



# The fairness of dismissals for misconduct arising from mental illness in South Africa

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## ABSTRACT

South African employers face complex challenges in managing employees with mental health conditions, particularly due to limited dedicated legislation. The legal framework protecting employees with mental health conditions is primarily governed by the *Constitution of the Republic of South Africa, 1996*, *Labour Relations Act 66 of 1995 (LRA)*, *Employment Equity Act 55 of 1998*, and various codes of practice and guidelines. These collectively establish comprehensive protections against discrimination and unfair dismissal.

The LRA mandates that all dismissals must meet both substantive and procedural fairness requirements. This becomes particularly sophisticated in cases involving mental illness, where employers must carefully balance organisational needs with employee rights. The Code of Good Practice: Dismissal specifically requires consideration of employees' health and personal circumstances when evaluating the fairness of dismissal decisions.

Key legal precedents, including *New Way Motor & Diesel Engineering v Marsland and Jansen v Legal Aid South Africa*, have established that employers must adopt a compassionate and holistic approach when addressing misconduct related to mental illness. This approach is endorsed in the case of *Spero v Elvey International (Pty) Ltd*<sup>1</sup> and requires employers to consider reasonable accommodations before resorting to dismissal, though they may cite unjustified hardship as a limitation to such accommodations.

The current framework emphasises a social model of disability, recognising that disabilities are often created or exacerbated by social environment rather than solely by physical or mental impairments. This perspective requires employers to evaluate both the workplace environment and individual circumstances when managing mental health-related issues, ensuring fair treatment while maintaining operational effectiveness.

To understand said obligations, the research uses a desk-top method of research literature published through secondary sources that include articles in journals, academic books, web publications as well as those from primary sources such as legislation, case laws and international conventions. The research will employ a case study methodology to conduct a

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<sup>1</sup> *Spero v Elvey International (Pty) Ltd* 1995 16 ILJ 1210 (IC).

comprehensive analysis of dismissal practices related to mental health-induced misconduct in South African workplaces.

**KEYWORDS:** Dismissal; misconduct; mental illness; fairness.

## **LIST OF ABBREVIATIONS**

CCMA	Commission for Conciliation, Mediation and Arbitration
CMHAP	Comprehensive Mental Health Action Plan
CRPD	Convention on the Rights of Persons with Disabilities
ESCR	Economic, social and cultural rights
EEA	Employment Equity Act
CESCR	Covenant on Economic, Social and Cultural Rights
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICD-11	International Classification of Diseases 11th revision
ILC	International Labour Conference
ILO	International Labour Organization
LAC	Labour Appeal Court
LC	Labour Court
LRA	Labour Relations Act 66 of 1995
WHODAS	Manual for WHO Disability Assessment Schedule
OPCRDP	Optional Protocol on Convention on the Rights of Persons with Disabilities
PEJ	Potchefstroom Electronic Journal
PER	Potchefstroom Electronic Resources
SAHRC	South African Human Rights Commission
TAC	Technical Assistance Guideline
UN	United Nations
UNDHR	United Nations Declaration of Human Rights

UNESCO	United Nations Educational, Scientific and Cultural Organisation
VRE	Vocational Rehabilitation and Employment
VS	Vulnerable societies
WHO	World Health Organization

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## **CHAPTER 1: Introduction**

### ***1.1 Introduction***

South Africa has one of the most celebrated constitutions with a comprehensive Bill of Rights. The provisions of the Bill of Rights have created new possibilities, such as equal protections for all human rights and the requirement not to discriminate anyone based on listed grounds. Human dignity, equality and freedom form the foundational values of the *Constitution of the Republic of South Africa, 1996* (hereinafter “the Constitution”). The combination of mental illness and workplace misconduct presents one of the most complex challenges in South African labour law, particularly concerning the fairness of dismissals in a manner that aligns with foundational values of the Constitution. Employers face a delicate balancing act: they must manage workplace discipline and workplace efficiency while being sensitive to mental health issues to avoid unfair dismissals and discrimination claims. This complexity is further heightened by the invisible nature of mental illness and the potential for its misuse in disciplinary contexts.

Mental illness can be characterised as a health condition that affects a person's thinking, feelings, behaviour, and ability to function in daily activities, including work performance. In the workplace context, mental illness becomes relevant as a disability when it creates substantial limitations on an employee's capacity to perform essential job functions or participate fully in the work environment. Under South African law, particularly the *Employment Equity Act 55 of 1998* (hereinafter *EEA*), mental illness qualifies as a disability when it meets three key criteria: (1) it represents a long-term or recurring mental impairment, (2) the impairment substantially limits the person's prospects of entry into or advancement in employment, and (3) it affects workplace functionality in a meaningful way.

The challenge to mental illness is illustrated in recent jurisprudence, particularly the landmark case *Legal Aid South Africa*<sup>2</sup> (hereinafter *Legal Aid*) where the Labour Appeal Court (hereinafter LAC) had to grapple with the complicated relationship

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<sup>2</sup> *Legal Aid South Africa v Jansen* 2020 41 ILJ 2580 (LAC).

between depression as a form of mental illness and workplace misconduct. This case highlighted a critical distinction: when mental illness impairs an employee's cognitive and conative abilities to the extent that they cannot appreciate the wrongfulness of their conduct, dismissal for misconduct becomes substantively unfair.<sup>3</sup> Instead, such cases should be approached from an incapacity or operational requirements perspective.

The *EEA* mandates reasonable accommodation for employees with disabilities, including mental illness. However, this requirement presents practical challenges for employers, particularly given the unpredictable nature and duration of mental health conditions. The concept of reasonable accommodation for mentally ill persons remains largely untested in South African courts, creating uncertainty for both employers and employees about their respective rights and obligations. Complexity arises from the burden of proof in these cases. Employees must not only disclose their mental illness but also demonstrate how it affects their workplace conduct.<sup>4</sup>

This creates a particular challenge in cases where employees must prove that their actions were wholly or partially beyond their control due to mental incapacity. Simultaneously, employers face the challenge of determining whether prolonged absences or misconduct are genuine manifestations of mental illness or potential attempts to avoid disciplinary action.<sup>5</sup> The financial and operational implications for employers may become substantial. Employers may face production losses due to absent employees while bearing the cost of both the absent employee and temporary replacements. Moreover, the unpredictability of mental illness recovery periods adds another layer of complexity to workforce planning and accommodation strategies.

This dissertation examines these multi-layered challenges in the South African labour law context. It aims to analyse the current legal framework's adequacy in addressing cases where mental illness intersects with workplace misconduct, focusing

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<sup>3</sup> Legal Aid para 42.

<sup>4</sup> Gresse and Gresse 2024 *PER / PELJ* 7.

<sup>5</sup> James 2004 *Legal Studies* 24(4):532.

particularly on the fairness of dismissals in such situations. By examining relevant case law, statutory requirements, and practical workplace challenges, this study aims to contribute to a more refined understanding of how to balance employee rights with employer obligations in cases involving mental health-related misconduct.

## **1.2 Problem Statement**

When mental illness and workplace misconduct coincide, it becomes a complex challenge in South African labour law, particularly regarding the fairness of dismissals. While the *Labour Relations Act* 66 of 1995 (hereinafter *LRA*) provides strong protection against unfair dismissals, there remains significant ambiguity in cases where employee misconduct is directly linked to or influenced by mental illness. This creates a legal and ethical tension between an employer's right to maintain workplace discipline and their duty to accommodate employees with mental health conditions under the *EEA*. Current legal philosophy suggests that employers must consider mental illness as a potential mitigating factor in misconduct cases, yet there are no clear guidelines for balancing these competing interests.<sup>6</sup> The challenge is further complicated by various factors such as the difficulty in establishing direct causation between mental illness and specific instances of misconduct, the varying degrees of employer awareness of employees' mental health conditions, the overlap between incapacity procedures and misconduct procedures, the inconsistent application of reasonable accommodation principles in misconduct cases and the stigma and discrimination surrounding mental health in the workplace.<sup>7</sup>

In the matter of *Jansen v Legal Aid South Africa*, the Labour Court (hereinafter LC) had to decide whether the employer's decision to dismiss Mr Jansen, who was struggling with depression and was constantly absent from work as a result, was fair and whether misconduct could be sited as the reason for the dismissal.<sup>8</sup> Mr Jansen argued that his behaviour was a result of his deteriorating mental health. His

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<sup>6</sup> Gresse and Mbaio 2020 *Law Democracy & Development* 112.

<sup>7</sup> Gresse and Mbaio 2020 *Law Democracy & Development* 130; See related discussion by Gresse and Gresse 2024 *PER / PELJ* 8,9.

<sup>8</sup> *Jansen v Legal Aid South Africa* 2018 39 ILJ 2024 (LC) para 12 (hereinafter *Jansen*).

employment with Legal Aid South Africa commenced on 2 March 2007.<sup>9</sup> In 2010, Mr Jansen was diagnosed with depression, combined with high anxiety.<sup>10</sup> Over the following years, Mr. Jansen was absent from work on numerous occasions, which he ascribed to his depression.<sup>11</sup>

Due to repeated unauthorised absence, Mr. Jansen was charged with being absent for 17 days, thus breaching his employer's policy.<sup>12</sup> As his condition deteriorated, he continued to be absent from work without following his employer's leave policy.<sup>13</sup> Mr. Jansen did not challenge the claim. He justified his actions based on his deteriorating mental health.<sup>14</sup> However, Legal Aid South Africa dismissed him. Mr. Jansen challenged the fairness of the dismissal on two grounds.<sup>15</sup> Firstly, he argued that it was unfair in that he was discriminated against on the grounds of disability in terms of section 187(1)(f) of the *LRA* and argued it to be an unfair discrimination matter in terms of section 6 of the *EEA*.<sup>16</sup> The LC found that Mr Jansen had proven a *prima facie* case and held that he was unfairly discriminated against.<sup>17</sup>

Legal Aid South Africa appealed the decision to the LAC. The LAC took into consideration that even though Mr Jansen had admitted to the transgressions, he maintained that his behaviour was a direct result of the depression. The depression, he argued, hindered his ability to conduct himself in such a manner that he could appreciate the wrongfulness of his behaviour, which consequently affected his self-control.<sup>18</sup> The LAC confirmed that incapacitating depression is a form of illness that places a duty on the employer to implement the procedures set out in items 10 and 11 of the Code of Good Practice: Dismissal.<sup>19</sup>

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<sup>9</sup> *Jansen* para 2.

<sup>10</sup> *Jansen* para 9.

<sup>11</sup> *Jansen* para 23.

<sup>12</sup> *Jansen* para 27.

<sup>13</sup> *Jansen* para 29.

<sup>14</sup> *Jansen* para 30.

<sup>15</sup> *Jansen* para 1.

<sup>16</sup> Section 6 of the *EEA*.

<sup>17</sup> *Jansen* para 59.

<sup>18</sup> *Legal Aid South Africa v Jansen* 2020 41 ILJ 2580 (LAC) para 39. (hereinafter *Legal aid*).

<sup>19</sup> *Jansen* para 50.

The LAC held that dismissal for reasons of misconduct would be inappropriate and substantively unfair if it is established that an employee's depression affected his intellectual ability and his intention, resulting in him being unable to acknowledge the wrongfulness of his conduct or to conduct himself with an appreciation of wrongfulness.<sup>20</sup> Instead, the employer ought to deal with the issue from an incapacity or operational requirements perspective.<sup>21</sup> Conversely, it can also be a mitigating factor if an employee's depression does not impede on their cognitive and conative abilities.<sup>22</sup> Their depression may, nevertheless, diminish their culpability.<sup>23</sup>

The LAC has established that while employers bear the overall onus of proving fair dismissal, an employee who invokes mental incapacity as a defence must adduce evidence demonstrating their inability to distinguish between right and wrong.<sup>24</sup> The *EEA* requires employers to take measures for employees to be reasonably accommodated in the workplace,<sup>25</sup> but employers may find it hard to accommodate mentally ill employees in the workplace.<sup>26</sup> Section 1 of the *EEA* defines reasonable accommodation as "any modification or adjustment to a job or to the working environment that will enable a person from a designated group to have access to or participate or advance in employment". Notably, people living with disabilities fall under the definition of designated groups.<sup>27</sup> Reasonable accommodation for mentally ill persons is yet to be robustly evaluated by the South African court system. Only when it is tried, will a clearer picture emerge on what reasonable accommodation under these circumstances would entail.<sup>28</sup>

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<sup>20</sup> *Legal Aid* para 42.

<sup>21</sup> *Legal Aid* para 42.

<sup>22</sup> *Legal Aid* para 42.

<sup>23</sup> Gresse and Gresse 2024 *PER / PELJ* 10.

<sup>24</sup> *Legal Aid* para 43.

<sup>25</sup> Section 15 of the *EEA*.

<sup>26</sup> Bernard 2014 *PER / PELJ* 2882, 2883; see related discussion by De Lorenzo 2013 *Employee Responsibilities and Rights Journal* 230 where it is mentioned that employees with mental illness pose a risk to themselves and others within the workplace.

<sup>27</sup> Section 1(e) of the *EEA* defines designated groups as black people, women and people with disabilities.

<sup>28</sup> Marumoagae 2012 *PER / PELJ* 351; see related discussion on what constitute reasonable accommodation by Ndou M 2020 *Orbiter* 544-545.

An employer cannot be expected to reasonably accommodate a mentally ill employee in the workplace if the employee has not disclosed their mental illness to the employer, since mental illness is, for the most part, seen as an invisible disability.<sup>29</sup> According to Bernard,<sup>30</sup> although a burden is imposed on an employer to offer reasonable accommodation, such accommodation does not mean accommodation at all costs and to the detriment of the employer's business. Depending on the circumstances of each employer's resources,<sup>31</sup> it must be understood from Bernard that reasonable accommodation means accommodation within the employer's means and capabilities.

The unpredictable nature, duration, and recurring characteristics of mental illnesses can impose unjustified hardship on employers, particularly given the difficulty of determining recovery timelines. This research raises a fundamental question about the evidentiary burden employees face with mental illness during dismissal inquiries: specifically, their ability to establish that their actions were influenced or determined by their mental health condition. This research addresses two critical questions: first, whether employees who disclose mental illness can effectively demonstrate reduced culpability due to their condition, warranting alternative measures before dismissal; and second, under what circumstances, if any, dismissal for misconduct would be fair when poor mental health is a contributing factor.

### **1.3            *Background***

Mental illness is a phenomenon that is seldom understood in the workplace, especially by those who manage staff at the plant level and who has the power to terminate an employee's services.<sup>32</sup> Mental illness in the South African workplace has seen little attention and regulation in the past, but progress has been made to recognise and appreciate it.<sup>33</sup> Travis describes mental illness as a condition that

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<sup>29</sup> Nxumalo 2018 *ILJ* 1436.

<sup>30</sup> Bernard 2014 *PER / PELJ* 2880; see also *Kievits Kroon Country Estate (Pty) Ltd v Mmoledi* 2012 11 *BLLR* 1099 (LAC) para 26 where the issue of reasonable accommodation was emphasised.

<sup>31</sup> Resources may include finance, equipment, facilities, technology and time.

<sup>32</sup> De Lorenzo 2013 *Employee Responsibilities and Rights Journal* 220.

<sup>33</sup> Swanepoel 2011 *PER/ PELJ* 2,3; See related discussion on Basson 2017 *PER/ PELJ* 1.

includes anxiety disorder, post-traumatic stress disorder, alcohol dependency and schizophrenia.<sup>34</sup> What is trite, is that mental illness is rarely recognisable by third parties who do not understand or know the signs of these conditions.

On the international stage, mental illness is recognised and granted protection by several international law organisations, such as the World Health Organization (hereinafter the WHO),<sup>35</sup> the United Nations (hereinafter the UN),<sup>36</sup> and the International Labour Organization (hereinafter the ILO).<sup>37</sup> The WHO was established in 1948 and, as a UN partner, is aimed at keeping the world safe by ensuring all people enjoy the best possible health.<sup>38</sup> Amplifying this commitment, the WHO has been hard at work to promote and protect mental health at work by establishing initiatives for work-related mental illness.<sup>39</sup> Some of these initiatives include the Comprehensive Mental Health Action Plan 2013–2030 (hereinafter CMHAP), which calls for countries to promote and support decent working conditions while calling for fair treatment of people with mental health conditions to meaningfully engage in work activities.<sup>40</sup>

The ILO, being a body consisting of governments, workers' organisations and employers' organisations,<sup>41</sup> was founded in 1919 with its main aim being to maintain social justice and to protect employee's rights and interests, including the right to be treated fairly, not to be unfairly discriminated against, and not to be unfairly dismissed.<sup>42</sup> Similarly, the UN *Convention on the Rights of Persons with Disabilities* (hereinafter CRPD) compliments the ILO on the right of persons with disabilities not to be unfairly discriminated against, since it also recognises that persons with

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<sup>34</sup> Travis 2006 *GPSolo* 39.

<sup>35</sup> WHO date unknown <https://www.who.int/about/>.

<sup>36</sup> *United Nations Convention on the Rights of Persons with Disabilities* (CRPD) 2007.

<sup>37</sup> *Discrimination (Employment and Occupation) Convention*, 1958, the *Termination of Employment Convention*, 1982, the *Vocational Rehabilitation and Employment (Disabled Persons) Convention*, 1983, *The Code of Good Practice on Managing Disability in the Workplace Convention*, 2001 are instruments of the ILO in which parties suffering from mental illness are protected.

<sup>38</sup> World Health Organisation 2022 <https://www.who.int/about>.

<sup>39</sup> WHO 2022 <https://www.who.int/publications/i/item/9789240049338>.

<sup>40</sup> WHO 2022 <https://www.who.int/publications/i/item/9789240049338>.

<sup>41</sup> International Labour Organisation date unknown <https://www.ilo.org/global/about-the-ilo/>.

<sup>42</sup> Cholewinski 2020 *International Journal of Law in Context* 304.

disabilities have the right to the enjoyment of the highest attainable standard of health without discrimination based on their disability.<sup>43</sup>

The CRPD plays an important role in the protection of people with mental illness,<sup>44</sup> and this is demonstrated by the incorporation of mental impairments when describing disabilities.<sup>45</sup> Additionally, the *Covenant on Economic, Social and Cultural Rights*<sup>46</sup> (hereinafter the CESCR) guarantees the enjoyment of economic, social, and cultural rights, which include, among other things, fair conditions of work<sup>47</sup> and the highest attainable standard of health.<sup>48</sup> In the South African context, the EEA protects persons with disabilities, including those with mental illness, against discrimination.<sup>49</sup> The *Code of Good Practice on Employing People with Disabilities*<sup>50</sup> incorporates mental illness in its definition and defines people with disabilities as "persons who have a physical or mental impairment; which is long term or recurring; and which substantially limits their prospects of entry into, or advancement in employment".<sup>51</sup> The definition of disability is, therefore, wide enough to include mental illness.<sup>52</sup> However, the social model is one important aspect that should be considered since it suggests that society plays a role in allowing persons with disabilities to participate fully in the civilisation around them.<sup>53</sup>

Ngwena and Pretorius<sup>54</sup> are of the view that discrimination based on disability is closer to a social construct than a medical one. Considering the above, the researcher refers to disability in this research as primarily referring to disability in the sense of mental impairment as the focal point of the dissertation. It is now clear that when mental illness adversely affects an employee's duties for a period

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<sup>43</sup> Article 5 of the CRPD.

