exclusion or restriction of persons on the basis of disability, which has the purpose or effect of impairment or nullifying the recognition, enjoyment or exercise, on equal

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<sup>383</sup> At para 121 of the judgment.

<sup>384</sup> Clause 11 of the Code.

<sup>385</sup> Clause 12.1 of the Code.

<sup>386</sup> Clause 14.2.1 of the Code.

<sup>387</sup> Clause 14.2.3 of the Code.

<sup>388</sup> Clause 8.2.1 of the Code.

<sup>389</sup> Clauses 12.3 and 13.

<sup>390</sup> Cole E C & van der Walt A (n 110 above), at page 522.

<sup>391</sup> The WPRPD, at page 51.

<sup>392</sup> The WPRPD, at page 17.

basis with others, of all human rights and fundamental freedoms in the political, social, cultural, civil, or any other field. It encompasses all forms of unfair discrimination, whether direct or indirect, including denial of reasonable accommodation.<sup>393</sup>

Disability discrimination is viewed from a human rights perspective as impairing human dignity.

The White Paper defines persons with disabilities as:

including those who have perceived and or actual physical, psychosocial, intellectual, neurological and/or sensory impairments which, as a result of various attitudinal, communication barriers, are hindered in participating fully and effectively in society on equal basis with others.<sup>394</sup>

What is significant about the above definition is that it differs from the one in section 1 of the EEA in that it is devoid of the words “long-term or recurring”. This means that the definition encompasses all forms of disabilities, even if they are temporary in nature. It is similar to the definition of persons with disabilities provided for in the AfDP<sup>395</sup> in this respect. The phrase “substantially limiting” has also been left out of this definition. It is of utmost importance that a distinction be made between the different beneficiary groups such as affirmative action, protection against discrimination, service delivery, reasonable accommodation, support measures and social security<sup>396</sup> and should be treated in that specific context when defining persons with disabilities.<sup>397</sup>

### **3.6 Technical Assistance Guidelines on the Employment of Persons with Disabilities**

The Technical Assistance Guidelines (TAG) was revised on 12 July 2017 and is intended to complement the Code of Good Practice on Employment of Persons with Disabilities. It is aimed to be a guidance to employers, employees and unions for the promotion of equal opportunities and fair treatment of persons with disabilities in the workplace and provide examples for implementation.<sup>398</sup> It should therefore be afforded recognition as a broader equality agenda for the promotion of the rights to equality, promotion of unfair discrimination and implementation of affirmative action measures.<sup>399</sup> It also assists the stakeholders by

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<sup>393</sup> The WPRPD, at pages 17 – 18.

<sup>394</sup> The WPRPD, at page 24.

<sup>395</sup> Article 1(g) of the AfDP.

<sup>396</sup> The WPRPD, at page 31.

<sup>397</sup> The WPRPD, at page 31.

<sup>398</sup> Foreword of TAG.

<sup>399</sup> Foreword of TAG.

educating them of the right to reasonable accommodation if required.<sup>400</sup> The TAG recognises the stigma attached to specific invisible functional impairments.<sup>401</sup>

As a guideline, the TAG advocates that disability should be understood within the South African context in respect of the differences between the medical and social models.<sup>402</sup> According to TAG the “[m]edical model focuses on the diagnosis and curing of disability whereas social model expresses the view that disability is not a problem, but rather the negative attitude of some people”.<sup>403</sup> It also provides guidance to courts and other tribunals when disputes arise and assists with the application and interpretation of the law.<sup>404</sup> TAG recommends that employers maintain a disability management strategy in order to retain employees who become disabled during their period of employment.<sup>405</sup>

The TAG simply adds practical clarification of the EEA and the disability code and does not add any new dimension to the management of disability and employment. The definitions are also the same as those provided for in the EEA, the Code and the CRDP. It emphasises the three criteria to be used when assessing an employee for the purpose of seeking or providing reasonable accommodation. The first one is that a person must have an impairment; the second is that the impairment must be long-term or recurring, and thirdly, the impairment must be substantially limiting. The TAG recommends termination of employment relationship in terms of items 10 and 11 of schedule 8 of the LRA where the employer is unable to retain an employee who becomes disabled or who is no longer able to do the job.<sup>406</sup> It advises employers to assist employees in accessing benefits in terms of the relevant prescripts.<sup>407</sup>

### **3.7 Labour Relations Act**

The LRA regulates the right to fair labour practices entrenched in section 23 of the Constitution. It also provides protection to employees not to be unfairly dismissed.<sup>408</sup> A

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<sup>400</sup> Clause 2.3.2 of TAG, at page 5.

<sup>401</sup> Clause 1.5 of the TAG, at page 2.

<sup>402</sup> Clause 1.8.1 of the TAG, at page 3.

<sup>403</sup> Clause 1.8.1 of the TAG, at page 3.

<sup>404</sup> Clause 3.1 of TAG, at page 6.

<sup>405</sup> Clause 11.1 of TAG.

<sup>406</sup> Clause 12.1 of TAG.

<sup>407</sup> Clause 13.1 of TAG.

<sup>408</sup> Section 185 (a) of the LRA.

definition of what constitutes a dismissal is provided for in section 186(1) of the LRA, which is basically the termination of an employment relationship.<sup>409</sup>

### **3.7.1 Misconduct**

Section 188(1)(a) of the LRA lists misconduct as grounds for dismissal if effected in accordance with a fair procedure.<sup>410</sup> The LRA does not, however, provide a comprehensive legal definition for misconduct, although it is the most common justification for termination of an employment relationship.<sup>411</sup> In labour law misconduct takes place as a result of an employee breaching the rules of the workplace arising from either express or implied terms of a contract or disciplinary code.<sup>412</sup> A distinguishing factor between a dismissal for incapacity, operational requirements and misconduct is that the latter is attributed to the employee's conduct.<sup>413</sup>

Schedule 8 of the LRA provides employers with guidelines in cases of dismissal for misconduct. The guidelines should be taken into consideration when assessing whether dismissal was effected in a fair manner.<sup>414</sup> It should be instituted in a fair manner that requires an assessment of whether or not there was a contravention of a rule regulating conduct in the workplace or of relevance to the workplace; the reasonableness or validity of the rule; if the employee was aware or ought to have been reasonably aware of the rule applied consistently; and whether dismissal was an appropriate sanction.<sup>415</sup> Although the code is a guideline, compliance with the code's provisions are material in the employer's proof for fair dismissal.<sup>416</sup>

### **3.7.2 Poor work performance**

Item 9 of schedule (Code of Good Practice: Dismissal) of the LRA provides guidelines in cases of dismissal for poor work performance. Dismissal for poor work performance requires a determination of whether the employee failed to meet a performance standard that they were either aware, or reasonably expected to be aware of, was given a fair opportunity to improve

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<sup>409</sup> Section 186 (1) of the LRA.

<sup>410</sup> Sections 188 (1)(a) and (b) of the LRA

<sup>411</sup> Grogan J (n 80 above), at page 178.

<sup>412</sup> Grogan J (n 80 above), at page 179.

<sup>413</sup> Grogan J (n 80 above), at page 179.

<sup>414</sup> Section 188 (2) of the LRA.

<sup>415</sup> Grogan J (n 80 above), at page 179.

<sup>416</sup> *Moropane v Gilbeys Distillers and Vintners (Pty) Ltd (1998)* 19 ILJ 635 (LC), at page 640; *Country Fair v CCMA (1998)* 19 ILJ 815 (LC), at para 32.



and whether dismissal was appropriate in the circumstances.<sup>417</sup> There are four questions which assist in determining the appropriateness of dismissal in these circumstances:

**a) Did the employee fail to meet a performance standard?**

In order to justify dismissal for poor work performance, the employer is required to prove that a reasonable standard exists, which can be proved through a contractual provision, practice or by reference to industry norms.<sup>418</sup> In *Somyo v Ross Poultry Breeders (Pty) Ltd*<sup>419</sup> the LAC warned that an employer who becomes concerned about an employee's poor work performance has an obligation to assess the performance, warn the employee that they might be dismissed if their work does not improve and give the employee an opportunity to improve their performance.<sup>420</sup> The case also emphasised that normal requirements might not apply if the employee holds a senior position.<sup>421</sup>

**b) Was the employee aware, or could reasonably be expected to have been aware, of the required performance standard?**

The code indicates that an employee may only be dismissed if the employee was aware of the required standard. The standard can be communicated to employees through various means and directives such as warnings and counselling for unsatisfactory performance.<sup>422</sup> The employee will be unlikely to deny knowledge of the standard if there were more warnings and guidance provided.<sup>423</sup>

**c) Was the employee given a fair opportunity to meet the required performance standard?**

Different standards and circumstances exist, for example between a person employed as a manager or an expert and a trainee in respect of the period given to improve.<sup>424</sup> In *Boss Logistics v Phophi*,<sup>425</sup> the LC overturned the arbitration award and found that the length of time an employee should be given to improve depends on the circumstances, including, but

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<sup>417</sup> Item 9 of the code.

<sup>418</sup> Grogan J (n 80 above), at page 377.

<sup>419</sup> [1997] 7 BLLR 862 (LAC).

<sup>420</sup> At para 886 C-F of the judgment.

<sup>421</sup> At para 866 of the judgment.

<sup>422</sup> Grogan J (n 80 above), at page 386.

<sup>423</sup> Grogan J (n 80 above), at page 386.

<sup>424</sup> [https://www.worklaw.co.za/SearchDirectory/Unfair\\_Dismissal/incapacity.asp#2](https://www.worklaw.co.za/SearchDirectory/Unfair_Dismissal/incapacity.asp#2) (accessed on 06 November 2018).

<sup>425</sup> [2010] 5 BLLR 525 (LC).

not limited to, the complexity of the job, the volume and the nature of the work, the nature of the employer's business, and the qualifications and experience of the employee.<sup>426</sup> The employee pretended during the interview to be an expert salesperson, but this later proved to be false. The employer decided not to provide the employee with counselling, training or assistance, since the person's initial deception had seriously breached the trust relationship. In *Damelin (Pty) Ltd v Solidarity obo Parkinson & Others*<sup>427</sup>, the LAC held that although a senior employee does not need the same degree of training that lesser skilled employees require to perform their functions, an employer must still provide essential resources to achieve targets.

#### **d) Is the dismissal an appropriate sanction?**

The next step is the determination whether dismissal was fair in the circumstances as dismissal should be the last resort after counselling if the employee fails. Dismissal could be found to be inappropriate in the circumstances where an opportunity existed to either move the employee to another position or demote them.<sup>428</sup> In *Chesteron Industries (Pty) Ltd v CCMA*<sup>429</sup> confirmed that "consideration of alternatives to dismissal would be a factor to take into account in assessing the appropriateness of the dismissal".<sup>430</sup> Item 8(3)<sup>431</sup> enjoins employers to consider other ways short of dismissal to remedy the matter.

#### **3.7.3 Incapacity (Ill health or injury)**

Incapacity is a listed ground for dismissal in terms of section 188(1)(a) of the LRA if effected in a fair manner.<sup>432</sup> Schedule 8, Code of Good Practice: Dismissal has to be taken into consideration in order to determine that dismissal was effected in a fair manner.<sup>433</sup> Items 10 and 11 of schedule 8 (Code of Good Practice: Dismissal) of the LRA<sup>434</sup> set out guidelines for dealing with employees who are unable to perform their work due to illness or injury. Incapacity implies that an employee is not able to perform the essential functions of the job. Item 10 of the Code requires the employer to investigate all possible alternatives short of dismissal if an employee is going to be absent for an extended period of time as a result of an illness or

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<sup>426</sup> Grogan J (n 80 above), page 286.

<sup>427</sup> (2017) 38 *ILJ* 872 (LAC), at para 40.

<sup>428</sup> Grogan J (n 80 above), at page 287.

<sup>429</sup> Case No: P286/06, 2008 (LC).

<sup>430</sup> At para 11 of the judgment.

<sup>431</sup> Schedule 8 of the LRA.

<sup>432</sup> Sections 188(1)(a) and (b) of the LRA.

<sup>433</sup> Section 188 (2) of the LRA.

<sup>434</sup> 66 of 1995.

injury.<sup>435</sup> Counselling and rehabilitation may be an appropriate step for an employer to consider if the cause of incapacity is for example related to alcoholism or drug abuse.<sup>436</sup> An employer's duty to accommodate the incapacity of an employee injured at work or due to work-related illness is more significant and requires either adaptation of the job or alternative work.<sup>437</sup>

Christianson differentiates between a dismissal for incapacity and a dismissal for disability. Section 187(1)(f) of the LRA<sup>438</sup> protects employees against unfair discrimination in a dismissal where the grounds for the dismissal are based upon, for example, the employee's disability. A dismissal because the employee has a disability would therefore automatically be unfair. A dismissal for incapacity may be fair if the employer has a valid and fair reason for dismissal and if the required procedures have been followed.<sup>439</sup> The employer is required to investigate whether or not the employee is capable of performing work, and if not, consider the extent of the incapacities, adapt the employee's duties or consider availability of any suitable alternative work before terminating.<sup>440</sup>

The court noted in *IMATU obo Strydom v Witzenberg Municipality*,<sup>441</sup> that permanent incapacity arising from ill-health or injury is accepted as a legitimate reason for dismissing an employee if the working circumstances cannot be modified. According to the court "[a] dismissal would under such circumstances be fair, provided that it was based on a proper investigation into the extent of the incapacity, as well as a consideration of possible alternatives to dismissal".<sup>442</sup> *Standard Bank of SA v CCMA*<sup>443</sup> provides an insight into the process that needs to be followed by employers in incapacity proceedings before an employee is terminated. The employer bears the onus of proving an employee's incapacity to justify dismissing them. The court noted that the "LRA guidelines for incapacity contemplate a four-stage enquiry before an employee can be dismissed for incapacity".<sup>444</sup>

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<sup>435</sup> Item 10 (1) of the Code.

<sup>436</sup> Item 10 (3) of the Code.

<sup>437</sup> Item 10 (4) of the Code.

<sup>438</sup> The LRA 66 of 1995

<sup>439</sup> Christianson M (n 46), at page 890.

<sup>440</sup> Item 11 of Schedule 8 of the LRA.

<sup>441</sup> (2012) 33 ILJ 1081 (LAC).

<sup>442</sup> *IMATU obo Strydom v Witzenberg Municipality* (2012) 33 ILJ 1081 (LAC) at para 7.

<sup>443</sup> (2008) 29 ILJ 1239 (LC).

<sup>444</sup> *Standard Bank of SA v CCMA* (2008) 29 ILJ 1239 (LC), at para 70 of the judgment.

### **Stage one**

The employer must investigate whether or not the employee is able to perform their work responsibilities, and if not whether the injuries are long-term or permanent, which necessitates following the next three steps.<sup>445</sup>

### **Stage two**

The employer must investigate the extent of the disability in relation to the performance of the duties of the position. This process might necessitate engaging medical and other experts to assist with the investigation.<sup>446</sup>

### **Stage three**

According to the court . . . “The employer investigates the extent of modifying the employee’s work circumstances or duties to accommodate the disability taking into consideration 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, priority being retention of the employee”.<sup>447</sup>

### **Stage four**

The employer must consider alternative work if modification of the work environment and duties is not possible.<sup>448</sup>

#### **3.7.3.1 Reasonable accommodation**

The court went on to define what constitutes reasonable accommodation in terms of the EEA which consists of modifying or adjusting the working environment to enable a person from a designated group to fully participate in employment.<sup>449</sup> According to the court reasonable accommodation includes the way in which the employee’s performance is measured.<sup>450</sup> The employer can only be relieved from their obligation to accommodate if accommodation will cause unjustifiable hardship to the employer.<sup>451</sup>

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<sup>445</sup> At para 72 of the judgment.

<sup>446</sup> At para 73 of the judgment.

<sup>447</sup> At para 74 of the judgment.

<sup>448</sup> At para 76 of the judgment.

<sup>449</sup> At para 78 of the judgment.

<sup>450</sup> At para 89 of the judgment.

<sup>451</sup> At para 67 of the judgment.

### 3.7.3.2 Unjustifiable hardship

The EEA puts in place the limits to match or complement employers' commitment to reasonably accommodate based on the conditions of each case.<sup>452</sup> Thus, the limits will be greater for a big, economically stable employer. In this regard, hardship refers to a challenge beyond control.<sup>453</sup>

While the referral to CCMA by the employee was in terms of section 188 of the LRA, the LC found that the employer did not accommodate the employee resulting in automatic unfair discrimination.<sup>454</sup> Consequently, the court found that the employee was a person with a disability.<sup>455</sup> In addition, the court was of the view that there is a clear distinction between disability and incapacity as the two are not identical.<sup>456</sup> An employee may be incapacitated if the employer cannot accommodate them or if they refuse an offer of reasonable accommodation. The court held that dismissal of an employee who is incapacitated in those circumstances is fair, but dismissing an employee who is disabled but not incapacitated is unfair".<sup>457</sup>

The importance of this judgement is that it provides clarity on disability and incapacity and provides procedures to be followed in dealing with employees with disabilities. Such clarity is crucial as disability and incapacity have different dispute resolution mechanisms. In this regard, in dismissal for incapacity, the CCMA or Bargaining Council has jurisdiction to arbitrate the dispute, whereas if the reason for the dismissal is unfair discrimination based on disability, the LC has jurisdiction to deal with the matter.

The first test is whether the employee is unable to perform their work is usually taken to be the distinguishing feature of incapacity. Persons with disabilities are able to perform duties provided that they are reasonably accommodated. Nxumalo<sup>458</sup> has commented that this conflation of disability and incapacity is problematic and requires, for ease of clarity of employers, separate policies on disability and incapacity. That is not currently the case.

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<sup>452</sup> At para 95 of the judgment.

<sup>453</sup> At para 98 of the judgment.

<sup>454</sup> At para 80 of the judgment.

<sup>455</sup> At para 14 of the judgment.

<sup>456</sup> At para 94 of the judgment.

<sup>457</sup> At para 147 of the judgment.

<sup>458</sup> Nxumalo L (n 18 above), at pages 1437 and 1449.

