



The regulation of incapacity based on ill-health or injury under the South African law: emerging trends

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SOLEMN DECLARATION

I, KGOPUTSO GEORGE SEKHUKHUNE, duly declare that this research entitled, "The regulation of incapacity based on ill-health or injury under the South African law: emerging trends", for the Degree of Master of Laws at the North-West University (Mafikeng Campus) hereby submitted, has not been previously submitted by me for a degree at this institution or any other university. I further declare that this research is my own work in design, structure and execution and that all materials and sources contained herein have been duly acknowledged.



KGOPUTSO GEORGE SEKHUKHUNE

18 November 2019

Date

DECLARATION BY SUPERVISOR

I, RAMOKGADI WALTER NKHUMISE, do hereby declare that this dissertation by KGOPUTSO GEORGE SEKHUKHUNE, for the degree of LLM, be accepted for examination.



RAMOKGADI WALTER NKHUMISE

18 November 2019

Date

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DEDICATION

I dedicate this research study to my late son, Bothlale Moahlodi. I strongly believe you are an angel watching over us, smiling ever to brighten our ways.

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LIST OF ABBREVIATIONS

ADA	Americans with Disability Act
ADAAA	Americans with Disabilities Act Amendment Act
BCEA	Basic Conditions of Employment Act
CCMA	Commission for Conciliation, Mediation and Arbitration
COIDA	Compensation for Occupational Injuries and Diseases Act
CRDP	Convention on the Rights of Persons with Disabilities
DDA	Disability Discrimination Act
EA	Equality Act
EEA	Employment Equity Act
EEOC	Equal Employment Opportunity Commission
FAMSA	Family South Africa
ILO	International Labour Organisation
ILJ	Industrial Law Journal
LAC	Labour Appeal Court
LC	Labour Court
LRA	Labour Relations Act
OHSA	Occupational Health and Safety Act
PEPUDA	Promotion of Equality and Prevention of Unfair Discrimination Act
PSCBC	Public Service Coordinating Bargaining Council
TAG	Technical Assistance Guidelines on the Employment of People with Disabilities
UK	United Kingdom
USA	United States of America
ZALC	South African Labour Court

CHAPTER 1

INTRODUCTION

1.1 Title

The regulation of incapacity based on ill-health or injury under the South African law: emerging trends

1.2 Research question

To what extent does the regulation of incapacity based on ill-health or injury protect the rights of employees with specific reference to depression or stress-related illness?

1.3 Problem statement

Under South African law, the dismissal of an employee due to ill-health or injury falls within the ambit of incapacity.¹ As a result, incapacity based on ill-health or injury is recognised as a fair reason for terminating the employment relationship.² Hence, the legislature enacted the *Labour Relations Act 66 of 1995* (hereafter the *LRA*) which provides guidelines that employers shall follow in effecting fair dismissals. Under the South Africa employment law context, dismissal for incapacity based on ill-health or injury is regulated under schedule 8 of the *LRA*, which contains the Code of Good Practice: Dismissal (hereafter referred to as the Code).³

Item 11 of the Code regulates the procedure on incapacity based on ill-health or injury under South African labour law.⁴ However, the Code falls short of providing adequate protection to incapacitated employees suffering from ill-health or injuries, specifically depression. For instance, the Code does not define the interaction between incapacity based on ill-health or injuries and disability in more detailed contents. Hence, the study interrogates the following issues amongst others: first, whether the regulation of incapacity provides adequate protection to employees experiencing ill-health as a

¹ Grogan *Workplace Law* 309.

² Grogan *Workplace Law* 309.

³ See Schedule 8: Code of Good Practice: Dismissal of the *Labour Relations Act 66 of 1995*.

⁴ See Schedule 8: Code of Good Practice: Dismissal of the *Labour Relations Act 66 of 1995*.

result of depression and stress related illness in the workplace? Secondly, does the regulation provide clear guidelines on the interaction between incapacity based on ill-health or injury and disability? Thirdly, what are the emerging trends from case law and academic developments relative to the regulation of incapacity based on ill-health or injuries?

The Labour Court has, on several occasions, delivered conflicting decisions in respect of the interpretation of the Code on incapacity based on ill-health or injury and disability. For example, in *Nagdee v Edson*⁵ (*Nagdee case*), an employee contended that he suffered from depression and the employer applied a wrong Code in that the employer dismissed him for incapacity rather than disability. The court held:

...there is no absolute prohibition against dismissing an employee by reason of a disability when the disability leads to incapacity to fulfil the functions in the workplace.⁶

Further, in *Independent Municipal and Allied Trade Union on behalf of Strydom v Witzenberg Municipality* (*Strydom case*),⁷ the court held:

...an assessment could not be undertaken in an arbitrary manner and without properly consulting the employee on possible alternatives.

This view was also stated in *National Union of Mine Workers v Libanon Gold Mining Co Ltd*⁸ wherein the court held:

...even though an employer may not be obliged to retain an employee who is not productive, fairness requires that a proper assessment be made of whether that situation has been reached before the employer resorts to dismissal.

The employers are bound to comply with the guidelines and cannot dismiss arbitrarily without following fair procedure.⁹

Generally, employers are confronted with challenges in implementing the guiding principles provided in the Code on ill-health or disability related cases. For example, in

⁵ *Nagdee v Edcon* (unreported) case number J1402/2015 of 26 February 2016.

⁶ *Nagdee v Edcon* (unreported) case number J1402/2015 of 26 February 2016 para 58.

⁷ *Independent Municipal and Allied Trade Union on behalf of Strydom v Witzenberg Municipality* 2012 33 ILJ 1081 (LAC) para 6.

⁸ *National Union of Mine Workers v Libanon Gold Mining Co Ltd* 1994 15 ILJ 585 (LAC) para 18.

⁹ Item 2 Schedule 8 Code of Good Practice on Dismissal of the *LRA*.

Ernstzen v Reliance Group Trading (Pty) Ltd,¹⁰ the employee who sustained injuries as a result of a motor vehicle accident contended that the employer dismissed him for disability but the employer argued that the dismissal was on grounds of incapacity. Evidently, it is an emerging trend that the employers frequently rely on inappropriate guidelines. It is important to apply appropriate guidelines because refusing to accommodate an incapacitated employee might result in unfair dismissal.¹¹ On the other hand, refusing to accommodate the disability of an employee constitute unfair discrimination. The duty to accommodate disability is more onerous.¹²

1.3.1 Background to study

Generally, employees suffering from injuries and ill-health experience some serious challenges in the workplace.¹³ Depression or stress-related illnesses have a direct impact on the ability of an employee to perform their functions in the workplace.¹⁴ In essence, Truter¹⁵ correctly argues:

...some employees who suffer from depression might qualify as employees who has a disability whilst others will not.

For instance, in *Jansen v Legal Aid South Africa (Jansen case)*,¹⁶ the employee was diagnosed with depression and contended that he had been dismissed for misconduct whereas he suffered from a disability. The Labour Court held that the employer unfairly discriminated the employee in terms of section 6 of the *Employment Equity Act 55 of 1998*.¹⁷ In this case the employer opted to follow a different procedure other than a procedure on incapacity. By inference, it is not certain whether depression is categorised as incapacity or disability.

¹⁰ *Ernstzen v Reliance Group Trading (Pty) Ltd* (unreported) case number C717/2013 of 18 May 2015 para 6.

¹¹ Item 4 Schedule 8 Code of Good Practice on Incapacity of the *LRA*.

¹² Chapter 5 of the Technical Assistance Guidelines on Employment of People with Disabilities.

¹³ *Liebenberg v Mbekwa* (JR2899/09) 2014 ZALC JHB.

¹⁴ Sallis and Birkin 2013 *Journal of Occupational Rehabilitation* 469.

¹⁵ Truter 2017 *TFM Magazine* 51.

¹⁶ *Jansen v Legal Aid South Africa* (unreported) case number C678/2014 of 16 May 2018.

¹⁷ *Jansen v Legal Aid South Africa* (unreported) case number C678/2014 of 16 May 2018 paras 10 and 59.

Given the above brief analysis, the current research theme, the regulation of depression as a form of incapacity under the South African labour law: emerging trends, is topical, relevant and significant in contributing to the challenges of interpretation and the development of a developmental framework.

1.3.2 Literature review

The point of departure in this study is anchored on the judicial and academic developments on this topic. Employers are more often confronted with the problem of dealing with incapacity where illness or injury overlaps with disability. For example, Burger¹⁸ in his research paper cites Basson *et al* in order to show:

....incapacity and disability are used interchangeably and that severe depression may affect an employee to the extent that the problem constitutes incapacity or disability.¹⁹

On the other hand, Grogan²⁰ emphasises that the onus rests on the employer to prove that the employee is incapacitated. Similarly, Du Plessis and Fouche²¹ indicate that an employer is obliged to accommodate the incapacitated employee before resorting to dismissal as an option. In *Samancor Tubatse Ferrochrome v Metal and Engineering Industries Bargaining Council*,²² the court held:

... incapacity should not only be defined in a narrow context as it extends to the point that incapacity may be permanent and may have partial or a complete impact on the employee's ability to perform the job.

It can be deduced from this view point that incapacity and disability apply interchangeably. Hence, the study examines the extent to which regulation of incapacity may protect the employees suffering from depression.

Furthermore, Grogan²³ argues that it is fair to dismiss sick or injured employees only when there is no prospect of their recuperating in a time during which employer can

¹⁸ Burger Incapacity as a Dismissal Ground in South African Labour Law 44.

¹⁹ Burger Incapacity as a Dismissal Ground in South African Labour Law 44.

²⁰ Grogan *Dismissal* 397.

²¹ Du Plessis and Fouche *A Practical Guide to Labour Law* 292.

²² *Samancor Tubatse Ferrochrome v Metal and Engineering Industries Bargaining Council* (unreported) case number JA 57/08 of 12 March 2018 para 9.

²³ Grogan *Workplace Law* 222.

cope without suffering significant loss as a result of the employee's absence. For instance, in *Danielskuil Steenwerke v Bobbejaan*,²⁴ the employee who experienced ill-health did not dispute that he was incapacitated, however, it was contended that the employers did not accommodate them.