<sup>44</sup> Article 2 of the CRPD shows mental illness as part of definition of disabilities.

<sup>45</sup> Nxumalo 2018 *ILJ* 1438.

<sup>46</sup> *International Covenant on Economic, Social and Cultural Rights 1966*.

<sup>47</sup> Article 7 of the CESCR.

<sup>48</sup> Article 12 of the CESCR.

<sup>49</sup> Section 6(1) of the *Employment Equity Act 55 of 1998*.

<sup>50</sup> GN 1345 in GG 23702 of 19 August 1998.

<sup>51</sup> GN 1345 in GG 23702 of 19 August 2002.

<sup>52</sup> WHO 2022 <https://www.who.int/publications/i/item/9789240049338>.

<sup>53</sup> Buder and Perry 2023, 12 April. <https://www.thesocialcreatures.org/thecreaturetimes/the-social-model-of-disability>.

<sup>54</sup> Ngwena and Pretorius. 2003 *Industrial Law Journal* 24(10), 1820.

exceeding 12 months, it may be considered a disability.<sup>55</sup> If an employee exhibits poor mental health that would incapacitate him to a serious extent and which cannot be reasonably accommodated, an employer could fairly dismiss an employee for ill health in line with items 10 and 11 of the Code of Good Practice: Dismissal.<sup>56</sup> If the employer has not reached the point of unjustified hardship in the accommodation process and has dismissed the employee, that could constitute an automatically unfair dismissal in terms of Section 187(1)(f) of the *LRA*.

It should, in this regard, be highlighted that section 187 of the *LRA* does not recognise mental illness as a prohibited ground for dismissal to constitute automatic unfair dismissal. Still, it does expressly recognise disability as a prohibited ground for dismissal. As was stated above, when disability is referenced, it should be understood to include mental illness as well. As a result, it would be automatically unfair if an employee were dismissed for their mental illness, and this was the dominant reason for the dismissal. However, the question does arise whether an employee could be dismissed for misconduct where his or her mental illness was involved, especially considering that they may not have been able to appreciate the wrongfulness of their conduct or control their actions due to their mental illness.

The employee's mental illness must be considered to find an appropriate method to address the problem at hand, since his or her culpability or blameworthiness may be reduced. When this happens, an employee is obligated to present evidence if he denies that he lacked the will to act in a particular manner due to mental impairment.<sup>57</sup>

International treaties and conventions adopted by the UN and the ILO are important since they bind countries who are signatories to the instruments, which for the most part include South Africa. National legislation must align with these instruments.<sup>58</sup>

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<sup>55</sup> GN 445 in GG 39792 of 18 May 2015.

<sup>56</sup> *Legal Aid* para 42.

<sup>57</sup> *Legal Aid* para 43.

<sup>58</sup> Section 233, *Constitution of the Republic of South Africa*, 1996 stipulates that "when interpreting any legislation, every Court must prefer an interpretation that is consistent with international law over one that is inconsistent with international law"; see also *NUMSA & others v Bader Bop (Pty) Ltd & another* 2003 2 BCLR 182 (CC) where the Court preferred an interpretation which took account of principles contained in the ILO; *Government of RSA*

Arising from this, South Africa developed laws that serve to protect employees from unfair dismissals based on disability or mental illness specifically.<sup>59</sup> Section 23 of the Constitution and section 185 of the *LRA* make it clear that everyone has the right to fair labour practices and expressly provide for the right not to be unfairly dismissed.<sup>60</sup>

In the international employment context, the treatment of mental illness has become paramount, creating clear obligations for employers to take necessary reasonable accommodation measures.<sup>61</sup> According to Mergret and Msipa,<sup>62</sup> the CRPD takes a stance from an international perspective against discrimination, and it not only calls for reasonable accommodation of disabled persons but also extends to the denial of reasonable accommodation for people with disabilities. Together with the CRPD, the ILO provides additional guidance on managing mental disabilities through the Code of Good Practice on the Managing of Disability in the Workplace<sup>63</sup> and Vocational Rehabilitation and Employment (Disabled Persons) Recommendation<sup>64</sup> to ensure equality in the workplace.

The employer is required to reasonably accommodate an employee who is incapacitated or who is ill before commencing with dismissal procedures.<sup>65</sup> Reasonable accommodation entails investigating the possibility of modifying the work environment, the employee's job, and/or the employee's circumstances to remove barriers that hinder the employee from performing adequately.<sup>66</sup>

#### **1.4 Aim of the Research**

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*v Grootboom & others* 2000 (11) BCLR 1169 (CC) where the Court consulted the UN Convention 2007 in its interpretation.

<sup>59</sup> Gresse and Mbaio 2020 *Law, Democracy & Development* 111.

<sup>60</sup> Section 185 of the LRA.

<sup>61</sup> *HM v Sweden communication* 3/2011 (Committee on the Rights of Persons with Disabilities).

<sup>62</sup> Mergret and Msipa 2014 *South African Human Rights Journal* 261.

<sup>63</sup> ILO Code of Practice on Managing Disability in the Workplace, 2001 (hereinafter the Disability Code).

<sup>64</sup> ILO Convention 159 of 1983 (*Vocational Rehabilitation and Employment of Disabled Persons* 1983) (hereinafter the VRE).

<sup>65</sup> GN 629 in GG37921 of 18 August 2014. Hereinafter The Dismissal Code.

<sup>66</sup> Gresse and Mbaio 2020 *Law, Democracy & Development* 124, 125.

This research aims to critically evaluate the legal framework in South Africa that governs dismissals for misconduct arising from mental illness in the workplace. To achieve this, the study starts with a discussion of domestic and international legislation that provides protection for persons with disabilities from unfair treatment in the workplace and dismissal. The analyses will further investigate what effect mental illness can have on a person's productivity and conduct, including employee disability, reasonable accommodation, and dismissals in the workplace in South Africa. The analyses will investigate the remedies persons suffering from mental illness can use to prevent continuous infringement of their rights when they commit misconduct in the workplace.

## **CHAPTER 2: International legislative framework dealing with disability in the workplace**

### **2.1 Introduction**

As mentioned in Chapter 1 of this study, mental illness is often misunderstood in the workplace, especially by those who manage staff at the plant level and who have the power to terminate an employee's services. Various studies have observed that mental illness has received little attention in the past and has been poorly regulated. South Africa has only recently started to pay attention to mental illness issues in the workplace.<sup>67</sup> This is demonstrated to the incorporation of the requirement when interpreting the Bill of Rights to consider international law.<sup>68</sup> It is heart-warming that considerable progress has been made to recognise and appreciate mental illness and the effects it might have on an employee's job performance and conduct.

In unpacking the progress made in dealing with mental illness, this chapter provides an overview of how various instruments of the UN and the ILO deal with mental health and disability in the workplace. Discussions will also include the role of the WHO in promoting and protecting mental health and the way in which it advocates for employers to deal with mental illness and disability at work. Furthermore, discussions include the role of the WHO in the classification of mental health as a disability and the awareness of mental health as a disability in every sphere of life and the world of work.

The aim of this chapter is to provide an understanding of how the relevant international instruments have shaped how mental illness is addressed in the workplace. This chapter begins with an overview of the UN and ILO, along with their relevant instruments. It then examines disability rights and employee protections within this international framework.

### **2.2 International laws and policies on disability in the workplace**

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<sup>67</sup> Gresse and Mbaio 2020 *Law, Democracy & Development* 111.

<sup>68</sup> S 39 of the Constitution.

## 2.2.1 United Nations

### 2.2.1.1 Background to the United Nations

The UN is an international organisation founded in 1945 after World War II.<sup>69</sup> The establishment of the UN was a pivotal moment in global history, representing a collective effort to maintain international peace and security, develop friendly relationship among nations, and promote social progress, better living standards, and human rights.<sup>70</sup> The UN is structured around six principal organs: the General Assembly, the Security Council, the Economic and Social Council, the Trusteeship Council, the International Court of Justice, and the Secretariat.<sup>71</sup> Each of these bodies has specific functions and responsibilities within the organisation. For the purposes of this research, the focus is on the Economic and Social Council, which is linked to mental health and disability.

The UN serves as the primary international forum for addressing global challenges and fostering multilateral engagements and cooperation.<sup>72</sup> Engagements include areas of human rights: monitoring and reporting on human rights situations, promoting and protecting human rights globally, and supporting human rights treaties and mechanisms.<sup>73</sup> Furthermore, the UN promotes health by coordinating global health initiatives through the WHO, combating diseases, and promoting public health. The UN carries out this work through its main organs, specialised agencies,<sup>74</sup> funds, and programmes.<sup>75</sup> Programmes include gender equality, health and human rights. According to Humphrey,<sup>76</sup> five international instruments emerged from these developments, with the Universal Declaration of Human Rights (UDHR) being especially pertinent to this dissertation's scope and therefore requiring specific examination.

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<sup>69</sup> United Nations date unknown <https://www.un.org/en/about-us>.

<sup>70</sup> United Nations date unknown <https://www.un.org/en/about-us>.

<sup>71</sup> United Nations date unknown <https://www.un.org/en/about-us>.

<sup>72</sup> Article 1 of the UNDHR.

<sup>73</sup> Li and Liu 2002 *Human Rights* 35,36.

<sup>74</sup> The UN specialised agencies are autonomous organisations working with the UN and each other through coordination of the UN and include the WHO and the ILO. United Nations date unknown <https://www.un.org/en/our-work>.

<sup>75</sup> United Nations date unknown <https://www.un.org/en/our-work>.

<sup>76</sup> Humphrey 1976 *William & Mary Law Review* 527.

### 2.2.1.2 Universal Declaration of Human Rights, 1948

The Universal Declaration of Human Rights (hereinafter the UDHR) was adopted on 10 December 1948 following the end of the World War II.<sup>77</sup> Brown<sup>78</sup> highlights that the UDHR is considered a beacon of hope that strives to ensure all human beings are afforded dignity, freedom, justice, and peace. Brown<sup>79</sup> asserts that the profound humanitarian tragedy of World War II prompted the United Nations Educational, Scientific and Cultural Organisation (hereinafter the UNESCO) to commence efforts to draft a preliminary declaration in 1946 that would later contribute to international human rights law.

The drafting process transitioned to the Commission on Human Rights, where 18 members from diverse political, cultural, and religious backgrounds collaborated to develop the document.<sup>80</sup> According to Brown,<sup>81</sup> the Commission made the strategic decision to frame the UDHR as a declaration rather than a treaty, incorporating civil, political, social, and economic rights into what they described as an “international bill of human rights”. Since the UDHR is officially classified as a declaration rather than a convention or treaty, this research maintains this formal designation throughout.

Though the UDHR was drafted as a declaration and considered to be soft law with no binding effect, it was later enhanced by two covenants: the *International Covenant on Civil and Political Rights* (hereinafter the ICCPR) and the *Convention of Economic, Social and Cultural Rights* (hereinafter the CESCR). South Africa demonstrated its initial commitment to both the CESCR and the ICCPR by signing them on 3 October 1994, subsequently ratifying the ICCPR on 10 December 1998 and the CESCR on 12 January 2015.<sup>82</sup> Of note, the CRPD shares a common relationship with ICCPR and CESCR in that ‘equal recognition before the law’ is recognised under

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<sup>77</sup> United Nations date unknown <https://www.un.org/en/about-us>.

<sup>78</sup> Brown 2016 *NYU Global Institute for Advanced Study*.

<sup>79</sup> Brown 2016 *NYU Global Institute for Advanced Study*.

<sup>80</sup> Brown 2016 *NYU Global Institute for Advanced Study*.

<sup>81</sup> Brown 2016 *NYU Global Institute for Advanced Study*.

<sup>82</sup> United Nations date unknown [https://tbinternet.ohchr.org/\\_layouts/15/TreatyBodyExternal/treaty.aspx](https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/treaty.aspx).

article 16 for ICCPR and article 12 for ICCPR, and 'human dignity and equality' is recognised under article 3 for the CRPD and article 1 for UDHR. South Africa signed the CRPD on 30 March 2007 and ratified it on 30 November 2007.<sup>83</sup> According to Brown,<sup>84</sup> civil and political rights and social and economic rights are considered interdependent, interrelated, and indivisible. Rudik<sup>85</sup> argues in this regard that the contiguity lies the fact that while the ICCPR grants protection through a model that restricts states from taking certain actions, the CESCRC imposes an obligation on states to take certain actions.

Hannum<sup>86</sup> holds that the UDHR is not a legally binding instrument,<sup>87</sup> though it serves as the foundation for the development of numerous international human rights treaties and has been widely accepted as customary international law. Since the UDHR is not legally binding and recognised as a common standard of achievement, South Africa did not have to ratify the instrument. Humphrey,<sup>88</sup> similar to Hannum, mentions that the UDHR was not intended to be binding on states, but the subsequent creation of covenants such as the ICCPR and the CESCRC, which has the same content as the Declaration, was intended to bind the states that ratified it.

South Africa displayed its allegiance to the UDHR by promoting and protecting the rights of persons with disabilities with the promulgation of legislation focusing on the rights of persons with disabilities in the workplace. This legislation includes the EEA, which is discussed in detail below as it is relevant to people with disabilities in the workplace. In addition, South Africa established the South African Human Rights Commission (hereinafter the SAHRC), which serves as an independent institution to monitor the implementation of the CRPD, including the investigation of complaints about the violation of the rights of persons with disabilities.<sup>89</sup> In response to the

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<sup>83</sup> United Nations date unknown [https://tbinternet.ohchr.org/\\_layouts/15/TreatyBodyExternal/Treaty.aspx](https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx).

<sup>84</sup> Brown 2016 *NYU Global Institute for Advanced Study*.

<sup>85</sup> Rudek 2022 *Denver Journal of International Law and Policy* 162.

<sup>86</sup> Hannum 1995 *Georgia Journal of International and Comparative Law* 25(1/2), 289.

<sup>87</sup> The UDHR was adopted as a declaration, not a treaty. Declarations are generally not legally binding under international law.

<sup>88</sup> Humphrey 1976 *William & Mary Law Review* 529.

<sup>89</sup> South African Human Rights Commission 2021 <https://nationalgovernment.co.za/units/view/61/south-african-human-rights-commission-sahrc>.

UDHR, section 181 of the Constitution create what is known as chapter 9 institutions in South Africa,<sup>90</sup> which are independent and only subject to the Constitution and Parliament.

The UDHR is therefore relevant to the research theme. It establishes fundamental human rights that apply to all individuals, including those with mental illnesses. The UDHR does not explicitly mention mental illness, but it does mention protection against discrimination. The rights of persons with mental illness can be derived from several key articles: article 1, which states that "all human beings are born free and equal in dignity and rights". This establishes the fundamental principle of equality that extends to persons with mental illness. Article 2 provides that "everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including... medical care and necessary social services".

### 2.2.1.3 World Health Organization and its role in dealing with mental illness and disability

#### 2.2.1.3.1 Background to the World Health Organization

The WHO was established in 1948 and is an agency of the UN.<sup>91</sup> It defines good mental health as "a state of well-being in which an individual realises his or her own abilities; can cope with the normal stressors of life; can work productively; and is able to make a contribution to his or her community".<sup>92</sup> Williams<sup>93</sup> contends that the WHO's mandate remains firmly rooted in principles of equity and integrity, operating within a human rights-based framework. Furthermore, the WHO is leading global efforts to expand universal health coverage, direct and coordinate the world's response to health emergencies and promote healthier lives.<sup>94</sup> The WHO has structures that are responsible for championing their work, and the World Health Assembly is the WHO's highest level decision-making forum. The World Health Assembly

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<sup>90</sup> Chapter 9 institutions include amongst others, the public protector, the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities and the Commission for Gender Equality.

<sup>91</sup> WHO date unknown <https://www.who.int/about/>.

<sup>92</sup> WHO date unknown <https://www.who.int/about/>.

<sup>93</sup> Williams 2022 *Howard Law Journal* 430.

<sup>94</sup> WHO date unknown <https://www.who.int/about/>.

serves as the WHO's highest decision-making authority, where delegates representing all Member States convene annually to establish global health priorities and to develop strategic frameworks for advancing international public health.<sup>95</sup>

#### 2.2.1.3.2 The role of the World Health Organization in the classification of mental health as a disability

The WHO has been instrumental in developing comprehensive classification systems that include mental health conditions as disabilities. One of the significant steps the WHO took was the implementation of the International Classification of Functioning, Disability and Health (hereafter ICF), which was adopted in 2001.<sup>96</sup> The ICF represents a paradigm shift from a purely medical model of disability to a biopsychosocial model that recognises that disability, including mental health conditions, results from the interaction between a person's health condition and their environment.<sup>97</sup> In the world of work, it could be understood that the environment includes how persons with disabilities interact with other people at the workplace. The WHO's classification of mental health as a disability is not legally binding in South Africa. However, its classifications and guidelines serve as influential recommendations rather than binding requirements.<sup>98</sup>

Mental, behavioural or neurodevelopmental disorders are currently characterised under the International Classification of Diseases, 11<sup>th</sup> revision,<sup>99</sup> (hereinafter ICD-11). The ICD-11 classification includes diseases that relate to an individual's cognition, emotional regulation, or behaviour and is associated among other things with distress or impairment in personal, occupational, or other important areas of functioning.<sup>100</sup>

The WHO has further developed a manual titled the *WHO Disability Assessment Schedule* (WHODAS), which provides a standardised method of measuring health

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<sup>95</sup> WHO date unknown <https://www.who.int/about/>.

<sup>96</sup> WHO date unknown <https://www.who.int/about/>.

<sup>97</sup> WHO 2012 <https://www.who.int/initiatives/mental-health-action-plan-2013-2030>.

<sup>98</sup> WHO date unknown <https://www.who.int/about/>.

<sup>99</sup> WHO 2024 <https://icd.who.int/browse/2024-01/mms/en>.

<sup>100</sup> WHO date unknown <https://www.who.int/about/who-we-are>.

and disability across cultures.<sup>101</sup> The intention of the manual is to place conditions like mental health on an equal bases with other areas of general health. The WHODAS manual seeks to achieve equality between mental health and general health conditions. As a population-level health and disability assessment tool, the WHODAS evaluates multiple domains of functioning, including cognition, mobility, and social interaction, and these domains are important for how mental illness is treated in the workplace.<sup>102</sup> In implementing the WHODAS, the WHO may have intended to recognise the previous neglect of mental illness, thus accepting the need to value mental illness in the same way it does other illnesses. Furthermore, the fact that the WHO recognises all cultures and medical conditions related to mental illness, shows their commitment to eradicating discrimination and ensuring equal treatment of all people.

In May 2013, the WHO implemented the CMHAP,<sup>103</sup> which was revised in 2019 and extended until 2030.<sup>104</sup> One of the six principles of the Plan deals with persons with mental disorders and psychosocial disabilities. It states that persons with mental disorders should be empowered to be involved in mental health advocacy, policy and legislation.<sup>105</sup> According to Williams,<sup>106</sup> in involving persons with disabilities, the Plan recognises mental health law by establishing legal and oversight mechanisms to promote human rights and emphasise policies and laws to comply with the CRPD.