### 3.7.4 Disability

Basson differentiates between three approaches to disability, these being the medical model, the social model and the human rights model.<sup>459</sup> The medical model approach considers persons with disabilities as weak and vulnerable members of society who need medical intervention and treatment, creating an impression of dependency.<sup>460</sup> The social model suggests that what makes persons with disabilities feel “disabled” is not their medical condition, but is rather the attitude and structures of society.<sup>461</sup> Ngwena contends the intention of the social model is to empower a group that has historically endured stigmatisation, discrimination and marginalisation by seeking to challenge the political oppression that can emanate from the label of disability.<sup>462</sup> The human rights model focuses on the human dignity of persons with disabilities, development of their fundamental rights and equality with other people.<sup>463</sup> It places obligation on states to realise the rights of persons with disabilities.<sup>464</sup> This can be done through the promulgation of empowering legislation.

The EEA appears to be based on both a social and medical approach to disability. It is social because it recognises disability as a human rights issue focusing on removing barriers. The presence of the “substantially limiting” clause in the definition of people with disabilities sometimes poses a problem when courts interpret a disability protected under section 6 of the EEA. The restrictive definition of disability can be subject to interpretation in line with the medical model of disability as observed in the *IMATU* case where the court placed emphasis on the impairment instead of the potential discrimination the employee was subjected to because of his medical condition.<sup>465</sup> Section 6 of the EEA provides protection against unfair discrimination in the workplace as a result of a disability.<sup>466</sup> In terms of section 187(1)(f), a dismissal is automatically unfair if the employer discriminated against the employee, directly

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<sup>459</sup> Basson, Y ‘Selected Developments in South African Labour Legislation related to Persons with Disabilities’ (2017) 20(1) *PER: Potchefstroomse Elektroniese Regsblad* 1-21, at page 3.

<sup>460</sup> Basson Y (n 459 above), at page 4.

<sup>461</sup> Basson Y (n 459 above), at page 4.

<sup>462</sup> Ngwena C (n 106 above), at pages 631 and 635.

<sup>463</sup> Basson Y (n 459 above), at page 4.

<sup>464</sup> Basson Y (n 459 above), at page 5.

<sup>465</sup> Grobbelaar-du Plessis I & van Rennen T, *Aspects of disability law in Africa*, 2011, Pretoria University Law Press, 1 -304, at page 251.

<sup>466</sup> Section 6 of the EEA.

or indirectly, on the basis of a disability amongst other factors.<sup>467</sup> Section 213 of the LRA does not define what constitutes a disability for the purposes of section 187(1)(f).

In *Smith v Kit Kat Group (Pty) Ltd*,<sup>468</sup> the court clarified the confusion of disability versus incapacity. It highlighted that disability is not the same as incapacity.<sup>469</sup> An employee is incapacitated if the employer cannot accommodate or if he/she refuses an offer of reasonable accommodation”.<sup>470</sup> It also emphasised the onerous duty of care of the employer in matters of disability in the workplace. Dismissal in breach of disability guidelines was found to be automatically unfair.

In *Jansen v Legal Aid South Africa*,<sup>471</sup> an employee with depression was dismissed for absenteeism. The employee had disclosed his condition to the employer a month before the disciplinary hearing. He referred an automatically unfair dismissal claim in terms of section 187(1)(f) of the LRA and an unfair discrimination claim under section 6 of the EEA on the basis that he was unfairly discriminated against on the basis of his disability. The LC articulated the basic principles applicable for determining whether or not a dismissal is automatically unfair, which consists of considering factual as well as legal causation.<sup>472</sup> Factual causation asks whether the dismissal would have occurred if there was no disability. Legal causation asks whether the disability was the most likely cause of dismissal.<sup>473</sup> The court found that “the dominant reason for the employee’s dismissal was his mental condition”.<sup>474</sup> Therefore, the dismissal constituted both automatically unfair dismissal and unfair discrimination.<sup>475</sup>

This case illustrates that where an employer has knowledge that an employee has a disability, the employer is under a duty to reasonably accommodate the employee. The case will be dealt with in more detail in Chapter 4 of this research.

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<sup>467</sup> Section 187 (1) (f) of the LRA.

<sup>468</sup> [2016] 12 BLLR 1239 (LC).

<sup>469</sup> At para 58 of the judgment.

<sup>470</sup> At para 58 of the judgment.

<sup>471</sup> *Jansen v Legal Aid South Africa* (2018) 39 ILJ 2024 (LC).

<sup>472</sup> *Jansen v Legal Aid South Africa*, at para 47.

<sup>473</sup> At para 47 of the judgment.

<sup>474</sup> At para 53 of the judgment.

<sup>475</sup> At para 59 of the judgment.

### 3.7.5 Constructive dismissal

The definition of dismissal in the LRA includes a situation where an employee terminates a “contract of employment with or without notice because the employer made continued employment intolerable for the employee”.<sup>476</sup>

The test for constructive dismissal was set out in *Eagleton v You Asked Services (Pty) Ltd*.<sup>477</sup> The employee must satisfy the court that that the employee terminated the contract of employment or resigned; continued employment had become *intolerable* for the employee and the *employer* must have made continued employment intolerable.<sup>478</sup> The test is not whether the employee had no choice but to resign, but the fact the employer made a continued employment intolerable.<sup>479</sup>

### 3.8 Diagrams for different categories

Next, diagrams indicating the steps that are taken before dismissal of an employee and the decision-making once unfairness is alleged, as well as the relevant legislation, codes and jurisdictions are explained. Each is set out as a summary for the relevant categories.

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<sup>476</sup> Section 186(1)(e) of the LRA.

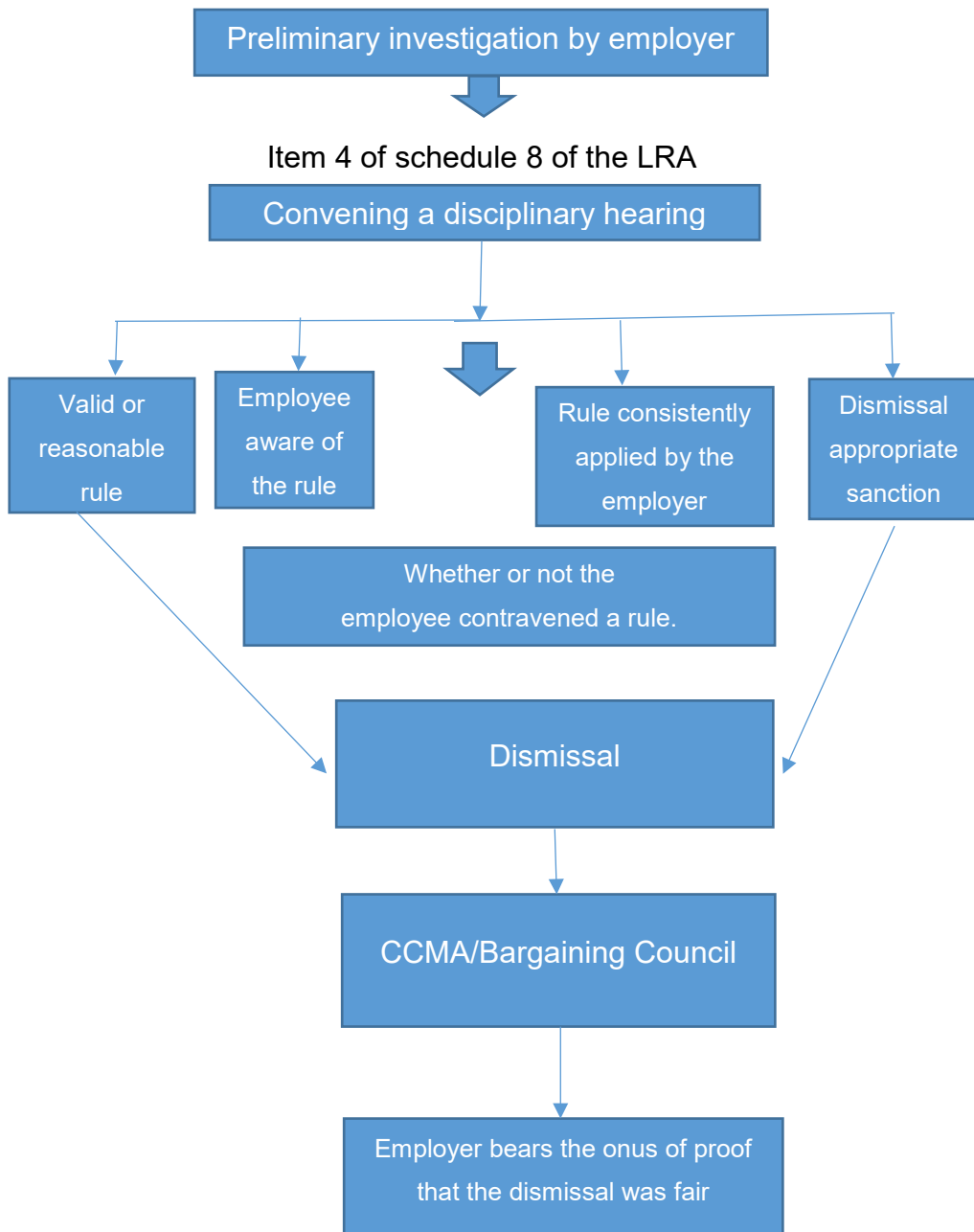
<sup>477</sup> (2009) 30 ILJ 320 (LC).

<sup>478</sup> At para 22 of the judgment.

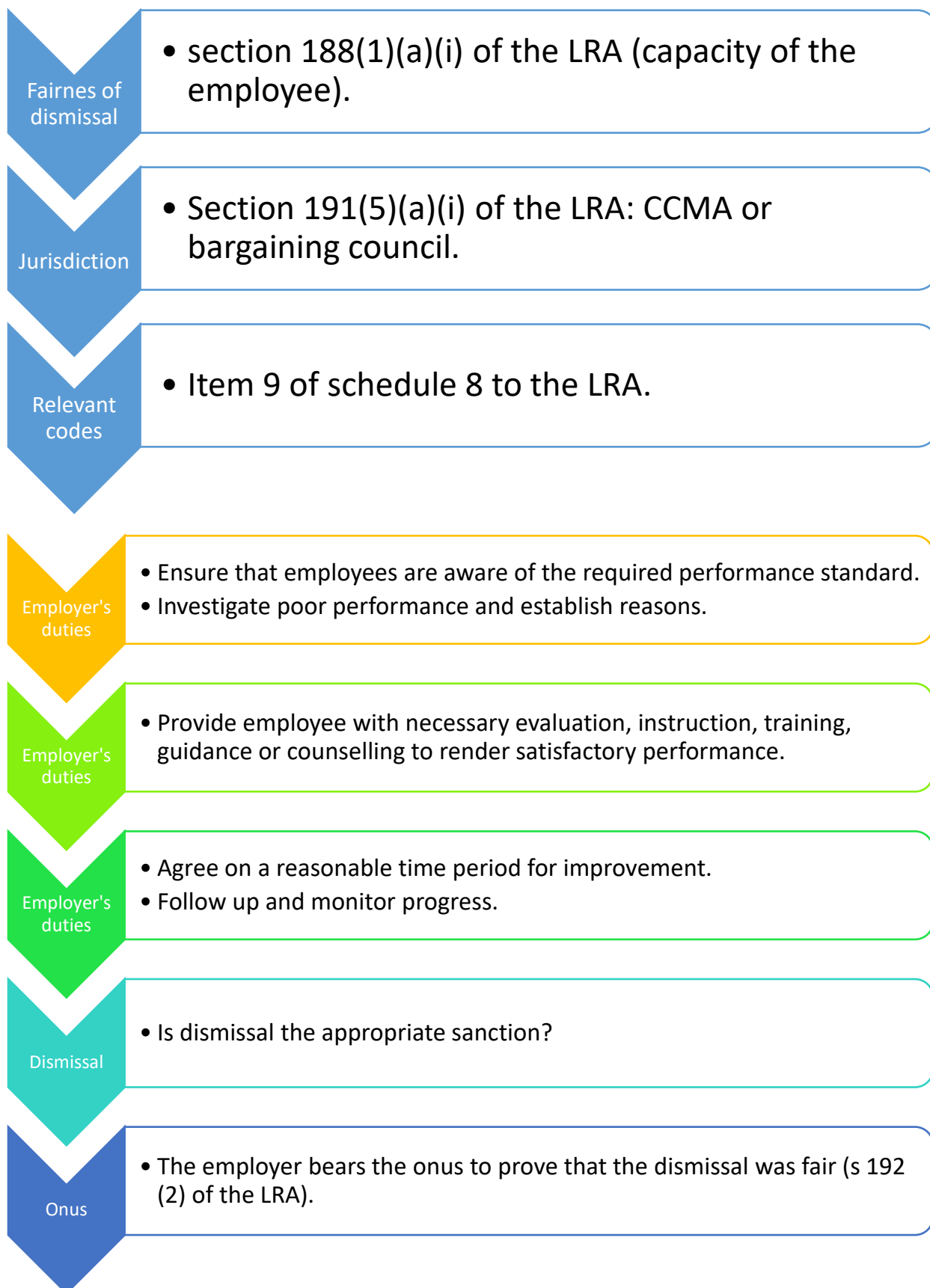
<sup>479</sup> *Strategic Liquor Services v Mvumbi NO & others* (2009) 30 ILJ 1526 (CC) at para 4.