In addition, Carvalheira²⁵ is of the view that there is no adequate protection provided to an employee suffering from a psychological disorder such as depression as there are no clear guidelines regulating whether the issue is incapacity due to ill-health or disability. Furthermore, the author opines that depression should be understood and interpreted within the regulatory prescripts of a disability.²⁶ Lastly, Marumoagae²⁷ correctly points out that disability and incapacity are two different concepts under South African labour law.

1.3.3 Scope and limitations of the study

The study focuses on incapacity based on ill-health or injuries with specific reference to depression and stress related illness. The study also takes a comparative survey of international conventions as well as foreign law developments from the United States of America (USA) and United Kingdom (UK). For example, in the USA the legislature enacted *Americans with Disabilities Act of 1990 (ADA)* which regulates equal employment opportunities for people suffering from disabilities. The Act adequately protects the rights of employees suffering from depression. Unlike in South Africa, there is no legislation which specifically regulates disability at the workplace. Hence, the statutory provisions relating to incapacity oftentimes overlap to disability and leave the employers confronted with legal challenges. Similarly, in the UK there is protective legislation regulating depression as a form of disability. The *Disability Discrimination Act of 1995 (DDA)* provides for protection to employees suffering from depression and stress related illness in the UK workplace. In this study, a comparative survey is

²⁴ *Danielskuil Steenwerke v Bobbejaan* (unreported) case number JR 923/2013 of 22 February 2016 paras 8 and 50.

²⁵ Carvalheira Depression, Dismissals and Disability 103.

²⁶ Carvalheira Depression, Dismissals and Disability 103.

²⁷ Marumoagae 2012 Potchefstroom Electronic Law Journal 356.

conducted to learn new pointers with necessary caution from other countries with a view of reforming South African regulatory policies.

Reference is made to legislation regulating incapacity based on ill-health or injury as well as disability in South Africa such as the *Employment Equity Act* 55 of 1998 (hereinafter referred to as *EEA*), the *Basic Conditions of Employment Act* 75 of 1997 (hereinafter referred to as *BCEA*), the *Occupational Health and Safety Act* 85 of 1993 (hereinafter referred to as *OHSA*), and the *Promotion of Equality and Prevention of Unfair Discrimination Act* 4 of 2000 (hereinafter referred to as *PEPUDA*). Lastly, other forms of incapacity as grounds for dismissal are not explored in this study.

1.3.4 Rationale and justification of the study

This study aims to contribute to the existing body of legal knowledge within the framework of incapacity based on ill-health or injury with special reference to depression. The study evaluates the existing laws regulating incapacity based on ill-health or injury as well as disability with a view of proposing law reform on this topic. Thus, the study is important as it clarifies to the employers how to categorise depression and the appropriate procedures to follow prior to dismissing an incapacitated employee.

1.4 Framework of the study

This study consists of the following interrelated five chapters:

Chapter one outlines the introduction, the research problem and the structure of the entire study. It consists of the problem statement, literature review and the research methodology.

Chapter two reflects on the constitutional overview and the legislative framework which regulates the dismissal for incapacity based on ill-health or injury. As a starting point, constitutional dispensation is explored prior to the legislative development of the law on dismissals.

Chapter three examines the recent position of incapacity based on ill-health or injuries with specific reference to depression and stress related illnesses. The chapter outlines

the emerging trends emanating from the courts and academic developments of the law on incapacity based on ill-health or injuries. Furthermore, the study analyses the challenges regarding the nature and extent of accommodation. Lastly, the chapter critically examines the interaction between incapacity based on ill-health or injuries and disability.

Chapter four outlines a comparative perspective of the regulation on incapacity based on ill-health or injuries under the South African law with foreign law and international conventions as well as the legal developments in the United Kingdom (UK) and United States of America (USA).

Chapter five summarises the findings of the study and proffers recommendations. It also provides recommendations to the employers, employees and policy-makers on this topic.

1.5 Research methodology

There are various research methods which could be adopted in conducting research, amongst others, the qualitative and quantitative. Qualitative research relates to the method of generating words rather than numbers as data for analysis.²⁸ On the other hand, quantitative refers to a method that strives to measure statistical models in order to explain what is observed.²⁹ This study adopts a qualitative method as the study is a theoretically-driven research that relies the most on legislative elements and international law instruments regulating incapacity in the workplace. The study interrogates and sifts the literature, textbooks, case law from Labour Court, Commission for Conciliation and Arbitration, *etcetera*. Furthermore, a comparative analysis between South Africa, United Kingdom (UK) and United States of America (USA) is undertaken. In essence, the countries were selected on the basis that they have adequately developed laws that address depression or stress-related conditions in the workplace. Lastly, the international law convention as a source of inspiration will also be explored.

²⁸ Bricki and Green 2007 <http://hdl.handle.net/10144/84230>.

²⁹ Bricki and Green 2007 <http://hdl.handle.net/10144/84230>

1.6 Relevance to research unit theme

The study forms part of the vulnerable employees under the research unit: Law, Justice and Sustainability. Employers and employees are often confronted with challenges in the workplace in relation to depression and this affects production in the workplace.

1.7 Ethics statement

This study is based on judicial and academic developments; it is descriptive in nature and no interviews were conducted with incapacitated or disabled people.

CHAPTER 2

CONSTITUTIONAL DISPENSATION AND THE REGULATORY LEGISLATIVE FRAMEWORK OF DISMISSAL FOR INCAPACITY BASED ON ILL-HEALTH OR INJURY UNDER SOUTH AFRICAN LAW

2.1 Introduction

Having set out in the previous chapter the exposition, background and significance of the study, this chapter outlines the legislative framework of incapacity based on ill-health or injury under South African labour law. Clearly, under South African labour law employees' rights are bolstered through legislation. Hence, in this chapter the plethora of legislation regulating incapacity due to ill-health with specific reference to depression and disability are explored.

2.2 South African legislative framework on incapacity based on ill-health or injury in the workplace

Under South African labour law, the rights of employers and employees are predominantly contained in the statutes.³⁰ Clearly, this is as a result of past unfair labour practices and intended purposes by the legislature to improve best labour practice. In order to adequately protect the rights of both the employees and employers, the legislature deemed it fit to confine the labour rights through the legislative framework. Moreover, the recommendations by the Wiehahn Commission on the principle of fair labour practice received more attention through legislative reforms.³¹ Since then, it has been the primary purpose of the legislature to enact labour legislation which promotes and protects the rights of incapacitated and disabled employees.

The Acts of Parliament are reasonable attempts to create statutory protection by the legislature upon which the rights of employers and employees are promoted.

³⁰ For example, see *LRA*, *EEA* and *BCEA*.

³¹ McGregor, Dekker and Budeli *Labour Law Rules* 4.

Nonetheless, the legislation falls short of providing clear guidelines on how to categorise depression under the South African labour law. Further, the law is not explicit nor clear on the interaction between incapacity and disability. For instance, it is a challenge to determine whether depression falls under the category of incapacity due to ill-health or disability. Hence, depression is currently understood and accommodated under the prescripts of either incapacity or disability. In this study, it is argued that despite the legislation in place, employers and employees are confronted with challenges in implementing the existing legislative provisions in relation to depression. Moreover, the employer's outcomes are challenged and subject for adjudication by the Commission for Conciliation, Mediation and Arbitration (CCMA), Labour Court (LC) and Labour Appeal Court (LAC).³²

2.2.1 Constitutional framework

The passing of the *Constitution of the Republic of South Africa*, 1996 (hereinafter referred to as the *Constitution*),³³ introduced some significant changes in the area of labour law. Moreover, the *Bill of Rights* regulates the labour rights of employers, employees and trade unions.³⁴ Most importantly, the *Bill of Rights* provides that "everyone has the right to fair labour practice".³⁵ However, the labour rights as contained in the *Constitution* are subject to limitations.³⁶ Although, the *Constitution* does not regulate the guidelines on incapacity due to ill-health or injury, it is the guardian of all laws in the country.³⁷ Besides the protection conferred by the *Constitution*, there are various other legislations in South Africa promoting the rights of both employees as well as employers and these are discussed hereunder.

2.2.2 The Labour Relations Act 66 of 1995

The *LRA* is the principal piece of legislation which promotes and protects the rights of employees suffering from ill-health or injury. The *LRA* itself does not define the concept

³² *Independent Municipal and Allied Trade Union on behalf of Anton Strydom v Witzenburg Municipality* (unreported) case number CA 08/2008 of 13 February 2012 para 5.

³³ Constitution of the Republic of South Africa, 1996.

³⁴ See chapter three of the study.

³⁵ Section 23(1) of the Constitution of the Republic of South Africa, 1996.

³⁶ Section 36(1) of the Constitution of the Republic of South Africa, 1996.

³⁷ Section 2 of the Constitution of the Republic of South Africa, 1996.

of incapacity nor articulate it in sufficient detail, however it encapsulates the Code.³⁸ Item 11 of the Code regulates the procedure for the employers to follow before dismissing an incapacitated employee based on ill-health or injury.³⁹ However, the Code serves as a guideline as it is not legislation.

Furthermore, the Code requires that the employers should provide reasonable accommodation to employees suffering from ill-health or injury.⁴⁰ However, the Act does not provide clear guidelines to employees suffering from depression and stress-related illness. To a great extent, case law reveals that employers are regularly confronted with challenges pertaining the regulation of incapacity or disability before contemplating dismissal of an employee suffering from depression or injury.⁴¹ Hence, it was established that South African law requires clarity and certainty in relation to the category under which depression falls as it is still a serious challenge classifying it under incapacity or disability.⁴² As correctly stated, the need to clarify and classify depression is to ensure that the South African labour law adequately promotes the rights of employees suffering from the condition. Employers must operate within the confinement of a specific regulation when dealing with employees suffering from depression. Moreover, the regulations should operate with fairness. Even today, there is still significant doubt whether depression is categorised under incapacity or disability process.