#### 2.2.1.3.3 Awareness of mental health as a disability in every sphere of life and the world of work

The general public's understanding of mental health as a disability has evolved significantly in recent years. This development may have been due to improvements in mental health literacy and a reduction in the stigma attached to persons with mental illness over time. According to the WHO, advocacy groups that include people with lived experience of mental illness have been hard at work to raise

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<sup>101</sup> Ustun *et al* 2010 <https://iris.who.int/handle/10665/43974>.

<sup>102</sup> WHO 2012 <https://www.who.int/initiatives/mental-health-action-plan-2013-2030>.

<sup>103</sup> CMHAP 2013-2030.

<sup>104</sup> WHO 2012 <https://www.who.int/initiatives/mental-health-action-plan-2013-2030>.

<sup>105</sup> WHO 2012 <https://www.who.int/initiatives/mental-health-action-plan-2013-2030>.

<sup>106</sup> Williams 2022 *Howard Law Journal* 441.

awareness about mental illness.<sup>107</sup> Srivastava *et al.*<sup>108</sup> mention that this increased awareness has led to more open discussions about mental health in various social contexts, including families, communities, and the media.

The recognition of mental health as a disability has significant implications for the workplace, creating an obligation for employers to reasonably accommodate people with a disability in the form of a mental illness. In this regard, employees may grapple with the question of whether there is a need to disclose their condition for fear of being stigmatised. Corrigan and Watson<sup>109</sup> point out that the effect of mental illness stigma is twofold: on the one hand, it is the reaction that the general population has to people with a mental illness, and on the other hand, it relates to the self-stigma that people with mental illness turn against themselves.

According to Funk *et al.*,<sup>110</sup> one of the major barriers to accommodating persons with disabilities is the stigma associated with mental health conditions, as a person with a mental illness may be stigmatised as lazy, weak, unintelligent or difficult. Funk<sup>111</sup> further holds that some societies view people with mental health conditions as dangerous. This perception may be an indication that more robust awareness is needed in all spheres of life and the world of work. Harvey *et al.*<sup>112</sup> propose that there is substantial evidence that certain work situations are associated with an increased risk of common mental disorders. This situation has driven many employers to implement mental health support programmes and make accommodations for employees with mental health conditions.

According to LaMontagne *et al.*,<sup>113</sup> the pervasive nature of mental health stigma in workplaces necessitates organisational strategies aimed at transforming corporate culture and attitudes toward mental illness. In supporting the developments brought

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<sup>107</sup> WHO 2022 <https://www.who.int/publications/i/item/9789240049338>.

<sup>108</sup> Srivastava *et al* *Industrial Psychiatry Journal* 4.

<sup>109</sup> Corrigan and Watson 2002 *World Psychiatry* 16.

<sup>110</sup> Funk *et al* Mental health and development: targeting people with mental health conditions as a vulnerable group

<sup>111</sup> Svab 2012 *University of Ljubljana* 3.

<sup>112</sup> Harvey *et al* 2017 *Occupational and Environmental Medicine* 302.

<sup>113</sup> LaMontagne *et al* 2014 *Bio Medical Psychiatry* 2.

by the WHO, Funk<sup>114</sup> states that the development of policies and the enforcement of zero discrimination policies could bring change within the workplace to accommodate persons with disabilities.

The WHO sets global standards and guidelines for mental health awareness, which should influence national policies and practices, including those related to employment. The importance of considering the position of the WHO on mental illness as a disability that deserves of recognition and protection, can therefore not be overstated.

## 2.2.2 The International Labour Organization

### 2.2.2.1 Background to the International Labour Organization

According to De Wet,<sup>115</sup> the ILO is a dedicated agency of the UN tasked with enforcing internationally recognised social justice and human and labour rights. According to Tapiola and Swepston,<sup>116</sup> the ILO has been protecting vulnerable workers in the workplace since it was founded in 1919. The organisation was instrumental in bringing sustained peace as a participant in the Treaty of Versailles that ended World War I. Following its establishment, a constitution was adopted that set its agenda as executing international labour standards.<sup>117</sup> In 1951, a tripartite structure consisting predominantly of governments, employers, and workers, was established.<sup>118</sup> Yossi and Faina<sup>119</sup> submit that one of the objectives of the tripartite relationship is to give a voice to the interest groups represented in the ILO and to help efficiency by including people with practical experience during committee deliberations.

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<sup>114</sup> Funk *et al*/Mental health and development: targeting people with mental health conditions as a vulnerable group

<sup>115</sup> De Wet 2008 *German Law Journal* 9(11), 1430.

<sup>116</sup> International Labour Organisation date unknown <https://www.ilo.org/about-ilo>. See also Tapiola and Swepston 2010 *Stanford Law and Policy Review* 513.

<sup>117</sup> De Wet 2008 *German Law Journal* 9(11), 1431.

<sup>118</sup> Yossi *et al* 2013 *Journal of International Law*, 34(4), 693; see also Langile 2006-2007 *Canadian Labour & Employment Law Journal* 281.

<sup>119</sup> Yossi *et al* 2013 *Journal of International Law* 34(4), 693. See also Valticos 1996 *International Labour Review* 135 (3-4), 475; Simpson 1994 *Monthly Labor Review* 117(9), 41.

De Wet<sup>120</sup> notes that the International Labour Conference (hereinafter ILC), as the ILO's highest decision-making authority, establishes international labour standards and provides a platform for deliberating on labour issues. Langile<sup>121</sup> correctly points out that, through the constitution, the ILO sets standards for how organs of states must go about creating laws and further oversee their execution, enforcement, and compliance. The ILO functions by means of international treaties known as conventions, which Member States are expected to ratify, subject to their domestic rules and constitution. These conventions become binding once ratified.<sup>122</sup> Furthermore, the ILO has recommendations that complement the corresponding convention by providing explicit methods and procedures through which conventions are to be adopted.<sup>123</sup> Nevertheless, unlike the conventions, recommendations are non-binding instruments.<sup>124</sup>

Still, Member States have 18 months to submit any conventions and recommendations before local competent bodies – in the case of South Africa, the Parliament – for enactment and implementation after the respective instrument has been adopted<sup>125</sup> by the ILC.<sup>126</sup> Following the incorporation of the ILO instruments into domestic law, Member States are required to self-report every five years on progress made towards the application of conventions in law and practice.<sup>127</sup> Despite the requirement for Member States to report to the ILO when they are noncompliant, the ILO does not have the power to impose financial sanctions on non-complying Member States.

According to Rubin,<sup>128</sup> the ILO's enforcement mechanisms are limited to three primary functions: compiling non-compliance reports, engaging with Member States,

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<sup>120</sup> De Wet 2008 *German Law Journal* 9(11), 1431.

<sup>121</sup> Langile 2006-2007 *Canadian Labour & Employment Law Journal* 277.

<sup>122</sup> Langile 2006-2007 *Canadian Labour & Employment Law Journal* 277; see also De Wet 2008 *German Law Journal* 9(11), 1433 and Wisskirchen 2005 *International Labour Review* 258.

<sup>123</sup> Laci *et al* 2017 *Journal of Educational and Social Research* 67.

<sup>124</sup> International Labour Organisation 2019 <https://www.ilo.org/publications/rules-game-introduction-standards-related-work-international-labour>.

<sup>125</sup> International Labour Organization Constitution 1944 <https://www.ilo.org/publications/ilo-constitution-0> (hereinafter the ILO Constitution).

<sup>126</sup> Article 19, paragraph 5(b) of the ILO Constitution.

<sup>127</sup> Tapiola and Swepston 2010 *Stanford Law and Policy Review* 515.

<sup>128</sup> Rubin 1998 *South African Law Journal* 694.

and offering technical assistance. Baccini and Koenig-Archibugi<sup>129</sup> explain that Member States violating their obligations are held publicly accountable through the ILO's monitoring and supervisory mechanism. Following South Africa's readmission to the ILO after a 30-year exclusion due to apartheid, the country ratified the ILO constitution on 26 May 1994.<sup>130</sup>

The ILO's stance on mental health in the workplace is rooted in its fundamental principles, which include promoting decent work conditions, ensuring occupational safety and health, and fostering inclusive and sustainable economic growth.<sup>131</sup> De Wet<sup>132</sup> argues that by addressing mental health issues in the workplace, the ILO aims to create a more supportive, productive, and sustainable work environment that protects and supports the physical, mental, and social well-being of workers universally.

#### 2.2.2.2 The role of the International Labour Organization in promoting and protecting disability rights in employment

The ILO plays a crucial role in promoting and protecting the rights of persons with disabilities in the world of work. Wisskirchen<sup>133</sup> points out that the ILO strives to create a more inclusive and equitable workplace for persons with disabilities by establishing international labour standards and codes of practice, giving technical assistance, and leading capacity-building efforts. These instruments protect workers' rights, promote decent working conditions, level the playing field, guide national policy, promote social dialogue, respond to changing needs, and provide a framework for technical assistance.

Dijkhoff<sup>134</sup> is of the opinion that the ILO also provides capacity-building support to its Member States to help them implement these standards effectively. This includes offering training, advisory services, and research to governments, employers'

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<sup>129</sup> Baccini and Koenig-Archibugi 2014 *London School of Economics and Political Science* 9.

<sup>130</sup> Smyth 1994 *Monthly Labor Review* 51.

<sup>131</sup> International Labour Organisation 2016 <https://www.ilo.org/publications/presentation-workplace-stress-collective-challenge>.

<sup>132</sup> De Wet 2008 *German Law Journal* 9(11), 1435.

<sup>133</sup> Wisskirchen 2005 *International Labour Review* 256.

<sup>134</sup> Dijkhoff 2019 *European Journal of Social Security* 21(4), 355.

organisations, and workers' organisations.<sup>135</sup> Some of this assistance takes the form of face-to-face discussions and on-the-spot visits from the ILO supervisory bodies to Member States who find it difficult to implement the ratified conventions, including in their domestic legal systems.<sup>136</sup> The ILO addresses the rights of persons with disabilities in employment by way of conventions and recommendations, the most important being the *Discrimination (Employment and Occupation) Convention*,<sup>137</sup> and *Discrimination (Employment and Occupation) Recommendation*,<sup>138</sup> the *Vocational Rehabilitation and Employment of Disabled Persons Convention*<sup>139</sup> and the ILO *Code of Practice: Managing disability in the Workplace* (hereinafter *Disability Code*).<sup>140</sup> Further conventions includes the *Termination of Employment Convention*<sup>141</sup>, the *Convention on the Rights of Persons with Disabilities*<sup>142</sup> and Optional Protocol to the Convention on the Rights of Persons with Disabilities.<sup>143</sup>

Through these instruments, the ILO continues to work with governments, employers' and workers' organisations, and other stakeholders to promote the rights of persons with disabilities in the workplace. This involves further developing and promoting international labour standards, providing technical assistance and capacity building, raising awareness, and fostering partnerships and collaboration.<sup>144</sup>

The ILO has also emphasised the importance of creating a supportive work environment that promotes mental health and well-being.<sup>145</sup> This includes measures such as providing access to mental health resources, promoting work-life balance, and fostering a culture of open communication and support. The ILO has also developed tools and resources to help employers and workers address mental health issues specifically, such as the "Workplace Stress: A Collective Challenge" report

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135 International Labour Organisation <https://www.ilo.org/global/about-the-ilo/how-the-ilo-works/departments-and-offices/governance/lang--en/index.htm>.

136 Schin-ichi 1995 *Japanese Annual of International Law* 8.

137 *Discrimination (Employment and Occupation) Convention*, 1958 (No. 111).

138 *Discrimination (Employment and Occupation) Recommendation*, 1958 (No. 111).

139 The VRE.

140 The disability Code.

141 *Termination of Employment Convention*, 1982.

142 *Convention on the Rights of Persons with Disabilities*, 2007.

143 *Optional Protocol to the Convention on the Rights of Persons with Disabilities*, 2007

144 Wisskirchen 2005 *International Labour Review* 257.

145 Saxena *et al* 2014 *World Psychiatry* 107-109.

and the "Managing Work-Related Psychosocial Risks" guide.<sup>146</sup> The "Workplace Stress: A Collective Challenge" report deals with the issue of work-related stress as a significant occupational safety and health concern.<sup>147</sup> This report aims to raise awareness about the collective nature of workplace stress and emphasises the need for collaborative efforts to address the growing occupational health issue.<sup>148</sup> This report is necessary since mental illness may develop during the course of employment or from work-related stressors caused by a biological agent, an environmental condition, an external stimulus, or an event.<sup>149</sup>

Furthermore, the "Managing Work-Related Psychosocial Risks" guide is a document that deals with the identification, assessment, and management of psychosocial risks in the workplace.<sup>150</sup> This guide is typically published by occupational health and safety organisations or labour authorities to provide practical guidance for employers and managers.<sup>151</sup>

### 2.2.2.3 International Labour Organization Conventions

#### 2.2.2.3.1 Discrimination (Employment and Occupation) Convention, 1958

The *Discrimination (Employment and Occupation) Convention* (hereinafter the Discrimination Convention) was adopted by the ILO in 1958. According to Laci *et al.*,<sup>152</sup> the basic objective of the Discrimination Convention is to adopt national measures and methodologies to eliminate any differences in treatment during employment or in a person's occupation and to repeal or modify any laws that are not consistent with this Discrimination Convention. The ILO's commitment to persons with disabilities is significant.

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<sup>146</sup> International Labour Organisation 2016 <https://www.ilo.org/publications/presentation-workplace-stress-collective-challenge>.

<sup>147</sup> International Labour Organisation 2016 <https://www.ilo.org/publications/presentation-workplace-stress-collective-challenge>.

<sup>148</sup> International Labour Organisation 2016 <https://www.ilo.org/publications/presentation-workplace-stress-collective-challenge>.

<sup>149</sup> International Labour Organisation 2016 <https://www.ilo.org/publications/presentation-workplace-stress-collective-challenge>.

<sup>150</sup> Andre 2016 *International Journal of Labour Research* 19.

<sup>151</sup> Andre 2016 *International Journal of Labour Research* 22.

<sup>152</sup> Laci *et al* 2017 *Journal of Educational and Social Research* 69.

The Discrimination Convention places an obligation on Member States that have ratified the Convention to implement a methodology that aims to improve equality in treatment and opportunity with respect to occupation and employment to fight all types of discrimination that may occur.<sup>153</sup> South Africa ratified the Discrimination Convention on 5 March 1997.<sup>154</sup> The Discrimination Convention provides a comprehensive definition of discrimination. To begin with, Article 1(a) provides that discrimination includes:

“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”.<sup>155</sup>

The significance of Article 1(b) is that notwithstanding its omission of specific mention of disability or mental health specifically, it allows for mental health to be included should it have the effect of impairing equality of opportunity or treatment during employment or occupation.<sup>156</sup> By virtue of Article 2,<sup>157</sup> South Africa has a legal obligation to establish and align national policies with this Convention to ensure equal treatment and opportunity for employees.

Therefore, the Discrimination Convention is highly relevant to this research. The Convention provides a comprehensive definition of discrimination that can be interpreted to include discrimination based on mental illness. The Convention emphasises the promotion of equality of opportunity<sup>158</sup> in employment, which is crucial when considering the fairness of dismissals involving employees with mental illnesses. The Convention requires Member States to declare and pursue a national

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<sup>153</sup> Article 2 of the ILO Convention *ILO Convention 111 of 1958* (Discrimination) (Hereinafter the ILO Discrimination Convention).

<sup>154</sup> International Labour Organisation date unknown  
[https://normlex.ilo.org/dyn/normlex/en/f?p=1000:11001:::...](https://normlex.ilo.org/dyn/normlex/en/f?p=1000:11001:::)

<sup>155</sup> Article 1(a) of the ILO Discrimination Convention.

<sup>156</sup> Article 1(b) of the ILO Discrimination Convention.

<sup>157</sup> Article 2 of the ILO Discrimination Convention details members' responsibilities to pursue a national policy designed to promote equality of opportunity and treatment in respect of employment and occupation, with the view to eliminate all discrimination.

<sup>158</sup> Article 1(b) of the ILO Discrimination Convention.

policy<sup>159</sup> to promote equality of opportunity and treatment during employment, which influences domestic labour laws and practices.

#### 2.2.2.3.2 Termination of Employment Convention, 1982

The *Termination of Employment Convention*<sup>160</sup> (hereinafter the Termination Convention) was adopted on 22 June 1982.<sup>161</sup> The Termination Convention deals with employers' reasons for terminating employees' services, and the process to be undertaken to ensure fairness in such termination of employment.<sup>162</sup> The Termination Convention is not in the list of instruments ratified, nor in the list of conventions that have not been ratified, so South Africa's status is not clear.<sup>163</sup> The Termination Convention continues to be one of the key ILO instruments addressing the issue of employment termination. According to Servais,<sup>164</sup> the Termination Convention is used to protect employees against unfair dismissals, including on grounds considered to be "inevitable, insurmountable, and unpredictable"<sup>165</sup> events, outside the will or the control of the employer. Article 4 of the Termination Convention provides that a worker's employment shall not be terminated unless there is a valid reason for such termination linked to the capacity or conduct of the worker or based on the operational requirements of the employer.

Article 5 of the Termination Convention includes a number of grounds, commonly referred to as "listed grounds", under which termination of employment will not be permitted. These grounds includes temporary absence from work due to illness or injury which is relevant to mental illness. Article 7 of the Termination Convention

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<sup>159</sup> Article 2 of the ILO Discrimination Convention.  
<sup>160</sup> International Labour Organisation date unknown  
[https://normlex.ilo.org/dyn/normlex/en/f?p=1000:11001:::.](https://normlex.ilo.org/dyn/normlex/en/f?p=1000:11001:::)  
<sup>161</sup> International Labour Organisation date unknown  
[https://normlex.ilo.org/dyn/normlex/en/f?p=1000:11001:::.](https://normlex.ilo.org/dyn/normlex/en/f?p=1000:11001:::)  
<sup>162</sup> Smit and Van Eck 2010 *Comparative and International Law Journal of Southern Africa* 43(1) 49.  
<sup>163</sup> ILO (International Labour Organisation) 1982 C158 - *Termination of Employment Convention*, 1982 (No. 158). [https://www.ilo.org/dyn/normlex/en/f?p=NORMLEX-PUB:12100:0::NO::P12100\\_ILO\\_CODE:C158](https://www.ilo.org/dyn/normlex/en/f?p=NORMLEX-PUB:12100:0::NO::P12100_ILO_CODE:C158) Date of access 29 Apr 2024 (Hereinafter the termination convention).  
<sup>164</sup> Servais 2021 *Annals of the Administration and Law* doi: 10.5604/01.3001.0015.6341  
<sup>165</sup> Inevitable, insurmountable and unpredictable events include force majeure and fortuitous events which it is outside control of the employer.

provides that a worker's employment shall not be terminated for reasons related to the worker's conduct or performance before he is provided an opportunity to defend himself against the allegations, unless the employer cannot reasonably be expected to provide this opportunity. Article 8 provides that a worker who considers his employment to have been unjustifiably terminated shall be entitled to appeal against that termination to an impartial body, such as a court, labour tribunal, arbitration committee, or arbitrator. These stringent rules make it difficult to dismiss employees for reasons based on mental illness where there are no grounds.