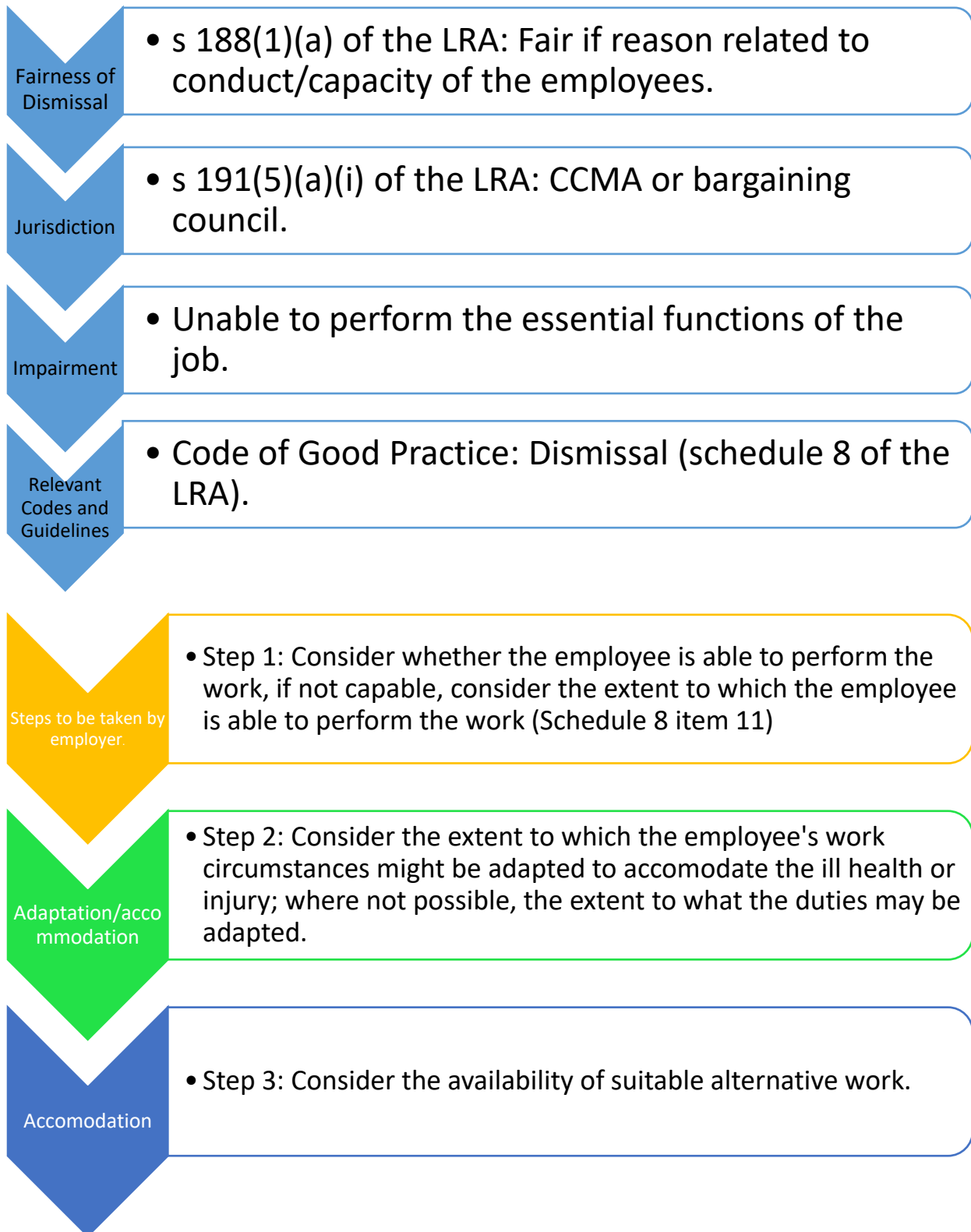
### 3.8.1 Misconduct diagram



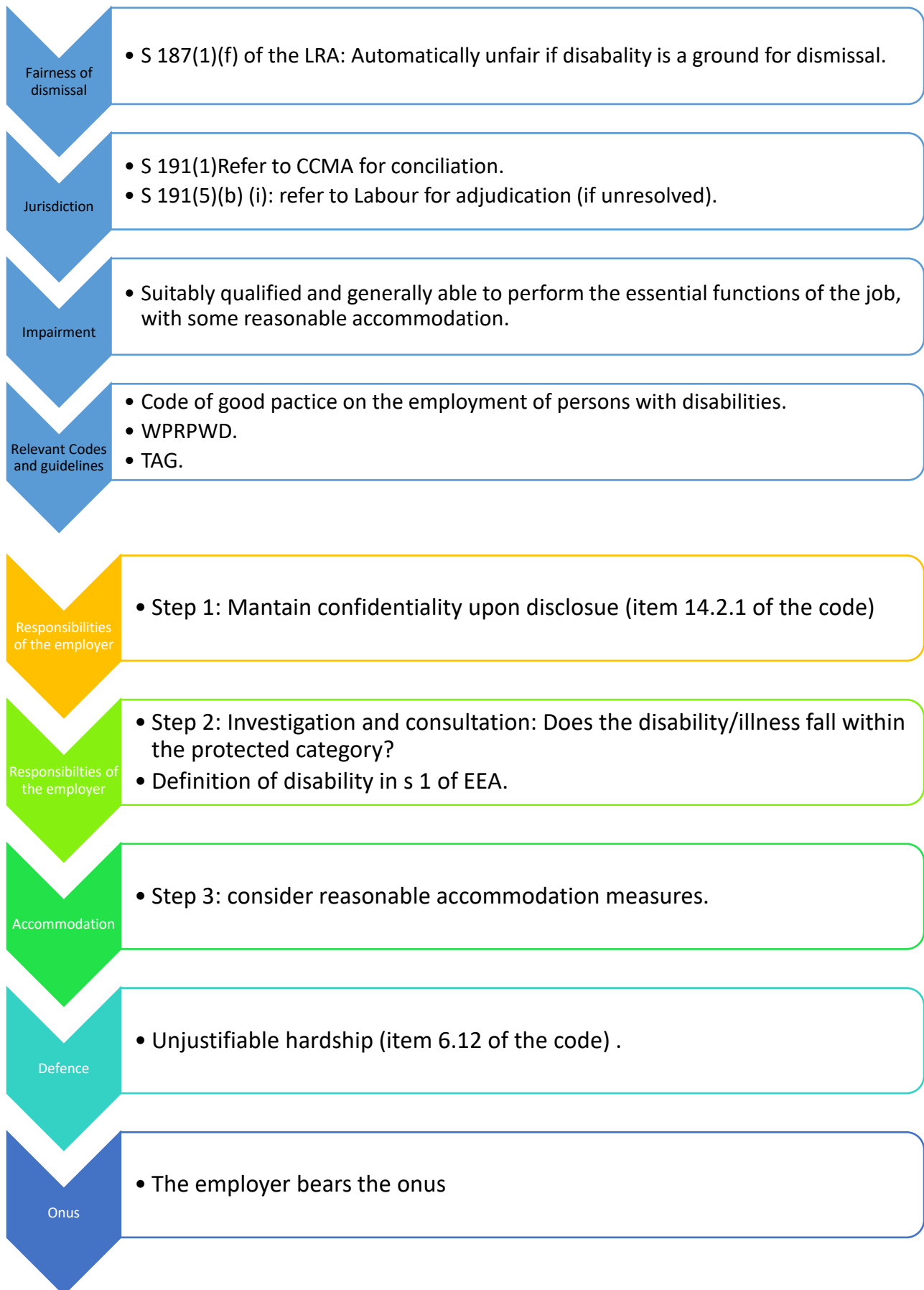
### 3.8.2 Poor work performance diagram



### 3.8.3 Incapacity (ill health/injury) diagram



### 3.8.4 Disability diagram



### 3.9 Conclusion

What is clear from the diagrams illustrating the different decision-making processes involved in each category, and the relevant legislation and codes which apply to each, is that employers are left with a complex task when poor work performance or absences occur in deciding what appropriate forum to utilise and how best to support their employees with disabilities, and with accommodation where needed. Employees with disabilities are in an even more difficult position as they have to navigate this complex system when they are dismissed (and sometimes before dismissal to ensure they are reasonably accommodated where necessary and appropriate).

*Standard Bank of SA v CCMA*,<sup>480</sup> provides proper guidelines to employers on what procedures need to be followed in order to reasonably accommodate an employee with a disability in the workplace, although it was referred as a case of unfair dismissal as result of incapacity. The judgment also assists in distinguishing between incapacity and disability. Employers need to be tolerant and conduct proper investigations with the intention to reasonably accommodate an employee where they have a disability. Dismissal should be the last resort when addressing both incapacity and disability procedures.

Disability and incapacity are not synonymous. The distinguishing factors in establishing either disability or incapacity is whether the employee is unable to perform their work in respect of incapacity, whereas a disabled person can perform the work but needs reasonable accommodation to do so.<sup>481</sup> The courts use the terms interchangeably as there is no real distinction between measures of reasonable accommodation in the context of an employee with a disability and providing an alternative to dismissal for incapacity, with Bassuday and Rycroft calling it a parallel process.<sup>482</sup>

In *Jansen v Legal Aid South Africa*,<sup>483</sup> the LC pronounced that an employee with depression was a person with a disability.<sup>484</sup> Depression should be recognised to fall within the ambit of a disability that is protected under sections 6 of the EEA and 187(1)(f) of the LRA. The lack of a definition of what constitutes a disability in terms of both these sections poses a problem for

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<sup>480</sup> (2008) 29 *ILJ* 1239 (LC).

<sup>481</sup> Bassuday K & Rycroft A (44 above), at page 2520.

<sup>482</sup> Bassuday K & Rycroft A (n 44 above), at page 2519.

<sup>483</sup> *Jansen v Legal Aid South Africa* (2018) 39 *ILJ* 2024 (LC).

<sup>484</sup> At para 43 of the judgment.

employers and dispute resolution tribunals when they are faced with cases of employees with depression. This results in the conflation of the different categories: misconduct, poor work performance, incapacity and disability. The reason why this conflation occurs for employees with depression in particular is because the illness is not self-evident. The fear of stigma, discrimination and consequences associated with disclosure results in employees not disclosing the illness to their employers.<sup>485</sup> The employees are less likely to request accommodation in these circumstances.<sup>486</sup>

Nxumalo argues that the EEA, code and the guidelines are general in nature and do not adequately cover psychosocial illnesses. The situation contributes to employers not understanding or giving proper effect to their constitutional obligation in accommodating employees with mental illnesses.<sup>487</sup> South Africa could benefit from dedicated disability legislation, as suggested by Grobbelaar-du Plessis<sup>488</sup> and also by Nxumalo, and a more comprehensive code to clarify and give much needed guidance to employees, employers and the judiciary. A clear distinction should be made between discrimination against a person with a disability for the purposes of section 6 of the EEA, and affirmative action measures as argued by Ngwena and others.

The revised disability code is a step in the right direction; however, it does not have the status of legislation. This will lead to various stakeholders utilising the definition of “persons with disabilities” provided for in the EEA when interpreting protection against discrimination in terms of section 6 of the EEA. Denial of reasonable accommodation has also been added in the revised code as a form of discrimination on the basis of a disability where accommodation can reduce the impact of the impairment concerned on the person’s ability to fulfil the essential functions of the job. Two further documents deserve mention: a bill on return to work for persons injured at work and a chapter nine institution’s monitoring and evaluation of disability integration into the workplace.

Firstly, it is noteworthy that the legislature has made some effort in proposed Compensation for Occupational Injuries and Diseases Act Amendments Bill<sup>489</sup> (COIDA) amendments with

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<sup>485</sup> Holness W (n 1 above), at page 526.

<sup>486</sup> Holness W (n 1 427 above), at page 526.

<sup>487</sup> Nxumalo L (n 18 above), at page 1445.

<sup>488</sup> Grobbelaar-du Plessis I and van Rennen T (n 465 above), at page 97.

<sup>489</sup> 2018.

regard to integration of persons with psychosocial illnesses in the workplace.<sup>490</sup> The amendments propose that a provision for the rehabilitation and reintegration of disabled persons in the workplace and arrangement for their early return to work be included in legislation. This is a step in the right direction with regard to the protection of psychosocial illnesses in the workplace. While such action is commended, it is argued that the amendments are not thorough enough as to how such integration should be achieved. Further to that, this amendment may not achieve its purpose as it is merely added to legislation which does not deal mainly with disability. Therefore, it is argued that in order to address the stigma attached to persons with mental illnesses, there is a need for disability legislation which will adequately address various disability issues, including rehabilitation and re-integration, as envisaged in the proposed COIDA amendments.

Secondly, the South African Human Rights Commission (SAHRC) has introduced a disability toolkit for employers in order to improve the employment of people with disabilities.<sup>491</sup> The toolkit contains information, guidelines, relevant pieces of legislation, links to best practices and resources relating to disability. This toolkit should be used by employers in conjunction with the Constitution, relevant legislation, and codes and guidelines in promoting the right to equality for people with disabilities. These two, however, do not close the gaps in the definitional concerns raised and do not provide clarity in relation to incapacity versus disability present in the legislation reviewed.

In conclusion, this chapter demonstrated that South Africa does not have legislation that addresses how employers should deal with depressed employees. Put differently, there is no clear legislative framework that guides employers on handling depression in the workplace. As a result, employees with depression continue to suffer prejudice and are often eventually dismissed on the basis of incapacity. However, the LRA provides proper guidelines and guidance for managing incapacity, poor performance and misconduct in the workplace.

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<sup>490</sup> Section 70A of the Compensation for Occupational Injuries and Diseases Amendment Bill, Vol 640 of 2018, Government Gazette 41958.

<sup>491</sup> South African Human Rights Commission Disability Toolkit, 2017.

## CHAPTER 4

### CASE LAW REVIEW

#### 4.1 Introduction

This chapter evaluates judgments of the courts in relation to how they interpret cases referred to them where the employment relationship of employees with depression are terminated. It seeks to assess how South African courts approach dismissal cases of employees with depression. The cases are considered under the different categories in relation to the reasons advanced for the termination of the employment relationship. The different categories are incapacity, poor work performance, constructive dismissal and misconduct.

#### 4.2 Employees terminated for incapacity

Four cases are analysed.

##### 4.2.1 *Hendricks v Mercantile & General Reinsurance Co of SA Ltd.*<sup>492</sup>

The above case was decided under the predecessor to the current LRA.<sup>493</sup> The employee was dismissed for incapacity that arose out of ill health as a result of depression and anxiety.<sup>494</sup> The employee's doctor in his report recorded that he had been unhappy with his work environment and circumstances since 1989.<sup>495</sup> The employee was constantly absent from work because of anxiety and depression, which put pressure on his colleagues.<sup>496</sup> They resented this as they had to perform additional work and his department was unable to meet its deadlines.<sup>497</sup> In 1990 alone, the employee was absent from work for 128 days.<sup>498</sup> In 1991, the employer offered him a transfer to another department that was less stressful, but the employee declined the offer.<sup>499</sup> The employee received about six counselling sessions recommended by his employer and eventually stopped attending these sessions.<sup>500</sup> The employer referred him to a psychiatrist who prescribed anti-depressants and rest.<sup>501</sup>

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<sup>492</sup> (1994) 15 *ILJ* 304 (LAC).

<sup>493</sup> LRA 28 of 1956.

<sup>494</sup> At page 306 of the judgment.

<sup>495</sup> At page 307 of the judgment.

<sup>496</sup> At page 306 of the judgment.

<sup>497</sup> At page 306 of the judgment.

<sup>498</sup> At page 314 of the judgment.

<sup>499</sup> At page 309 of the judgment.

<sup>500</sup> At page 307 of the judgment.

<sup>501</sup> At page 309 of the judgment.



The psychiatrist observed that his stressors were work-related.<sup>502</sup> He was away for the whole month in 1992.<sup>503</sup> On his return, the employer had a counselling session with him where it was explained that his absenteeism had resulted in additional workload on his colleagues and that the nature of his work might have contributed to his ill-health.<sup>504</sup> The employer again offered to create a less stressful position for the employee with no loss in salary or benefits.<sup>505</sup> The employee declined for the second time.<sup>506</sup> The employee was eventually dismissed in 1992 following a hearing.<sup>507</sup> It is clear from the facts of the case that the employer made several attempts to try to accommodate the employee without any success. The LAC held that the employer acted fairly in dismissing the employee.<sup>508</sup>

The court did not refer to any domestic legislation and international instruments; however, it was clear from the facts of the case that the employer had tried to reasonably accommodate the employee by offering him alternative work without loss of salary and benefits which was unfortunately declined by the employee. This forms the basic principle of affording the employee alternative work as required by item 11 schedule 8 to the LRA, although the case was decided in terms of the erstwhile LRA. The case was treated as incapacity.

#### **4.2.2 *Spero v Elvey International (Pty) Ltd*<sup>509</sup>**

An employee with depression overdosed on his psychiatric medication and was hospitalised.<sup>510</sup> When he returned to work, the employer considered him unfit to resume his duties.<sup>511</sup> He was suspended pending a hearing into his capacity to perform his duties.<sup>512</sup> The employee was dismissed despite submitting a report from his psychiatrist indicating that his condition was temporary.<sup>513</sup> The employer reasoned that the employee's severe depression and the unpredictable effects of his medication rendered him incapable of carrying out his duties.<sup>514</sup>

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<sup>502</sup> At page 309 of the judgment.

<sup>503</sup> At page 310 of the judgment.

<sup>504</sup> At page 310 of the judgment.

<sup>505</sup> At page 310 of the judgment.

<sup>506</sup> At page 310 of the judgment.

<sup>507</sup> At page 313 of the judgment.

<sup>508</sup> At page 316 of the judgement.

<sup>509</sup> (1995) 16 *ILJ* (IC)).

<sup>510</sup> At page 1212 of the judgment.

<sup>511</sup> At page 1212 of the judgment.

<sup>512</sup> At page 1212 of the judgment.

<sup>513</sup> At page 1212 of the judgment

<sup>514</sup> At page 1212 of the judgment

The employee referred an unfair labour practice dispute to the Industrial Court in terms of section 46(9) of the LRA.<sup>515</sup> The court noted that there were no South African legislative guidelines at the time of its decision on how an employer should deal with employee's depression and incapacity, and sought reliance on international law namely, article 6 of the Convention 158 of 1982 and paragraph 5 of ILO Recommendation 166 of 1982, which prohibit termination of employment as a result of a temporary illness or injury.<sup>516</sup>

The Industrial Court found that the dismissal was unfair because the employee's incapacity was temporary and the employer failed to consider the psychiatrist's report that the condition would improve; the employer failed to consult with the employee with the view of offering alternatives to dismissal.<sup>517</sup> It also noted that dismissal should be the last resort.<sup>518</sup> The court ordered the reinstatement of the employee, but not retrospectively, as it made a concession that there was no guidance in South African law on the correct approach to misconduct, poor performance or incapacity of employees who are affected by psychological stress, and felt that the employer should not be penalised for that although they acted unfairly.<sup>519</sup>

At the time of the decision of this case, there were no proper guidelines on how to deal with similar cases. However, the Industrial Court diligently considered international law as a guideline and sought to protect the rights of the employee against unfair dismissal perpetrated by the employer, as his condition was of a temporary nature. The court emphasised that dismissal should be the last resort after the employer has explored all avenues in order to accommodate the employee. Items 10 and 11 of schedule 8 to the LRA now provide guidelines for termination of employment as a result of incapacity. If this case had been heard after the enactment of these guidelines, the court would have reached a similar conclusion.

#### **4.2.3 Bennett and Mondipak<sup>520</sup>**

The employee had nine years' service employed by Mondipak and was later appointed as human resources clerk at its Kuils River Branch.<sup>521</sup> The employer embarked on a restructuring

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<sup>515</sup> At page 1212 of the judgment

<sup>516</sup> At page 1218 of the judgement.

<sup>517</sup> At page 1211 of the judgment.

<sup>518</sup> At page 1211 of the judgment.

<sup>519</sup> At page 1211 of the judgment.

<sup>520</sup> (2004) 25 ILJ 583 (CCMA).

<sup>521</sup> At page 584 of the judgment.

process in 1999/2000.<sup>522</sup> The employer was diagnosed with anxiety and depression in 2002 as a result of not coping with the additional workload of processing employees' time and attendances.<sup>523</sup> He was granted sick leave for anxiety and depression, as recorded in a sick note from his psychiatrist.<sup>524</sup>

The employee was booked off sick again in 2003 for anxiety and depression attributed to his workload.<sup>525</sup> This was supported by a report from his psychiatrist.<sup>526</sup> He was dismissed by the employer.<sup>527</sup> The reason for his dismissal was based on the suggestion by his psychiatrist that, although the employee was ready to resume his duties, he was likely to have a relapse if his work environment did not improve.<sup>528</sup> She further stated that he was likely to succeed if work burden was lifted. The employer's complaint was that his breakdown was work-induced, and furthermore, that at the time of his dismissal, he had recovered sufficiently to resume his duties.<sup>529</sup> He also claimed that the employer had not attempted to address the stressors in the work environment which would have enabled him to function more effectively.<sup>530</sup> In coming to its conclusion, the Commissioner relied on items 10 and 11 of Schedule 8<sup>531</sup> for guidance.<sup>532</sup> The Commissioner found that the employer had a duty to investigate the issues which caused the stress with the intention of providing accommodation.<sup>533</sup> The offer of alternative work was the last resort after considering alleviation of stressors.<sup>534</sup>

The commissioner sought guidance from schedule 8 of the code of good practice.<sup>535</sup> The case was treated as incapacity.<sup>536</sup> The commissioner noted that the employer had failed to follow the guidelines, and that the incapacity was not permanent.<sup>537</sup> Adjusting the workload could have provided relief to the employee.<sup>538</sup> The Commissioner concluded that the dismissal was

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<sup>522</sup> At page 585 of the judgment.

<sup>523</sup> At page 584 of the judgment.

<sup>524</sup> At page 591 of the judgment.

<sup>525</sup> At page 587 of the judgment.

<sup>526</sup> At page 594 of the judgment.

<sup>527</sup> At page 587 of the judgment.

<sup>528</sup> At page 587 of the judgment.

<sup>529</sup> At page 586 of the judgment.

<sup>530</sup> At page 585 of the judgment.

<sup>531</sup> Code of Good Practice: Dismissal.

<sup>532</sup> At page 595 of the judgment

<sup>533</sup> At page 595 of the judgment.

<sup>534</sup> At page 596 of the judgment.

<sup>535</sup> At page 595 of the judgment.

<sup>536</sup> At page 596 of the judgment.

<sup>537</sup> At page 594 of the judgment.

<sup>538</sup> At page 594 of the judgment.

unfair and reinstated the employee with the same terms and conditions of employment that had existed before his dismissal.<sup>539</sup> The judgment emphasises the importance of adhering to guidelines provided for in schedule 8 of the LRA before an employee is terminated as a result of incapacity for ill-health.