The *LRA* provides that "every employee has the right not to be unfairly dismissed".⁴³ This section refers to all employees, including incapacitated employees suffering from ill-health or injuries, depression, stress and disability. Hence, it is against the section for an employee to be dismissed without following fair procedure and exhausting of all available remedies. Over and above, section 188 of the *LRA* serves as the cornerstone provision relating to incapacity and places the onus of proof on the employer who contemplates a dismissal for incapacity. For example, in *Independent Municipal and*

³⁸ McGregor, Dekker and Budeli *Labour Law Rules* 4.

³⁹ Schedule 8 Code of Good Practice on Dismissal for Incapacity of the *LRA*.

⁴⁰ Item 4 Schedule 8 Code of Good Practice on Incapacity of the *LRA*.

⁴¹ For example, see *Ernstzen v Reliance Group Trading (Pty) Ltd* (unreported) case number C171/2013 of 18 May 2015 as discussed in chapter three below.

⁴² McGregor, Dekker and Budeli *Labour Law Rules* 4.

⁴³ Section 185 of the *LRA*.

Allied Trade Union on behalf of Anton Strydom v Witzenburg Municipality,⁴⁴ the court held:

...any person considering whether or not the reason for dismissal is fair or whether or not the dismissal was effected in accordance with a fair procedure must take into account any relevant Code of Good Practice issued in terms of the *LRA*.⁴⁵

Section 187(1)(f) of the *LRA* regulates unfair dismissal of employees based on disability. Though the *LRA* does not provide a concrete definition of disability, the *EEA* has, to a significant extent, defined disability.⁴⁶ It is clear that the drafters of the *LRA* recognise the distinction between incapacity and disability. An inference could be drawn that employers confronted with depression more often rely on inappropriate procedures.

Notwithstanding the fact that there are procedures on incapacity based on ill-health or injury, the employer in *New Way Motors and Diesel Engineering (Pty) Ltd v Marsland (New Way Motors case)*,⁴⁷ took an inappropriate action against the employee. In the latter case the employee's wife left him and, as a result, he was admitted at a hospital wherein he was diagnosed with depression.⁴⁸ The employee returned from his work and his behaviour was not the same as before. The employer became aware of his condition and he was subjected to unfair treatment because of his mental condition. He was later subjected to a disciplinary hearing due to poor performance and was issued with a final written warning. Thereafter, the employer terminated the employment contract with the employee citing the redundancy of his position. The employee contended that he was unfairly dismissed in that he was discriminated against for depression. The court held that the conduct of the employer constituted an attack on the dignity of the employee on the grounds envisaged in section 187(1)(f) of the *LRA*.⁴⁹

⁴⁴ *Independent Municipal and Allied Trade Union on behalf of Anton Strydom v Witzenburg Municipality* (unreported) case number CA 08/2008 of 13 February 2012.

⁴⁵ *Independent Municipal and Allied Trade Union on behalf of Anton Strydom v Witzenburg Municipality* (unreported) case number CA 08/2008 of 13 February 2012 para 5.

⁴⁶ See chapter three of the study below.

⁴⁷ *New Way Motors and Diesel Engineering (Pty) Ltd v Marsland* 2009 30 ILJ 2875 (LAC).

⁴⁸ *New Way Motors and Diesel Engineering (Pty) Ltd v Marsland* 2009 30 ILJ 2875 (LAC) para 5.

⁴⁹ *New Way Motors and Diesel Engineering (Pty) Ltd v Marsland* 2009 30 ILJ 2875 (LAC) paras 17 and 26.

In addition, the court stated:

...it is not strictly necessary to decide whether the concept of disability as set out as a ground in section 187(1)(f) of the *LRA* describe the condition suffered by the employee. The uncontested evidence is that the employee suffered a depression.

Apart from the view point of the court, it can be deduced that employers confronted with employees suffering from depression rely on other forms of dismissal. Hence, in this study it is argued that it should be clear on the regulation based on incapacity that depression is categorised as ill-health or disability. For obvious reasons, the failure of the employer to comply with proper guidelines results in the matter being adjudicated by CCMA or the courts, which may be time-consuming and quite exhausting for employees.

2.2.3 The Code of Good Practice: Dismissal on Incapacity

The *LRA* contains the Code which provides guidelines that the employers should follow before initiating a dismissal. In *Moropane v Gilbeys Distillers and Vintners (Pty) Ltd*,⁵⁰ the court held that the Code is not law itself. However, a person ignoring this Code does that at their own peril. The court opined that compliance with the Code would ensure that the employer acted reasonably and fairly.⁵¹ The drafters of the Code made it clear that the guidelines provided in the Code should not serve as a replacement for collective agreements and disciplinary codes.⁵² However, in the absence of any collective agreements, disciplinary codes and procedures issued by the employers in the workplace, the employers are bound to adhere to the guidelines provided in the Code.

For example, in *TVET SA (Pty) Ltd v Swanepoel*⁵³ (hereafter referred to as the *TVET* case), the employee contended that the employer failed to adhere to the guidelines provided in the Code. Further, the employee's contention was that the employer failed to investigate the nature and extent of her incapacity. Also, that the employer had not

⁵⁰ *Moropane v Gilbeys Distillers and Vintners (Pty) Ltd* 1998 19 ILJ 635 (LC).

⁵¹ *Moropane v Gilbeys Distillers and Vintners (Pty) Ltd* 1998 19 ILJ 635 (LC) para E page 640.

⁵² See item 1 of the Code of Good Practice as it stipulates that "this Code is not intended as a substitute for disciplinary codes and procedures where these are subject to collective agreement....."

⁵³ *TVET SA (Pty) Ltd v Swanepoel* (unreported) case number C882/2015 23 of 23 May 2016 para 7.

investigated all possible alternatives prior to dismissing her. The court held that the Code of Good Practice places an onerous obligation on the employer to comply with the guidelines in circumstances where an employee suffers from incapacity.⁵⁴ Significantly, it is trite that the employers must consult the Code from time to time when contemplating a dismissal for incapacity.

Item 1 of the Code stipulates that the principle emphasised in the Code is that the relationship between employers and employees must be of utmost respect and befitting to their working environment.⁵⁵ This means that the employers have a duty to adhere to the principle of fairness when handling incapacitated employees.

Items 8 and 9 of the Code analyse the guidelines that employers should follow when dealing with incapacity based on poor work performance. However, for the purpose of this study, the incapacity based on poor performance is not interrogated unless poor performance emanates from injuries or ill-health. Items 10 and 11 of the Code raise obligatory guidelines to employees suffering from ill-health and injuries. The provisions of items 10 and 11 of the Code, as contained in schedule 8, emphasise fair and substantive procedure.⁵⁶

Besides, item 10 of the Code recognises that incapacity may result in permanent or temporary inability of an employee to execute the functions initially agreed upon by the employer and employee. Hence the drafters of the Code saw it fit to table guidelines focused on incapacity. In addition, the employers are encouraged to investigate the circumstances leading to incapacity and determine whether they can find an alternative accommodation to place the incapacitated employee.⁵⁷ Furthermore, the employers are sensitised to evaluate and assess all surrounding circumstances short of dismissal.⁵⁸ In sum, the employers are guided to consider the

⁵⁴ *TVET SA (Pty) Ltd v Swanepoel* (unreported) case number C882/2015 23 of 23 May 2016 para 50.

⁵⁵ Item 1 of the Code of Good Practice on Dismissal of the *LRA*.

⁵⁶ Code of Good Practice on Dismissal of the *LRA*.

⁵⁷ Item 10(1) of the Code of Good Practice on Dismissal of the *LRA*.

⁵⁸ Item 10(1) of the Code of Good Practice on Dismissal of the *LRA*.

general principles outlined above. Thus, in so doing the employer complies with section 188(1)(a) of the *LRA*.

Furthermore, the provision of item 10 of the Code places more onerous duty on the employer in instances where the employee sustained incapacity at work, either temporarily or permanently. In addition, item 10(3) of the Code states that the degree of incapacity is relevant to the fairness of any dismissal. Hence, depression as a form of incapacity may also be relevant. In short, it means that the employer should go the extra mile for the employees who experience ill-health or injuries emanating from their working environment.

2.2.4 The Basic Conditions of Employment Act 75 of 1997

This piece of legislation regulates the conditions of employment between employers and employees. It should be noted that Chapter 3 of the *BCEA* regulates leave. However, it is not applicable to employees working for less than 24 hours for an employer.⁵⁹ Amongst other labour rights, the *BCEA* provides guidelines in relation to sick and incapacity leave.⁶⁰ The Act stipulates that the employee is entitled to a minimum period of paid sick leave per annum. Section 22 of the *BCEA* provides that

... the employee is entitled to an amount of paid sick leave equal to the number of days the employee would normally work during a period of six weeks.⁶¹

Practically, the employers misuse their powers in relation to the provision of sick leave, especially when the employee continuously extends the sick leave days. For example, in *National Health Laboratory Service v Yona* (hereinafter *NHLS* case),⁶² the employee contended that she sustained severe depression and generalised anxiety disorder as a result of the unfair conduct of the employer. Furthermore, the employee remained absent on sick leave for an uninterrupted period of five months. In the event, the employee submitted several sick notes covering the period of absence until her

⁵⁹ McGregor, Dekker and Budeli *Labour Law Rules* 44.

⁶⁰ See sections 22 and 23 of the *Basic Conditions of Employment Act 75 of 1997*.

⁶¹ Section 22(2) of the *Basic Conditions of Employment Act 75 of 1997*.

⁶² *National Health Laboratory Service v Yona* (unreported) case number PA 12/13 of 12 May 2015 para 10.

resignation and later argued that it was constructive dismissal.⁶³ As a result, the employer processed her sick leave as unpaid. The court held that the unfair conduct of the employer towards the employee rendered her continued employment intolerable and as a result ordered the employer to pay the employee the full amount deducted as an unpaid leave.⁶⁴ Taking into consideration the aforementioned case, employers often err in implementing the provision of the Act, specifically when an employee continuously files for sick leave.