The above stipulations make the Termination Convention highly relevant to this research. It sets international standards for fair dismissal practices, which can influence domestic labour laws and judicial interpretations, even in non-ratifying countries. The Termination Convention requires a valid reason for termination, which is directly relevant to assessing the fairness of dismissals when an employee's mental health is involved. The Termination Convention emphasises procedural fairness in dismissals,<sup>166</sup> which is crucial when considering the rights of employees suffering from mental illnesses. The Termination Convention provides for the right of workers to defend themselves against allegations of misconduct, which is particularly relevant for employees with mental illnesses who may face stigma or misunderstanding.

#### 2.2.2.3.3 Vocational Rehabilitation and Employment (Disabled Persons) Convention, 1983

The stance taken by the ILO on issues of disability in the workplace has been made clear in the *Vocational Rehabilitation and Employment (Disabled Persons) Convention* (hereinafter the VRE), which supports equality and the equal treatment of persons with disabilities in the workplace.<sup>167</sup> The VRE sets objectives and provides a framework for fundamental principles to be followed, and by this, it continues to maintain the status of a promotional convention because it sets out general principles and objectives rather than strict, detailed requirements. This allows countries

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<sup>166</sup> Article 7 of the *Termination Convention*.

<sup>167</sup> Articles 1(4) and 4 of the ILO Convention 159 of 1983 (*Vocational Rehabilitation and Employment (Disabled Persons) Convention*, 1983).

to implement its provisions in ways that best suit their specific contexts.<sup>168</sup> South Africa has not yet ratified the VRE.<sup>169</sup> Yet, it appears that the VRE is important for South Africa's efforts of managing people with disabilities. According to O'Reilly,<sup>170</sup> the VRE rules are flexible<sup>171</sup> by design, with applicability to all Member States regardless of the progress with its implementation in a particular state with respect to the vocational rehabilitation and employment operations for persons with disabilities. The VRE calls on government departments and private sectors alike to support and weigh "vocational guidance, vocational training, placement, employment, and other related services" using all available means and resources with accompanying adjustments.<sup>172</sup>

What is notable is that the VRE incorporates a definition of a person with a disability, which includes a person with mental impairments.<sup>173</sup> According to Article 1(1) of the VRE, a "disabled person is an individual whose possibilities for obtaining, retaining, and advancing in suitable employment are significantly diminished as a result of a duly recognised mental impairment". Following from the definition of "disabled person", the VRE further provides guidance on the measures to be followed at the national level to carry out the policy.<sup>174</sup> This elaborate methodology inspires governments to implement techniques to help people with disabilities adjust to workplace conditions.<sup>175</sup>

Therefore, it is clear that the VRE is highly relevant to this research. The VRE promotes vocational rehabilitation, which is relevant in assessing whether employers

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<sup>168</sup> O'Reilly The Right to Decent Work of Persons with Disabilities. (ILO Working Paper, No 14) (2003).

<sup>169</sup> International Labour Organisation date unknown [https://normlex.ilo.org/dyn/normlex/en/f?p=1000:11200:0::NO:11200:P11200\\_COUN-TRY\\_ID:102888](https://normlex.ilo.org/dyn/normlex/en/f?p=1000:11200:0::NO:11200:P11200_COUN-TRY_ID:102888).

<sup>170</sup> O'Reilly The Right to Decent Work of Persons with Disabilities. (ILO Working Paper, No 14) (2003).

<sup>171</sup> O'Reilly The Right to Decent Work of Persons with Disabilities. (ILO Working Paper, 978-92-2-120144-1) (2007).

<sup>172</sup> O'Reilly The Right to Decent Work of Persons with Disabilities. (ILO Working Paper, 978-92-2-120144-1) (2007).

<sup>173</sup> Article 1(1) of the VRE.

<sup>174</sup> Article 1(1) of the VRE.

<sup>175</sup> O'Reilly The Right to Decent Work of Persons with Disabilities. (ILO Working Paper, No 14) (2003).

have taken adequate steps to support employees with mental illnesses before resorting to dismissal. The VRE requires ratifying states to formulate and implement a national policy on vocational rehabilitation and employment of persons with disabilities, influencing domestic labour laws and practices. The VRE promotes non-discrimination in employment, which is a key factor in evaluating the fairness of dismissals based on mental illness.

#### 2.2.2.3.4 Convention on the Rights of Persons with Disabilities, 2007

The CRPD was adopted in 2006 in combination with the *Optional Protocol to the Convention on the Rights of Persons with Disabilities* (hereinafter the OPCRPD) and put into operation in 2008.<sup>176</sup> The OPCRPD allows individuals to bring complaints to the Committee on the Rights of Persons with Disabilities after exhausting national remedies.<sup>177</sup> The OPCRPD is discussed below. Internationally, the CRPD is regarded as a breakthrough since it aims to protect the rights and dignity of persons with disabilities. Article 5 of the CRPD states its significance as its ability to set standards that recognise the rights of people with disabilities in "economic, social, political, and cultural" domains.

The CRPD sets the base for the protection of persons with disabilities with the application of human rights. It further requires State Parties to promote and protect the rights of people with disabilities.<sup>178</sup> In addressing mental health conditions, the CRPD establishes two fundamental principles: Article 12 provides that "State Parties shall recognise that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life", while article 17 stipulates that "Every person with disabilities has a right to respect for his or her physical and mental integrity on an equal basis with others". Under the CRPD, the term disability is defined as part of the definition of persons with disabilities, which states that: "persons with disabilities include those who have long-term physical, mental, intellectual or sensory

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<sup>176</sup> See the preamble of the CPRD2007; see also the OPCRPD 2007.

<sup>177</sup> Article 1 of the OPCRPD.

<sup>178</sup> Article 27 of the CRPD.

impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others".<sup>179</sup>

It is evident from the mentioned definition that the UN's point of view on disability is based on a rights-based approach and the social model of disability.<sup>180</sup> Rudek<sup>181</sup> argues that the CRPD is an important instrument, but it does not give absolute protection to people with psychological disability. This is because of the ongoing debates over whether mental illness must be approached based on a social or medical model. Rudek<sup>182</sup> calls for the amendment of the CRPD in the future and explains that the CRPD in its current format leaves millions of people who suffer from psychological conditions worldwide without protection because of the constant clash between the context of social versus medical models of disability that have to be reconciled to ensure collaboration.

Notwithstanding this, the CRPD aims to promote and protect individuals with mental and physical disability and wants to ensure that they gain access to human rights and freedoms.<sup>183</sup> Wildeman<sup>184</sup> holds that the CRPD appears to approach disability based on a social model, which emphasises autonomy and self-determination in the pursuit of disability rights. The social model approach to disability excludes health and medical intervention and focuses more on the disadvantages and struggles they face in society.

People with disabilities experience these challenges in addition to their impairments.<sup>185</sup> This framework is crucial for the prevention and eradication of segregation and discrimination, in particular against persons with mental illness at the workplace. Smith<sup>186</sup> echoes this and holds that discrimination on grounds of disability is forbidden, and State Parties are encouraged to allow access to opportunities for

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179 Article 1 of the CRPD.

180 UN Disability Inclusion Strategy. <https://www.un.org/en/disabilitystrategy/resources>.

181 Rudek 2022 *Denver Journal of International Law and Policy* 157.

182 Rudek 2022 *Denver Journal of International Law and Policy* 157.

183 Article 1 of the CRPD.

184 Wildeman 2013 *Journal of Law, Medicine and Ethics* 59.

185 Shandra 2018 *Social Forces* 160.

186 Smith 2002 *Amicus Curiae* 14.

mainstream workplaces in public and private sectors. The Discrimination Convention is discussed below.

South Africa has demonstrated its commitment to giving effect to the CRPD with legislative and policy framework steps taken to align South Africa's legislation with the CRPD.<sup>187</sup> The equality framework of the *Constitution* relies on three interconnected provisions: s 9(2) enables positive measures to advance previously disadvantaged persons; s 9(3) prohibits unfair discrimination by the state on specified grounds; and s 9(4) extends this prohibition to private actors. In addition to this, South Africa has submitted an initial report on commitment to the reporting obligation under the CRPD.<sup>188</sup> Furthermore, in 2015 the Department of Justice and Constitutional Development in South Africa initiated a review of legislation to align with CRPD requirements.<sup>189</sup> This includes the drafting the White Paper on the Rights of Persons with Disabilities<sup>190</sup> to expedite the inclusion and integration of persons with disabilities.<sup>191</sup> In line with the CRPD requirement of setting up an independent monitoring framework,<sup>192</sup> South Africa established the SAHRC, which has the power to monitor, protect, and promote human rights, including the rights of persons with disabilities.<sup>193</sup> Malatji<sup>194</sup> proposes that it is particularly encouraging that government appreciates the need for such a monitoring structure. As South Africa endeavours to bring disability issues into the mainstream, it is important to ensure that monitoring frameworks and mechanisms function effectively.<sup>195</sup>

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<sup>187</sup> Committee on the Rights of Persons with Disabilities Concluding observations on the initial report of South Africa.

<sup>188</sup> Committee on the Rights of Persons with Disabilities Concluding observations on the initial report of South Africa.

<sup>189</sup> GN 445 in *GG* 39792 of 18 May 2015.

<sup>190</sup> GN 230 in *GG* 39792 of 09 March 2016.

<sup>191</sup> Committee on the Rights of Persons with Disabilities Concluding observations on the initial report of South Africa, 1. 1.

<sup>192</sup> Article 33(2) of the CRPD.

<sup>193</sup> Malatji SA needs an independent monitoring framework to implement rights of persons with disabilities.

<sup>194</sup> Malatji SA needs an independent monitoring framework to implement rights of persons with disabilities.

<sup>195</sup> Malatji SA needs an independent monitoring framework to implement rights of persons with disabilities.

Therefore, it can be argued that the CRPD is highly relevant to the research theme. Firstly, the CRPD provides a comprehensive framework<sup>196</sup> for the rights of persons with disabilities, including those with mental illnesses, which is directly applicable to workplace situations. Secondly, the CRPD emphasises non-discrimination and equality, which are crucial principles in assessing the fairness of dismissals based on mental illness. Thirdly, the CRPD mandates reasonable accommodation<sup>197</sup> in the workplace, which is crucial for employees with mental illnesses. Lastly, the CRPD recognises the legal capacity of persons with disabilities, which includes those with mental illnesses,<sup>198</sup> which is relevant to employment rights.

#### 2.2.2.3.5 Optional Protocol to the Convention on the Rights of Persons with Disabilities, 2007

The Optional Protocol to the Convention on the Rights of Persons with Disabilities (hereinafter the OPCRPD) affirms in its Preamble the fundamental importance of ensuring persons with disabilities enjoy comprehensive access to human rights across physical, social, economic, cultural, health, educational, and communicational spheres.<sup>199</sup> Grant<sup>200</sup> states that the OPCRPD is optional because State Parties to the main CRPD are not obligated to ratify it. As such, countries can be party to the CRPD without accepting the additional optional obligations set out in the OPCRPD.

The OPCRPD adheres to the principles of non-discrimination, respect, equality of opportunities, and accessibility for persons with disability.<sup>201</sup> It provides mechanisms to monitor and implement the CRPD.<sup>202</sup> The OPCRPD committee presides over this by allowing individuals to raise complaints if their rights have been infringed by the State.<sup>203</sup> Furthermore, the committee is empowered to set up an inquiry upon

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<sup>196</sup> Article 5 of the CRPD.

<sup>197</sup> Article 27 of the CRPD.

<sup>198</sup> Article 1 of the CRPD.

<sup>199</sup> Preamble of the OPCRPD.

<sup>200</sup> Grant 2015 *Indiana International and Comparative Law Review* 25(2), 206.

<sup>201</sup> Article 3 of the OPCRPD.

<sup>202</sup> United Nations 2006 <https://www.ohchr.org/en/instruments-mechanisms/instruments/optional-protocol-convention-rights-persons-disabilities>.

<sup>203</sup> Hendricks 2007 *European Journal of Health Law* 276.

receiving credible information about violations, to investigate, and to produce findings and recommendations.<sup>204</sup>

The OPCRPD calls for the habitation and rehabilitation of persons with disabilities in areas such as health and employment.<sup>205</sup> Possibly the most important obligation imposed by the OPCRPD is the requirement for State Parties to afford persons with disabilities the right to work, the opportunity to gain a living by working in their chosen field, and to work in an open, inclusive environment that accommodates persons with disabilities.<sup>206</sup> This makes the OPCRPD highly relevant to the research. While the OPCRPD does not directly change South African law, it can influence the interpretation and application of domestic laws related to disability discrimination in employment. As stated above, the OPCRPD establishes an individual complaints mechanism, allowing individuals or groups to bring complaints against State Parties for alleged violations of the CRPD. This is particularly relevant for matters of unfair dismissal based on mental illness. The CRPD, to which the OPCRPD is linked, explicitly includes mental impairments<sup>207</sup> in its definition of disability. This strengthens the argument that mental illness should be protected against discrimination in employment. The CRPD also emphasises the right to reasonable accommodation in the workplace, which is crucial for employees with mental illnesses.

### **2.3 Conclusion**

This chapter examined the WHO's role and the related international instruments in addressing mental illness in the workplace. The WHO's contribution, particularly through the ICF and ICD-11, has advanced our understanding of mental health conditions as disabilities if viewed within a biopsychosocial framework. Key international instruments, including various ILO conventions and the CRPD, establish fundamental principles for fair treatment of employees with mental illness.

The conventions contribute to a more inclusive, equitable, and supportive work environment that recognises and accommodates the rights and needs of employees

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<sup>204</sup> Articles 6 and 7 of the OPCRPD.

<sup>205</sup> Article 26 of the OPCRPD.

<sup>206</sup> Article 27 of the OPCRPD.

<sup>207</sup> Article 1 of the OPCRPD.

with mental health conditions. While South Africa did not ratify all these conventions, they influence domestic labour law development and interpretation, aligning with constitutional values and promoting inclusive workplace practices. The next chapter explores legislative protection for mental illness in South Africa.

## CHAPTER 3: Legislative protection for mental illness in South Africa

### 3.1 Introduction

The ILO establishes fundamental standards that serve as benchmarks for evaluating Member States' compliance with ratified conventions. Upon ratification, Member States assume a binding obligation to align their domestic legislation and regulatory frameworks with the principles enshrined in these conventions. South African legal framework governing employment and mental illness is primarily grounded in the Constitution. The Constitution serves as the supreme law of the land,<sup>208</sup> and thus provides a comprehensive framework for the protection of human rights and freedoms, including those related to mental health and disability in the workplace.<sup>209</sup>

The Constitution does not directly mention mental health,<sup>210</sup> it enshrines fundamental rights that are crucial for individuals with mental health conditions. These constitutional provisions lay the foundation for protecting employees with mental illness from unfair discrimination and ensuring their equal and dignified treatment in the workplace. The South African government has enacted various statutes and policies to give effect to these constitutional principles, including the *LRA*, the *EEA*, and the accompanying codes of good practice. The *LRA* regulates the relationship between employers and employees, providing mechanisms for reasonable accommodation and resolving disputes, including those related to unfair dismissal of employees with mental illness.

The *EEA* is another critical piece of legislation aimed at eliminating unfair discrimination and promoting affirmative action measures to ensure equitable representation of employees from different groups, including people with disabilities. It prohibits direct and indirect unfair discrimination based on various grounds, including disability, and introduces codes of good practice, such as the Code of Good Practice

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<sup>208</sup> Section 2 of the *Constitution of the Republic of South Africa*, 1996.

<sup>209</sup> The Constitution's Bill of Rights enshrines fundamental human rights protections through multiple sections, including s 9 (Equality), s 10 (Human Dignity), s 23 (Fair Labor Practices), and s 27 (Healthcare, Food, Water, and Social Security).

<sup>210</sup> While not explicitly mentioning mental health, the Constitution addresses these protections through several key provisions: s9 (Equality), s10 (Human Dignity), s 23 (Fair Labor Practices), and s 27 (Right to Healthcare).

on Employment of Persons with Disabilities and the Technical Assistance Guidelines on the Employment of Persons with Disabilities.

This chapter examines the legal framework governing mental illness in South African workplaces to assess whether current legislation adequately protects employees with mental health conditions and provides sufficient guidance to employers. The chapter analyses key legislative instruments, case law developments, and workplace practices to identify potential gaps in the legal protection of employees with mental illness.

### **3.2            *Legal framework in South Africa***

#### **3.2.1          Constitutional protection**

According to Sunga,<sup>211</sup> the legal system of apartheid South Africa was characterised by job reservation, little protection and widespread discrimination, resulting in the exploitation of employees. Lingaas<sup>212</sup> further points out that the acts of apartheid included, among other things, measures designed to divide and discriminate against the population along racial lines and to exploit labour. The discriminatory situation necessitated protection to ensure fair and equal treatment as envisaged in the Constitution.

To remedy the situation, the interim Constitution<sup>213</sup> was enacted in 1993, followed by the Constitution in 1996. S 2 of the Constitution provides a comprehensive framework for the protection of human rights and freedoms. As mental illness in the workplace is a significant concern in South Africa, it is crucial to understand how the Constitution safeguards the rights of individuals suffering from mental health conditions.

Christianson<sup>214</sup> affirms that in South Africa, people with disabilities are entitled to protection in terms of the Constitution and legislation. However, it is remarkable that the Constitution does not directly mention mental health except in section

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<sup>211</sup> Sunga 1998 *European Journal of Crime, Criminal Law & Criminal Justice* 391.

<sup>212</sup> Lingaas 2015 *Oslo Law Review* 2(2), 96.

<sup>213</sup> *Constitution of the Republic of South Africa* 200 of 1993.

<sup>214</sup> Christianson 2004 *Industrial Law Journal* 25(5), 895.

28(1)(f)(ii) in reference to the Bill of Rights and children's rights. According to Grobbelaar-du Plessis and Njau,<sup>215</sup> the Constitution enshrines the right to equality and non-discrimination, including discrimination based on disability, and fair labour practices and these rights apply to everyone. The Bill of Rights<sup>216</sup> contained in Chapter 2 of the Constitution are viewed as the foundation of democracy, which has the effect of binding all government institutions and the courts, thus granting everyone protection. The only restriction is that the rights mentioned in the Bill of Rights may be limited to the extent that such limitation is reasonable and justifiable in an open and democratic society.<sup>217</sup> S 36 establishes the limitation clause, which acknowledges that rights enshrined in the Bill of Rights may be subject to reasonable restrictions. These limitations, however, must satisfy two fundamental criteria: they must be proven through laws of general application and must demonstrably serve legitimate social purposes.<sup>218</sup>

The Constitution, particularly the provisions on equality and fair labour practices in the Bill of Rights, fundamentally shapes South African law. S 233 mandates courts to consider interpretations consistent with international law. Despite this constitutional imperative for uniformity, varying judicial interpretations in disability cases have created contradicting precedents. The Bill of Rights, when applied, has the effect of testing the validity of legislation against fundamental rights.<sup>219</sup> When the Bill of Rights is put into practice, it leads to an interpretation of labour legislation that complies with the Constitution.<sup>220</sup>

Furthermore, the Constitution has the effect of developing the common law where compliance with any particular human right is not at stake.<sup>221</sup> Moreover, all legislation that fails to maintain and protect the rights contained in the Constitution may be reviewed and declared unconstitutional.<sup>222</sup> In *National Education Health & Allied*

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<sup>215</sup> Grobbelaar-du Plessis and Njau 2019 *De Jure* 52, 277.

<sup>216</sup> Section 7(1) of the Constitution.