#### **4.2.4 *Rikhotso v MEC for Education***<sup>540</sup>

An educator employed by the Gauteng Department of Education was granted sick leave for depression pending his application for medical boarding from 1 June 2001.<sup>541</sup> The employer approved the sick leave until 31 March 2001.<sup>542</sup> During 2000, the employer submitted an application for medical boarding which was referred to a panel of doctors appointed by the Department.<sup>543</sup> The panel concluded that the employee suffered from major depressive disorder and post-traumatic stress disorder.<sup>544</sup> It made recommendations that the department should endeavour to find a more suitable position, possibly in another school or department as the work environment contributed to his stressors.<sup>545</sup> His application to be medically boarded was unsuccessful.<sup>546</sup>

The decision was conveyed to the employee in a letter dated 18 July 2001 which allocated him to another school.<sup>547</sup> The employer addressed three letters to the employee requesting him to report for duty on 20 September 2001, 9 November 2001 and 21 November 2001.<sup>548</sup> He was warned that failure to report to work could lead to a termination of services in terms of section 14(1)(a) of the Employment of Educators Act 76 of 1998 which provides for dismissal by operation of the law for unauthorised absence in excess of fourteen days.<sup>549</sup> The employee did not return to work, despite being offered alternative placings at three separate schools.<sup>550</sup> The employee challenged the procedure followed by the employer in considering his medical boarding application as being legal and justified and/or reasonable and/or fair and/or provided

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<sup>539</sup> At page 596 of the judgment.

<sup>540</sup> (2004) 25 ILJ 2385 (LC).

<sup>541</sup> At page 2386 of the judgment.

<sup>542</sup> At page 2386 of the judgment.

<sup>543</sup> At page 2387 of the judgment.

<sup>544</sup> At page 2390 of the judgment.

<sup>545</sup> At page 2390 of the judgment.

<sup>546</sup> At page 2388 of the judgment.

<sup>547</sup> At page 2388 of the judgment.

<sup>548</sup> At page 2389 of the judgment.

<sup>549</sup> At page 2389 of the judgment.

<sup>550</sup> At page 2389 of the judgment.

for by the Act and its regulations and the LRA.<sup>551</sup> He also disputed whether the employer was entitled to deal with him in terms of section 14 of the Act, namely to deem him to have discharged himself from its service.<sup>552</sup> The court found that it was clear from the circumstances of the case that the employee was only interested in being medically boarded rather than improving and resolving his work environment.<sup>553</sup> The court was therefore satisfied that the Member of the Executive Council (MEC) had complied with the Incapacity Code and Procedures contained in schedule 1 to the Educators Act, which has similar provisions to the EEA code.<sup>554</sup> The matter was dealt with as an incapacity.

#### **4.2.5 *IMATU obo Strydom v Witzenburg Municipality*<sup>555</sup> (LC)**

##### **LC**

This case was brought to the LC as an application for review of an arbitration award.<sup>556</sup> The employee had been employed as a town clerk until the merger of several town councils in October 2001 when he assumed a position of a senior administration officer.<sup>557</sup> He was unhappy at work as he believed he was more qualified than the position he was occupying.<sup>558</sup> He was absent from work on several occasions between 2001 and 2005 and his psychiatrist diagnosed him with major depression caused by stressors at work.<sup>559</sup> He applied for medical boarding early in 2005, but his application was refused by the retirement fund on the basis that he was not unfit to work.<sup>560</sup> The employer requested him to report to work, but he failed to do so.<sup>561</sup> The employer held an incapacity hearing and the employee was dismissed.<sup>562</sup> The chairperson of the enquiry relied on the medical report that was six months old and found that the employee was incapacitated from performing his functions on a permanent basis.<sup>563</sup>

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<sup>551</sup> At page 2387 of the judgment.

<sup>552</sup> At page 2387 of the judgment.

<sup>553</sup> At page 2390 of the judgment.

<sup>554</sup> At page 2390 of the judgment.

<sup>555</sup> (2008) 29 *ILJ* 2947 (LC); (2012) 33 *ILJ* 1081 (LAC).

<sup>556</sup> At page 2949 of the judgment.

<sup>557</sup> At page 2948 of the judgment.

<sup>558</sup> At page 2948 of the judgment.

<sup>559</sup> At page 2948 of the judgment.

<sup>560</sup> At page 2948 of the judgment.

<sup>561</sup> At page 2948 of the judgment.

<sup>562</sup> At page 2948 of the judgment.

<sup>563</sup> At page 2948 of the judgment.

The employee referred an unfair dismissal dispute to the bargaining council, and the arbitrator confirmed that the dismissal was fair.<sup>564</sup> The LC noted that the employee was in a catch-22 situation in that in order to succeed in his application for medical boarding, the employee had to assert that he was medically unfit to work.<sup>565</sup> This weakened his case for reasonable accommodation in order to resist dismissal for incapacity.<sup>566</sup> The court felt that the employee was not willing to work as he had an opportunity take a lower paying position of a clerk.<sup>567</sup> This was the distinguishing factor from the case of *Standard Bank of SA v CCMA & Others*,<sup>568</sup> being that in the Standard Bank case, the employee was desperate to keep her job but only applied for medical boarding because the employer refused to accommodate her.<sup>569</sup>

The LC held that the employer acted reasonably in granting the employee extended sick leave of about ten months.<sup>570</sup> There was indisputable evidence that the employee did not want to work for the employer and questionable whether he wanted to work at all.<sup>571</sup> The application for review was dismissed.<sup>572</sup> LC did not refer to schedule 8 of the LRA to justify that the employer followed the correct procedure in dismissing the employee.

## **LAC**

The employee approached the LAC to appeal against the judgment of the LC and to set aside the arbitration award.<sup>573</sup> The application for the appeal was not opposed by the employer.<sup>574</sup>

The LAC had to make the following determination:

- a. Whether the employer failed to give effect to its obligations as pronounced in items 10 and 11 of schedule 8;<sup>575</sup>
- b. Whether the failure by the employer to comply with the guidelines resulted in unfair dismissal;<sup>576</sup>
- c. Whether the commissioner's findings that the dismissal was fair in the circumstances were correct;<sup>577</sup> and

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<sup>564</sup> At page 2949 of the judgment.

<sup>565</sup> At page 2950 of the judgment.

<sup>566</sup> At page 2950 of the judgment.

<sup>567</sup> At page 2951 of the judgment.

<sup>568</sup> (2008) 29 ILJ 1239 (LC).

<sup>569</sup> At page 2951 of the judgment.

<sup>570</sup> At page 2951 of the judgment.

<sup>571</sup> At page 2948 of the judgment.

<sup>572</sup> At page 2949 of the judgment.

<sup>573</sup> At para 1 of the LAC judgment.

<sup>574</sup> At para 1 of the LAC judgment.

<sup>575</sup> At para 4 of the LAC judgment.

<sup>576</sup> At para 4 of the LAC judgment.

<sup>577</sup> At para 4 of the LAC judgment.

d. Whether the LC erred in not setting aside the award and therefore committed an error in its findings.<sup>578</sup>

The LAC referred to section 188(2) of the LRA which makes provisions for taking into account any relevant code of good practice in order to establish whether a dismissal was effected in a fair manner.<sup>579</sup> The relevant code in this respect is schedule 8 of the LRA.<sup>580</sup> Items 10 and 11 provide guidelines in cases of incapacity on the grounds of ill-health or injury.<sup>581</sup> The LAC cited *Sidumo & another v Rustenburg Platinum Mines Ltd & Others*<sup>582</sup> as authority which binds commissioners to the code of good practice in order to establish whether dismissal was effected in a fair manner.<sup>583</sup> The court interpreted items 10 and 11 and the purpose of incapacity enquiry mainly to assess whether the employee was capable of performing their duties, be it a position they had occupied before the enquiry or an alternative position which could occur through a proper assessment of the employee's condition.<sup>584</sup> The fact that the employee was incapacitated did not end the enquiry; the employer has a responsibility to adapt the employee's work circumstances so as to accommodate the incapacity, and adapt duties or make provisions for alternative work if available.<sup>585</sup>

The court recognised that permanent incapacity justified legitimate reasons for termination of a working relationship if the circumstances could be adapted after proper consideration for alternatives to dismissal.<sup>586</sup> It equated the employer's obligations in terms of items 10 and 11 to the reasonable accommodation obligation provided for in the EEA.<sup>587</sup> Non-compliance with the obligation would render the dismissal unfair. The LAC was critical of the scanty manner in which the employer had handled the matter.<sup>588</sup> Firstly, the employer relied on a six-month old psychiatrist's report that was submitted by the employee in his application for medical boarding and the assessment report submitted by Metropolitan in support of its decision for repudiating the employee's application.<sup>589</sup> The doctor recorded that the employee was capable of

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<sup>578</sup> At para 4 of the LAC judgment.

<sup>579</sup> At para 5 of the LAC judgment.

<sup>580</sup> At para 5 of the LAC judgment.

<sup>581</sup> At para 4 of the LAC judgment.

<sup>582</sup> (2007) 28 ILJ 2405 (CC).

<sup>583</sup> At para 6 of the LAC judgment.

<sup>584</sup> At para 5 of the LAC judgment.

<sup>585</sup> At para 5 of the LAC judgment.

<sup>586</sup> At para 7 of the LAC judgment.

<sup>587</sup> At para 8 of the LAC judgment.

<sup>588</sup> At para 18 of the LAC judgment.

<sup>589</sup> At para 27 of the LAC judgment.

resuming his duties or alternative duties in the future.<sup>590</sup> The chair finalised the matter without affording the employee opportunity to seek a second opinion from another psychiatrist as pleaded by the employee.<sup>591</sup> Relying on the old report compromised the assessment.<sup>592</sup> Secondly, the chairperson confused the incapacity enquiry and misconduct proceedings by remarking that his responsibility was to assess whether or not a continued relationship was going to be amenable for both parties.<sup>593</sup> After recommending dismissal, the chairperson invited the employee to make submissions in mitigation.<sup>594</sup> He referred to previous conduct by the employee when he fraudulently applied and submitted a report to the Department of Labour.<sup>595</sup>

The court was also critical of the commissioner's conduct of the proceedings at the CCMA.<sup>596</sup> It first reiterated that arbitration was a hearing *de novo*.<sup>597</sup> What was expected of the commissioner was to listen to the evidence afresh and consider documents submitted and make a determination as to the fairness or otherwise of the employee's dismissal.<sup>598</sup> The commissioner approached the hearing as an appeal by only confining himself to the evidence that was presented at the incapacity enquiry and ignored new evidence that was presented in arbitration.<sup>599</sup> Dr Kalinski's report that was presented at arbitration showed that at the time of the arbitration, the employee had already recovered from his illness.<sup>600</sup>

The commissioner failed to consider this report as he found that it was not presented before the chairperson of the enquiry.<sup>601</sup> The commissioner also accepted an assumption that the employee would not have accepted other clerical positions that were available because they were of a lower level.<sup>602</sup> The decision was based on the wrong premise.<sup>603</sup> The employer failed to consider evidence, which resulted in lack of proper assessment of the employee's

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<sup>590</sup> At para 27 of the LAC judgment.

<sup>591</sup> At para 12 of the LAC judgment.

<sup>592</sup> At para 27 of the LAC judgment.

<sup>593</sup> At para 13 of the LAC judgment.

<sup>594</sup> At para 13 of the LAC judgment.

<sup>595</sup> At para 13 of the LAC judgment.

<sup>596</sup> At para 15 of the LAC judgment.

<sup>597</sup> At para 14 of the LAC judgment.

<sup>598</sup> At para 15 of the LAC judgment.

<sup>599</sup> At para 15 of the LAC judgment.

<sup>600</sup> At para 17 of the LAC judgment.

<sup>601</sup> At para 17 of the LAC judgment.

<sup>602</sup> At para 18 of the LAC judgment.

<sup>603</sup> At para 20 of the LAC judgment.



capability to continue working as contemplated in terms 10 and 11 of schedule 8.<sup>604</sup> The LAC held that “the commissioner committed a gross irregularity in the conduct of arbitration proceedings and his decision was one that a reasonable decision maker could not make, and thus fell to be reviewed and set aside”.<sup>605</sup> The LC was also criticised in dismissing the employee’s review application. The question posed by LC was misplaced and did not take into account, firstly, that none of the medical reports submitted claimed that the employee was permanently disabled or incapacitated; secondly, the employer relied on a medical report that was over six months old, and the employee had recovered at the time of the arbitration.<sup>606</sup> There was no basis for finding that the employee was permanently incapacitated and could not be accommodated.<sup>607</sup>

The LC should have realised that the commissioner did not take into consideration items 10 and 11 of schedule 8, and therefore failed to comply with section 188(2) of the LRA.<sup>608</sup> For this reason alone, the award fell to be set aside.<sup>609</sup> The LAC held that the employee’s dismissal was both procedurally and substantively unfair.<sup>610</sup> The employee was awarded compensation amounting to an equivalent of 12 months’ remuneration.<sup>611</sup> The reason offered by the LAC for not reinstating the employee was because of the absence of his testimony and being unable to cross-examine the employee about his willingness to work.<sup>612</sup> The case was treated by the court as incapacity.

The LAC emphasised the importance of taking into account the relevant code of good practice issued in terms of the LRA when determining whether dismissal is effected in a fair manner. In this case the employer, CCMA and the LC failed to consider the guidelines provided for in items 10 and 11 of schedule 8<sup>613</sup> and as a result reached an incorrect conclusion.

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<sup>604</sup> At para 28 of the LAC judgment.

<sup>605</sup> At para 29 of the LAC judgment.

<sup>606</sup> At para 29 of the LAC judgment.

<sup>607</sup> At para 32 of the LAC judgment.

<sup>608</sup> At para 28 of the LAC judgment.

<sup>609</sup> At para 28 of the LAC judgment.

<sup>610</sup> At para 36 of the LAC judgment.

<sup>611</sup> At para 36 of the LAC judgment.

<sup>612</sup> At para 33 of the LAC judgment.

<sup>613</sup> Labour Relations Act No. 66 of 1995.

#### **4.2.6. Analysis**

These four cases where employees were dismissed for incapacity show that the courts are generally relying on the relevant codes and guidelines to determine whether in fact incapacity, as alleged, is proved for purposes of dismissal. Further, the temporary nature of the impairment usually means that an employee should not be dismissed but should be offered reasonable accommodation measures. Dismissal without prior offering of such measures has been held to be unfair.

### **4.3 Employees terminated for poor work performance**

Two cases are analysed.

#### **4.3.1 *L S v Commissioner for Conciliation, Mediation & Arbitration & Others*<sup>614</sup>**

The employee occupied a strategic position for a period of one year.<sup>615</sup> Her performance began to deteriorate a few months after she was appointed.<sup>616</sup> The employee suffered a series of traumatic experiences prior to and during her employment with the company.<sup>617</sup> She was gang raped four years before she was appointed and suffered from post-traumatic disorder as a result of the incident.<sup>618</sup> Her poor work performance was of concern to her and as a result she sought intervention from her employer.<sup>619</sup> She was referred to an employee wellness programme for psychological help.<sup>620</sup> Her attendance of the programme was erratic. The psychologist prepared a report indicating that the employee required long-term therapeutic intervention which was outside the ambit of the wellness programme.<sup>621</sup> The employee continued to underperform although she was receiving treatment from her psychiatrist.<sup>622</sup> She was charged with misconduct relating to her poor work performance.<sup>623</sup> Although she was legally represented at the hearing, she did not attend.<sup>624</sup> She was dismissed.<sup>625</sup>

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<sup>614</sup> (2014) 35 ILJ 2205 (LC).

<sup>615</sup> At para 2 of the judgment.

<sup>616</sup> At para 2 of the judgment.

<sup>617</sup> At para 9 of the judgment.

<sup>618</sup> At para 9 of the judgment.

<sup>619</sup> At para 10 of the judgment.

<sup>620</sup> At para 10 of the judgment.

<sup>621</sup> At para 15 of the judgment.

<sup>622</sup> At para 18 of the judgment.

<sup>623</sup> At para 28 of the judgment.

<sup>624</sup> At para 30 of the judgment.

<sup>625</sup> At para 35 of the judgment.

She referred an unfair dismissal dispute to the CMMA.<sup>626</sup> Although the evidence of the employer's witness supported the employee's evidence of mental distress, the commissioner upheld the employee's dismissal on the basis that there was no medical evidence to support her contention that she was medically unfit to work.<sup>627</sup> On review, the LC observed that the commissioner misdirected the nature of the question she was called upon to determine.<sup>628</sup> She made an incorrect assumption that she was required to make a determination about the employee's incapacity.<sup>629</sup> She failed to consider the question whether it was fair to dismiss an employee for misconduct without the employer enquiring into the impact that her mental illness had on her capacity to perform her duties in line with the guidelines in schedule 8 code of good practice: dismissal.<sup>630</sup> The court noted that the development in jurisprudence which recognises different categories falls under the code of good practice.<sup>631</sup> The commissioner had no appreciation of the proceedings to be followed for incapacity and misconduct.<sup>632</sup>

The LC was satisfied that the employer mischaracterised the nature of the proceedings it had to follow.<sup>633</sup> It pursued misconduct proceedings for poor work performance instead of following the guidelines provided for in item 10 of the schedule 8 code of good practice: dismissal when it was well aware of the employee's mental illness.<sup>634</sup> The court awarded compensation equivalent to four months' salary. This case illustrates the lack of knowledge of some of the employers and commissioners in differentiating between poor work performance, misconduct, and incapacity.

#### **4.3.2 *Transnet Rail Engineering v Mienies & Others***<sup>635</sup>

An employee with depression was dismissed for gross negligence and poor work performance.<sup>636</sup> The employer had disregarded a doctor's medical report recommending that the employee be transferred to another depot in order to prevent the worsening of his diagnosed depression.<sup>637</sup> His condition was exacerbated by constant conflict with his

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<sup>626</sup> At para 36 of the judgment.

<sup>627</sup> At para 40 of the judgment.

<sup>628</sup> At para 43 of the judgment.

<sup>629</sup> At para 44 of the judgment.

<sup>630</sup> At para 46 of the judgment.

<sup>631</sup> At para 47 of the judgment.