The *BCEA* provides that the employer is not obliged to pay an employee for incapacity leave in the absence of proof in the form of a medical certificate indicating that the absence of the employee was due to sickness or injury.⁶⁵ For the fact that an employee suffers from ill-health or an injury such as depression does not necessarily mean that he can absent himself from work for an unreasonable period of time without proof. In terms of this Act, it is a requirement that an incapacitated employee produce a medical certificate which serves as proof of incapacity.

2.2.5 Employment Equity Act 55 of 1998

The *EEA* was enacted, amongst other things, to eliminate unfair discrimination in employment.⁶⁶ The Act defines what constitutes disability as compared to the *LRA* which is silent on the definition. Truter,⁶⁷ argues that *EEA* does not provide a list of illnesses which might be described as disability. Therefore, depression is a complex phenomenon as it might qualify as incapacity and in other instances qualify as a disability. Moreover, Truter⁶⁸ emphasises that incapacity and disability are not synonymous in terms of the *EEA*. It should be borne in mind that incapacity based on ill-health or injury may correspond with disability to a large extent. In this study, it is argued that permanent injury could be used interchangeably with disability. Depressed employees who are dealt with under disability are accorded more protection than the

⁶³ *National Health Laboratory Service v Yona* (unreported) case number PA 12/13 of 12 May 2015 paras 10 and 14.

⁶⁴ *National Health Laboratory Service v Yona* (unreported) case number PA 12/13 of 12 May 2015 para 44.

⁶⁵ Section 23(1) of the *BCEA*.

⁶⁶ See preamble of the *EEA*.

⁶⁷ Truter 2017 *TFM Magazine* 51.

⁶⁸ Truter 2017 *TFM Magazine* 51.

depressed employee dealt with under incapacity process. Moreover, section 1 of the *EEA* defines disability as

...a long term or recurring physical or mental impairment which substantially limits their prospects of entry into, or advancement in employment.

For example, in *Jansen* case,⁶⁹ the employee suffered from major depression and this condition was exacerbated by his employer's conduct. The employer represented the employee's wife at the divorce proceedings. As a result, the employee contended that the employer dismissed him on the grounds of misconduct whereas he suffered from depression and that the dismissal was automatically unfair. Furthermore, he contended that the employer breached a conflict of interest. The employee was diagnosed with a major depression by a doctor and was booked off from work for a period. Afterwards, the employee was dismissed from work. The employee contended that he was suffering from disability. The court held that the dismissal of the employee was automatically unfair in terms of section 187(1)(f) of the *LRA*.⁷⁰ Furthermore, the court held that the employer unfairly discriminated the employee in terms of section 6 of the *EEA*. It emerges from this case that where the employer was aware of the mental state of the employee he could not resort to dismissal for misconduct, but rather follow the guidelines related to incapacity or disability.

Further, in *General Motors (Pty) Ltd v Numsa on behalf of Ruiters*,⁷¹ the employee sustained an injury whilst playing rugby. The employee injured his left hand which caused him trouble at work. It was swollen and he could not handle anything. As a result, the injury was described by medical report as a permanent injury. After incapacity inquiry was held, the employee was dismissed because he was unable to work and was deemed not productive.⁷² The employee contended that the employer did not thoroughly investigate alternative positions for him as he was eligible to be a driver. The court held that the obligations of the employer as set out in items 10 and

⁶⁹ *Jansen v Legal Aid South Africa* (unreported) case number C678/2014 of 16 May 2018 paras 10 and 59.

⁷⁰ *Jansen v Legal Aid South Africa* (unreported) case number C678/2014 of 16 May 2018 para 68.

⁷¹ *General Motors (Pty) Ltd v Numsa on behalf of Ruiters* (unreported) case number PA 8/12 of 22 January 2015.

⁷² *General Motors (Pty) Ltd v Numsa on behalf of Ruiters* (unreported) case number PA 8/12 of 22 January 2015 para 18.

11 of schedule 8 to the *LRA* works interchangeably with similar obligations in the *EEA*.⁷³ To a significant extent, the guidelines in the Code and *EEA* in relation to disability and permanent injury intertwine and should be used interchangeably. The emerging trends from judicial exercise illustrate that practically employers currently experience challenges in implementing the proper guidelines in dealing with depression at the workplace.

In sum, the law is not clear on which set of principles should be applied by the employer who has to manage an employee suffering from depression. Therefore, employers have an option to address the case of employees suffering from depression either under the disability or incapacity processes. There are some authorities who opine that

South African jurisprudence with regard to the reasonable accommodation of persons with disabilities in the workplace does not provide clear guidelines.⁷⁴

However, the *EEA* expressly provides that the employer should reasonably accommodate the disabled employee in an environment which is modified and adjusted to the working place.⁷⁵ Given the above analysis, South African legislation falls short of providing an adequate explanation on the distinction and overlap between incapacity based on ill-health or injury and disability. Therefore, it would be unrealistic to expect employers to distinguish between these two concepts in complex depression matters.

2.2.6 Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000

Apart from other legislations outlined above, this piece of legislation applies indirectly to incapacity based on ill-health or injury and it also applies directly to disability. This legislation is rarely applied under the labour law context, even though it certainly plays a crucial role. For example, the Act makes a provision that, no person should be

⁷³ *General Motors (Pty) Ltd v Numsa on behalf of Ruiters* (unreported) case number PA 8/12 of 22 January 2015 para 34.

⁷⁴ Marumoagae 2012 Potchefstroom Electronic Law Journal 352.

⁷⁵ Section 1 of the *EEA*.

discriminated on the grounds of disability.⁷⁶ Simply, it is an acceptable principle that employees should not be discriminated on the grounds of their disability.

Furthermore, the Act stipulates that the person who suffers from disability should enjoy equal opportunities and be reasonably accommodated.⁷⁷ In other words, the key principle of the Act is to eliminate unfair discrimination against people living with disabilities, amongst other factors. Though the Act does not utilise the word employee, it also indirectly protects the rights of employees suffering from depression, stress and disability. It is also clear from that context that a disabled person should be reasonably accommodated.

In short, and notwithstanding the fact that the Act clearly refers to people living with disabilities, it does not exclude incapacitated employees. Hence, in this study it is argued that the words 'disability' and 'incapacity' are used interchangeably. Furthermore, the Act was promulgated to eliminate unfairness. Over and above, the Act states that "neither the state nor any person may unfairly discriminate against any person".⁷⁸ Therefore, the Act protects any person and it can be argued that the phrase any person includes, amongst others, incapacitated employees suffering from depression, stress-related illnesses and disabled employees.

2.2.7 Compensation for Occupational Injuries and Diseases Act 130 of 1993

This legislation applies directly or indirectly to incapacity based on ill-health or injury. Moreover, the Act guarantees the payment of compensation for an employee who suffered injuries whilst within the scope of employment.⁷⁹ The provision quite clearly protects the employees in the workplace. Therefore, employees can successfully lodge a claim under *COIDA* if they can prove on balance of probabilities that the depression or occupational harm was sustained during the scope of the employment.⁸⁰ In essence, the employers are statutorily obliged to compensate the employee who gets involved in an accident resulting in his or her disablement or death, provided that it arose from

⁷⁶ Section 9 of *Prohibition of Equality and Prevention of Unfair Discrimination Act 4 of 2000*.

⁷⁷ Section 9(c) of *PEPUDA*.

⁷⁸ Section 6 of the *PEPUDA*.

⁷⁹ Section 22(1) of *COIDA*.

⁸⁰ Landman and Ndou 2015 *Industrial Law Journal* 2473.

the course of employment. For example, in *Parexel International (Pty) Ltd v Chakane*,⁸¹ the employee was knocked on her head by a cabinet door at her workplace. Consequently, she fell on the crates and injured her back. This fall resulted in her losing consciousness and was urgently taken to the hospital. Thereafter, the employee lodged an application under *COIDA*. Accordingly, the employee reported the accident and injury in terms of the Act since the incident occurred within the scope of employment. Furthermore, the employee was later diagnosed with a mental condition classified by the doctor's report as "pre-morbid mood disorder." On the other hand, the employer after several incapacity enquiries, dismissed the employee for incapacity. The court held that the employer failed to accommodate the employee and failed to appreciate that the condition of the employee was due to an accident that happened at work.⁸²

The latter case clearly shows the challenges that employees encounter after experiencing injuries or ill-health in the workplace. Although the application for compensation under *COIDA* could be successful, the employee might still be subjected to incapacity processes. It is worth noting that *COIDA* does not provide guidelines to employers and employees after compensation has been granted about the future reasonable accommodation of employees.

Moreover, the *COIDA* does not provide clear guidelines on whether depression sustained within the course of employment falls within the ambit of an accident. It seems that the employee who suffers from depression can lodge a claim under the auspices of *COIDA*. Hence, some of the scholars suggest that

...the meaning of an accident in the Act is broader than the popular understanding of the term and includes any unplanned or unforeseen occurrences and need not occur at a single instance.⁸³

⁸¹ *Parexel International (Pty) Ltd v Chakane* (unreported) case number JR534/12 of 21 November 2017.

⁸² *Parexel International (Pty) Ltd v Chakane* (unreported) case number JR534/12 of 21 November 2017 paras 7, 11 and 23.

⁸³ Benjamin 1993 South African Journal on Human Rights 123-125.

For instance, in the above mentioned *Jansen* case,⁸⁴ the matter was adjudicated within the confinement of *LRA* as well as *EEA* and not *COIDA* despite the fact that depression started whilst within the scope of his work.

In addition, Van Jaarsveld,⁸⁵ submits that an employee is eligible to lodge a claim under *COIDA* for depression or stress-related illness. He suggests that

...a claim for a stress-related illness, for example depression or anxiety, is subject to compensation provided an employee is able to prove that the stress-related disease arose out of and in the course of employee's employment.

It appears, to a significant extent, that the incapacitated employee is protected by the Act and could successfully claim compensation.