<sup>217</sup> Section 36, the Constitution.

<sup>218</sup> Section 36 of the Constitution.

<sup>219</sup> Grobbelaar-du Plessis and Njau 2019 *De Jure* 277.

<sup>220</sup> Grobbelaar-du Plessis and Njau 2019 *De Jure* 277.

<sup>221</sup> Grobbelaar-du Plessis and Njau 2019 *De Jure* 277.

<sup>222</sup> Section 2 of the Constitution.

*Workers Union v University of Cape Town*<sup>223</sup> (hereinafter *NEHAWU*), the court clarified that the legislature provides the foundational framework for fair labour practices, while the specialised labour tribunals, particularly the LAC and LC, are tasked with interpreting and expanding this framework through their jurisprudence.<sup>224</sup> The principle set by the court is that where legislation is enacted to give effect to constitutional rights, such rights should primarily be claimed through the legislation and that the legislation must be consistent with the Constitution.<sup>225</sup>

Likewise in *Minister of Health and Another v New Clicks South Africa*<sup>226</sup> (hereinafter *New Clicks*), the court reiterated that the constitutional requirement for administrative justice rights to be implemented through national legislation necessitates that claim be pursued through legislation enacted for that purpose.<sup>227</sup> Direct reliance on s 33(1) of the Constitution or common law principles, while circumventing the specific legislation, contradicts this legislative framework.<sup>228</sup>

### 3.2.2 Rights against unfair dismissals

#### 3.2.2.1 Unfair dismissal

The *LRA* establishes a dual fairness requirement for dismissals through s 188(1), mandating both procedural and substantive fairness.<sup>229</sup> This framework provides critical protection for employees with mental health conditions through two primary mechanisms: safeguarding against incapacity-based dismissals and preventing automatically unfair dismissals where the termination arise from disability discrimination.<sup>230</sup>

S 187 further strengthens dismissal protections by establishing the concept of automatically unfair dismissals, where certain grounds for termination are presumed unfair without requiring additional proof. Specifically, s 187(1)(f) designates

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<sup>223</sup> *National Education Health & Allied Workers Union v University of Cape Town* 2003 24 ILJ 95 (CC).

<sup>224</sup> *NEHAWU* para 34.

<sup>225</sup> *NEHAWU* para 35.

<sup>226</sup> *Minister of Health and Another v New Clicks South Africa* (Pty) Ltd and Others [2005] ZACC.

<sup>227</sup> *New Clicks* para 96.

<sup>228</sup> *New Clicks* para 96.

<sup>229</sup> Section 188(1) of *LRA*.

<sup>230</sup> Section 187(1)(f) of the *LRA*.

dismissals as automatically unfair when based on direct or indirect discrimination, including disability-related grounds.<sup>231</sup> This protection is reinforced by Item 2(3) of the Dismissal Code, which confirms that dismissals infringing on fundamental rights or those listed in s 187 are automatically unfair, thereby providing comprehensive protection for employees with mental health conditions.

### 3.2.2.2 Dismissal for misconduct

S 188(1) of the *LRA* mandates that employment termination must satisfy dual fairness requirements to be considered valid. This encompasses both a substantively justified reason and adherence to proper procedural requirements. The legislation specifically limits legitimate grounds for dismissal to those related to employee conduct, capacity, or the operational necessities of the business.<sup>232</sup>

The right to fair labour practices is an entrenched right for which the employer bears responsibility. The employer has to ensure that employees are protected from unfair labour practices.<sup>233</sup> In *Piliso v Old Mutual Life Assurance* (hereinafter *Piliso*)<sup>234</sup> this requirement includes taking proactive steps towards the elimination of discrimination in the workplace, and this includes persons with disabilities. S 23(1) of the Constitution guarantees everyone the right to fair labour practices.<sup>235</sup> This provision is particularly relevant for employees with mental illness, as it protects them against unfair dismissal and discrimination based on their mental health status.

The Constitutional Court in *National Education Health & Allied Workers Union v University of Cape Town*<sup>236</sup> established that while the concept of “fair labour practice” resists precise definition, courts must draw on both domestic and international experience to give it substantive content. Based on the principles established in *NEHAWU and New Clicks*, it is only possible to rely directly on s 23(1) of the Constitution (right to fair labor practices) instead of the *LRA* in two specific

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<sup>231</sup> Section 187 of the *LRA*.

<sup>232</sup> Section 188(1) of the *LRA*.

<sup>233</sup> Section 187 of the *LRA*.

<sup>234</sup> *Piliso v Old Mutual Life Assurance Co (SA) Ltd & Others* 2007 JOL 18897 (LC), para 93.

<sup>235</sup> Section 23(1) of the *Constitution of the Republic of South Africa*, 1996.

<sup>236</sup> *National Education Health & Allied Workers Union v University of Cape Town* 2003 24 ILJ 95 (CC) para 33-34.

circumstances: when challenging the constitutionality of the *LRA* and when addressing gaps in the *LRA*.<sup>237</sup>

### 3.2.2.3 Code of Good Practice: Dismissal

The *Code of Good Practice: Dismissal* (hereinafter the *LRA Dismissal Code*) provides that all employers should adopt disciplinary rules that establish the standard of conduct required of their employees. This requirement aims to ensure a uniform approach to discipline. The disciplinary codes of employers may differ from one business to another, depending on the nature and size of the businesses. Item 3(4) of the *LRA Dismissal Code* further maintains that it is generally inappropriate for an employer to dismiss an employee for a first offence, except where the offence is of such gravity that it would damage the employment relationship beyond repair. Gresse and Gresse hold that in dismissal cases, mental illness has to be considered when a sanction is contemplated.<sup>238</sup>

### 3.2.2.4 Dismissal for incapacity

Employers may well be cautioned to follow the correct dismissal procedures for the reason that there could be a slight difference between disability and incapacity, and the dismissal may be found to be automatically unfair. In *Standard Bank of South Africa v Commission for Conciliation, Mediation and Arbitration and Others*<sup>239</sup> (hereinafter *Standard Bank*), the court held that disability is not synonymous with incapacity. An employee is incapacitated if the employer cannot accommodate the employee or if the employee refuses an offer of reasonable accommodation.

The court further found that dismissing an employee who is incapacitated in those circumstances is fair, but dismissing an employee who is disabled but not incapacitated is unfair.<sup>240</sup> Marumoagae<sup>241</sup> maintains that a decision by the employer to dismiss the employee must come as a last resort after the employer proved that the person with the disability was unable to perform the job even after reasonable

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<sup>237</sup> *NEHAWU* para 15; see also *New Clicks* para 144.

<sup>238</sup> Gresse and Gresse 2024 *PER / PELJ* 3.

<sup>239</sup> *Standard Bank* para 94.

<sup>240</sup> *Standard Bank* para 94.

<sup>241</sup> Marumoagae 2012 *PER / PELJ* 355.

accommodation was offered. The employer need not accommodate an employee with a disability if this would impose an unjustifiable hardship on the business of the employer.<sup>242</sup>

#### 3.2.2.5 Dismissal for operational requirements

The LRA Code of Good Practice on Dismissal for Operational Requirements establishes specific parameters for operational dismissals, encompassing economic, technological, structural, or comparable business needs. Retrenchment becomes a valid consideration when an organisation faces financial challenges that threaten its sustainability.<sup>243</sup> In such circumstances, workforce reduction may qualify as a legitimate economic measure to reduce operational costs and ensure business continuity in the short to medium term. The organisation must demonstrate that such measures are necessary for its continued viability.

The *LRA* permits dismissals based on operational requirements, provided they strictly align with the statutory definition outlined in s 213 and the Code of Good Practice on Dismissal for Operational Requirements. Any termination citing operational requirements that falls outside these prescribed parameters may constitute an automatically unfair dismissal.

The employer must demonstrate that operational requirements serve as the genuine basis for termination, rather than using them as a pretext to mask other motivations for dismissal. This necessitates clear evidence that the dismissal stems from authentic operational needs as defined in the legislative framework, ensuring protection to persons living with mental illness.

#### 3.2.3 Rights against unfair discrimination

##### 3.2.3.1 Prohibition of unfair discrimination under section 6 of the EEA

The *EEA* is an important piece of legislation that is derived from the *Constitution*. It is intended to prevent unfair discrimination and implement affirmative action measures to enable equitable representation of employees from different races,

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<sup>242</sup> Item 6.11 of the Employment Disability Code.

<sup>243</sup> Section 189 of the *LRA*.

genders, and disability groups in the workplace.<sup>244</sup> It is true that the *EEA* does not define "disability", but it does provide a definition for "people with disabilities". According to the *EEA*, people with disabilities refer to "people who have a long-term or recurring physical or *mental impairment* which substantially limits their prospects of entry into, or advancement in, employment" (own emphasis added).<sup>245</sup> It is again evident from this definition that mental illness is regarded as a disability, and would therefore be covered by the protection afforded to employees by the *EEA* and other similar instruments.

The Constitutional Court has dealt with the concept of "discrimination" as part of equality. In *Prinsloo v Van der Linde and Others*,<sup>246</sup> the Constitutional Court interpreted the term "discrimination" to include the unequal treatment of people based on their features or characteristics.<sup>247</sup> In the case of *Harksen v Lane*,<sup>248</sup> the court held that discrimination is unfair if it impairs, or is likely to impair, an individual's fundamental human dignity or adversely affect them in any comparably serious way.<sup>249</sup>

S 6(1) of the *EEA* prohibits unfair discrimination.<sup>250</sup> In terms of this section, no person may discriminate directly or indirectly against an employee on various grounds, including disability or any other arbitrary ground.<sup>251</sup> Courts and tribunals rely on the test articulated in *Harksen v Lane*<sup>252</sup> as the authoritative framework for assessing claims of unfair discrimination<sup>253</sup> on arbitrary grounds<sup>254</sup> under s 6(1) of

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<sup>244</sup> Preamble of the *EEA*.

<sup>245</sup> Section 1 of the *EEA*.

<sup>246</sup> *Prinsloo v Van der Linde and Another* 1997 3 SA 1012 (CC), para 31 (hereinafter *Prinsloo*).

<sup>247</sup> *Prinsloo* para 31.

<sup>248</sup> *Harksen v Lane No and Others* 1997 11 BCLR 1489 (CC) (hereinafter *Harksen v Lane*).

<sup>249</sup> *Harksen v Lane* para 50.

<sup>250</sup> Section 6(1) of the *EEA*.

<sup>251</sup> Section 6(1) of the *EEA*.

<sup>252</sup> *Harksen v Lane* para 45.

<sup>253</sup> *Harksen v Lane* para 54. *Harksen* was decided in terms of Section 8 of the interim *Constitution of the Republic of South Africa, Act 200 of 1993*, but its pronouncements on the equality right remain authoritative and have on numerous occasions been endorsed and followed by the Constitutional Court.

<sup>254</sup> The concept of "arbitrary ground" in section 187(1)(f) of the LRA is intended to cover forms of unfair discrimination not explicitly listed in the Employment Equity Act. Notice 1345 or notice 1085? It allows for a flexible approach to identifying new grounds of unfair discrimination.

the *EEA*. According to Mushariwa,<sup>255</sup> the test requires a two-stage inquiry: first, by determining whether differentiation amounts to discrimination on specified grounds. Secondly, If the differentiation amounts to discrimination, the test will consider whether it amounts to unfair discrimination.

The presumption of unfairness will be based on an identified and specified ground. A presumption of unfairness automatically arises when discrimination is based on any of the grounds explicitly specified in the legislation.<sup>256</sup> Consequently, it is trite that the *EEA* is relevant to the research. The *EEA* explicitly prohibits unfair discrimination, including on the grounds of disability, which includes mental illness. However, the inherent requirements defence, provided under s 6(2)(b) of the *EEA*, serves as a legitimate justification for what would otherwise constitute automatic unfair discrimination in employment practices.<sup>257</sup> The *EEA*'s broad definition of disability includes mental impairments, which is crucial for protecting employees with mental illnesses.

The *EEA* requires employers to implement affirmative action measures,<sup>258</sup> which can benefit employees with mental illnesses. It explicitly requires employers to provide reasonable accommodation for people with disabilities, including those with mental illnesses. The *EEA* shifts the burden of proof<sup>259</sup> to the employer in discrimination cases, which can be beneficial for employees with mental illnesses challenging their dismissal as being automatically unfair.

### 3.2.3.2 Inherent requirements

S 6(2)(b) of the *EEA* explicitly recognises that it is not unfair discrimination to distinguish, exclude, or prefer any person based on an inherent requirement of a job. This provision serves as a defence against claims of unfair discrimination when the requirement is genuinely necessary for the position. However, the inherent

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<sup>255</sup> Mushariwa 2012 *PER/ PELJ* 415.

<sup>256</sup> Mushariwa 2012 *PER/ PELJ* 415.

<sup>257</sup> Marumoagae 2012 *PER / PELJ* 355.

<sup>258</sup> Section 15 of the *EEA*.

<sup>259</sup> Section 11 of the *EEA*.

requirement defence must be objectively justified, must be essential to perform core function.<sup>260</sup>

In *IMATU v City of Cape Town*<sup>261</sup> (hereinafter *IMATU*) the case concerned a firefighter who was denied employment due to his Type 1 diabetes. The City of Cape Town had a blanket ban on employing people with Type 1 diabetes as firefighters and this ban was based on safety concerns without individual assessment even though the applicant qualified for the position.<sup>262</sup> The court had to determine: whether the blanket ban constituted unfair discrimination, whether having Type 1 diabetes precluded someone from performing firefighting duties and whether the inherent requirements defence was valid.<sup>263</sup> The court found that the blanket ban amounted to unfair discrimination since no individual assessment was conducted, no consideration of reasonable accommodation and that there was no scientific evidence supporting the ban.<sup>264</sup> The principle set by the court was that inherent requirements must be based on objective evidence, individual assessment is necessary and that a blanket exclusions without justification are discriminatory.<sup>265</sup> This shows that the court will not take the defence advanced by the employer lightly without questioning its validity, thus granting protection to persons living with disability.

### 3.2.3.3 Reasonable accommodation

Reasonable accommodation as a construct is central to the protection of employees with disabilities in the South African workplace, including those with mental illnesses. Designated employers have a duty to reasonably accommodate persons with disability.<sup>266</sup> The *LRA's* Dismissal Code establishes employers' obligation to

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<sup>260</sup> Section 187(2) of the *LRA*.

<sup>261</sup> *IMATU v City of Cape Town* (2005) 26 ILJ 1404 (LC).

<sup>262</sup> *IMATU* para 1.

<sup>263</sup> *IMATU* para 89.

<sup>264</sup> *IMATU* para 110,111.

<sup>265</sup> *IMATU* para 117.

<sup>266</sup> A designated employer, as defined in Section 1 of the *EEA* refers to an employer employing 50 or more employees or fewer than 50 employees but with a total annual turnover equal to or above the applicable Schedule 4 threshold for its sector, a municipality, an organ of state (excluding local spheres of government, National Defence Force, National Intelligence Agency, and South African Secret Service) or an employer bound by a collective agreement designating it as a designated employer.

provide reasonable accommodation for employees whose work performance is affected by illness or injury. However, the Act itself does not define the parameters of such accommodation.<sup>267</sup> Accommodation could be achieved by changing an employee's work environment or placing them in a different, more suitable position. The *EEA* offers a definition of reasonable accommodation as "any modification or adjustment to a job or to the working environment that will enable a person from a designated group to have access to or participate or advance in employment".<sup>268</sup> Since people with disabilities (mental illnesses) form part of the designated groups, such reasonable accommodation will subsequently also apply to them.

As decided in *Standard Bank of South Africa v Commission for Conciliation, Mediation and Arbitration and Others*,<sup>269</sup> (hereinafter *Standard Bank*) it is trite that employers in South Africa have a legal duty to reasonably accommodate employees with disabilities to prevent discrimination. According to Gresse and Gresse,<sup>270</sup> if an employer fails to accommodate an employee with a disability, the omission may amount to discrimination, and even unfair discrimination. For the employer to consider a mentally ill employee for reasonable accommodation, and for the expectation to reasonably accommodate to be justified, the employee should disclose his or her medical condition to the employer, since mental illness may be invisible, as established in an earlier chapter.<sup>271</sup>

In offering reasonable accommodation,<sup>272</sup> the employer is guided by the Employment Disability Code.<sup>273</sup> Item 6.9 of the Employment Disability Code provides that reasonable accommodation includes:

"adapting existing facilities to make them accessible, adapting existing equipment or acquiring new equipment including computer hardware and software, re-organising workstations, changing training and assessment

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<sup>267</sup> Dismissal code.

<sup>268</sup> Section 1 of the *EEA*.

<sup>269</sup> *Standard Bank* para 9.

<sup>270</sup> Gresse and Gresse 2024 *PER/PELJ* 3.

<sup>271</sup> Marumoagae 2012 *PER / PELJ* 352. See also Gresse and Gresse 2024 *PER/PELJ* 18.

<sup>272</sup> Reasonable accommodation may be temporary or permanent; see section Item 6.8 of the Employment Disability Code.

<sup>273</sup> Employment Disability Code.

materials and systems, restructuring jobs so that non-essential functions are re-assigned, adjusting working time and leave, providing readers, sign language interpreters, and providing specialised supervision, training and support.”<sup>274</sup>

Item 6.8 of the Employment Disability Code requires the employer to consult with the employee and/or medical experts to determine which accommodation may be reasonable and necessary. Marumoagae<sup>275</sup> argues that if given reasonable accommodation, it is possible for employees with disabilities to perform equally to others without a disability. According to Smit,<sup>276</sup> the employee can only be dismissed if his mental health incapacitates him from performing his duties, but the employer bears the burden of proving the link between mental disorder as a disability and inability to perform.

#### 3.2.3.4 *Unjustified hardship*

Unjustified hardship is a central concept in South African labour law, particularly in relation to reasonable accommodation for employees with disabilities. It serves as a limit to the extent of accommodation that employers are required to provide. While employers are required to provide reasonable accommodation, this duty is not absolute.<sup>277</sup> Although unjustified hardship is not defined under the *EEA*, s 6 of the Employment Disability Code<sup>278</sup> provides the following definition:

“unjustifiable hardship is action that requires significant or considerable difficulty or expense and that would substantially harm the viability of the enterprise. This involves considering the effectiveness of the accommodation and the extent to which it would seriously disrupt the operation of the business.”<sup>279</sup>

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<sup>274</sup> Item 6.9 of the Employment Disability Code.

<sup>275</sup> Marumoagae 2012 *PER / PELJ* 356.

<sup>276</sup> Smit 2021 *Law Democracy & Dev* 48.

<sup>277</sup> In *Jansen*, the Constitutional Court clarified that while employers have a duty to reasonably accommodate employees with disabilities, this duty is not absolute para 189.

<sup>278</sup> The Employment Disability Code.

<sup>279</sup> Item 6.12 of the Employment Disability Code.

From the definition of unjustified hardship provided in the Employment Disability Code, it is clear that the employer should in good faith attempt to reasonably accommodate an employee with disability. This accommodation is necessary for employees with mental illness due to the invisible nature of such illness and the likelihood that employees would not disclose the medical condition to the employer.<sup>280</sup> Gresse and Gresse<sup>281</sup> suggest that employers should only be absolved from accommodating a mentally ill employee after showing that reasonable accommodation will impose a real burden on the business.