<sup>632</sup> At para 52 of the judgment.

<sup>633</sup> At para 66 of the judgment.

<sup>634</sup> At para 66 of the judgment.

<sup>635</sup> (2015) 36 *ILJ* 2605 (LAC).

<sup>636</sup> At para 1 of the judgment.

<sup>637</sup> At para 16 of the judgment.

supervisor.<sup>638</sup> The employee was diagnosed with a major depressive disorder precipitated by worsening work stress and received medication for his condition.<sup>639</sup> The employer referred an unfair dismissal dispute to the bargaining council.<sup>640</sup> The arbitrator found that there was a fair reason for the dismissal.<sup>641</sup> On review, the LC noted that the arbitrator ignored the evidence of alleged victimisation against the employee and his mental condition.<sup>642</sup> She failed to refer to the doctor's report and the employee wellness programme reports.<sup>643</sup> The LC set aside the arbitration award and ordered that the employee be reinstated with retrospective effect.<sup>644</sup> The LAC concurred with the court *a quo*.<sup>645</sup>

Although the LAC was correct in reviewing and setting aside the arbitration award, it did not refer to the guidelines. It however highlighted that if employees display shortcomings in the performance of their duties, fairness dictates that these employees should not only be informed that their performances are deficient, and in what respect, but also that the employees should be given an opportunity to improve.<sup>646</sup> The matter was treated as a poor work performance.

### 4.3.3 Analysis

These two cases show that where an employer is made aware of an employee's mental illness and poor work performance is alleged, the employer should consider the impact that the illness has on the person's capacity to work. An opportunity to improve work performance should be offered to the employee. Further, employee victimisation is a factor that should be considered when appraising an employee's performance.

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<sup>638</sup> At para 14 of the judgment.

<sup>639</sup> At para 13 of the judgment.

<sup>640</sup> At para 2 of the judgment.

<sup>641</sup> At para 2 of the judgment.

<sup>642</sup> At para 3 of the judgment.

<sup>643</sup> At para 3 of the judgment.

<sup>644</sup> At para 3 of the judgment.

<sup>645</sup> At para 13 of the judgment.

<sup>646</sup> At para 16 of the judgment.

## 4.4 Constructive dismissal

Three cases are analysed.

### 4.4.1 *Marsland v New Way Motor & Diesel Engineering*<sup>647</sup>

The employee was appointed as a marketing director in February 2001.<sup>648</sup> In December 2001 while on family holiday, the employee's wife left him.<sup>649</sup> As a result of this, he suffered a "nervous breakdown" and was admitted to hospital.<sup>650</sup> The employer was aware that he was diagnosed with depression.<sup>651</sup> When he returned to work in February 2002, the employee suffered humiliation and was ostracised by his superiors and made fun of because of his predicament.<sup>652</sup> Some of his critical functions were removed from him, which resulted in him becoming redundant.<sup>653</sup>

He suffered a relapse in May 2002 and was again granted sick leave.<sup>654</sup> His employer showed no sympathy on his return to work and called him into a disciplinary hearing for poor work performance, poor time keeping, misuse of company benefits and breaching of company rules and regulations.<sup>655</sup> He was handed a final written warning.<sup>656</sup> The employer's ill treatment worsened and at some stage he was denied tools of trade.<sup>657</sup> He was subjected to verbal abuse and threats from senior officials.<sup>658</sup> He terminated his employment contract without notice and referred a dispute to the bargaining council on the grounds of automatically unfair constructive dismissal.<sup>659</sup> The dispute was unresolved at conciliation and referred to the LC for resolution.<sup>660</sup>

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<sup>647</sup> (2009) 30 *ILJ* 169 (LC); (2009) 30 *ILJ* 2875 (LAC).

<sup>648</sup> At page 174 of the judgment.

<sup>649</sup> At page 175 of the judgment.

<sup>650</sup> At page 175 of the judgment.

<sup>651</sup> At page 175 of the judgment.

<sup>652</sup> At page 175 of the judgment.

<sup>653</sup> At page 177 of the judgment.

<sup>654</sup> At page 177 of the judgment.

<sup>655</sup> At page 177 of the judgment.

<sup>656</sup> At page 179 of the judgment.

<sup>657</sup> At page 180 of the judgment.

<sup>658</sup> At page 181 of the judgment.

<sup>659</sup> At page 183 of the judgment.

<sup>660</sup> At page 173 of the judgment.

## **LC**

The dispute was referred to the LC in terms of sections 186(e) read with 187(1)(d) and/or (f) of the LRA in that dismissal constituted an automatically unfair dismissal.<sup>661</sup> The employer failed to give evidence, and the court relied solely on the evidence of the employee, concluding that he was constructively dismissed.<sup>662</sup> The court had to make a determination whether the dismissal was automatically unfair.<sup>663</sup> The key question asked by the court was whether the employee's mental illness problems resulted or were the dominant reason for the employer to discriminate against him, causing an intolerable working environment and forcing him to terminate his employment.<sup>664</sup> The court held that the conduct of the employer amounted to unfair discrimination against the employee on the grounds of his mental illness.<sup>665</sup> The court further noted that the mental illness played a considerable role in the employee's dismissal and there was enough evidence to show that the dismissal was automatically unfair.<sup>666</sup> The court awarded 24 months compensation.<sup>667</sup>

## **LAC**

The employer appealed against the decision of the LC.<sup>668</sup> The employer did not dispute that the employee had been constructively dismissed at the LAC.<sup>669</sup> It contended that the employee had conducted himself in a manner that destroyed or seriously damaged the relationship of trust and confidence between the parties.<sup>670</sup> The employer further argued that the dismissal did not constitute a prohibited ground.<sup>671</sup>

The LAC found it unnecessary to decide whether the concept of "disability" as set out as a ground in section 187(1)(f) described the condition suffered by the employee but focused rather on whether the employer's conduct impaired the employee's dignity.<sup>672</sup> It however acknowledged that depression is a form of a mental illness.<sup>673</sup>

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<sup>661</sup> At page 173 of the judgment.

<sup>662</sup> At page 190 of the judgment.

<sup>663</sup> At page 191 of the judgment.

<sup>664</sup> At page 191 of the judgment.

<sup>665</sup> At page 192 of the judgment.

<sup>666</sup> At page 196 of the judgment.

<sup>667</sup> At page 196 of the judgment.

<sup>668</sup> At para 1 of the LAC judgment.

<sup>669</sup> At para 21 of the LAC judgment.

<sup>670</sup> At para 21 of the LAC judgment.

<sup>671</sup> At para 21 of the LAC judgment.

<sup>672</sup> At para 24 of the LAC judgment.

<sup>673</sup> At para 24 of the LAC judgment.

The LAC held that the employer's conduct clearly constituted an egregious attack on the dignity of the employee,<sup>674</sup> and accordingly fell within the grounds set out in section 187(1)(f) of the LRA and was therefore automatically unfair.<sup>675</sup> The employer argued that the award of maximum compensation was unreasonable given that it had made an offer of restoring the employment relationship which was declined by the employee.<sup>676</sup> The LAC rejected this argument and found that the maximum compensation was appropriate in the circumstance where the employer's appalling treatment continued even after his dismissal.<sup>677</sup> The court was reluctant to describe depression as a disability, opting to refer to the conduct of the employer as an analogous ground protected by section 187(1)(f) of the LRA.

#### **4.4.2 *Western Cape Education Department v General Public Service Sectoral Bargaining Council & Others*<sup>678</sup>**

An employee was in the service of the state for over 20 years.<sup>679</sup> He suffered a heart attack in July 2006 but fully recovered.<sup>680</sup> He was later diagnosed with post-traumatic stress disorder and clinical depression.<sup>681</sup> He was booked off sick from February 2007 and hospitalised in March 2007. He applied for ill-health retirement and incapacity leave in June 2007.<sup>682</sup> The employer failed to address his applications for over two years, which resulted in excessive deductions from the employee's salary.<sup>683</sup> At all material times, the employee submitted medical certificates during his absence from work.<sup>684</sup> The employer ignored grievances lodged by the employee in respect of deductions from his salary and the delay in finalising his applications.<sup>685</sup> The employee eventually resigned in September 2009 and referred a constructive dismissal dispute to the bargaining council.<sup>686</sup> The arbitrator found that there was constructive dismissal and reinstated the employee.<sup>687</sup> On review, the LC had to make a determination whether there was dismissal and whether reinstatement was an appropriate

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<sup>674</sup> At para 26 of the LAC judgment.

<sup>675</sup> At para 26 of the LAC judgment.

<sup>676</sup> At para 34 of the LAC judgment.

<sup>677</sup> At para 36 of the LAC judgment.

<sup>678</sup> (2013) 34 *ILJ* 2960 (LC).

<sup>679</sup> At para 4 of the judgment.

<sup>680</sup> At para 5 of the judgment.

<sup>681</sup> At para 5 of the judgment.

<sup>682</sup> At para 5 of the judgment.

<sup>683</sup> At para 5 of the judgment.

<sup>684</sup> At para 6 of the judgment.

<sup>685</sup> At para 11 of the judgment.

<sup>686</sup> At para 13 of the judgment.

<sup>687</sup> At para 14 of the judgment.

remedy in the circumstances.<sup>688</sup> The LC agreed with the arbitrator that there was an inordinate delay in finalising the employee's applications for over two years and resolving his grievances which resulted in an intolerable working relationship.<sup>689</sup> The employee's resignation was the last resort.<sup>690</sup> The employer failed to establish any fair reason for the dismissal, whether for misconduct, incapacity or operational requirements.<sup>691</sup> The employee's evidence that the circumstances at work had changed and were no longer intolerable was not disputed by the employer.<sup>692</sup> The employee had recovered psychologically and was better equipped to work.<sup>693</sup> The LC concluded that reinstatement was the only justified remedy in the circumstances.<sup>694</sup> The employer could have handled the situation better by utilising items 10 and 11 of schedule 8 of the LRA. The evidence clearly indicated that the employee's ailment was not permanent. The matter was treated as incapacity.

#### **4.4. National Health Laboratory Service v Yona & Others<sup>695</sup>**

The circumstances of the above case are similar to *Western Cape Education Department v General Public Service Sectoral Bargaining Council & Others*.<sup>696</sup> Ms Yona worked for the National Health Laboratory for a period of 21 years.<sup>697</sup> In November 2009, she was diagnosed with severe depression and general anxiety disorder as a result of work related problems.<sup>698</sup> She was absent from work for an extended period.<sup>699</sup> The employee's leave was treated as leave without pay despite the employee submitting sick notes from medical practitioners.<sup>700</sup> Her salary for the month of June 2010 was about R1 000.00 as a result of deductions for leave without pay.<sup>701</sup> The employer failed to advise her about applying for an extended sick leave in terms of the employer's sick leave policy which makes provisions for extended leave if an employee is suffering from a serious illness.<sup>702</sup> Her application for temporary incapacity/disability was also not approved by Alexander Forbes.<sup>703</sup> This situation became

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<sup>688</sup> At para 15 of the judgment.

<sup>689</sup> At para 23 of the judgment.

<sup>690</sup> At para 23 of the judgment.

<sup>691</sup> At para 31 of the judgement.

<sup>692</sup> At para 29 of the judgment.

<sup>693</sup> At para 27 of the judgment.

<sup>694</sup> At para 31 of the judgement.

<sup>695</sup> (2015) 36 *ILJ* 2259 (LAC).

<sup>696</sup> (2013) 34 *ILJ* 2960 (LC).

<sup>697</sup> At para 3 of the judgment.

<sup>698</sup> At para 10 of the judgment.

<sup>699</sup> At para 12 of the judgment.

<sup>700</sup> At para 12 of the judgment.

<sup>701</sup> At para 13 of the judgment.

<sup>702</sup> At para 16 of the judgment.

<sup>703</sup> At para 12 of the judgment.



untenable resulting in her resigning whilst on sick leave in order to access funds from the provident fund.<sup>704</sup> In a constructive dismissal dispute at the CCMA, the commissioner found that the employer through the conduct of Mr Abraham had caused the employment relationship to become intolerable, by his deliberate failure to uphold the employer's sick leave policy and his lack of compassion towards the employee.<sup>705</sup> The conduct of the employer resulted in the unfair dismissal of the employee who was awarded compensation in the amount equivalent to three months' salary which the employee earned at the time of her constructive dismissal, namely R102 000.00.<sup>706</sup> The employer's application for review of the award was dismissed by the LC which resulted in the employer appealing against the decision to the LAC.<sup>707</sup> The employer's grounds for appeal were the following:

- a. The LC ignored the fact that the employee held a senior managerial position and had had knowledge of the employer's sick leave policy;
- b. The CCMA had misinterpreted the sick leave policy which only authorised the CEO authority to approve extended sick leave and not the committee;
- c. The sole cause of the employee's anxiety and depression was her unsuccessful application for a promotion; and
- d. Although the employee was legally represented and the employer a lay person, the commissioner assisted the employee and unreasonably and unjustifiably criticised Mr Abraham.<sup>708</sup>

The LAC found that the employee's lack of compassionate treatment at the hands of the HR Manager, Mr Abraham, and financial loss suffered by the employee when she was only paid R1 000.00, was such that she was subjected to a psychological and traumatic degradation of her human dignity, taking into consideration the employee's senior management position.<sup>709</sup> The LAC also found it shameful and shocking that the employer, being an organ of state, chose to be represented by a lay person.<sup>710</sup> The LAC held that the employee's resignation was neither voluntary nor intended to terminate her employment relationship.<sup>711</sup> The appeal was dismissed with costs.<sup>712</sup>

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<sup>704</sup> At para 13 of the judgment.

<sup>705</sup> At para 16 of the judgment.

<sup>706</sup> At para 17 of the judgment.

<sup>707</sup> At para 21 of the judgment.

<sup>708</sup> At para 22 of the judgment.

<sup>709</sup> At para 42 of the judgment.

<sup>710</sup> At para 43 of the judgment.

<sup>711</sup> At para 43 of the judgment.

<sup>712</sup> At para 46 of the judgment.

The cost order against the employer served as a punitive measure for the lack of empathy and disdain on the part of the employer, and the finding of degradation to the employee's human dignity.

#### **4.4.4. Analysis**

These three cases show that the courts prize the dignity of employees with mental illness and expect compassion from employers. What is of concern is that the law, whilst morally concerned with compassion, is much more concerned with equality. Substantive equality requires that all employees are treated the same, but that those with challenges such as mental illness are provided with reasonable accommodations so they can fully participate in the workplace. The attitude of the employer in refusing the sick leave that the employee qualified for in the case of *Yona* was unlawful, regardless of the diagnosis of the employee. In instances where employees' diagnosis of mental illness is disclosed, there exists the real risk of stigma and discrimination against the employee which may result from ableism and sanism. As the case of *Marsland*, discussed above, shows, employees with mental illness may suffer from degrading and discriminatory attitudes of employers and experience bullying as a result of their illness.

#### **4.5 Employees dismissed for misconduct**

Five cases are analysed under this category.

##### **4.5.1 *Automobile Association of SA v Govender No & Others*<sup>713</sup>**

The employee worked for the Automobile Association of South Africa as a patrol man.<sup>714</sup> He was diagnosed with severe depression when his wife of eight years left him.<sup>715</sup> He was taking several medications for sinusitis and depression on a daily basis and the employer was aware of his predicament.<sup>716</sup> On 19 December 1998, the employee was on duty.<sup>717</sup> He attended a breakdown at Westville. His colleague, Mr Rudman communicated with him at around 16:00 and noticed that he sounded drowsy.<sup>718</sup> At 17:30, the employee telephoned his colleague and informed him that he was involved in a car accident with a bakkie.<sup>719</sup> He could not avoid the

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<sup>713</sup> (1999) 20 ILJ 2854 (LC).

<sup>714</sup> At para 1 of the judgment.

<sup>715</sup> At para 1 of the judgment.

<sup>716</sup> At para 1 of the judgment.

<sup>717</sup> At para 2 of the judgment.

<sup>718</sup> At para 2 of the judgment.

<sup>719</sup> At para 4 of the judgment.

collision because his reflexes were too slow.<sup>720</sup> The other vehicle was slightly damaged.<sup>721</sup> The employee was involved in an altercation with the driver of the other vehicle and he drew his firearm and threatened the driver.<sup>722</sup> When he reported for duty the following day, he could not remember what had happened the previous day.<sup>723</sup> He was admitted to hospital a day after the accident.<sup>724</sup> He was charged with misconduct for reckless and negligent driving, endangering the lives of members of the public, bringing the association into dispute, acting aggressively and pointing a firearm at another person whilst representing the association.<sup>725</sup> He was found guilty and dismissed.<sup>726</sup>

He referred an unfair dismissal dispute to the CCMA.<sup>727</sup> At arbitration, the employee could not remember much of what had transpired on the day of the accident.<sup>728</sup> Dr Lalla testified that the employee was treated for depression and migraines.<sup>729</sup> He said that depression and medication could result in memory loss.<sup>730</sup> He was referred to a psychiatrist, D. Hoosen, for his depressive condition.<sup>731</sup> The commissioner attributed some degree of negligence to the employee for driving whilst highly sedated.<sup>732</sup> He, however, substituted the sanction of dismissal with a final written warning.<sup>733</sup> The employee was reinstated but without retrospective effect.<sup>734</sup>

On review in the LC, Justice Landman concurred with the commissioner.<sup>735</sup> It found the employee to have lacked the necessary *mens rea* to commit the misconduct.<sup>736</sup> The sanction imposed by the commissioner was too lenient to prevent another disastrous incident. The commissioner failed to balance the interest of both parties when considering an appropriate sanction.<sup>737</sup> He remitted the matter to the bargaining council for the commissioner to consider

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<sup>720</sup> At para 4 of the judgment.

<sup>721</sup> At para 4 of the judgment.

<sup>722</sup> At para 5 of the judgment.

<sup>723</sup> At para 8 of the judgment.

<sup>724</sup> At para 11 of the judgment.

<sup>725</sup> At para 9 of the judgment.

<sup>726</sup> At para 10 of the judgment.

<sup>727</sup> At para 10 of the judgment.

<sup>728</sup> At para 11 of the judgment.

<sup>729</sup> At para 12 of the judgment.