2.2.8 Occupational Health and Safety Act 85 of 1993

Generally, a working environment which is not healthy or safe to the health of employees is a cause for serious concern.⁸⁶ The legislature deemed it fit to specifically enact *OHS Act* which regulates the health and safety of employees. Moreover, the Act provides that the employers should promote the health and safety working environment which is not hazardous to the employees.⁸⁷ This piece of legislation does not regulate the procedure for incapacity in the workplace, but plays a crucial role in preventing unnecessary future incidents which might affect the abilities of employees to perform their work. Though this Act imposes criminal sanction on non-compliance, it is not clear if an employee who sustained depression as a result of hazardous environment may institute criminal charges against the employer.⁸⁸

⁸⁴ *Jansen v Legal Aid South Africa* (unreported) case number C678/2014 of 16 May 2018.

⁸⁵ Van Jaarsveld 2005 *Obiter* 627.

⁸⁶ For example, see *Beaurain v Martin* (unreported) case number C16/2012 of 16 April 2014 where an employee was dismissed for publishing on Facebook that the conduct of the employer to release dirt through air condition compromised the health of both the staff and patients.

⁸⁷ Section 8(1) of the *OHS Act* 85 of 1993 states that "every employer shall provide and maintain, as far as is reasonable practicable a working environment that is safe and without risk to the health and safety of employees".

⁸⁸ Section 38 of *OHS Act*.

2.3 Conclusion

Having outlined the constitutional framework and the plethora of legislation regulating incapacity in the workplace, it can be deduced that the law does not provide clear guidelines on the protection of employees suffering from depression. For instance, the interaction between incapacity and disability has not yet been clarified under the South African labour law. As stated earlier in this study, an example was illustrated from stress-related conditions such as depression that to a significant extent the employers encounter challenges when exposed to such challenging situations. From emerging case law, it was illustrated that depression is a complex subject and employers are opted to classify it either under incapacity or disability. As a result, it is left to the courts to provide further guidance on the nature and scope of this issue. The statutes were enacted to promote labour rights since common law inadequately protects those rights. In the next chapter, an in-depth analysis of the regulations on incapacity based on ill-health and injury is explored.

CHAPTER 3

ANALYSIS OF THE REGULATION ON INCAPACITY BASED ON ILL-HEALTH OR INJURY UNDER THE SOUTH AFRICAN LAW: EMERGING TRENDS

3.1 Introduction

Having set out the constitutional overview and legislative framework of incapacity based on ill-health or injury in the previous chapter, the current chapter provides an in-depth analysis of the regulation of incapacity based on ill-health or injury. Furthermore, the chapter examines the interaction between incapacity based on ill-health and disability with specific reference to the regulation of depression at the workplace. Incapacity due to ill-health or injury and disability are closely related and this chapter examines the extent of the regulation of incapacity and the guidelines that protect employees suffering from depression under South African labour law.

3.2 The definition of key concepts

3.2.1 Dismissal as a general principle

Dismissal is a sanction which can be imposed by an employer against an employee and it may result in termination of contract of employment. Section 186 of the *LRA* stipulates the definitional elements of dismissal in a broad context.⁸⁹ There are different forms of dismissal recognised under the South African labour law. A dismissal simply refers to the termination of the relationship between employer and employee.⁹⁰ Scholars concur that some form of conduct is required from the employer to terminate the employment contract.⁹¹ Apart from other factors which might lead to a dismissal, this study examines incapacity as a fair ground of dismissal. Employment law requires that the employers should comply with both substantive and procedural requirements

⁸⁹ For example, section 186(1)(a) of *LRA* defines 'dismissal' as a termination of employment with or without a notice amongst other definitional elements.

⁹⁰ McGregor, Dekker and Budeli *Labour Law Rules* 115.

⁹¹ Du Toit et al *Labour Relations Law* 426.

of fairness prior to dismissing an employee.⁹² Given this brief synopsis, dismissal is categorised according to the circumstances surrounding the facts upon which the employee is exposed and it warrants the employer to take action.

3.2.2 *Distinction between incapacity and disability*

3.2.2.1 Definition of incapacity

In this study, it is essential to distinguish incapacity and disability with a view to assessing whether the regulatory framework provides adequate and proper guidelines to employers contemplating dismissal for depression.

It is accepted that incapacity is a no-fault dismissal as it is a condition beyond the control of the incapacitated employee.⁹³ Some scholars have narrowed down the definition of incapacity as an inability to perform the essential functions of the job.⁹⁴ In the broader context, it can be inferred that incapacity refers to inability of an employee to execute his or her duties and functions as a result of ill-health or injury which renders an employee incapable to meet the required standards of the contract of employment or performance agreement. In addition, Hardijzer,⁹⁵ defines incapacity as the "the failure or inability of a worker to carry out a job according to expected standards". Moreover, in *Samancor Tubatse Ferrochrome v Metal and Engineering Industries Bargaining Council*,⁹⁶ the Labour Court held that

...incapacity extends beyond as it can result in partial or a complete impact on the employee's ability to perform the job.⁹⁷

⁹² McGregor, Dekker and Budeli *Labour Law Rules* 115.

⁹³ Christianson 2004 *Industrial Law Journal* 884; see also *Eskom and National Union of Mine Workers on behalf of Fillisen* 2002 23 ILJ 1666 ARB where the court held that "the incapacity due to ill-health is not the fault of the employee and should be treated with great compassion before it is found that the employee's incapacity is of such a nature that dismissal is justified".

⁹⁴ Bassuday and Rycroft 2015 *Industrial Law Journal* 2516.

⁹⁵ Hardijzer 2014 <https://journals.co.za>.

⁹⁶ *Samancor Tubatse Ferrochrome v Metal and Engineering Industries Bargaining Council* (unreported) case number JA 57/08 of 12 March 2010.

⁹⁷ *Samancor Tubatse Ferrochrome v Metal and Engineering Industries Bargaining Council* (unreported) case number JA 57/08 of 12 March 2010 para 9.

Incapacity may emanate from ill-health or injury and may also include physical or mental disability.⁹⁸ Incapacity is therefore a broad concept that encompasses different categories. For instance, incapacity may arise from ill-health such as depression. Further, incapacity may arise from injury which is either temporary or permanent. Apart from abovementioned categories, incapacity also extends to other factors such as poor-work performance which do not form part of this study. As indicated already, incapacity is a no-fault form of dismissal.

3.2.2.2 Definition of disability

The *EEA* provides some proper conceptual guidelines in defining disability within its legislative prescript. The *EEA* defines disability as an on-going, permanent or impartial impairment which limits the chances of entering into labour market or progression within the employment.⁹⁹ It is also accepted that disability refers to a physical or mental impairment that may be sensory, cognitive and developmental.¹⁰⁰ Clearly, defining disability poses some serious challenges since its meaning cannot be confined to a medical phenomenon by virtue of its extending to other social phenomenon. Disability refers to

...the impairment on a body of a person which limits participation of an individual in certain activities and can be permanent, temporarily or episodic.¹⁰¹

Ngwena¹⁰² observes that the definition of disability under the *EEA* is unsatisfactorily in many respects as it entails the medical aspect of disability rather than its social dimension. He correctly holds a view that

...where the medical model of disability is insufficiently responsive to disability as lived and experienced, it must yield to the social model.¹⁰³

⁹⁸ Grogan *Dismissal, Discrimination and Unfair Labour Practice* 420.

⁹⁹ Section 1 of the *EEA*.

¹⁰⁰ Article 1 of the Convention on the Rights of Persons with Disabilities and Optional Protocol (2006) refers to "persons with disabilities to include those who have long term physical, mental, intellectual or sensory impairment which in interaction with barriers may hinder their full and effective participation in society on an equal basis with others".

¹⁰¹ Anon 2015 www.ru.ac.za.

¹⁰² Ngwena 2005 Stellenbosch Law Review 242.

¹⁰³ Ngwena 2005 Stellenbosch Law Review 242.

In brief, incapacity due to ill-health or injury and disability are not the same phenomenon. It is accepted that a clear distinction should be drawn between incapacity due to ill-health or injury and disability.¹⁰⁴ Correctly, a person who is disabled has an impairment which can limit his or her ability to compete in the labour market as compared to those physically and mentally able employees. However, it does not necessarily mean that a disabled employee is incapable of performing specific function(s) if he or she could be reasonably accommodated.¹⁰⁵ On the other hand, an incapacitated employee is deemed capable of performing his or her duties prior sustaining of the incapacity due to ill-health or injury. Therefore, his or her incapacity due to ill-health or injury renders the employee incapable of fulfilling the obligations emanating from the contract of employment.

More often, incapacity due to ill-health or injury overlaps with disability. Therefore, an employee who can prove that they were dismissed due to major depression which is workplace-related can still rely on an action based on discrimination on the grounds of disability. On the other hand, the same employee can lodge a successful claim based on incapacity due to ill-health or injury under the *LRA*.¹⁰⁶

3.3 Understanding an in-depth analysis of the regulation of incapacity based on ill-health or injury with specific reference to depression

3.3.1 Is depression incapacity due to ill-health, injury or disability?

Depression implies loss of energy, mood disorder and feeling weak. Depression can either be mild or severe.¹⁰⁷ Depression reflects a sign of mixed- feelings which might include tiredness and discouragement. In some instances, employees could not identify depression in clear and objective terms. However, depression is more of a health problem rather than a social issue. It is also accepted that depression is an ill-health

¹⁰⁴ Bassuday and Rycroft 2015 *Industrial Law Journal* 2516 correctly hold the view that "in South African Labour Law the terms incapacity for ill-health or injury and disability are not interchangeable".

¹⁰⁵ Marumoagae 2012 Potchefstroom Electronic Law Journal 356.

¹⁰⁶ For example, see *Jethro v Mec for Department of Education Western Cape Government* (unreported) case number C292/2015 of 22 April 2016.

¹⁰⁷ Barosso 2003 *The International Journal of Transport Studies* 89.

that affects the body, mind and behaviour.¹⁰⁸ From existing case law, it can be easily detected that other cases of depression are dealt with under the domain of incapacity procedures. For example, in the *Strydom* case,¹⁰⁹ the employee alleged that he was suffering from major depression and as a result he applied for a medical boarding which was declined. Thereafter, the employer conducted an incapacity enquiry and dismissed the employee on the ground of incapacity based on ill-health. Accordingly, the Labour Court confirmed the fairness of the dismissal and dismissed the case.¹¹⁰ Although the employee was unsuccessful in this application, the case reflects the pragmatic approach that the courts adopt in cases of depression.