### 3.2.3.5 Technical Assistance Guidelines on the Employment of Persons with Disabilities of 2017

The Technical Assistance Guidelines on the Employment of Persons with Disabilities<sup>282</sup> (hereinafter the TAG) complements the Employment Disability Code and serves as a guide to employers and trade unions alike for the promotion of equal opportunities and fair treatment of persons with disabilities in the workplace.<sup>283</sup> The TAG is a domestic guideline document developed specifically for South Africa to provide guidance on implementing disability-related employment policies. Furthermore, the Commission for employment equity report is one of the reports used to monitor progress made towards disability-related employment.<sup>284</sup>

The TAG also educates stakeholders on the right to reasonable accommodation.<sup>285</sup> The TAG promotes the understanding that disability should be understood with respect to the difference in the treatment of persons with disability, whether based on the medical or social models.<sup>286</sup> The significance of the TAG is that it is often

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<sup>280</sup> Nxumalo 2018 *ILJ* 1436.

<sup>281</sup> Gresse and Gresse 2024 *PER/PELJ* 18.

<sup>282</sup> Workinfo date unknown <http://www.workinfo.org/index.php/legislation/item/1833-technical-assistance-guidelines-on-the-employment-of-persons-with-disabilities>.

<sup>283</sup> Preamble of the TAG.

<sup>284</sup> Department of Employment and Labour 2023 <https://accountingacademy.co.za/news/read/commission-for-ee-cee-24th-annual-report-2023-24>.

<sup>285</sup> Clause 1.5 of the TAG, 2.

<sup>286</sup> Clause 1.8.1 of the TAG, 3.

used by the courts and other tribunals for the interpretation of the law whenever there are disputes.<sup>287</sup>

The TAG also explains the differences between the social and medical models as far as disability is concerned, and mentions that the "medical model focuses on the diagnosis and curing of disability whereas the social model expresses the view that disability is not a problem, but rather the negative attitude of some people".<sup>288</sup> The TAG advises employers to maintain a disability management strategy to retain employees who become disabled during their period of employment.<sup>289</sup> Similar to the Employment ILO Disability Code, the TAG provides additional information that serves to clarify the *EEA* and the ILO Disability Code. This can be seen in the definition under TAG, which is like those provided under the *EEA*.<sup>290</sup>

Furthermore, like the *LRA* Dismissal Code, it emphasises the three criteria to be used when assessing an employee for the purpose of seeking or providing reasonable accommodation.<sup>291</sup> The criteria include that firstly, a person must have an impairment; second, the impairment must be long-term or recurring; and thirdly, the impairment must be substantially limiting.<sup>292</sup> Moreover, the TAG recommends that employers terminate employment relationships in line with 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>293</sup> In the end, it recommends that employers help employees access benefits on relevant prescripts and legislation.<sup>294</sup>

The TAG aids this research as it provides practical implementation guidance for the *EEA* and the Employment ILO Disability Code, establishes an inclusive definition of

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287 Clause 3.1 of the TAG, 6.  
288 Clause 1.8.1 of the TAG, 3.  
289 Clause 11.1 of TAG 45.  
290 Clause 5.1 of the TAG, 8.  
291 Clause 5.2 of the TAG, 8.  
292 Clause 5.1.1 of the TAG, 8.  
293 Clause 12.1 of TAG.  
294 Clause 13.1 of TAG.

disability as including mental impairments. and provides detailed strategies for employee retention and reintegration in the workplace.

### 3.2.3.6 Code of Good Practice on the Employment of People with Disabilities

The Code of Good Practice on the Employment of People with Disabilities<sup>295</sup> (hereinafter the Employment Disability Code) is intended to give employers and employees certainty about their rights and responsibilities and to resolve conflicts in order to ensure that individuals with disabilities can enjoy and exercise their rights at work.<sup>296</sup> The Employment Disability Code focuses on the effect of a disability on the person in relation to the working environment and not on the impairment itself. The matter is expressed in *Standard Bank*<sup>297</sup>, where the court reiterated that disability is not synonymous with incapacity. Item 5.3.1(b) defines persons with disabilities similar to the *EEA*, as "persons who have a long-term or recurring physical or mental impairment, which substantially limits their prospects of entry into, or advancement in employment".<sup>298</sup>

Item 6.1 of the Employment Disability Code provides that employees who become disabled during employment should be reintegrated into work where it is reasonably possible, and employers should seek to reduce the effect of an employee's disability on the person. Item 6.6 of the Employment Disability Code provides that when an employee develops a disability, the employer must consult with the employee to determine whether it can reasonably accommodate the employee's disability.

While remaining in contact with the employee, the employer should also encourage the employee to return to work early where this is reasonable.<sup>299</sup> The early return of an employee to work may call for vocational rehabilitation, transitional work programmes, or temporary or permanent flexible working time where needed.<sup>300</sup> When an employee is frequently absent from work due to an illness or injury on his or her part, the employer must, in consultation with the employee, determine whether the

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<sup>295</sup> GN 1085 in GG 39383 of 09 November 2015 (Hereinafter the Employment Disability Code).

<sup>296</sup> Item 2 of the Employment Disability Code.

<sup>297</sup> *Standard Bank* para 94.

<sup>298</sup> Item 5.3.1(b) of the Employment Disability Code.

<sup>299</sup> Item 11.3 of the Employment Disability Code.

<sup>300</sup> Item 11.3 of the Employment Disability Code.

latter is absent due to a disability that the employer should reasonably accommodate.<sup>301</sup>

Furthermore, item 11.5 of the Employment Disability Code provides that employers should explore the possibility of offering alternative work, reduced work, or flexible work placement for the employee with a disability where this is reasonable, so that employees are not persuaded or do not become obliged to resign from their employment. Item 12.1 of the Employment Disability Code also states that an employer may dismiss an employee who has a disability if the employer is unable to retain the employee in line with the Employment Disability Code.

The Employment Disability Code is clearly relevant to the research. It provides a comprehensive definition of disability that includes mental impairments, which is crucial for protecting employees with mental illnesses. The Employment Disability Code reinforces the principle of non-discrimination, which is essential in ensuring fair treatment of employees with mental illnesses. It provides guidance on reasonable accommodation, which can help employees with mental illnesses perform their job functions effectively.

### ***3.3 Conclusion***

This chapter explored legislation that protects employees with disabilities in the South African workplace. What one can draw from the discussion is that the South African legislative for workplace mental illness protection operates on multiple levels: constitutional foundations, statutory provisions, and regulatory guidelines. This comprehensive framework emphasises non-discrimination, reasonable accommodation, and fair procedures.

What is evident is that the legal framework is robust, and it addresses complex issues related to mental illness in the workplace, particularly in relation to fair dismissal practices. However, there may be practical implementation challenges that suggest the need for more explicit legislation and continued judicial guidance to balance employee rights with operational requirements. Against this background,

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<sup>301</sup> Item 11.4 of the Employment Disability Code.

the next chapter investigates the impact of mental illness on a person's productivity and conduct.

## **CHAPTER 4: The impact of mental illness on a person's productivity and conduct**

### **4.1 Introduction**

The earlier chapter examined South Africa's legislative framework about mental illness in the workplace. This framework establishes the foundational standards for how organisations must accommodate and support employees with mental health conditions. Mental illness in the workplace is a complex and significant issue that affects both employees and employers. It has far-reaching consequences for productivity, employee conduct, and organisational costs. This chapter explores the various ways in which mental health conditions affect the workplace environment and overall business operations. The WHO recognises that employee mental health can be influenced by various workplace factors, including job strain, working conditions, management practices, long working hours, a lack of team cohesion, harassment, and bullying.<sup>302</sup> These factors can contribute to the development or exacerbation of mental health issues among employees.

The effect of mental illness in the workplace manifests in several key areas, including employee productivity, workplace conduct and interpersonal relationships, adherence to workplace rules and schedules, absenteeism and presenteeism, and direct and indirect costs to employers. Understanding these impacts is crucial for developing effective strategies to support employees with mental health conditions and to mitigate the negative effects on both individual well-being and organisational performance. This discussion delves into each of the mentioned areas, examining how mental illness affects workplace dynamics and the potential consequences for both employees and employers.

### **4.2 The prevalence of mental illness**

The WHO provides that mental illness is a universal problem that should be acknowledged and should receive special attention.<sup>303</sup> According to Dewa *et al.*,<sup>304</sup> mental

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<sup>302</sup> Chopra 2009 *International Journal of Mental Health Systems* 2.

<sup>303</sup> Gaston and Phyllis Mental Health and Work Impact Issues and Good Practices'

<sup>304</sup> Dewa *et al* 2004 *HealthcarePapers*, 12-25.

illness is so rife that it accounts for approximately 12 percent of all disease and injuries worldwide. According to James,<sup>305</sup> it is estimated that one in four of people will suffer from mental illness at some point in their lives, considering that 121 million people currently suffer from mental illness. Despite the prevalence of mental illness globally, statistics for South Africa are not readily available.<sup>306</sup>

Havenaar *et al.*<sup>307</sup> reveal that the World Bank indicates mental illness as one of the major causes of human resources issues, which in turn affects economies.<sup>308</sup> There could be a connection between employment, mental wellbeing and productivity in that people who are employed are likely to suffer from mental illness.

Foller and Jones<sup>309</sup> are of the view that although mental illness and mental health may be connected, it is advised to treat them separately since employees with mental illness are able to perform and achieve a good standard of health. However, Butterworth *et al.*<sup>310</sup> argue that high job demands, job strain, low latitude of control, and unequal reward systems could contribute to adverse psychological conditions.

The prevalence of mental illness in the workplace contextualises the number of employees affected by dismissal policies. It highlights the frequency of mental health-related dismissal decisions, informs policy development and resource allocation, and supports anti-discrimination measures in dismissal processes.

### **4.3            *The impact of mental illness on a person's productivity in the workplace***

According to the WHO, mental illness may be influenced by various factors. Kestel<sup>311</sup> mentions that factors that come from the work environment may include "job strain, working conditions, management practices, long working hours, lack of team cohesion, harassment and bullying". According to Smit,<sup>312</sup> persons with mental illness,

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<sup>305</sup> James 2004 *Legal Studies* 517.

<sup>306</sup> Smit 2021 *Law Democracy & Dev* 45.

<sup>307</sup> Thiagarajan and Newson 2021 *Sapian Labs* 24.

<sup>308</sup> Havenaar *et al* 2007 *Soc Psychiatry Psychiatr Epidemiol.* 9

<sup>309</sup> Follmer and Jones 2018 *Journal of Management* 328.

<sup>310</sup> Butterworth *et al* 2011 *Occupational and Environmental Medicine* 1.

<sup>311</sup> Kestel 2019 <https://www.who.int/news-room/commentaries/detail/mental-health-in-the-workplace>.

<sup>312</sup> Smit 2021 *Law Democracy & Dev* 46.

although not incapable of performing optimally, tend to perform at 70 percent of their potential. Based on my analysis, I argue that inadequate working environments and high-stress conditions can trigger mental health difficulties, consequently affecting workplace productivity.

Havenaar *et al.*<sup>313</sup> state that employees who have mental illness are inclined to have more unproductive days because they are unable to function optimally. Fifty percent of those who are unable to report for work take sick leave of 13 or more days, and at worst, some abandon their work.<sup>314</sup> Follmer and Jones<sup>315</sup> argue that it is unavoidable that production will be affected when this happens. Fellow employees may be left to work harder in order to cover for colleagues who are absent.

Dewa *et al.*<sup>316</sup> propose that the remaining employees may become fatigued and be unable to perform well in their positions. Dewa *et al.*<sup>317</sup> further hold that the monetary disruptions of absenteeism and the decline in production can be seen when looking at the company bottom line. Mental illness is estimated to affect 7.1 percent of the total payroll and likely costs billions of rands. Smit<sup>318</sup> argues that the demand created by the Fourth Industrial Revolution, which requires higher levels of cognitive and mental functioning, may end up costing the employer since persons with mental illness may fail to rise up to the change in business operation. The impact of mental illness on workplace productivity warrants examination in this research as it affects employee performance standards, reasonable accommodation determinations, incapacity procedures, fair dismissal considerations, and discrimination prevention measures.

#### **4.4            *The effect of mental illness on a person's conduct in the workplace***

Mental illness is considered a concealable condition as a person may have invisible symptoms that affect their personal or work lives. Sometimes others do not notice

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<sup>313</sup> Dewa *et al* 2004 *HealthCarePapers* 13.  
<sup>314</sup> Dewa *et al* 2004 *HealthCarePapers* 14.  
<sup>315</sup> Follmer and Jones 2018 *Journal of Management*  
<sup>316</sup> Dewa *et al* 2004 *HealthCarePapers* 14.  
<sup>317</sup> Dewa *et al* 2004 *HealthCarePapers* 14.  
<sup>318</sup> Smit 2021 *Law Democracy & Dev* 46.

these symptoms.<sup>319</sup> Symptoms of mental illness include physical, emotional, cognitive, and behavioural symptoms that may affect a person's conduct at work.<sup>320</sup> Conduct may include behaviours such as irritability, mood swings, increased conflicts with colleagues, and difficulty adhering to workplace rules and schedules.

Gross and Jazaieri<sup>321</sup> argue that individuals with certain mental health conditions may experience intense emotional reactions that are disproportionate to the situation, leading to conduct that can be difficult for others to understand or manage. In the work environment, this behaviour may be challenging to deal with and could result in persons with mental illness being avoided.

Irritability and mood swings are common symptoms of several mental health conditions that can affect workplace performance. Such irritability and mood swings may last as long as a week. Gross and Jazaieri<sup>322</sup> explain that when persons with conditions that cause irritability and mood swings become agitated, they tend not to be concerned with the long-term effects of their actions. Constant conflict between persons with mental illness and employees may result in labour and workplace disruptions.<sup>323</sup>

Emens<sup>324</sup> proposes that engagement with persons with mental illness, even for a short period, may affect how other people feel. It could create a hostile environment. The phenomenon of increased conflict between fellow employees and a person with mental illness emerged in *Automobile Association of South Africa v Govender NO & Others*,<sup>325</sup> which is discussed in more detail in Chapter 5 of this research. In this case, an employee was dismissed for misconduct related to displaying violent behaviour towards other colleagues.<sup>326</sup> There is a common perception that

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<sup>319</sup> Follmer and Jones 2018 *Journal of Management* 328, 329.

<sup>320</sup> Follmer and Jones 2018 *Journal of Management* 329.

<sup>321</sup> Gross and Jazaieri 2014 *Clinical Psychological Science* 391.

<sup>322</sup> Gross and Jazaieri 2014 *Clinical Psychological Science* 394.

<sup>323</sup> Smit 2021 *Law Democracy & Dev* 43.

<sup>324</sup> Emens 2006 *Georgetown Law Journal* 401.

<sup>325</sup> *Automobile Association of South Africa v Govender NO & Others* 1999 20 ILJ 2854 (LC) (hereinafter the *Automobile case*).

<sup>326</sup> *Automobile case* para 1.

employees with mental illness may be violent, and this may have influenced the employer's decision to dismiss the employee.<sup>327</sup>

Mental health conditions can significantly affect an individual's ability to adhere to workplace rules and schedules, presenting challenges for both employees and employers. According to Adler *et al.*,<sup>328</sup> mental health conditions can be associated with diminished time management and reduced job performance on jobs that involve rational, interactive tasks. Mental health conditions can interfere with an individual's ability to manage time effectively, leading to difficulties in adhering to workplace schedules.

The impact of mental illness on workplace conduct merits critical examination in this research as it affects the display of symptoms in workplace behaviour, the differentiation between medical symptoms and wilful misconduct, the determination of reasonable accommodations and the assessment of dismissal fairness under South African labour law.

#### **4.5            *The effect of mental illness on a person's absenteeism and presenteeism in the workplace***

Smit<sup>329</sup> points out that workplace bullying of employees with mental illness contributes to increased absenteeism, with South African data showing affected employees taking an average of 18 to 27 days off work annually due to mental health conditions.<sup>330</sup> Mental illness has the potential to increase absenteeism cost for the employer. However, presenteeism<sup>331</sup> contributes the greater part of the cost, adversely affecting employer operations.<sup>332</sup>

Mental illness in the workplace may contribute directly to costs associated with health care and disability. Employers may be compelled to refer people with mental illness for medical treatment as a way of assisting them in dealing with their

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<sup>327</sup> Holness 2016 *South African Journal on Human Rights* 514.

<sup>328</sup> Adler *et al* 2006 *American Journal of Psychiatry* 1569.

<sup>329</sup> Smit 2021 *Law Democracy & Dev* 46.

<sup>330</sup> Smit 2021 *Law Democracy & Dev* 46.

<sup>331</sup> The concept of presenteeism describes circumstances where employees attend work but, due to physical or mental health conditions, operate at diminished productivity levels.

<sup>332</sup> Evans-Lacko and Knapp 2016 *Soc Psychiatry Psychiatr Epidemiol* 1525.

condition. This could result in employers having to incur medical costs, especially in situations where persons with mental illness take sick leave for long periods or need medical specialists.

Smit<sup>333</sup> explains that prolonged absence may eventually lead to disability, thereby exacerbating the cost to the employer, especially when there is a need to give reasonable accommodation to persons with mental illness. Smit<sup>334</sup> further avers that the mismanagement of workplace mental health carries substantial business implications, including productivity losses and employee attrition. My analysis reveals that inadequate workplace mental health management, including insufficient treatment protocols and referral systems, generates indirect costs for employers. Based on my research findings, I argue that these organisational shortcomings in addressing mental health needs have measurable financial implications.

According to Smit,<sup>335</sup> mental illness has multiple cost implications for employers, including medical treatment expenses, disability management costs, employee turnover and replacement training, vocational rehabilitation expenses, and reasonable accommodation implementation costs.

The relationship between mental illness and workplace attendance patterns on both absenteeism and presenteeism is crucial to this research, as it affects dismissal considerations, has operational consequences, requires reasonable accommodation, fair assessment criteria and long-term prognosis evaluations.

#### **4.6 Conclusion**

As discussed in this chapter, it is clear that mental illness has significant and multifaceted effect on workplace productivity, employee conduct, and overall organisational costs. Mental illness presents significant workplace challenges through reduced productivity, behavioural changes, and organisational costs. These consequences necessitate comprehensive management strategies, including supportive policies and reasonable accommodations, to mitigate both human and financial

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<sup>333</sup> Smit 2021 *Law Democracy & Dev* 44.

<sup>334</sup> Smit 2021 *Law Democracy & Dev* 43.

<sup>335</sup> Smit 2021 *Law Democracy & Dev* 43.

costs. The failure to address these challenges effectively can result in decreased organisational performance and increased liability risks.

Employers have to implement supportive policies, provide appropriate accommodations, and foster an inclusive work environment to mitigate the negative effects of mental illness on both individual employees and the organisation as a whole. Failure to address these issues can result in significant human and financial costs, affecting not only the individuals with mental illness but also their colleagues and the overall organisational performance. The next chapter examines the dismissal of an employee when mental illness is the main reason for misconduct.

## **CHAPTER 5: The dismissal of an employee when mental illness is the main reason for misconduct**

### **5.1 Introduction**

The management of employee misconduct arising from mental health conditions presents significant legal and procedural complexities for employers. Organisations must carefully navigate dismissal procedures when mental illness is the underlying cause of workplace misconduct. As has been established in previous chapters, the South African legal framework recognises mental illness as a form of disability, necessitating reasonable accommodation before considering dismissal. However, this recognition raises important questions about how to balance the rights and needs of employees with mental health conditions against the business interests of an employer and the disciplinary standards expected in the workplace.