<sup>730</sup> At para 13 of the judgment.

<sup>731</sup> At para 27 of the judgment.

<sup>732</sup> At para 15 of the judgment.

<sup>733</sup> At para 15 of the judgment.

<sup>734</sup> At para 15 of the judgment.

<sup>735</sup> At para 17 of the judgment.

<sup>736</sup> At para 17 of the judgment.

<sup>737</sup> At para 18 of the judgment.

either compensation or offering an alternative position for the employee which did not involve driving and interacting with members of the public.<sup>738</sup> The LC deemed it necessary to afford the employer an opportunity to investigate if it could reasonably accommodate the employee by offering him an alternative position which did not involve driving and interacting with members of the public. This case again was also handled as incapacity.

#### **4.5.2 MEC for the Department of Health, Western Cape v Weder; MEC for Department of Health, Western Cape v Democratic Nursing Association of SA obo Mangena<sup>739</sup>**

The LAC dealt with the two appeals at the same time because they had similar facts and were similar in nature.<sup>740</sup> The two employees worked for the Department of Health, Western Cape albeit in different positions.<sup>741</sup> They were both dismissed from work by operation of the law.<sup>742</sup> Section 17(3)(a)(i) of the Public Service Act, Proclamation 103 of 1994, provides that an employee other than an educator who absents himself without the permission of his head of department, office or institution for a period exceeding one calendar month, shall be deemed to have been dismissed from the public service on account of misconduct with effect from the date immediately succeeding his last day of attendance at his place of duty.<sup>743</sup> The employer has discretion to reinstate the dismissed employee in the public service to either his former position or any other position if the employee returns to work and shows good cause why he should be reinstated.<sup>744</sup> The employer's decision not to reinstate can only be reviewed by LC in terms of section 158(1)(h) of the LRA.<sup>745</sup>

Mr Weder was booked off sick in December 2009 after he was diagnosed with pulmonary tuberculosis, schizophrenia and major depression.<sup>746</sup> He submitted his medical certificate to the employee.<sup>747</sup> On 26 January 2010 he received a telegram from his employer requesting him to report to work to discuss his unauthorised absence.<sup>748</sup> He telephoned his employer and left a message with Sister Busi that he was off sick.<sup>749</sup> He received another telegram on 5

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<sup>738</sup> At para 19 of the judgment.

<sup>739</sup> (2014) 35 ILJ 2131 (LAC).

<sup>740</sup> At para 1 of the judgment.

<sup>741</sup> At para 1 of the judgment.

<sup>742</sup> At para 1 of the judgment.

<sup>743</sup> Section 17(3)(a)(i) of the Public Service Act.

<sup>744</sup> Section 17(3)(b) of the Public Service Act.

<sup>745</sup> At para 11 of the judgment.

<sup>746</sup> At para 5 of the judgment.

<sup>747</sup> At para 5 of the judgment.

<sup>748</sup> At para 6 of the judgment.

<sup>749</sup> At para 7 of the judgment.

February 2011 with the same message and to contact Ms Isaacs.<sup>750</sup> He again phoned the employer and left a message with Mr Simang that he was still off sick.<sup>751</sup> The employer denied receiving these telephone calls.<sup>752</sup> Mr Weder was dismissed from work on 11 February 2010, retrospectively from 21 January 2010.<sup>753</sup> On 8 February 2011, Mr Weder's union, DENOSA, made representations to the employer to reconsider its decision.<sup>754</sup> The representations provided reasons for the employee's absence and were accompanied by medical certificates indicating that the employee was sick at the time of his dismissal.<sup>755</sup> The employer was not satisfied with the explanation and confirmed the dismissal.<sup>756</sup>

The second employee in this case, Ms Mangena was initially booked off sick by Dr Bikitsha for the month of February 2010.<sup>757</sup> She was referred to a psychiatrist, Dr Fortuin, who diagnosed major depression and booked her off until 31 May 2010.<sup>758</sup> She received a letter on 19 March 2010 instructing her to return to work.<sup>759</sup> She phoned her employer on 23 March 2010 informing them that she was still booked off sick and thereafter faxed medical certificates for the attention of Sister Bazara, her supervisor.<sup>760</sup> When she did not receive her salary for the month of April, she phoned her workplace to make enquiries and was advised that she was dismissed.<sup>761</sup> She approached her Union, DENOSA, who made representations to the employer but the employer refused to reinstate her.<sup>762</sup>

DENOSA brought applications to review the MEC's decision in terms of section 158(1)(h) of the LRA in respect of both employees.<sup>763</sup> The LAC noted that the MEC's action was open to review in term of section 158 on the principle of legality.<sup>764</sup>

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<sup>750</sup> At para 7 of the judgment.

<sup>751</sup> At para 7 of the judgment.

<sup>752</sup> At para 7 of the judgment.

<sup>753</sup> At para 7 of the judgment.

<sup>754</sup> At para 8 of the judgment.

<sup>755</sup> At para 8 of the judgment.

<sup>756</sup> At para 10 of the judgment.

<sup>757</sup> At para 12 of the judgment.

<sup>758</sup> At para 12 of the judgment.

<sup>759</sup> At para 12 of the judgment.

<sup>760</sup> At para 12 of the judgment.

<sup>761</sup> At para 12 of the judgment.

<sup>762</sup> At para 12 of the judgment.

<sup>763</sup> At para 14 of the judgment.

<sup>764</sup> At para 33 of the judgment.

The LC interpreted the meaning of section 17(3)(b) of the Public Service Act to mean that unless the employer, having regard for the full conspectus of relevant facts and circumstance is satisfied that a continued relationship has been rendered intolerable by the employee's conduct, the employer should as a general rule approve the reinstatement of the employee.<sup>765</sup> A contrary finding would represent a breach of the employee's right to fair labour practices and the right to equality.<sup>766</sup> The requirements of legality prevented the employee from being helpless pursuant to an employer's arbitrary decision.<sup>767</sup>

It was common cause that both employees were sick and medical certificates were submitted as proof thereof. The court had difficulty in assessing the reasonableness of the dismissal and the decision not to reinstate, as the employer did not provide reasons.<sup>768</sup> The employer put too much emphasis on absence without authorisation without taking into consideration reasons provided by the union that the employees were sick.<sup>769</sup> The employees were reinstated retrospectively. The employer's appeal against the court *a quo* was dismissed by the LAC.<sup>770</sup> The LAC emphasised the employee's right to fair legal practices and the right to equality entrenched in the Constitution.<sup>771</sup> Both these employees were treated badly, ostensibly because the law required dismissal for unauthorised absence – yet proof of the sick leave required was provided.

#### **4.5.3 *Gangaram v MEC for the Department of Health, KwaZulu Natal & Another*<sup>772</sup>**

The employee sustained back injuries on duty and was unable to perform her operational duties.<sup>773</sup> She was offered alternative work and confined to office duties as recommended by her doctor.<sup>774</sup> In August 2010, she was instructed to perform her previous operational duties despite not having recovered from her injuries.<sup>775</sup> She was also diagnosed with major depression which exacerbated her chronic back pain.<sup>776</sup> She continuously submitted medical certificates indicating that she was under treatment and should avoid carrying heavy

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<sup>765</sup> At para 36 of the judgment.

<sup>766</sup> At para 37 of the judgment.

<sup>767</sup> At para 37 of the judgment.

<sup>768</sup> At para 41 of the judgment.

<sup>769</sup> At para 40 of the judgment.

<sup>770</sup> At para 43 of the judgment.

<sup>771</sup> At para 37 of the judgment.

<sup>772</sup> (2017) 38 *ILJ* 2261 (LAC).

<sup>773</sup> At para 3 of the judgment.

<sup>774</sup> At para 4 of the judgment.

<sup>775</sup> At para 6 of the judgment.

<sup>776</sup> At para 9 of the judgment.

objects.<sup>777</sup> She was offered the option of alternative work, which entailed a drop from salary level 10 to level 4 or to apply for medical boarding.<sup>778</sup> She was booked off sick for an extended period.<sup>779</sup> In August 2011, she received a letter that she had been terminated in terms of section 17(3)(a)(i) of the Public Service Act Proclamation 103 of 1994.<sup>780</sup> In terms of section 17(3)(a)(i), an employee who absents themselves from work without permission for a period exceeding one calendar month is deemed to have been dismissed from the public service on account of misconduct.<sup>781</sup> She referred an unfair dismissal dispute to the bargaining council, but the arbitrator upheld the employer's preliminary point that the employee was terminated by operation of law.<sup>782</sup> The employee made representations to the employer who failed to respond.<sup>783</sup> The employee made an application for review of the decision to dismiss in the LC.<sup>784</sup> The court dismissed the application on the basis that the employee had failed to place the employer on terms to take a decision following her representations.<sup>785</sup>

On appeal, the LAC noted that although the employee did not report for duty, there was uncontested evidence that she was sick with depression, and during her period of absence continued to submit medical certificates and sick leave applications which were accepted by the officials.<sup>786</sup> The LAC re-instated the employee retrospectively.<sup>787</sup>

#### **4.5.4 *Pharmaco Distribution (Pty) Ltd v EWN*<sup>788</sup>**

An employee, a pharmaceutical sales representative, was employed by Pharmaco Distribution on an indefinite basis under a written contract of employment.<sup>789</sup> The contract made provisions for medical examination of the employee if the employer deemed it necessary, which also applied to psychological evaluations.<sup>790</sup> Senior management officials were aware that the employee had a bipolar condition which was under the control of medication.<sup>791</sup>

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<sup>777</sup> At para 9 of the judgment.

<sup>778</sup> At para 10 of the judgment.

<sup>779</sup> At para 9 of the judgment.

<sup>780</sup> At para 13 of the judgment.

<sup>781</sup> Section 17(3)(a)(i) of the Public Service Act Proclamation 103 of 1994.

<sup>782</sup> At para 15 of the judgment.

<sup>783</sup> At para 17 of the judgment.

<sup>784</sup> At para 18 of the judgment.

<sup>785</sup> At para 23 of the judgment.

<sup>786</sup> At para 29 of the judgment.

<sup>787</sup> At para 32 of the judgment.

<sup>788</sup> (2017) 38 *ILJ* 2496 (LAC).

<sup>789</sup> At para 2 of the judgement.

<sup>790</sup> At para 7 of the judgment.

<sup>791</sup> At para 9 of the judgment.

From January to October 2009, the employee queried the calculation of her commission and late payments.<sup>792</sup> When the matter was not resolved, she lodged a grievance on 28 October 2009. On the same day the employee was charged with several acts of misconduct.<sup>793</sup> She was found guilty and given a final written warning.<sup>794</sup> Her appeal against the sanction was never entertained by management.<sup>795</sup> She was suspended on 18 November 2009 and handed a letter to subject herself to medical examination to assess her suitability for the position.<sup>796</sup> The employee's attorney wrote a letter to the employer recording that the instruction amounted to victimisation and requested the employer to withdraw the letter.<sup>797</sup> The employee did not attend the medical examination that was scheduled for 24 November 2009.<sup>798</sup> On 26 November the employee was charged with misconduct for failing to obey a lawful instruction.<sup>799</sup> She was found guilty and dismissed.<sup>800</sup>

The employer referred the matter to the LC.<sup>801</sup> The LC was required to determine the following issues:

- a. Whether the provisions in the employee's contract of employment requiring her to undergo medical testing were enforceable or void;
- b. Whether her dismissal for failing to submit to a medical examination on the employer's instructions was automatically unfair in terms of section 187(1)(f) of the LRA; and
- c. In the event her dismissal was not automatically unfair, whether it was substantively or procedurally unfair.<sup>802</sup>

The court found that the provisions in the employee's contract were void and unenforceable.<sup>803</sup> The employer could not establish to the satisfaction of the court that "medical facts or employment conditions" justified the medical testing.<sup>804</sup> The employee was subjected to medical examination because the employer knew that she had bipolar disorder which she

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<sup>792</sup> At para 4 of the judgment.

<sup>793</sup> At para 5 of the judgment.

<sup>794</sup> At para 6 of the judgment.

<sup>795</sup> At para 6 of the judgment.

<sup>796</sup> At para 6 of the judgment.

<sup>797</sup> At para 8 of the judgment.

<sup>798</sup> At para 10 of the judgment.

<sup>799</sup> At para 10 of the judgment.

<sup>800</sup> At para 10 of the judgment.

<sup>801</sup> At para 11 of the judgment.

<sup>802</sup> At para 12 of the judgment.

<sup>803</sup> At para 16 of the judgment.

<sup>804</sup> At para 17 of the judgment.



maintained was under control.<sup>805</sup> She would not have been asked to submit for medical examination and consequently dismissed if she did not have a bipolar disorder.<sup>806</sup> The court found that her bipolar condition led the employer to subject her to medical examination and consequently dismissal.<sup>807</sup> That in itself was unfair discrimination in terms of section 6 of the EEA.<sup>808</sup> Her refusal to submit to medical testing resulted in her dismissal for a prohibited reason in terms of section 187(1)(f) of the LRA.<sup>809</sup> The employee was awarded damages in the sum of R15 000 for unfair discrimination for singling her out for medical examination on account of her bipolar illness in terms of section 6 of the EEA.<sup>810</sup> R222 000.00 was awarded as compensation to her for the automatically unfair dismissal.<sup>811</sup>

The employer appealed against the decision of the LC, and the employee cross-appealed against its award of compensation and damages.<sup>812</sup> The LAC found that, based on the evidence, the employer would not have instructed the employee to undergo psychiatric assessment but for her bipolar illness, and would not have been dismissed.<sup>813</sup> It was satisfied that the LC found correctly that the employer's conduct amounted to unfair discrimination on the basis of a disability in terms of section 6 of the EEA and that the dismissal was automatically unfair in terms of section 187(1)(f) of the LRA.<sup>814</sup>

The LAC however noted that where claims are made both in terms of the LRA and the EEA and the court is satisfied that that the dismissal was based on unfair discrimination as provided for in the LRA, the court must ensure that the employer is not penalised twice for the same wrong.<sup>815</sup> To award both non-patrimonial damages and compensation to the employee for the same wrongful act would not be just and equitable.<sup>816</sup> It found that the LC erred in awarding the employee a *solatium* in the amount of R15 000.00 for impairment of her dignity as a result of unfair discrimination in terms of section 6 of the EEA.<sup>817</sup>

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<sup>805</sup> At para 16 of the judgment.

<sup>806</sup> At para 16 of the judgment.

<sup>807</sup> At para 16 of the judgment.

<sup>808</sup> At para 16 of the judgment.

<sup>809</sup> At para 16 of the judgment.

<sup>810</sup> At para 17 of the judgment.

<sup>811</sup> At para 19 of the judgment.

<sup>812</sup> At para 19 of the judgment.

<sup>813</sup> At para 17 of the judgment.

<sup>814</sup> At para 34 of the judgment.

<sup>815</sup> At para 49 of the judgment.

<sup>816</sup> At para 49 of the judgment.

<sup>817</sup> At para 49 of the judgment.

The LAC awarded R285 000.00 to the employee as compensation for her automatically unfair dismissal in terms of section 187(1)(f) of the LRA.<sup>818</sup> The court clearly pronounced that discrimination of an employee with bipolar condition constituted unfair discrimination on the basis of a disability in terms of section 6 of the EEA, particularly where the employee was singled out for medical testing purely because of her condition. The sanism implicit in the employers' attitudes can be identified in this case.

#### **4.5.5 *Jansen v Legal Aid SA*<sup>819</sup>**

The LC had to consider whether dismissal of an employee on the grounds of misconduct, where the employee had depression which had been made known to the employer, constituted an automatically unfair dismissal and unfair discrimination.<sup>820</sup> The employee, Mr Jansen, had been employed by Legal Aid South Africa as a paralegal since 2007.<sup>821</sup> He was an exemplary employee who received performance awards until 2010 when he was diagnosed with major depression.<sup>822</sup> He was referred to hospital for treatment and counselling.<sup>823</sup> He also requested his employer to refer him to the employee wellness programme and he also advised the employer about his personal and work problems which resulted in him being depressed.<sup>824</sup>

Mr Jansen's wife filed for divorce and when the employee attended a divorce court on 3 September 2012, he discovered that the manager and Justice Centre executive was representing his wife without having disclosed this to the employee as required by company policy.<sup>825</sup> This incident exacerbated the employee's mental condition, which resulted in him being referred to a clinical psychologist.<sup>826</sup> The employee tried to engage with the employer without any success.<sup>827</sup> His condition worsened and he absented himself from work for 17 days.<sup>828</sup> He was advised by the employer that the 17 days absence from work would be considered as unpaid leave, which caused further deterioration of the employee's condition.<sup>829</sup>

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<sup>818</sup> At para 51 of the judgment.

<sup>819</sup> (2018) 39 *ILJ* 2014 (LC).

<sup>820</sup> At para 1 of the judgment.

<sup>821</sup> At para 2 of the judgment.

<sup>822</sup> At para 9 of the judgment.

<sup>823</sup> At para 10 of the judgment.

<sup>824</sup> At paras 11 – 13 of the judgment.

<sup>825</sup> At para 14 of the judgment.

<sup>826</sup> At para 15 of the judgment.

<sup>827</sup> At para 16 of the judgment.

<sup>828</sup> At para 23 of the judgment.

<sup>829</sup> At para 23 of the judgment.

He lost control over himself and was acting erratically and out of character.<sup>830</sup> He stayed away from work from 11 October to 18 October 2013 and on 16 October 2010 consulted Dr van Wyk who diagnosed him with manic depression.<sup>831</sup>

On 7 November 2013, the employee was charged with unauthorised absenteeism, insolence and a refusal to obey lawful instruction.<sup>832</sup> During November and December 2013, the employee submitted medical reports from his psychiatrist.<sup>833</sup> The report recorded that his mental condition had not improved and that he was not coping with his work circumstances.<sup>834</sup> He showed symptoms of reactive depression and signs of burnout.<sup>835</sup> The psychiatrist recommended time off work.<sup>836</sup> The chairperson of the disciplinary hearing refused to accept the report.<sup>837</sup> The employee was eventually dismissed.<sup>838</sup> The employee referred the dispute to the LC as both an automatically unfair dismissal claim in terms of section 187(1)(f) of the LRA and an unfair discrimination claim under section 6 of the EEA.<sup>839</sup> In both disputes, the employee claimed that the employer unfairly discriminated against him on the ground of his disability.<sup>840</sup>

The LC had to decide the following legal issues:

- a. Whether the employee suffered from a disability within the meaning of section 187(1)(f) of the LRA and/or section 6 of the EEA;
- b. Alternatively, whether the employee's alleged mental condition was an analogous ground to one or more of the grounds listed in section 187(1)(f) of the LRA and/or section 6 of the EEA;
- c. Whether the employer unfairly discriminated against the employee on the grounds of disability or an analogous ground within the meaning of section 6 of the EEA; and

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<sup>830</sup> At para 26 of the judgment.