As already indicated above, item 10(1) of the Code recognises the fact that injury or ill-health may be temporary or permanent. Hence, depression can be mild or major, but it remains a treatable illness.¹¹¹ This reasoning finds its context within the domain of incapacity due to ill-health or injury. Thus, depression can be treated as incapacity due to ill-health. When dealing with depression as a form of incapacity it is difficult to treat it merely as an ill-health as it extends to mental-illness.¹¹² Although depression is a form of mental-illness, employers cannot simply dismiss employees without following the substantive and procedural requirements of fairness for dismissal. Employees suffering from mental illnesses are vulnerable and are likely to be prejudiced and discriminated against.¹¹³

Regardless of the point that depression is a form of mental illness, it has been treated as incapacity due to ill-health or injury by the employers and the courts have accepted this facet. For example, in *Russels Furniture (Pty) Ltd v Commission for Conciliation Mediation and Arbitration*,¹¹⁴ the employee consulted a psychiatrist who diagnosed him with depression, knee injury and a heart problem. The employer instituted an incapacity enquiry and the employee failed to attend such on numerous occasions

¹⁰⁸ Mqota *City Press* 5.

¹⁰⁹ 2008 29 ILJ 2947 (LC).

¹¹⁰ 2008 29 ILJ 2947 (LC) para 20.

¹¹¹ Lukasik *GPSOLO* 12.

¹¹² Mqota *City Press* 5.

¹¹³ Swanepoel 2011 *Potchefstroom Electronic Law Journal* 41.

¹¹⁴ *Russels Furniture (Pty) Ltd v Commission for Conciliation Mediation and Arbitration* (unreported) case number DA 21 of 2008.

leading to his dismissal. The court held that his lengthy absence had a serious effect on the operations of the employer and justified a dismissal of the employee.¹¹⁵ The employer in this case opted to follow the procedure on incapacity based on ill-health or injury though they had knowledge that the employee was suffering from depression.

With logical acceptance, depression may be extended to be an occupational injury. The classification of depression as a mental condition implies that it may be treated as a psychological condition. For instance, Landman and Ndou,¹¹⁶ opine that

...if the psychiatric harm amounts to an occupational injury or an occupational disease, the employee may claim in terms of COIDA.

The discussion above shows that the treatment of depression, although not more often, is described as an ill-health rather than an injury under the South African labour law.

On the other hand, depression can be described as a form of disability. As outlined above, the *EEA* describe disability as a form of physical or mental impairment. Therefore, it can also be inferred that depression qualifies as a disability under the context of *EEA* because of the mental impairment. Depression is a psychological condition that could negatively affect the performance of an employee.¹¹⁷ Under item 10 of the Code regulating incapacity on ill-health or injury, disability is referred to in passing where it outlines the adaptation or accommodation of employee's disability.¹¹⁸ Thus, disability is indicated in the Code without sufficiently detailing the explanation within the context of incapacity.¹¹⁹ Nevertheless, the *EEA* has attempted to provide some insight on the concept of disability.

More often, employers are confronted with cases where incapacity due to ill-health and injury overlaps with disability, especially in instances where the employee suffers from depression. The stigma of depression confuses employers to frequently adopt

¹¹⁵ *Russels Furniture (Pty) Ltd v Commission for Conciliation Mediation and Arbitration* (unreported) case number DA 21 of 2008 para 14.

¹¹⁶ Landman and Ndou 2015 *Industrial Law Journal* 2473.

¹¹⁷ Ngazire Assessment of the Regulation of Depression 19.

¹¹⁸ Christianson 2004 *Industrial Law Journal* 889.

¹¹⁹ Christianson 2004 *Industrial Law Journal* 889.

routinely different approaches when handling this challenge.¹²⁰ Of course, employment law does not provide any rigid approach to regulate depression. For example, in the recent case of *Jansen*,¹²¹ the employee was employed as a paralegal worker at Legal Aid South Africa. The employee was diagnosed with depression around 7 April 2010. A medical certificate was issued by a medical practitioner indicating that the employee suffered a major depression. The employee informed his employer and requested that he be referred for a wellness programme. Thereafter, the employee attended FAMSA (Family South Africa) programmes. On the 17 November 2011, again, the employee consulted a medical practitioner who indicated that the employee had a depression with high anxiety. The employee submitted a medical certificate to the employer.¹²²

On 3 September 2012, the employee attended a court as he was in the process of divorce and his employer was representing the employee's wife. The employee contended that the employer's conduct in representing his wife during the divorce proceedings aggravated his mental illness. The employee indicated that his condition resulted in his absence from work.¹²³ Further, the employer charged the employee with misconduct. Amongst other legal issues, the court was tasked to decide on whether the employee suffered from incapacity due to ill-health or disability.¹²⁴ The court held that the dismissal of the employee was automatically unfair for the purposes of section 187(1)(f) of the *LRA*. In addition, the court held that the employee was discriminated in terms of section 6 of the *EEA*.

After careful consideration of the merits in this case, it can be alluded that where an employer is aware that the employee suffers from depression, an employer should follow the procedure of a fair dismissal based on incapacity due to ill-health or injury or as a form of discrimination based on disability.¹²⁵ Furthermore, it can be generally accepted that depression qualifies under the domain of disability. Therefore, the court must treat each case based on its own merits. It has been correctly argued that the

¹²⁰ See *Jansen v Legal Aid South Africa* (unreported) case number C678/2014 of 16 May 2018.

¹²¹ *Jansen v Legal Aid South Africa* (unreported) case number C678/2014 of 16 May 2018.

¹²² *Jansen v Legal Aid South Africa* (unreported) case number C678/2014 of 16 May 2018 para 10.

¹²³ *Jansen v Legal Aid South Africa* (unreported) case number C678/2014 of 16 May 2018 para 23.

¹²⁴ *Jansen v Legal Aid South Africa* (unreported) case number C678/2014 of 16 May 2018 para 57.

¹²⁵ *Jansen v Legal Aid South Africa* (unreported) case number C678/2014 of 16 May 2018 para 59.

employee is securely protected under the *EEA* on the basis of disability.¹²⁶ Moreover, employees who argued that depression falls within the domain of *EEA* enjoy much protection. In addition, the employer has to justify that *EEA* was implemented together with the *Code of Good Practice: Key Aspects on the Employment of People with Disabilities* (hereinafter the Disability Code) prior dismissal.¹²⁷ Hence, the employer can also justify fairness of dismissal under statutory framework of both the *EEA* and the *LRA*. Clearly, existing case law tends to indicate that a blanket approach may be applied in matters of depression.

Lastly, incapacity due to ill-health or injury overlaps with disability in cases of injuries. For example, in the *Ernstzen* case,¹²⁸ the employee suffered injuries arising from a car accident. As a result, the employee contended that he was dismissed due to his disability.¹²⁹ On the other hand, the employer argued that the employee was dismissed under the ambit of incapacity due to ill-health or injury. The employee contended that the dismissal constituted discrimination on the ground of disability. The court held that, although the issues raised in the application could be considered within the court's jurisdiction, it was of the opinion that the dispute ought to be determined under the CCMA jurisdiction. The Court stayed the proceedings and referred the matter to CCMA for arbitration.¹³⁰ Therefore, employees may rely on both the procedure of incapacity based on ill-health or injury rather than the procedure on disability for their claim to be justifiable within the CCMA's jurisdiction.¹³¹

Having outlined the distinction between incapacity for ill-health or injury and disability, it is clear that there is still uncertainty on how employers have to deal with cases of depression.¹³²

¹²⁶ Carvalheira Depression, Dismissal and Disability 77.

¹²⁷ GN 1345 in GG23702 of 19 August 2002.

¹²⁸ *Ernstzen v Reliance Group Trading (Pty) Ltd* (unreported) case number C717/2013 of 18 May 2015.

¹²⁹ *Ernstzen v Reliance Group Trading (Pty) Ltd* (unreported) case number C717/2013 of 18 May 2015 paras 1 and 6.

¹³⁰ *Ernstzen v Reliance Group Trading (Pty) Ltd* (unreported) case number C717/2013 of 18 May 2015 at para 24.

¹³¹ Bassuday and Rycroft 2015 *Industrial Law Journal* 2521.

¹³² Welgemoed Are Employees Suffering from Depression in the South African Workplace Protected by the Existing Disability Provisions within Employment Law? 87.

3.3.2 *The nature and extent of the investigations*

The Code alerts employers to investigate the nature and extent of the incapacity or injury. More often, depression is not fully appreciated and understood as the employee's life might look quite normal to others. Gilbert,¹³³ indicates that

I have never thought of myself as someone who might have to deal with depression.

Managing an employee with depression can be difficult, but an employer can only dismiss an employee suffering from depression as a last resort, after exploring all other alternative avenues.¹³⁴ Therefore, investigations on incapacity should not be conducted in a piecemeal. Apparently, the employer ought not only to follow employment policy governing incapacity at his workplace, but to follow the procedure in the *LRA* and the Code.

For example, in *Samuels v Commission for Conciliation Mediation and Arbitration*,¹³⁵ the employee was suspended from work whilst he was away on a course. He consulted a doctor who placed him on sick leave for stress-related illness. The employer provided him with a notice to attend an incapacity hearing after which he was dismissed. Aggrieved by the decision of the employer, the employee approached the labour court to review and set aside the arbitration award.¹³⁶ The court held that the employer failed to take into account the law governing incapacity procedures prior dismissing the employee for incapacity. Furthermore, the Labour Court set aside the arbitration award indicating that the arbitrator solely relied on the employment policy to effect the dismissal without due consideration of the *LRA*, relevant code of good practice as well as existing case law regulating dismissal due to ill-health or injury.¹³⁷

¹³³ Gilbert <http://journals.co.za>.

¹³⁴ Rangata and Lehtjo 2015 <http://journals.co.za>.

¹³⁵ *Samuels v Commission for Conciliation Mediation and Arbitration* (unreported) case number D781/2006 of 10 July 2008.