The judgments of *Jansen v Legal Aid South Africa*<sup>336</sup> (hereinafter *Jansen*) and *Legal Aid South Africa v Jansen*<sup>337</sup> (hereinafter *Legal Aid*) highlight the complexities involved in addressing misconduct committed by employees with mental health conditions. These matters, along with others like *Automobile Association of South Africa v Govender NO & Others*,<sup>338</sup> (hereinafter *Automobile*) demonstrate the evolving nature of South African labour law in dealing with mental illness in the workplace. They underscore the need for employers to carefully consider the impact of an employee's mental health on their behaviour and to explore alternative sanctions or reasonable accommodation before resorting to dismissal for misconduct under these circumstances.

This chapter examines how South African courts and labour legislation approach the intersection of mental illness and workplace misconduct. Building on the previously discussed impact of mental illness on workplace productivity and conduct, this chapter examines the intersection of employee disability, reasonable accommodation, unjustified hardship, and dismissals where mental illness underlies misconduct. The

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<sup>336</sup> *Jansen*.

<sup>337</sup> *Legal Aid*.

<sup>338</sup> *Automobile*.

analysis incorporates judicial interpretations of disability rights and workplace treatment through relevant case law.

## **5.2            *Understanding mental illness as a disability***

The WHO recognises disability as a major health issue and further holds that people seek health services not because they are disabled but because “a disease makes it difficult for them to do what they used to do beforehand”.<sup>339</sup> Westlake *et al.*<sup>340</sup> hold that individuals with an intellectual or mental impairment may experience difficulties in communicating their thoughts, reflecting on internal states, and generally have difficulty in understanding the content of questions. However, the manifestation of mental illness in the workplace can be less visible and more complex to manage than many physical disabilities. Understanding mental illness in this context is important and employers should become informed to avoid unfair dismissal.

## **5.3            *Dismissal considerations and processes for employees with mental illness***

The South African legal framework requires employers to consider mental illness as a form of disability, necessitating reasonable accommodation before considering dismissal. This begs the question of whether employees with mental illness are incapable of being dismissed for misconduct. According to the *LRA*, employee conduct and incapacity are recognised as reasons why an employer may dismiss an employee given that the process followed in the dismissal is fair.<sup>341</sup> Schedule 8 of the Dismissal Code lists the requirements that have to be met to justify a fair dismissal.<sup>342</sup> Schedule 8, item 4(1) of the *LRA* Code of Good Practice: Dismissal<sup>343</sup> (hereinafter the Dismissal Code), lists procedural requirements to be met by the employer prior to dismissing the employee.<sup>344</sup> On the other hand, Schedule 8, item 7 of the

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<sup>339</sup> WHO 2012 <https://www.who.int/standards/classifications/international-classification-of-functioning-disability-and-health/who-disability-assessment-schedule>.

<sup>340</sup> Westlake *et al* 2020 *The European Journal of Psychiatry*.

<sup>341</sup> Section 188(1)(a) of the *Labour Relations Act* 66 of 1995.

<sup>342</sup> Schedule 8 of the Dismissal Code.

<sup>343</sup> Dismissal Code.

<sup>344</sup> Schedule 8, item 4(1) of the Dismissal Code requires employer to investigate and determine whether there are grounds for dismissal, notify the employee of the allegations, allow the employee opportunity to state a case in response to the allegations, allow employee

Dismissal Code provides the requirements the employer should meet to ensure dismissal is substantively fair.<sup>345</sup>

In addition, the employer is required to follow a process outlined in schedule 8, item 10 and 11 of the Dismissal Code when dismissing an employee for ill health or injury. Considering that incapacity on the grounds of ill health or injury may be temporary or permanent, the employer should:

“if an employee is temporarily unable to work in these circumstances, the employer should investigate the extent of the incapacity or the injury. If the employee is likely to be absent for a time that is unreasonably long in the circumstances, the employer should investigate all the possible alternatives short of dismissal. When alternatives are considered, relevant factors might include 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 ill or injured employee. In cases of permanent incapacity, the employer should ascertain the possibility of securing alternative employment, or adapting the duties or work circumstances of the employee to accommodate the employee's disability”.<sup>346</sup>

Schedule 8, Item 11 of the Dismissal Code provides further guidelines employers need to follow when dismissing employee for ill health or injury.<sup>347</sup> According to

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<sup>345</sup> reasonable time to prepare for the case with assistance of a union representative or fellow employee and furnish employee with reasons of notice to dismiss.

Schedule 8, item 7 of the Dismissal Code requires the employer to consider whether or not the employee contravened a rule or standard regulating conduct in, or of relevance to, the workplace, if a rule or standard was contravened, whether or not (i) the rule was a valid or reasonable rule or standard, (ii) the employee was aware, or could reasonably be expected to have been aware, of the rule or standard; (iii) the rule or standard has been consistently applied by the employer; and (iv) dismissal was an appropriate sanction for the contravention of the rule or standard.

<sup>346</sup> Schedule 8, item 10 of the Dismissal Code.

<sup>347</sup> Schedule 8, 11 of the Dismissal Code requires the employer to consider whether or not the employee is capable of performing the work; and (b) if the employee is not capable (i) the extent to which the employee is able to perform the work; (ii) the extent to which the employee's work circumstances might be adapted to accommodate disability, or, where this is not possible, the extent to which the employee's duties might be adapted; and (iii) the availability of any suitable alternative work.

Gresse and Mbao,<sup>348</sup> obtaining medical evidence and guidance from medical experts is important in justifying dismissal. *Avril Elizabeth Home for the Mentally Handicapped v CCMA*<sup>349</sup> (hereinafter *Avril Elizabeth*) confirmed the above dismissal requirements and further reiterated that there must be a fair hearing, employee must be allowed opportunity to state case and the process must be simplified.<sup>350</sup>

Notwithstanding this, employers may be challenged when an employee with mental illness commits misconduct for which he must be disciplined and dismissed if found guilty.<sup>351</sup> Gresse and Gresse support this and aver that there may be a need for a guideline to assist employers in navigating between incapacity, disability, or poor work performance.<sup>352</sup> This situation requires a delicate balance between maintaining workplace discipline while complying with labour laws, and accommodating employees with mental health conditions. One of the main challenges is determining whether the employee's actions should be treated as misconduct or as a manifestation of their mental illness.

#### **5.4 Analysis of cases dealing with dismissal for misconduct arising from mental illness**

##### **5.4.1 Background to the facts in *Jansen v Legal Aid South Africa and Legal Aid South Africa v Jansen***

In *Jansen v Legal Aid South Africa* (herein after *Jansen*) evolved after Mr. Jansen was employed by the Legal Aid Board ('the employer') as a paralegal from 2007 until his dismissal in February 2014.<sup>353</sup> During his employment, he was exceptional at his work, resulting in him gaining numerous honours, including appointment as

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<sup>348</sup> Gresse and Mbao 2020 *Law Democracy & Development* 127.

<sup>349</sup> *Avril Elizabeth Home for the Mentally Handicapped v Commission for Conciliation Mediation and Arbitration and Others* (JR782/05) [2006] ZALC.

<sup>350</sup> *Avril Elizabeth* para 75-78.

<sup>351</sup> The challenge manifest itself in the manner the courts treat same dismissal cases of employees with mental illness. In the LC matter of the *Jansen* para 50, it was found that the employee's mental illness was the proximate reason for his dismissal and not misconduct, but later in the Legal Aid case para 49, the Court found that the employee's mental illness was not the proximate reason for his dismissal, but his misconduct. These developments could create challenges and anxiety amongst employers.

<sup>352</sup> Gresse and Gresse 2024 *PER/PELJ* 2.

<sup>353</sup> *Jansen* para 2-5.

a brand ambassador.<sup>354</sup> During his visit to a doctor on 7 April 2010 (for a different ailment), Mr. Jansen was diagnosed with depression.<sup>355</sup> Following medical assessment by his treating doctor, he was referred to hospital for counselling and treatment.<sup>356</sup> Mr. Jansen informed the employer about his diagnosis of “major depression” by means of a medical certificate.<sup>357</sup>

In the meantime, the line manager represented Mr. Jansen’s wife in a case involving domestic violence without informing Mr. Jansen in line with the employer’s policy. This triggered Mr. Jansen’s depression, of which he subsequently made the employer aware.<sup>358</sup> Mr. Jansen’s depression worsened as a result of this personal and professional life.<sup>359</sup> His personal life resulted in conflict situations with his superiors.<sup>360</sup> This conflict led to an increase in Mr. Jansen’s absenteeism and complaints about his general attitude.<sup>361</sup> Mr. Jansen’s behaviour did not go unnoticed and eventually resulted in him being charged with misconduct, for which a disciplinary hearing was held on 7 November 2013.<sup>362</sup> At the hearing, Mr. Jansen did not challenge the factual basis of the charges but attempted to present medical evidence in the form of a report from Dr Farre to motivate his actions.<sup>363</sup>

The chairperson of the hearing rejected the medical evidence, while ruling that the hearing was convened to evaluate the charges of misconduct and not to determine the Mr. Jansen’s incapacity.<sup>364</sup> Following the disciplinary process, Mr. Jansen was found guilty of misconduct and on 24 February 2014, he was dismissed.<sup>365</sup>

Aggrieved by the decision of the employer, Mr. Jansen challenged his dismissal by first approaching the CCMA to institute a claim of unfair dismissal in terms of the

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354 *Jansen* para 7.

355 *Jansen* para 9.

356 *Jansen* para 9.

357 *Jansen* para 10.

358 *Jansen* para 14.

359 *Jansen* para 26.

360 *Jansen* para 42,43.

361 *Jansen* para 15.

362 *Jansen* para 15. The employee was charged with misconduct relating to his absenteeism, insubordination, and a failure to obey a lawful instruction.

363 *Jansen* para 29.

364 *Jansen* para 30.

365 *Jansen* para 5.

LRA and a claim for unfair discrimination in terms of the *EEA*. After assessing the case, the CCMA confirmed that it did not have the jurisdiction to hear the matter, referring the matter further to the LC.<sup>366</sup> Mr. Jansen succeeded with his claim for unfair dismissal and unfair discrimination at the LC.<sup>367</sup> However, the employer was not satisfied with the findings of the LC, consequently approaching the LAC, which overturned the LC decision.<sup>368</sup>

#### 5.4.1.1 Assessment of the facts the court relied upon in its judgment in *Jansen v Legal Aid South Africa*

The LC's judgment in *Jansen v Legal Aid South Africa*<sup>369</sup> (hereinafter the *Jansen*) raises important questions about the link between mental health, disability discrimination, and fair labour practices. The court's assessment of the facts and subsequent ruling provides valuable insights into the obligations of employers towards employees with mental health conditions. The first claim to consider was whether Mr. Jansen's dismissal was automatically unfair as provided for in section 187(1)(f)<sup>370</sup> of the Dismissal code.<sup>371</sup> It is common cause that Mr. Jansen's claim was based on the assertion that he was a victim of unfair discrimination and that his dismissal was based on his disability (mental illness/depression) or an analogous arbitrary ground.<sup>372</sup> Mr. Jansen's second claim was that he had been unfairly discriminated against on the ground of disability and/or an analogous ground in terms of the *EEA*.<sup>373</sup>

Although the court accepted that Mr Jansen suffered from "reactive depression" that arose from stress,<sup>374</sup> it concluded that Mr. Jansen's depression could not be

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<sup>366</sup> *Jansen* para 25.

<sup>367</sup> *Jansen* para 68.

<sup>368</sup> *Legal Aid* para 53.

<sup>369</sup> *Jansen*.

<sup>370</sup> Section 187(1)(f) states that a dismissal is automatically unfair if the reason for the dismissal is that the employer unfairly discriminated against an employee, 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>371</sup> *Jansen* para 29.

<sup>372</sup> *Jansen* para 1.1.

<sup>373</sup> *Jansen* para 1.2.

<sup>374</sup> *Jansen* para 40.

classified as a disability.<sup>375</sup> This finding of the court may be regarded as a setback when viewed against the growing body of research suggesting that mental health conditions should be elevated and treated with the same gravity as physical disabilities.<sup>376</sup> Holness<sup>377</sup> underscores this by noting that the equal participation of persons with disabilities, including those with psychological disabilities, is essential as highlighted in s 12 and 23(1) of the Constitution.<sup>378</sup> This recognition ensures that employees with mental health conditions are afforded the same protections under labour law as those with physical disabilities.

The issue of the intersection between misconduct, disability, reasonable accommodation and dismissal demonstrated itself in the *Jansen*. The LC held that Mr. Jansen's culpability in the misconduct with which he was charged could have been diminished by his condition<sup>379</sup> making dismissal inappropriate.<sup>380</sup> This determination led the court to conclude that the employer had a duty to accommodate Mr Jansen and that an incapacity enquiry was the appropriate mechanism to address the Mr. Jansen's shortcomings.<sup>381</sup>

Marumoagae is of the opinion that once the employee becomes aware of his disability, he must inform the employer to allow the employer to investigate and consider reasonable accommodation.<sup>382</sup> It is submitted that based on the employer's omission to investigate and consider reasonable accommodation, the court was correct in finding<sup>383</sup> that Mr. Jansen's dismissal was automatically unfair. The reason is that the employer appears to have acted in contravention of section 187(1)(f) of the *LRA* based on disability.<sup>384</sup>

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375 *Jansen* para 45.

376 Nxumalo 2018 *ILJ* 1450.

377 Holness 2016 *South African Journal on Human Rights* 512.

378 *The Constitution of the Republic of South Africa*, 1996.

379 The court referred to conditions which the employee suffered from at the time which include depression, anxiety, alcoholism and grief.

380 *Jansen* 43.

381 *Jansen* 43.

382 Marumoagae 2012 *PER / PELJ* 352.

383 *Jansen* 68.

384 S 187(1)(f) of the *LRA* provides that a dismissal is automatically unfair if the reason for the dismissal is that the employer unfairly discriminated against an employee, directly or indirectly, on any arbitrary ground, including disability.

The issue of discrimination was also considered and the court, relying on the *EEA*, noted that persons with a disability are defined 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>385</sup> The court, referring to the findings of the earlier case of *New Way Motor and Diesel Engineering (Pty) Ltd v Marsland*<sup>386</sup> (hereinafter *New Way Motor*), adopted the view that a court need not determine whether the mental illness satisfies the definition of disability as defined in terms of labour legislation.<sup>387</sup> Notwithstanding this view, the court held that discrimination based on an employee’s depression infringed the employee’s right to human dignity, and this infringement constituted unfair discrimination based on an analogous ground.<sup>388</sup>

Despite the finding, the court may have departed from its responsibility to clarify with certainty whether the mental illness satisfies the definition of disability as defined in terms of labour legislation. This omission by the Court could be regarded as significant since, according to Holness,<sup>389</sup> the Disability Code, the Dismissal Code and the TAG do not offer sufficient guidance on how to reasonably accommodate mental illness. The LC, having accepted that Mr Jansen suffered from depression and that the employer was aware of his mental illness,<sup>390</sup> accepted that Mr Jansen was dismissed due to his condition.<sup>391</sup> The LC established that the applicant’s dismissal was automatically unfair in terms of s 187(1)(f) of the *LRA*,<sup>392</sup> and further found that it was necessary to conduct a test to determining such a dismissal and to prove unfair discrimination within the meaning of section 6 of the *EEA*.<sup>393</sup>

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385 *Jansen* para 44.

386 *New Way Motor*.

387 *New Way Motor* para 45.

388 *New Way Motor* 45.

389 Holness 2016 *South African Journal on Human Rights* 512.

390 *Jansen* para 51.

391 *Jansen* para 50.

392 Section 187(1)(f) of the *LRA*.

393 Section 6 of the *EEA*.

However, in contrast, the court in *Smith v Kit Kat Group*<sup>394</sup> (hereinafter *Smith*) relied on the Dismissal Code, and stated that the aspects of consultation and accommodation are critical components when one has to decide whether discrimination based on disability is fair.<sup>395</sup> In *Jansen*, it was held that Mr. Jansen's dismissal was automatically unfair due to discrimination on one of the listed grounds.<sup>396</sup> The sundry assessment and the courts' reliance on diverse statutory instruments in dealing with the dismissal of an employee suffering from mental illness reveal the need for a detailed legislative and policy framework.<sup>397</sup>

#### 5.4.1.2 Assessment of the facts on which the court relied for its judgment in *Legal Aid South Africa v Jansen*

Following the judgment in the *Jansen v Legal Aid South Africa*<sup>398</sup> and having been dissatisfied with the outcome, the employer took the case to the LAC on appeal. What is of note is that the judgment in the *Legal Aid South Africa v Jansen*<sup>399</sup> (hereinafter *Legal Aid*) differed substantially from that of the LC. The full assessment is discussed below. Notwithstanding the LAC's acceptance that Mr Jansen suffered from depression, the court noted that Dr Farre (the clinical psychologist) who had assessed Mr. Jansen, did not declare that Mr. Jansen suffered from "chronic, major or ongoing depression".<sup>400</sup>

Furthermore, the LAC was not persuaded by the evidence that Mr. Jansen's mental illness was the proximate reason for his dismissal.<sup>401</sup> The court relied on the evidence presented by Dr Farre, who testified that notwithstanding Mr. Jansen's medical condition, Mr. Jansen appreciated the difference between right and wrong and that he was capable of acting in accordance with such appreciation.<sup>402</sup> In determining whether the reason for Mr. Jansen's dismissal was discrimination on prohibited

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<sup>394</sup> *Smith v Kit Kat Group (Pty) Ltd* (JS787/14) [2016] ZALCJHB 362; 2016 12 BLLR 1239 (LC) 2017 (38) ILJ 483 (LC).

<sup>395</sup> *Smith* para 59.

<sup>396</sup> *Smith* para 59.

<sup>397</sup> Gresse and Mbaio 2020 *Law, Democracy & Development* 110.

<sup>398</sup> *Jansen*.

<sup>399</sup> *Legal Aid*.

<sup>400</sup> *Legal Aid* para 7.

<sup>401</sup> *Legal Aid* para 45-47.

<sup>402</sup> *Legal Aid* para 45.

grounds, the LAC noted the fact that Mr. Jansen did not dispute that he had engaged in the conduct that formed the basis of the disciplinary action instituted against him.<sup>403</sup> This admission by Mr. Jansen persuaded the court that the cause of the dismissal was Mr. Jansen's conduct.

Additionally, based on Mr. Jansen's admission, the court was unconvinced that the misconduct was due to his depression<sup>404</sup> and that Mr. Jansen could not appreciate the wrongfulness of his actions or had no self-control.<sup>405</sup> Having regard for these findings, the LAC rejected the LC's conclusion that the employee had discharged the evidentiary burden required to succeed in his claim under s 187(1)(f) of the *LRA*.<sup>406</sup> The LAC held that Mr. Jansen did not present credible evidence that he was treated differently from other employees or that his depression resulted in such treatment.<sup>407</sup> The LAC concluded that the employer had a legitimate reason to discipline Mr. Jansen and thus, Mr. Jansen's claim of unfair discrimination was rejected.<sup>408</sup> The LAC set aside the findings of the LC and dismissed the case.