<sup>831</sup> At para 24 of the judgment.

<sup>832</sup> At para 27 of the judgment.

<sup>833</sup> At para 29 of the judgment.

<sup>834</sup> At para 29 of the judgment.

<sup>835</sup> At para 29 of the judgment.

<sup>836</sup> At para 29 of the judgment.

<sup>837</sup> At para 30 of the judgment.

<sup>838</sup> At para 32 of the judgment.

<sup>839</sup> At para 1 of the judgment.

<sup>840</sup> At para 1 of the judgment.

d. Whether the reason for the employee's dismissal was that the employer unfairly discriminated against the employee on the grounds of a disability and/or analogous arbitrary ground and, as such, whether the employee's dismissal was automatically unfair within the meaning of section 187(1)(f) of the LRA.<sup>841</sup>

The employer declined to give evidence and the court based its decision on the employee's evidence and witnesses.<sup>842</sup> The court was satisfied that the employee raised a credible possibility that the dominant reason for the dismissal was his mental condition; at the very least his condition played a significant role or influenced the decision to dismiss him.<sup>843</sup>

The employer was aware that the employee had a disability or reactive and manic depression.<sup>844</sup> The LC held that where an employer has knowledge that an employee has a disability, the employer is under a duty to reasonably accommodate the employee.<sup>845</sup> Instead of dismissing the employee for misconduct, the employer had a duty to institute an incapacity enquiry.<sup>846</sup> However, the court found that the employee's condition was not consistent with a definition of people with disabilities in terms of section 1 of the EEA.<sup>847</sup> Notwithstanding this, the court viewed it as instructive to refer to *New Way Motor & Diesel Engineering (Pty) Ltd v Marsland*,<sup>848</sup> where the LAC did not deem it necessary to decide whether the concept of disability, as set out as a ground in section 187(1)(f), described the condition suffered by the employee.<sup>849</sup> The LAC recognised depression as a form of mental illness.<sup>850</sup>

The LC found that the employee's conduct was linked to his mental condition.<sup>851</sup> It drew an inference that the reason for the employee's dismissal was because of his mental illness.<sup>852</sup> The dismissal was held to be automatically unfair and constituted unfair discrimination in terms of section 6 of the EEA.<sup>853</sup> The conduct of the employer had the potential to impair the

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<sup>841</sup> At para 57 of the judgment.

<sup>842</sup> At para 51 of the judgment.

<sup>843</sup> At para 53 of the judgment.

<sup>844</sup> At para 43 of the judgment.

<sup>845</sup> At para 43 of the judgment.

<sup>846</sup> At para 43 of the judgment.

<sup>847</sup> At para 44 of the judgment.

<sup>848</sup> (2009) 30 *ILJ* 2875 (LAC), at para 32.

<sup>849</sup> At para 45 of the judgment.

<sup>850</sup> At para 45 of the judgment.

<sup>851</sup> At para 50 of the judgment.

<sup>852</sup> At para 50 of the judgment.

<sup>853</sup> At para 59 of the judgment.

employee's human dignity.<sup>854</sup> The court expressed the basic principles applicable for determining whether or not a dismissal was automatically unfair.<sup>855</sup> A factual causation as well as a legal causation must be considered.<sup>856</sup> Factual causation asks whether the dismissal would have occurred if there was no disability.<sup>857</sup> Legal causation asks whether the disability was the most likely cause of dismissal.<sup>858</sup> Because the employer did not lead evidence in this case, it was possible for the employee to establish factual and legal causation between the disability and the dismissal.<sup>859</sup> The employer was ordered to reinstate the employee with full retrospective effect, to pay compensation equivalent to six months' salary and the employee's legal costs.<sup>860</sup> The court expressed doubts that the employee's condition was consistent with the definition of people with disabilities in terms of the EEA.<sup>861</sup> It, however, reached a conclusion that the employee was discriminated against on the basis of his disability, which was depression in this case.<sup>862</sup> The case serves as a warning to employers that they need to ensure that when they are dealing with an employee who has depression, dismissing the person because of their mental illness is not lawful.

#### **4.5.6. Analysis**

These five cases show that employers must consider what role the disclosed mental illnesses play in the alleged misconduct by employees and that dismissal of an employee with mental illness because of their diagnosis, and singling out for medical testing of an employee with mental illness is unlawful. Employers must be careful to attribute employees' behaviour to misconduct and initiate dismissal proceedings where mental illness is present that may require other steps to be taken first.

#### **4.6 Conclusion**

The two cases analysed (*Hendricks* and *Spero*)<sup>863</sup> in respect of employees with depression and decided before the current LRA indicate that courts treated depression as an incapacity. There were no proper guidelines on how to deal with these cases and they sought guidance

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<sup>854</sup> At para 46 of the judgment.

<sup>855</sup> At para 47 of the judgment.

<sup>856</sup> At para 47 of the judgment.

<sup>857</sup> At para 47 of the judgment.

<sup>858</sup> At para 47 of the judgment.

<sup>859</sup> At para 50 of the judgment.

<sup>860</sup> At para 68 of the judgment.

<sup>861</sup> At para 44 of the judgment.

<sup>862</sup> At para 68 of the judgment.

<sup>863</sup> Paragraphs 4.2.1 and 4.2.2 of the dissertation.

from international instruments, namely article 6 of the Convention 158 of 1982 and paragraph 5 of the ILO Recommendation 166 of 1982, which prohibit termination of employment as a result of a temporal illness or injury. The courts continued to treat depression as incapacity after the enactment of the LRA and the EEA, which came into effect in 1995 and 1998 respectively.<sup>864</sup> The court emphasised the principles as laid down in items 10 and 11 of schedule 8 to the LRA, which involve considering whether the employee is able to perform their work; if not capable, considering the extent to which the employee is able to perform the work, adapting the work circumstances to accommodate the employee and considering alternative work. Dismissal is considered the last resort in respect of employees who cannot be reasonably accommodated without causing unjustifiable hardship to the employer.

In *Transnet Rail Engineering v Mienies & Others*,<sup>865</sup> the court reached a different conclusion. The employee was dismissed for misconduct, but the LAC held that the employer should have treated the employee's conduct as poor performance with the emphasis that if employees display shortcomings in the performance of their duties, fairness requires that they should not only be informed of deficiencies in their performance, they should be given the opportunity to improve. The LAC acknowledged that depression was a mental illness in *Marsland v New Way Motor & Diesel Engineering*,<sup>866</sup> it was however reluctant to categorise it as a disability but rather as an analogous ground protected by section 187(1)(f) of the LRA.

*Pharmaco Distribution (Pty) Ltd v EWN*<sup>867</sup> is a move in the right direction in affording more protection to employees with depression who are not fully covered by the definition of people with disabilities in the EEA. The court clearly pronounced that discrimination against an employee with bipolar condition constituted unfair discrimination on the basis of a disability in terms of section 6 of the EEA. What is significant about this case is that the employee was on medication and her condition was under control, which is inconsistent with the finding in *IMATU & Another v City of Cape Town*,<sup>868</sup> where the LC rejected the argument that a

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<sup>864</sup> *Bennett and Mondipak; Rikhotso v MEC for Education; IMATU obo Strydom v Witzenburg; L S v Commissioner for Conciliation, Mediation & Arbitration & Others; Western Cape Education Department v General Public Service Sectoral Bargaining Council & Others; National Health Laboratory Service v Yona & Others; MEC for the Department of Health, Western Cape v Weder; MEC for Department of Health, Western Cape v Democratic Nursing Association of SA obo Mangena, Gangaram v MEC for Department of Health, kwaZulu Natal & Another and Automobile Association of SA v Govender No & Others.*

<sup>865</sup> 2015 36 ILJ 2605 (LAC).

<sup>866</sup> 2009 30 ILJ 2875 (LAC).

<sup>867</sup> 2017 38 ILJ 2496 (LAC).

<sup>868</sup> (2005) 26 ILJ 1404 (LC).

complainant who had diabetes that was controlled by medication management had a disability.<sup>869</sup>

In *Jansen v Legal Aid SA*,<sup>870</sup> the LC raised challenges with the definition of people with disabilities in the EEA conceding that the employee's condition was not consistent with the definition. It however found that depression is a form of a mental illness and ruled that the employee was both automatically dismissed and unfairly discriminated against on the basis of his disability. It went on to further state that the conduct of the employer had the potential to impair the employee's human dignity. The court, however, confused the process to be followed when dealing with an employee with a disability in the workplace. It suggested that the employer should have followed incapacity proceedings. This is inconsistent with the court's finding that depression was a mental illness and constituted a disability. The decisions reviewed indicate that South African courts have different approaches to depression, with most of them considering it as an incapacity issue. Although courts have not been consistent with their categorisation of depression, it is noted that it is increasingly acknowledged as a mental illness.

The difference in how courts categorise depression reveals that<sup>871</sup> there are no proper guidelines on how depression should be treated. There is also a problem with the definition of people with disabilities in the EEA. There is a need for the definition to be broken down in order to afford more protection to employees with depression. A distinction should be made between a disability which is protected under sections 6 of the EEA, and 187(1)(f) of the LRA and the definition intended for affirmative action measures. Ngwena advocates for a parity of disability "with other protected categories such as race, sex and gender in order to avoid anomalies in discrimination law".<sup>872</sup> A legal definition and interpretation should focus on the people who experience discrimination on the basis of disability to ensure fair treatment and promotion of human dignity.<sup>873</sup> The extent of the disability focus should be on the alleged conduct of the perpetrator rather than proving membership to the protected group.<sup>874</sup> There should be a difference between a disability interpretation for a rights-based treatment

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<sup>869</sup> At para 89 of the judgment.

<sup>870</sup> 2018 39 *ILJ* 2024 (LC).

<sup>871</sup> At para 43 of the judgement.

<sup>872</sup> Ngwena C (n 53 above), at page 117.

<sup>873</sup> Ngwena C (n 53 above) at page 123.

<sup>874</sup> Ngwena C (n 53 above) at page 124.

protected in terms of section 6 of the EEA and a disability for preferential treatment for affirmative action measures.<sup>875</sup> Adopting the definition of “people with disabilities’ without modification as the equivalent of “disability” in section 6 poses restrictions on the protected group against unfair discrimination as part of respecting the right to equality.<sup>876</sup> The narrow definition of disability also poses constraints to employees from requesting accommodation if unsure whether their disability will be covered.<sup>877</sup> Categorising depression as a disability will afford more substantial protection to employees against discrimination and dismissal.

In *L S v Commissioner for Conciliation, Mediation & Arbitration & Others*,<sup>878</sup> and *Transnet Rail Engineering v Minies & Others*,<sup>879</sup> the arbitrators failed to assess and consider the true reason for the employees’ poor performance, which was depression. This resulted in cases being categorised and dealt with as incapacity for poor work performance instead of being treated in terms of guidelines provided in item 10 of schedule 8. In *Marsland and Yona*,<sup>880</sup> where employees resigned as a result of intolerable treatment at the hands of the employer, the court made a finding that the conduct of the employer impaired the employees’ fundamental right to human dignity.

Section 17(3)(a)(1), Proclamation 103 of 1994 makes provisions for termination of service of a public service employee who absents themselves from work for a period of thirty days without permission. The LAC in *MEC for the Department of Health, Western v Weder; MEC for Department of Health, Western Cape v Democratic Nursing Association of SA obo Mangenga*<sup>881</sup> interpreted this section to mean that reinstatement of an employee should be approved unless the employer, after having considered all the relevant information, is satisfied that a continued relationship has been rendered intolerable by the employee’s conduct. Finding otherwise would be “a breach of the employee’s right to fair labour practices and the right to equality”.<sup>882</sup> The employees’ treatment was inconsistent with how other employees in similar situations were treated.

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<sup>875</sup> Ngwena C (n 53 above) at page 150.

<sup>876</sup> Ngwena C (n 53 above) at page 150.

<sup>877</sup> Holness H (n1 above), at page 528.

<sup>878</sup> (2014) 35 *ILJ* 2205 (LC).

<sup>879</sup> (2015) 36 *ILJ* 2605 (LAC).

<sup>880</sup> Paragraphs 4.4.1 and 4.4.3 of the dissertation above.

<sup>881</sup> (2014) 35 *ILJ* 2131 (LAC).

<sup>882</sup> At para 37 of the judgment.



The facts of most of the cases reviewed shows the sanism present in the employers' conduct; alternatively, they show that employers are confused or ignorant about the relevant procedures to follow where an employee with depression or similar mental illness performs poorly, is absent from work, or commits misconduct. In all of the twelve cases reviewed, the employees were successful in their claims for unfair dismissal, or unfair discrimination in two cases. The courts are sympathetic to the plight of employees with mental illness in the workplace and, by and large, referred to the relevant codes and guidelines for support for their conclusions. However, the legislation is still deficient in relation to the definition of "disability" which, if rectified, may assist employers to follow the correct procedures and provide the right support to employees with mental illness to ensure their full and equal participation in the workplace.

## CHAPTER 5

### CONCLUSION

#### 5.1 Introduction

The main objective of this research was to investigate the status of depression in the South African workplace law including legislative protection of employees with depression. The previous chapters provided information on international, regional, and domestic law and a review of relevant case law where employees with depression were terminated from the workplace. Referring to the purpose of the research and results discussed in the previous chapters, conclusions will be made which lead to recommendations.

#### 5.2 The influence of international and regional treaties

Chapter 2 considered international and African regional instruments on protection afforded to employees with disabilities in the workplace. South African courts are enjoined to recognise international instruments when interpreting any legislation. Such an obligation is entrenched in section 233 of the Constitution. Some of these instruments have been ratified and adopted by South Africa, which makes compliance mandatory. Pertinent cases reviewed in Chapter 2 of the research indicate that courts seek guidance from international instruments to determine fairness of dismissal of employees even though some of these instruments are not ratified by South Africa.<sup>883</sup> The courts' interpretation of fairness was consistent with international treaties. In *Spero v Elvey International (Pty) Ltd*,<sup>884</sup> the Industrial Court relied on article 6(1) of the Convention 158 of 1982 which prohibits dismissal of an employee for temporal absence from work as a result of an illness or injury. In *Mahlangu v CIM Deltak*,<sup>885</sup> the court referred to article 7 of the same convention which makes provisions for an employee's right to be heard before dismissal. *Avril Elizabeth Home for Mentally Handicapped v CCMA and Others*,<sup>886</sup> and *Sidumo & Another v Rustenburg Platinum Mines Ltd & Others*,<sup>887</sup> also made reference to an employee's right of appeal to an independent tribunal provided for in article 8 of the Convention to challenge an alleged unfair dismissal.

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<sup>883</sup> *Mahlangu, Gallant v CIM Deltak, Spero v Elvey International (Pty) Ltd, Avril Elizabeth Home for Mentally Handicapped v CCMA and Sidumo & Another v Rustenburg Platinum Mines Ltd & Others*.

<sup>884</sup> (1995) 16 ILJ 1210 (IC).

<sup>885</sup> (1986) 7 ILJ 346 (IC).

<sup>886</sup> (2006) 27 ILJ 1644 (LC).

<sup>887</sup> (2007) 28 ILJ 2405 (CC).

International law provides the basis for protection against discrimination of persons with disabilities, with the definition of what constitutes persons with disabilities and discrimination being imported into South African law for the most part. Definitions in African regional law, for the most part, resemble that of international instruments. Some of these documents provide clarity that persons with disabilities include people with mental impairment, thereby providing a basis for protection of employees with depression in the workplace. Consequently, it can be said that depression is a form of mental illness.

They also shed light about the prohibition of discrimination on a basis of a disability in all forms of employment, including retaining an employee at work who has a disability. They have made a significant contribution to the South African legislation and policy framework, and the management of disability and employment of persons with disabilities. The CRPD and the AfDP exclude the phrase “substantially limiting” in their definition of persons with disabilities. This exclusion has not been imported into domestic law. These instruments do not, however, provide insight into differences between dismissal for incapacity or disability.

### **5.3 South African legislative and policy framework**

Section 9 of the Constitution, known as the equality clause, prohibits unfair discrimination against any one or more of the listed grounds. Disability is one of the listed grounds which enjoys protection against discrimination. The right to equality and prohibition of unfair discrimination equally applies to persons with disabilities.<sup>888</sup>

Persons with disabilities enjoy the right to human dignity, which should be respected and protected.<sup>889</sup> For persons with disabilities, the right to inherent dignity is very important in the workplace, and in relations with colleagues and employers, because they sometimes find themselves to be victims of discrimination and suffer degrading treatment due to their disability.<sup>890</sup> This has been confirmed by courts in at least three judgements which have been explored in this study.<sup>891</sup>

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<sup>888</sup> Section 9 of the Constitution.

<sup>889</sup> Section 10 of the Constitution.

<sup>890</sup> *Marsland v New Way Motor & Diesel Engineering* (2009) 30 ILJ 2875 (LAC).

<sup>891</sup> *Marsland v New Way Motor & Diesel Engineering; National Health Laboratory Service v Yona & Others and Jansen v Legal Aid SA*.

The LRA makes provisions for the various categories of dismissal, namely incapacity, operational requirements and misconduct. There is a further breakdown of incapacity into two categories, namely: ill health or injury and poor work performance. Schedule 8 of the code of good practice provides guidelines of procedures to be followed in respect of these categories as outlined in Chapter 3 of this research. *Standard Bank of SA v CMMA* outlines in detail the process to be followed by employers in incapacity proceedings as a result of ill health or injury before an employee is terminated, which is in line with the guidelines provided for in items 10 and 11 of schedule 8 to the LRA. The process that should be followed in case of an employee with a disability is different from the incapacity procedure prescribed in schedule 8 as these two concepts are not synonymous. What seems to cause confusion is that the words “incapacity” and “disability” are used interchangeably in item 10 of schedule 8 which conflates these two concepts. The misconception about what constitutes a disability results in employers and the judiciary treating depression as an incapacity issue.