¹³⁶ *Samuels v Commission for Conciliation Mediation and Arbitration* (unreported) case number D781/2006 of 10 July 2008 at paras 8 and 21.

¹³⁷ *Samuels v Commission for Conciliation Mediation and Arbitration* (unreported) case number D781/2006 of 10 July 2008 at paras 8 and 21.

Depression as a mental ill-health is not easily noticeable. Hence, the Code emphasises that long periods of absence by employees may raise alarm.¹³⁸ In such situations, employers should investigate the employee's routine of long absence. Investigations may be guided by medical certificates handed by the employee to an employer.¹³⁹ The employers should also conduct thorough checks on the medical certificates of the employee to determine the cause of absenteeism. Furthermore, the detection of depression from the medical certificates may be sufficient to guide the employer during the course of investigations.

The above approach was illustrated in the case of *Transnet Rail Engineering v Mienies*,¹⁴⁰ where an employee was dismissed by the employer for misconduct due to lengthy absenteeism and other factors. The employee was diagnosed with major depression and during arbitration the arbitrator failed to take into account the medical report. The evidence pertaining to the employee's previous medical condition was not considered. As a result, the employee contended that his dismissal was unfair.¹⁴¹ The Labour Appeal Court held that the employer ignored the evidence from medical reports that the employee was suffering from depression. Therefore, dismissal was unfair since the employer failed to consider whether there were alternatives to dismissal and could have reasonably accommodated the employee.¹⁴²

The above guidelines from case law clearly demonstrate that the employer should seriously consider medical evidence that the employee is suffering from depression and align his procedure with the relevant code of good practice regulating dismissal based on ill-health or injury. The outcome of such investigations should also determine whether the matter falls within the domain of incapacity due to ill-health or injury and disability. In conclusion, the employer has to prove that they have indeed exhausted all reasonable measures in investigating the nature and extent of the incapacity based on ill-health or injury prior a dismissal.¹⁴³

¹³⁸ Schedule 8 of the Code of Good Practice on Dismissal.

¹³⁹ Schedule 8 of the Code of Good Practice on Dismissal.

¹⁴⁰ 2015 36 ILJ 2605 (LAC) paras 1, 13 and 18.

¹⁴¹ *Transnet Rail Engineering v Mienies* 2015 36 ILJ 2605 (LAC) paras 1, 13 and 18.

¹⁴² *Transnet Rail Engineering v Mienies* 2015 36 ILJ 2605 (LAC) paras 1, 13 and 18.

¹⁴³ Schedule 8 Item 10(1) of the Code of Good Practice on Dismissal.

3.3.3 Reasonable accommodation

It is a well-established principle that the employer should reasonably accommodate the incapacitated employee before contemplating dismissal if the illness or injury is work-related.¹⁴⁴ Reasonable accommodation entails a modification or adjustment of the work to suit the incapacitated or disabled employee.¹⁴⁵ In other words, an employee who suffers from depression should also be reasonably accommodated. It can be assumed that the moment the employer acknowledges that the employee suffers from depression, he or she must also establish whether it amounts to incapacity due to ill-health or disability. Over and above, the duty to accommodate is more onerous if the cause of depression is work-related.¹⁴⁶

Clearly, it seems that an employee whose depression is categorised as disability would enjoy more protection under South African labour law than an employee whose depression is classified as incapacity based on ill-health or injury.¹⁴⁷ For example, an accommodation for disability employees is promoted by *EEA*, Disability Code and the Technical Assistance Guidelines on the Employment of People with Disabilities (TAG). Moreover, a failure by an employer to accommodate an employee suffering from depression classified as a disability may constitute a form of unfair discrimination. In addition, an employee whose depression is classified as incapacity due to ill-health or injury may only enjoy protection under the *LRA* and the Code.¹⁴⁸

Despite the above discussion, as long as reasonable accommodation does not lead to undue hardship, then the employer is obliged to accommodate the incapacitated employee.¹⁴⁹ For example, in *Standard Bank of South Africa v CCMA*,¹⁵⁰ the employee was involved in a car accident and sustained injuries whilst within the scope of employment. The employee worked for the employer for approximately fifteen years

¹⁴⁴ Schedule 8 Item 10(4) of the Code of Good Practice on Dismissal.

¹⁴⁵ Nxumalo Disability Discrimination and Undue Hardship within the Working Environment 17.

¹⁴⁶ Item 10 of The Code of Good Practice on Dismissal: Incapacity due to ill-health or injury.

¹⁴⁷ Viviers Mental Health and the World of Work: A Comparative Analysis of the Legal Frameworks Governing Categories of Mental Health Conditions 158.

¹⁴⁸ *Jansen v Legal Aid South Africa* (unreported) case number C678/2014 as discussed in chapter two.

¹⁴⁹ Item 11 Schedule 8 Code of Good Practice on Incapacity of the *LRA*.

¹⁵⁰ *Standard Bank of South Africa v Commission for Conciliation Mediation and Arbitration* 2007 ZALC JHB.

prior to the accident. After the accident the employee returned to work, but she encountered problems. Thereafter, she consulted medical practitioners as her health was deteriorating. As a result, the medical practitioner recommended her to be accommodated on less-heavy duties.¹⁵¹

Afterwards, the employee was moved from one position to another. Later, the employer dismissed the employee based on incapacity due to ill-health or injury. The employee argued that the employer failed to reasonably accommodate her leading to her dismissal.¹⁵² The employee took the initiative to educate herself to capture data using a computer which made her work adaptable. However, the employer refused to allow her to use the computer. Instead, the employee was urged to accept a position as a switch board operator. This position was more or less the same as a demotion. The court held that the employer failed to implement the guidelines in the Code of Good Practice on incapacity due to ill-health or injury. Furthermore, the court held that the duty to accommodate the employee emanate from the obligation not to discriminate. As a result, the dismissal of this employee was declared procedurally unfair.¹⁵³

It is submitted that the employer has to exhaust all suitable alternatives prior a dismissal for incapacity due to ill-health or injury.¹⁵⁴ Therefore, an employer has to take all reasonable steps to accommodate an employee suffering from depression and he or she must also consider adapting and assisting the employee in all possible ways.¹⁵⁵

¹⁵¹ *Standard Bank of South Africa v Commission for Conciliation Mediation and Arbitration* 2007 ZALC JHB 318 para 2.

¹⁵² *Standard Bank of South Africa v Commission for Conciliation Mediation and Arbitration* 2007 ZALC JHB 318 paras 2 and 59.

¹⁵³ *Standard Bank of South Africa v Commission for Conciliation Mediation and Arbitration* 2007 ZALC JHB 318 para 146.

¹⁵⁴ Van Der Walt *The Impact of the Administrative Adjudication of Road Traffic Offences Act on the Employment Relationship* 21.

¹⁵⁵ Code of Good Practice: Key Aspects on the Employment of People with Disabilities provides guidelines on the concept of reasonable accommodation of employee with disabilities. Item 6 recognise that the disabled employees who met the required skills of the job should be accommodated. Furthermore, reasonable accommodation requires amongst other factors, adaptation, training, education and restructuring.

If all available alternatives have been exhausted, the employer can fairly dismiss an employee suffering from depression.¹⁵⁶ Therefore, an employer cannot be reasonably expected to accommodate an employee if this could lead to unjustifiable hardship. Generally, the fact that the employee is suffering from depression has a likelihood of being unproductive and this could adversely affect other employees at the workplace.¹⁵⁷ Further, an employee suffering from depression who unreasonably refuses to be accommodated may be dismissed. Unjustifiable hardship is an available defence mechanism by an employer to justify dismissal of an employee.¹⁵⁸

Therefore, the employer has to establish the proper procedure when dealing with an employee suffering from depression. Further, the employer has to establish whether the depression can be classified as a disability or incapacity due to ill-health or injury. Thereafter, the employer can adopt the procedure which is deemed most appropriate and suitable under the circumstances.

3.3.4 The duty to accommodate

The duty to accommodate follows after the employer has investigated the nature of the incapacity. As indicated above, the duty to accommodate an incapacitated employee is more arduous if the incapacity is work-related.¹⁵⁹ Accordingly, there is more onerous duty on the employer to accommodate an employee who suffers from depression if the cause of this mental condition is work-related.¹⁶⁰ Therefore, the onus rests with the employer to prove that the depressed employee was accommodated or there was an attempt to accommodate the depressed employee prior to the dismissal. As mentioned already, the duty to accommodate in the context of disability is more onerous than incapacity based on ill-health or injury.¹⁶¹

¹⁵⁶ Hendricks v Mercantile and General Reinsurance Co of SA Ltd 1994 15 ILJ 304 (LAC).

¹⁵⁷ Wallace 2016 <https://psychcentral.com>.

¹⁵⁸ Watkins 2013 <https://www.workinfo.com>.

¹⁵⁹ Item 10(4) of Schedule 8 Code of Good Practice on Dismissal.

¹⁶⁰ Item 10(4) of Schedule 8 Code of Good Practice on Dismissal.

¹⁶¹ Viviers Mental Health and the World of Work: A Comparative Analysis of the Legal Frameworks Governing Categories of Mental Health Conditions 158.

The latter argument was scrutinised in the case of *National Education Health and Allied Workers Union on behalf of Lucas and Department of Health (Western Cape)*,¹⁶² where the arbitrator held that it is trite that the employer should determine the extent of incapacity whether it falls within the domain of *LRA* or *EEA* and after such determination he or she must follow the correct procedure.¹⁶³ The arbitrator indicated that if the employer had adopted an approach prescribed under the *EEA* or relevant code dealing with disability could have reached a fair and just decision as opposed to the decision reached after following the *LRA* and Code on incapacity.¹⁶⁴ In addition, the arbitrator indicated that the employee could have been reasonably accommodated fairly in the same way they would have accommodated a person with disabilities. The arbitrator opined that the *EEA* was specifically enacted to protect the rights of employees with disability from being unfairly dismissed for reasons related to their disability.