The LAC recognised that the mental illness of "depression" is a worryingly common occurrence in the South African workplace.<sup>409</sup> The court noted that depression is a form of ill health and that many of the legal mechanisms<sup>410</sup> dealing with the incapacity of an employee will apply to the dismissal of a person suffering from mental illness.<sup>411</sup> The court reiterated that employers must assess a depressed employee's capacity (emphasis on employees suffering from mental illness) prior to dismissal, otherwise failure to do so could result in a substantively or procedurally unfair dismissal.<sup>412</sup> The court found that the assessment is necessary since the employee's

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403 *Legal Aid* para 38.

404 *Legal Aid* para 45.

405 *Legal Aid* para 39.

406 *Legal Aid* para 49.

407 *Legal Aid* para 49.

408 *Legal Aid* para 48-49.

409 *Legal Aid* para 40.

410 The court made specific reference to Item 10 and 11 of the Code of Good Practice: Dismissal, contained in Schedule 8 of the LRA para 41.

411 *Legal Aid* para 41.

412 *Legal Aid* para 41.

actions could reduce their blameworthiness for misconduct or eliminate their appreciation of wrongfulness.<sup>413</sup>

Conversely, the court reflected on the role of an employee during dismissal for reasons based on mental illness. The court noted that for an employee to succeed in a claim for an automatically unfair dismissal based on mental illness, the employee would need to provide sufficient evidence and engage in the “narrower determination<sup>414</sup> of whether the reason for his dismissal was his depression and if he was subjected to differential treatment on that basis”.<sup>415</sup> *Gresse and Gresse*<sup>416</sup> hold that the narrower determination involves whether the reason for the employee’s dismissal was depression or whether the employee had been subjected to differential treatment on that basis.

The courts’ assessment of evidence in the *Jansen* case and the *Legal Aid* case shows important facts that form the basis for reaching a conclusion on fairness of dismissal for employee suffering from mental illness. What is noted in both cases is that in *Jansen*, the LC held that Mr. Jansen’s culpability for the misconduct with which he was charged could have been diminished by his condition, making dismissal inappropriate given the circumstances where the employer failed to assess the employee’s conduct prior to dismissal.

In contrast, the court in *Legal Aid* accepting that Mr. Jansen appreciated the difference between right and wrong after his own admission of the misconduct, and that he was capable of acting in accordance with this appreciation based on evidence from Dr Farre. The court subsequently ruled that dismissal was appropriate since the proximate cause was not the employee’s condition. As acknowledged by *Gresse and Gresse*,<sup>417</sup> the contrast in the court’s decisions and the conduct of the employer

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<sup>413</sup> *Legal Aid* para 42.

<sup>414</sup> The court held that conative ability is a question of fact and an employee denying conative ability, as the respondent in effect does, bears an evidentiary burden to prove the factual basis of the defense.

<sup>415</sup> *Legal Aid* para 43.

<sup>416</sup> *Gresse and Gresse* 2024 *PER/PELJ* 11.

<sup>417</sup> *Gresse and Gresse* 2024 *PER/PELJ* 3.

sets a classic example of the lacuna that exists in legislative jurisprudence on mental illness.

5.4.1.3 Assessments of the facts the court relied upon in its judgement in *Automobile Association of South Africa v Govender NO & Others*

This *Automobile Association of South Africa v Govender NO & Others*<sup>418</sup> (hereinafter *Automobile*) dealt with the dismissal of an employee for misconduct after displaying violent behaviour towards other colleagues. The employee was employed as a patrol man in the company.<sup>419</sup> During the course of his employment, he was diagnosed with depression after his wife of eight years left him and he was taking several medication as a result.<sup>420</sup> On 19 December 1998, while the employee was on duty attending to a breakdown, his colleague, Mr Rudman, communicated with him at around 16:00 and noticed that he sounded drowsy.<sup>421</sup> The employee telephoned Mr. Rudman at 17:30 and informed him that he had been involved in a car accident with a bakkie and that he could not avoid the accident as his reflexes were too slow.<sup>422</sup>

Following this, the employee became involved in an argument with the driver of the other vehicle, to such an extent that he drew his firearm and threatened the driver.<sup>423</sup> When he reported for duty the next day, he contended that he could not remember what had happened the previous day.<sup>424</sup> Following this incident, he was charged with misconduct for reckless and negligent driving, endangering the lives of members of the public, bringing the association into disrepute, and acting aggressively and pointing a firearm at another person while representing the association.<sup>425</sup> He was found guilty following the enquiry and dismissed.<sup>426</sup>

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<sup>418</sup> *Automobile*.  
<sup>419</sup> *Automobile* para 1.  
<sup>420</sup> *Automobile* para 1.  
<sup>421</sup> *Automobile* para 2.  
<sup>422</sup> *Automobile* para 4.  
<sup>423</sup> *Automobile* para 5.  
<sup>424</sup> *Automobile* para 8.  
<sup>425</sup> *Automobile* para 9.  
<sup>426</sup> *Automobile* para 10.

He referred an unfair dismissal dispute to the CCMA and during the arbitration, the employee could not remember much of what had transpired on the day of the accident.<sup>427</sup> In line with the principle set in the *Legal Aid South Africa v Jansen*<sup>428</sup> (hereinafter *Legal Aid*), the employee bears an evidentiary burden to prove the factual basis of the defence. Dr Lalla testified on behalf of the employee that he had been treated for depression and migraines and further said that depression and medication could result in memory loss.<sup>429</sup>

In adjudicating the case, the commissioner attributed some degree of negligence to the employee for driving while highly sedated and substituted the sanction of dismissal with a final written warning.<sup>430</sup> The employee was reinstated but without retrospective effect.<sup>431</sup> This finding by the CCMA aligns with the finding in *Jansen*<sup>432</sup> where the court found that the employee's culpability for the misconduct with which he was charged could have been diminished by his condition, making dismissal inappropriate.<sup>433</sup>

The company took the case on review and the LC concurred with the commissioner by ruling that the employee lacked the necessary knowledge of wrongdoing to commit the misconduct.<sup>434</sup> However, the LC further found that the sanctions imposed by the commissioner were too lenient to prevent another disastrous incident.<sup>435</sup> The court remitted the matter to the bargaining council for the commissioner to consider either compensation or an alternative position that would not involve driving and interacting with members of the public.<sup>436</sup>

The LC deemed it necessary to allow the employer to investigate if it could reasonably accommodate the employee by offering him an alternative position that would not involve driving and interacting with members of the public. The case shows the

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<sup>427</sup> *Automobile* para 11.

<sup>428</sup> *Legal Aid*.

<sup>429</sup> *Automobile* para 11.

<sup>430</sup> *Automobile* para 15.

<sup>431</sup> *Automobile* para 15.

<sup>432</sup> *Jansen*.

<sup>433</sup> *Jansen* para 43.

<sup>434</sup> *Automobile* para 17.

<sup>435</sup> *Automobile* para 18.

<sup>436</sup> *Automobile* para 19.

stance taken by the courts that the employers have a duty to consider the impact of the employee's mental illness on their behaviour and to explore alternative sanctions or reasonable accommodations. This further shows the legislative protection afforded to people with disabilities.

#### 5.4.1.4 Consequence of incorrect choice between misconduct and incapacity dismissal procedures

When an employer incorrectly pursues dismissal for misconduct instead of incapacity, particularly in cases involving mental illness, several significant legal and procedural consequences may arise. As established in *Standard Bank v CCMA*<sup>437</sup>, there is a crucial distinction between disability and incapacity, with the court reiterating that following an incorrect process inherently leads to unfair dismissal. The misconduct route fails to consider the medical condition's impact on behavior and neglects the employer's duty to investigate and provide reasonable accommodation, potentially resulting in discrimination claims.

The *Janser*<sup>438</sup> specifically addressed this issue, establishing that mental illness may diminish culpability, making a misconduct process inappropriate when a medical condition affects behavior. The court mandated that an incapacity inquiry is necessary when dealing with mental health issues. Additionally, *IMATU*<sup>439</sup> reinforced the requirement for individual assessment and medical evidence, rejecting blanket approaches to medical conditions. The *Legal Aid v Janser*<sup>440</sup> case further demonstrated that choosing the wrong process could result in an automatically unfair dismissal, potentially violating the Employment Equity Act and constitutional rights.

The consequences of pursuing misconduct instead of incapacity are particularly severe because the incapacity route requires specific procedural elements: medical investigation, mandatory consultation, exploration of accommodation options, consideration of alternative positions, and provision of support opportunities. Failure to follow this proper process can result in higher compensation awards for

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<sup>437</sup> *Standard Bank* para 58-60.

<sup>438</sup> *Jansen v Legal Aid* para 89-92.

<sup>439</sup> *IMATU* para 91-93.

<sup>440</sup> *Legal Aid* para 112-115.

automatically unfair dismissal, possible reinstatement orders, additional damages for discrimination, and significant costs implications. This emphasises the critical importance of correctly identifying and following the appropriate dismissal process when dealing with employees affected by medical conditions or disabilities.

## **5.5 Conclusion**

This chapter discussed the dismissal of an employee when mental illness is the dominant factor in the committal of misconduct. The jurisprudential analysis of dismissals for mental illness-related misconduct in South Africa reveals several critical challenges: first, the legislative and policy framework, given the absence of clear legislative guidance, inconsistent policy interpretation, and uncertainty in procedural requirements. Secondly, the judicial interpretation evident from the divergent approaches between courts, exemplified in *Jansen* where the LC and LAC reached opposing conclusions, highlights the complexity of these matters. Thirdly, there are competing legal considerations where two fundamental tensions emerge: balancing disability accommodation requirements with disciplinary procedures and reconciling mental illness as both a medical condition and a potential misconduct factor. Lastly, the procedural challenges related to the burden of proof requirements, the interrelations between evidence of mental illness and misconduct and the scope of the employer's investigative duty. The next chapter tables conclusions to the research and offers recommendations to address these challenges.

## **CHAPTER 6: Conclusion and Recommendation**

### ***6.1 Conclusions***

This paper approached the concept of the fairness of dismissal in the workplace from four angles: the international legislative framework dealing with disability in the workplace, which was discussed in Chapter 2, legislative protection for mental illness in South Africa as discussed in Chapter 3, the impact of mental illness on a person's productivity and conduct as discussed in Chapter 4 and the dismissal of an employee when mental illness is the main reason for misconduct in Chapter 5. Through this analysis, a systematic framework emerges that offers critical insights and evidence-based strategies for managing mental health in South African organisations

The international framework for protecting persons with mental illness in the workplace operates through a multi-layered system of United Nations agencies and instruments. The UN establishes fundamental principles through the UDHR, while the WHO provides critical classification systems and assessment tools that recognize mental health conditions as disabilities. The ILO strengthens these protections through specialised conventions and recommendations, including the Discrimination Convention, Termination Convention, VRE, and CRPD, which collectively establish standards for preventing workplace discrimination and ensuring reasonable accommodation. South Africa has demonstrated its commitment to these international standards by ratifying key instruments and aligning its domestic legislation with international obligations, creating a comprehensive framework for protecting employees with mental illness in the workplace.

This legal framework is rooted in constitutional rights of equality, dignity, and fair labour practices. While mental health is not explicitly mentioned in the Constitution except regarding children's rights, the framework provides protection through interconnected legislative instruments. The *LRA* governs employer-employee relationships and protects against unfair dismissal through its Code of Good Practice, while the *EEA* addresses discrimination and includes mental impairments in its definition of disability.

Additional protection comes from the Code of Good Practice on the Employment of People with Disabilities and TAG, which outline reasonable accommodation requirements and workplace integration strategies. This integrated framework creates a robust system requiring employers to protect and accommodate employees with mental illness, supported by dispute resolution mechanisms through the CCMA and Labour Courts.

The prevalence and impact of mental illness in the workplace presents significant challenges for both employers and employees. These challenges lead to both absenteeism and presenteeism, resulting in substantial costs for employers through healthcare expenses, disability management, employee turnover, rehabilitation expenses, and the implementation of reasonable accommodation measures. The impact is particularly significant in the context of the Fourth Industrial Revolution, which demands higher levels of cognitive and mental functioning from employees.

The legal framework for addressing mental illness in the workplace requires careful consideration of disability status and reasonable accommodation before proceeding with dismissal. Mental illness, being less visible and more complex to manage than physical disabilities, presents unique challenges for employers in determining whether an employee's actions should be treated as misconduct or as a manifestation of their condition. The concept of unjustified hardship serves as a limit to the extent of accommodation required from employers, though they must demonstrate that reasonable accommodation would impose a real burden on the business.

The Labour Court's judgment in *Jansen v Legal Aid South Africa* addresses critical questions about mental health, disability discrimination, and fair labour practices in the workplace. While the court acknowledged Jansen's "reactive depression", it controversially concluded that his depression did not constitute a disability, despite growing recognition that mental health conditions should be treated with the same gravity as physical disabilities.

The court held that Jansen's culpability for misconduct could have been diminished by his condition, making dismissal inappropriate, and found that the employer had failed in its duty to investigate and provide reasonable accommodation. Although

the court relied on the *EEA's* definition of disability, it followed the precedent from *New Way Motor* that courts need not determine whether mental illness meets the statutory definition of disability, instead finding that discrimination based on depression infringed the employee's dignity and constituted unfair discrimination on analogous grounds. The court's varying reliance on different statutory instruments in this case highlights the need for more detailed legislative and policy framework regarding mental illness in the workplace.

The *Automobile Association* illustrates how courts handle dismissals involving mental illness and misconduct. The case involved a patrol man who, while suffering from depression and under medication, was involved in a series of incidents including threatening someone with a firearm. Although initially dismissed for misconduct, the CCMA reduced the sanction to a final written warning, acknowledging that his condition and medication could have affected his behaviour. This aligned with the Jansen precedent, which recognised that mental illness could diminish culpability for misconduct.

The Labour Court, while agreeing that the employee lacked full awareness of wrongdoing, found the CCMA's sanctions too lenient and ordered consideration of either compensation or alternative employment that would minimize public interaction. This case demonstrates the courts' expectation that employers must consider mental illness's impact on behaviour and explore reasonable accommodation options before proceeding with dismissal, reinforcing the legislative protections for employees with disabilities.

## **6.2 Recommendations**

### 6.2.1 Introduction

This section presents key recommendations aimed at addressing the challenges surrounding mental illness and workplace misconduct in South Africa's employment context. The recommendations address three critical areas of intervention: legislative reform, policy framework enhancement, and educational programmes.

The recommended legislative reforms may develop more comprehensive regulations that specifically address the intersection of mental illness and workplace

misconduct. These proposed amendments aim to clarify existing ambiguities in the LRA, particularly regarding the distinction between incapacity and disability, while establishing clearer guidelines for handling cases where mental illness interconnects with misconduct.

The policy framework recommendations emphasise the need for enhanced procedural protections and standardised approaches. There is significant focus on addressing the current system's inequitable expectation that employees with mental illness should navigate complex procedures independently. The proposed framework includes mandatory medical expert evidence requirements and consistent procedural safeguards across workplaces.

The educational component advocates for comprehensive awareness programmes targeting both employers and employees. These programmes aim to enhance an understanding of mental health issues in the workplace, clarify rights and responsibilities, and improve the management of mental health-related workplace incidents. The recommendations collectively seek to create a more equitable and informed approach to handling mental illness in the workplace while reducing the risk of unfair dismissals and litigation. Therefore, this part of the chapter proposes recommendations for regulating the fairness of dismissal for misconduct arising from mental illness.

## 6.2.2 Recommendations

### 6.2.2.1 Legislative reform to address mental illness challenges

The misconduct of employees suffering from mental illness cannot be managed using a one-size-fits-all approach.<sup>441</sup> South African lawmakers should consider developing more comprehensive legislation specifically addressing mental health in the workplace.<sup>442</sup> This could involve amendments to the LRA to provide clearer guidelines on how to handle cases where mental illness intersects with misconduct. A

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<sup>441</sup> Gresse and Gresse 2024 *PER/PELJ* 24.

<sup>442</sup> Nxumalo 2018 *ILJ* 1437.

dedicated section should be included to deal with misconduct, incapacity and reasonable accommodation for mental illness conditions.

Since item 10 of the LRA Code of Good Practice on Dismissal refers to both “incapacity” and “disability”, there is a need to amend Section 1 of the *LRA* to include a definition of disability. Furthermore, though the confusion between “incapacity” and “disability” was clarified in earlier court judgements,<sup>443</sup> it seems the confusion still persists.<sup>444</sup>

The proposed amendments to the incapacity procedures in the *LRA* Code of Good Practice on Dismissal would serve three crucial purposes: to provide distinct procedural requirements for incapacity and reasonable accommodation, to provide clear differentiation between disability and incapacity considerations and to enhance guidance for judicial interpretation of these distinct concepts. Furthermore, mentally ill employees should be entitled to more protection, such as protection against unfair dismissal and increased favourable outcomes at the courts as a direct result of enhanced guidance in cases where mentally ill employees are unfairly dismissed.

#### 6.2.2.2 Enhanced policy framework

The Department of Employment and Labour should develop a detailed policy framework or code of practice specifically focused on mental health in the workplace. In most workplaces, incapacity and disciplinary procedures allows for representation by a fellow employee or by a union representative, but they do not automatically allow expert representation<sup>445</sup> such as legal representation.<sup>446</sup>

The current system's expectation that employees with mental illness should independently navigate complex procedures is inequitable. Two key interventions are proposed: first, a comprehensive policy framework providing employers with detailed protocols and standardised procedures for mental health cases; second,

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<sup>443</sup> *Smith v Kit Kat Group* para 58.

<sup>444</sup> *Gresse and Gresse 2024 PER/PELJ* 31.

<sup>445</sup> Item 4(1) of the Code of Good Practice contained in Schedule 8 of the LRA.

<sup>446</sup> *MEC: Department of Finance, Economic Affairs & Tourism, Northern Province v Mahumani* 2005 2 All SA 479 (SCA) para 11.

enhanced procedural protections ensuring mandatory medical expert evidence<sup>447</sup> and consistent procedural safeguards across workplaces.

This paper submits that enhanced policy frameworks would strengthen protections for employees with mental illness during workplace incapacity and reasonable accommodation processes, thereby safeguarding them against unfair dismissals

### 6.2.2.3 Employer and employee education programmes

Nationwide employer and employee education programmes should be implemented to increase awareness and understanding of mental health issues in the workplace. For employers, this should include training on how to identify potential mental health issues, how to provide reasonable accommodation, and how to fairly address misconduct that may be related to mental illness. Furthermore, employers should be better equipped to conduct proper role clarification for different role players in a disability management process.

For employees, this should include training on their rights and responsibilities in terms of the relevant legislation, an obligation to disclose their mental health illness, and awareness of procedures and accommodation request processes they need to follow. Basic mental health literacy programmes should recognise common mental health conditions, how their mental illness affects workplace behaviour and performance, and understand symptoms and manifestations.

This paper submits that enhanced awareness will enable both employers and employees to better navigate the complex intersection of mental illness and misconduct in the workplace. Such understanding would help employees recognise circumstances that could jeopardise their employment, while employers would benefit from reduced litigation risks arising from infringement of fair labour practice rights.

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<sup>447</sup> Gresse and Gresse 2024 *PER/PELJ* 30.

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