Section 187(1)(f) of the LRA protects employees against unfair discrimination in a dismissal where the ground for the dismissal is based upon, for an example, the employee’s disability. The dismissal is automatically unfair if the basis for such a dismissal is the employee’s disability. The constraint facing the duty to provide full protection for persons with disabilities or employees with depression in particular is the lack of an adequate definition of what constitute a disability protected by section 187(1)(f) of the LRA. Employers and courts utilise the definition of persons with disabilities provided for in the EEA, which complicates matters.

The enactment of the EEA was to bring about clarity on discrimination matters in the workplace. It seeks to eliminate discrimination in employment law and give effect to the obligations of South Africa as a member of the ILO. Disability is listed as a prohibited ground for discrimination. The definitions in the EEA and the disability code of persons with disabilities partly provide some solution by including mental impairment in the definition. However, this definition poses a problem if the disability is not substantially limiting; for example, if it is under control as result of medical intervention.<sup>892</sup>

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<sup>892</sup> In *Pharmaco Distribution (Pty) Ltd v EWN* (2017) 38 ILJ 2496 (LAC), the employee had bipolar disorder that was well managed with therapy and medication, at para 9 of the judgment.

Although the intention of the EEA was to bring about clarity in discrimination matters in the workplace, the legislation does not provide proper guidelines on the nature of the disability protected by section 6 of the EEA.

Ngwena is critical of how reasonable accommodation is framed in the EEA.<sup>893</sup> It causes distortion between accommodation and affirmative action which deserves distinction.<sup>894</sup> The purpose of the disability code is to provide guidelines to employers and employees with disabilities, including guidance on reasonable accommodation. It provides clarity when interpreting the EEA. It also describes what constitutes mental impairment and depression falls neatly into that definition. The code promotes retention of employees who become disabled during employment and recommends reasonable accommodation, either temporary or permanently, which includes providing alternative work, reduced work or flexible working hours after consultation with the employee.

Persons with disabilities are entitled to keep their disability status confidential; however, in cases of employees with depression it may be important for the employee to disclose their condition to the employer especially where accommodation is required, because depression is not self-evident.<sup>895</sup> Incapacity proceedings in terms of items 10 and 11 of schedule 8 of the LRA can be followed if it appears that an ill employee is not able to perform the job due to being incapacitated. The employer has an obligation to assist an employee who is either temporarily or permanently disabled to access employee benefits either through the Compensation for Occupational Injuries and Diseases Act or relevant employee benefit scheme.<sup>896</sup>

The TAG also provides guidance to employers, employees and unions for the promotion of equal opportunities and fair treatment of persons with disabilities in the workplace and provide examples for implementation. The TAG recommends termination of an employment relationship in terms of items 10 and 11 of schedule 8 of the LRA where the employer is unable to retain the employee who becomes disabled or who is no longer able to do the job. It advises

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<sup>893</sup> Ngwena C, '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(3) *Stellenbosch Law Review* 534-561, at page 536.

<sup>894</sup> Ngwena C (n 893 above), at page 536.

<sup>895</sup> Holness W (n 1 above), at pages 526 – 527.

<sup>896</sup> Compensation for Occupational Injuries and Diseases Act No. 130 of 1993.

employers to assist employees in accessing benefits in terms of the relevant prescripts. The White Paper on the Rights of Persons with Disabilities is a policy document applicable to government institutions, the judiciary, law and policymakers with the intention of accelerating transformation and redress in respect of inclusion, integration and equality for persons with disabilities. Domestic law and policy therefore make it clear that disability is a protected ground under the Constitution and legislation, but that persons with depression and similar mental illness face great difficulties in qualifying for such protection due to the definitions employed in the legislation and due to the harmful stereotypical attitudes and sanism they face from employers.

#### **5.4 The courts' perspective on the issue of depression**

While the courts have dealt with the issue of depression, it is argued that there is no adequate direction on whether depression is a disability or incapacity issue. As a result of this lacuna, it is not clear whether depression falls within the realm of disability deserving protection as afforded by various labour legislation. Additionally, the lack of clarity indicates that employers will continue to treat depression as an incapacity issue. In this context, in seven cases which have been explored in this study (*Hendricks v Mercantile & General Reinsurance Co of SA Ltd*,<sup>897</sup> *Spero v Elvey (Pty) Ltd*,<sup>898</sup> *Bennet and Mondipak*,<sup>899</sup> *Rikhotso v MEC for Education*,<sup>900</sup> *IMATU obo Strydom v Witzenburg Municipality*,<sup>901</sup> *Western Cape Education Department v General Public Service Sectoral Bargaining Council & Others*,<sup>902</sup> *National Health Laboratory Service v Yona & Others*,<sup>903</sup> *L S v Commissioner for Conciliation, Mediation & Arbitration & Others*<sup>904</sup> and *Automobile Association of SA v Govender No & Others*<sup>905</sup>), the court dealt with depression as an incapacity issue due to ill-health.

Although the court in *Transnet Rail Engineering v Mienies & Others*<sup>906</sup> did not refer to any guidelines in the LRA, it highlighted that if employees display shortcomings in the performance of their duties, fairness dictates that these employees should not only be informed that their

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<sup>897</sup> 1994 15 *ILJ* 304 (LAC).

<sup>898</sup> 1995 16 *ILJ* (IC).

<sup>899</sup> 2004 25 *ILJ* 583 (CCMA).

<sup>900</sup> 2004 25 *ILJ* 2385 (LC).

<sup>901</sup> 2012 33 *ILJ* 1081 (LAC).

<sup>902</sup> 2013 34 *ILJ* 2960 (LC).

<sup>903</sup> 2015 36 *ILJ* 2259 (LAC).

<sup>904</sup> 2014 35 *ILJ* 2205 (LC).

<sup>905</sup> 1999 20 *ILJ* 2854 (LC).

<sup>906</sup> 2015 36 *ILJ* 2605 (LAC).

performances are deficient and in what respect, but also that the employees should be given an opportunity to improve. The court's statement mirrors the guidelines in cases of dismissal for poor work performance provided for in item 9 of schedule 8 to the LRA. Section 17(3)(a)(i) of the Public Service Act, which makes provision for dismissal from the public service on account of misconduct by operation of the law if the employee absents himself or herself from work for a month without permission from the employer, resulted in absenteeism arising from depression being categorised and treated by court as misconduct due to absenteeism in three cases, *MEC for the Department of Health, Western Cape v Weder*, *MEC for Department of Health, Western Cape v Democratic Nursing Association of SA obo Mangena*<sup>907</sup> and *Gangaram v MEC for the Department of Health, KwaZulu Natal & Another*.<sup>908</sup> The court in *Marsland v New Way Motor & Diesel Engineering*<sup>909</sup> concluded that depression was a form of a mental illness. It did not make a finding in relation to the "disability" of the employee but rather the "health" status of the employee. It described this as an analogous ground protected by section 187(1)(f) of the LRA.

*Pharmaco Distribution (Pty) Ltd v EWN*<sup>910</sup> brought a different perspective to the norm followed in the other court decisions reviewed in Chapter 3 in relation to depression cases. The court clearly pronounced that dismissal of an employee with a bipolar condition constituted unfair discrimination on the basis of a disability in terms of section 6 of the EEA and an automatically unfair dismissal in terms section 187(1)(f) of the LRA. What is significant about this case was the fact that the employee's condition was under control, which is inconsistent with the part of the definition of people with disabilities in the EEA, which requires the condition to be substantially limiting.

In *Jansen v Legal Aid SA*,<sup>911</sup> the LC expressed challenges with the definition of people with disabilities in the EEA as it viewed the definition as not being consistent with the condition suffered by the employee. The court however concluded that the employee was a person with a disability and that depression was a form of a mental illness. The court further held that the dismissal of an employee who has a mental condition which the employer is aware of, in circumstances where the acts of misconduct are inextricably intertwined with the employee's

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<sup>907</sup> 2014 35 *ILJ* 2131 (LAC).

<sup>908</sup> 2017 38 *ILJ* 2261 (LAC).

<sup>909</sup> 2009 30 *ILJ* 2875 (LAC).

<sup>910</sup> 2017 38 *ILJ* 2496 (LAC).

<sup>911</sup> 2018 39 *ILJ* 2024 (LC).

mental condition, constitutes an automatically unfair dismissal in terms of section 187(1)(f) of the LRA and unfair discrimination in terms of section 6 of the EEA. Although the court viewed depression as a disability, it however suggested that the employer should have followed incapacity proceedings.

This decision highlights the challenges with the definition of people with disabilities in the EEA; lack of a definition of disability protected under both section 6 of the EEA and section 187(1)(f) of the LRA, and lack of proper guidelines to assist with distinguishing the difference between incapacity and disability. The words incapacity and disability appear to have been used interchangeably in the judgment, which resulted in the court reaching a conclusion that the employer should have followed incapacity proceedings.

Court decisions reviewed indicate that South African courts have different approaches to how they categorise dismissal cases of employees with depression. In most cases, depression is categorised as an incapacity issue. Although courts have not been consistent with their categorisation of depression, it is noted that it is increasingly acknowledged as a mental illness. The lack of consistency in how the judiciary categorises depression reveals that there are no proper guidelines on how depression should be treated. Consequently, employees are unlawfully dismissed and are not offered accommodation where relevant to ensure their full and equal participation in the workplace.

## **5.5 Depression as a disability**

The inconsistent categorisation of depression by courts creates uncertainty in employment law. The problem is further exacerbated by the interchangeable use of the words disability and incapacity in item 10 of schedule 8. The two concepts are distinct concepts which are subject to different employment law processes. It is evident from the case law discussed in Chapter 4 on the subject that there is still vagueness which clings to the issue of depression. The courts appear to have addressed the issue of depression as an incapacity or ill-health. The manner in which depression is currently dealt with by employers and the judiciary is unsatisfactory as it strips employees with depression of protection against unfair discrimination afforded by the Constitution, the EEA and the LRA.

The EEA and the disability code both described people with disabilities as people who have long-term or recurring physical impairment which *substantially limit* their prospects of entry



into, or advancement in employment. With the exception of substantial limitation, this definition is in harmony with some international instruments dealing with disability. Courts have accepted and acknowledged that depression is a form of mental illness, also known as a psychosocial illness. Depression affects cognitive functioning such as decision-making, concentration, memory and problem-solving abilities. Depression has protection that is afforded to people with disabilities as it is a mental illness. However, there are challenges with the definition of people with disabilities as described in the EEA and highlighted by various authors and illustrated by the courts, which results in employees with depression not being afforded full protection of employment laws afforded to people with disabilities. Ngwena argues that the definition in the EEA is intended for affirmative action measures in terms of Chapter III of the EEA.<sup>912</sup> Because of the stigma attached to a mental illness, depression is one of those illnesses which is subjected to social oppression. Other people may view a person with depression as having a disability despite taking ameliorating medication, and they may be susceptible to discrimination in the workplace. The difficulty with the definition is further complicated by the lack of a definition of what constitute a disability that is protected under section 187(1)(f) of the LRA against automatically unfair dismissal. Although the LRA provides definitions of some items in section 213 of the Act, there is no definition for disability. Disclosure and consequent provision of reasonable accommodation to employees with psychosocial illnesses is difficult because these illnesses are not obvious, and due to the fear of disclosure also associated with fear of stigmatisation and discrimination.<sup>913</sup> However, the cases analysed in Chapter 4, show that in those instances the employers were aware that the employees they dismissed had depression. The employers however failed to provide reasonable accommodation as required under the EEA and the Disability Code.

It is not only the private sector which perpetrates unfair discrimination against employees with depression, but government departments are also guilty of the same as noted in case law discussed in Chapter 4. In nine of these cases, the employers were either government departments, parastatals or municipalities. Seven employers were in the private sector, mostly large companies who are financially sound. None of the employers had raised unjustifiable hardship as a defence for failure to accommodate the employees. Unjustifiable hardship is the

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<sup>912</sup> Ngwena C (n 53 above), at page 150.

<sup>913</sup> Holness W (n 1 above), at page 527.

threshold at which the employers are relieved of their obligation to accommodate disabled employees. This mean the threshold could have been higher for these employers.

The revised disability code issued in 2015 is an improvement on the 2002 code. It makes provision for a definition of discrimination on the basis of disability, which is currently not in the EEA. It describes it as any distinction, exclusion or restriction on the basis of disability which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise, on equal basis with others, of all human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field. It includes all forms of discrimination, including denial of reasonable accommodation.<sup>914</sup> The definition is identical to the definition in the White Paper on the Rights of Persons with disabilities also issued in 2015. This definition is in line with the CRPD and the AfDP and excludes the substantial limitation phrase contained in the EEA. Denial of reasonable accommodation also constitutes discrimination. This is more relevant where the disability does not impact on the employee's ability to perform the essential functions of the job; if the disability for example, is under control as a result of medical intervention. Discrimination against an employee on the basis of a disability as evident in this definition should be construed as a ground protected under section 6 of the EEA and section 187(1)(f) of the LRA. Depression also falls neatly into the definition of mental impairment described in clause 5.3.1(b) of the Code of Good Practice on Employment of Persons with Disabilities as it is a clinically recognised condition or illness which affects a person's thought processes, judgement or emotions.

The disability code does not have the status of legislation, and as such various stakeholders will continue to rely on the definition of people with disabilities provided for in the EEA when interpreting protection against discrimination in terms of sections 6 of the EEA and 187(1)(f) of the LRA. Although the legislative framework provides guidelines and protection for employees with disabilities to enforce their rights, it appears that there are grey areas in the way the courts categorise depression, which necessities the legislature to address the issue. *Jansen* and *Pharmaco* judgments set an important precedent for enforcing the rights of employees with depression in asserting their rights and with meaningful remedies. It remains to be seen if the judiciary will follow suit in similar cases.

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<sup>914</sup> Clause 5.1, Code of Good Practice on Employment of Persons with Disabilities, 9 November 2015.

What makes it difficult to have a consistent approach is the fact that claims are brought under different legislation and based on different categories (disability, incapacity, poor performance, etc.). Until disability specific legislation is enacted, the courts will be central in interpreting and deliberating on the categorisation of the issue of depression in the workplace. The United States of America is one of the most progressive jurisdictions in addressing disability in the workplace. The Americans with Disabilities Act (ADA) was specifically enacted to address employees with disabilities in the workplace. The substantial limitation aspect was removed from the ADA in 2008 as a result of criticism by disability rights theorists and advocates.<sup>915</sup> This criticism was due to the exclusionary impact of the threshold requirement under the ADA and the restrictive interpretation given to ADA by the Supreme Court of Appeal.<sup>916</sup> Consideration within the South African labour and disability context is needed in drafting relevant disability specific legislation. Careful consideration of the “substantial limitation” aspect is needed.

## 5.6 Recommendations

The following recommendations are made in the study:

South Africa would benefit from disability specific legislation which should make provision for depression to be recognised as a disability where relevant. This will provide more protection against unfair dismissal for employees with depression and provide them with legislated guidelines to assert their rights with confidence knowing that their rights are protected by legislation. The Constitution, LRA, EEA, Disability Code, TAG and the WPRPWD are very useful but are not currently sufficient safeguards to enforce the rights of employees with depression in the workplace. The judgments reviewed demonstrate that these legislative and policy instruments are hardly used by courts when adjudicating cases of depression in the workplace. None of the judgments relied on TAG and the WPRPWD as guidelines. Most judgments relied on the Constitution, LRA, EEA and the Disability Code.

Disability legislation will assist employers and provide guidelines on how to deal with employees with depression in the workplace, especially when a need arises to prove reasonable accommodation. Cases reviewed indicate that when employees become depressed, employers either initiate incapacity proceedings as a result of ill-health or poor

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<sup>915</sup> Ngwena C, ‘Developing juridical method for overcoming subordination in disablism: the place of transformative epistemologies’ (2014) 30(2) *South African Journal on Human Rights* 275-312, at pages 288-289.

<sup>916</sup> Ngwena (n 915 above), at pages 288-289.

work performance proceedings, initiate disciplinary proceedings against employee or advise employees to apply to be medically boarded. The temporary nature of impairment from mental illness is also not understood by employers – that an employee can recover from an episode of mental illness and return to work (with accommodations where needed).

The judiciary also needs definite legislation and proper guidelines on how to treat cases of employees with depression which are referred to court and other dispute resolution tribunals like the CCMA. The case law reviewed indicates that courts have different approaches to depression, with most of the decisions categorising it as an incapacity issue. The definition of persons with disabilities must be redrafted to ensure that terms are clarified and that categories and levels of disability are included in the definition. In addition, there is a need for the development of a specific policy on reasonable accommodation to address shortcomings in the legislation including mental illness, reduced functional capacity for each disability, as well as job accommodation measures. A clear distinction should be made between discrimination on the basis of a disability which is protected under section 6 of the EEA and section 187(1)(f) of the LRA and a disability for the purposes of providing reasonable accommodation and for affirmative action measures. A definition of a disability for the purpose of sections 6 of the EEA and 187(1)(f) of the LRA should place an emphasis on the social oppression (stigma) experienced by persons with disabilities. Social oppression is an important cause for disability. It is of utmost importance that a distinction be made between the different beneficiary groups, such as affirmative action, protection against discrimination, service delivery, reasonable accommodation, support measures and social security, and should be treated in these specific contexts when defining persons with disabilities.

There is a need to create awareness of the legislative and policy frameworks for both employers and employees – private and public. Employers and employees need to be educated about the reality of depression and its effects in the workplace through campaigns and workshops with the intention of eliminating the stigma attached to mental illness and forging pathways to obtain accommodations which are clearer and more accepted. It is important that an attitudinal change towards employees with depression must be brought about, to be expressed in legislation as the recognition of human rights and dignity by reasonably accommodating them in the workplace in order to do away with sanism.

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