Generally, failure to accommodate disability presupposes that the disabled employee is discriminated.¹⁶⁵ Although the employer has a duty to accommodate, the employee also has a minimal duty to disclose his or her medical health condition.¹⁶⁶ In the event that the employee fails to disclose his or her medical condition, this could prejudice his or her claim for unfair dismissal based on incapacity due to ill-health or injury.¹⁶⁷ Accordingly, it would be illogical for employees suffering from depression to anticipate that their frequent absenteeism from work could raise alarm to the employer that they suffer from ill-health.

¹⁶² *National Education Health and Allied Workers Union on behalf of Lucas and Department of Health* 2004 25 ILJ 2091 (BCA).

¹⁶³ *National Education Health and Allied Workers Union on behalf of Lucas and Department of Health* 2004 25 ILJ 2091 (BCA) para 28.

¹⁶⁴ *National Education Health and Allied Workers Union on behalf of Lucas and Department of Health* 2004 25 ILJ 2091 (BCA) para 28.

¹⁶⁵ Chapter 5 of item 6.1 of the Technical Assistance Guidelines on the Employment of People with Disabilities.

¹⁶⁶ *Western Cape Education Department v General Public Service Sectoral Bargaining Council* 2014 10 BLLR 987 (LAC).

¹⁶⁷ *Western Cape Education Department v General Public Service Sectoral Bargaining Council* 2014 10 BLLR 987 (LAC).

Similarly, in *National Union of Mine Workers on behalf of Nkinqa v Commission for Conciliation, Mediation and Arbitration*,¹⁶⁸ the employee was dismissed from work as a result of frequent absenteeism. The employee submitted that the reason for his absence was the depression he suffered from the death of his wife.¹⁶⁹ The employee did not present medical certificates for the period of his absence. Subsequently, the employee was dismissed from work for misconduct. Thereafter, the employee referred the matter to the CCMA for unfair dismissal. The CCMA arbitrator considered all the factors surrounding the dispute and concluded that the dismissal of the employee was procedurally and substantively fair. Aggrieved by the decision of the arbitrator, the employee lodged an application for review which was later dismissed as he could not show the court the reason that there was any prospect of success should the arbitration award be considered.

Furthermore, in *De Beer v The Minister of Safety and Security/Police*,¹⁷⁰ the employee was diagnosed with post-traumatic stress disorder and major depression. As a result of his health condition, he was frequently absent from work. Thereafter, the employer terminated the contract of employment because of absenteeism.¹⁷¹ Aggrieved by the decision of the employer, the employee lodged an application at the Labour Court. The employee contended, amongst others, that he should obtain a final relief for unfair dismissal dispute. Further, the employee argued that if he did not obtain a final relief it would exacerbate his anxiety, depression and stress. The court held that the employee was responsible for his own prejudice and could not use it as a defence. Accordingly, the application for granting of the interim relief order was dismissed.¹⁷²

From the above cases, there is a general consensus that an employee who suffers from depression may be dismissed from employment if such an employee does not

¹⁶⁸ *National Union of Mine Workers on behalf of Nkinqa v Commission for Conciliation, Mediation and Arbitration* (P86/07) 2009 ZALC 25 (25 February 2009) paras 4 and 27.

¹⁶⁹ *National Union of Mine Workers on behalf of Nkinqa v Commission for Conciliation, Mediation and Arbitration* (P86/07) 2009 ZALC 25 (25 February 2009) paras 4 and 27.

¹⁷⁰ *De Beer v The Minister of Safety and Security/Police* (unreported) case number P720/2010 of 23 May 2011.

¹⁷¹ *De Beer v The Minister of Safety and Security/Police* (unreported) case number P720/2010 of 23 May 2011 at paras 3, 46 and 50.

¹⁷² *De Beer v The Minister of Safety and Security/Police* (unreported) case number P720/2010 of 23 May 2011 at paras 3, 46 and 50.

inform the employer of his or her health condition. Lastly, the duty to accommodate cannot be forcefully imposed on an employee who is not prepared to be accommodated.

Finally, an employer has a duty to consider incapacity leave. Equally, an employee who applies for incapacity leave has a duty to ensure that it is approved. Hence, an employee who absconds from work without approval of his or her leave may suffer the consequences. For example, in *Popcru v Department of Correctional Service*,¹⁷³ the employee submitted leave of absence as he alleged that he was suffering from depression. He further filed an application for incapacity leave for several months. Afterwards, the employee remained absent from work without confirming whether the leave was approved or not. Subsequently, the employer granted the leave partly. Therefore, the employee contended that he reasonably assumed that the leave was granted in full as the employer did not inform him of the outcome timeously. The court held that the employer was entitled to recover monies paid to the employee as it was not due to him for the days which the employee was absent.¹⁷⁴

Although the employee was unsuccessful in this case, it confirmed the fact that the duty to accommodate an employee may on reasonable grounds extends to granting of incapacity leave.¹⁷⁵ It seems that this also forms part of the duty to accommodate an incapacitated employee suffering from depression.

3.4 Emerging trends

From the judicial and academic developments outlined above, it can be concluded that there are some emerging trends that depression can be classified either as a form of disability or incapacity due to ill-health or injury. However, it is doubtful that this approach is correct. Specifically, because it can be deduced that disability is more

¹⁷³ *Popcru v Department of Correctional Service* 2017 38 ILJ 964 (LC).

¹⁷⁴ *Popcru v Department of Correctional Service* 2017 38 ILJ 964 (LC) paras 10, 11 and 26.

¹⁷⁵ *Public Servants Association of South Africa on behalf of De Bruyn v Minister of Safety and Security* 2009 30 ILJ 1631 (LC) where the employee was diagnosed with depression and contended that it was as a result of treatment emanating from his seniors at his working environment. He further contended that there was no reason to disapproving his portion of incapacity leave and granting the other portion. The Labour Court dismissed the application of the employee on the basis that the appropriate forum to deal with such dispute was Public Service Coordinating Bargaining Council (PSCBC) paras 3, 7 and 26.

deserving than incapacity based on ill-health or injury. It seems that the extent to which depression is protected as incapacity due to ill-health or injury is limited under South African labour law. This conclusion finds support because when dismissal is effected under the ambit of incapacity, it limits the employee to claim that the dismissal was unfair based on the ground of discrimination. Therefore, there is still a degree of uncertainty whether employees can rely on the guidelines of dismissal provided by both *EEA* and *LRA* in cases dealing with depression.

For instance, this approach was illustrated in the *Jansen case*,¹⁷⁶ above where the employee relied on both the *EEA* and *LRA*. As indicated above, his application was successful under both legislations. In conclusion, the court held that the employer discriminated the employee on the grounds of disability and declared that the dismissal was automatically unfair.

It is worth noting that major depression or stress-related illness is characterised as a serious psychiatric mood disorder which needs effective treatment.¹⁷⁷ It has been argued that psychiatric disorder needs proper regulatory framework.¹⁷⁸ However, it is doubtful whether depression is a health condition which frequently affects employees in the workplace. It is tempting to conclude that depression is a disability. Moreover, the *EEA* has attempted to broaden the scope of protection for persons with disabilities to include mental impairment which narrow progression of an employee in the working environment.¹⁷⁹ In the light of the relatively evolving of the psychiatric issue, depression is a complex mental health condition which requires careful consideration by employers to carefully exercise a proper approach when contemplating a dismissal based on such issue.

3.5 Conclusion

The analysis above illustrated that the regulation of incapacity based on ill-health or injury offers limited protection for employees suffering from depression. Due to the

¹⁷⁶ *Jansen v Legal Aid South Africa* (unreported) case number C678/2014.

¹⁷⁷ Zheng, Wang and Liu 2018 <https://doi.org/10/111/cns.12800>.

¹⁷⁸ Du Plessis 2009 *Industrial Law Journal* 1494.

¹⁷⁹ Section 1 of the Employment Equity Act.

overlapping between incapacity based on ill-health or injury and disability, it may be correct to conclude that depression may fall within the limits of both. Furthermore, there are no proper guidelines that an employer can solely rely on. It is clear that the regulations on incapacity based on ill-health or injury fall short of protecting employees suffering from depression. Clearly, the Code of Good Practice on incapacity cannot be used solely in cases of depression without supplementing it with the *EEA* and Disability Code.

For example, this aspect was illustrated in the *Jansen* case discussed above which dealt with the interaction between incapacity due to ill-health or injury as well as disability. Significantly, the above position is precipitated by the fact that the regulation on incapacity based on ill-health or injury in the South African context does not provide clear guidelines to adequately protect employees suffering from depression. In conclusion, the current legal framework regulating depression is not settled under the South African labour law. The next chapter examines the international framework regulating dismissal as well as the extent to which other countries (UK and USA) protect employees suffering from depression in their respective jurisdiction.

CHAPTER 4

COMPARATIVE ANALYSIS

4.1 Introduction

The previous chapter explored the regulations of incapacity based on ill-health or injury with specific reference to depression. Furthermore, the interaction between incapacity due to ill-health or injury and disability was interrogated with a view of identifying the shortcomings under the umbrella term of incapacity. The present chapter surveys international and foreign law in an attempt to evaluate how depression at the workplace is regulated under foreign jurisdictions. The countries cited in this evaluation all have different methods of addressing depression as compared to South African labour jurisprudence. Besides the fact that South African labour law promotes and protects the rights of employees suffering from depression, it is a well-known fact that depression is a worldwide concern and affects employees across the globe.¹⁸⁰

In this chapter, USA and UK are selected as countries in which comparative survey is undertaken. In addition, the international conventions that regulate incapacity in the workplace are explored. This chapter examines and analyses the regulations which other foreign countries rely upon when dealing with matters of depression in order to provide some guidelines for future legislative reform to South African labour law on the regulation regarding depression.

4.2 Significance of international instruments and comparative law

4.2.1 Significance of international standards and their application to South Africa

The approach followed by South African law reflects a country which accommodates international and foreign law. In other words, the courts in the Republic of South Africa when examining legal issues may seek guidance from international and foreign law.¹⁸¹

¹⁸⁰ Marcus et al Depression: A Global Public Health Concern 6.

¹⁸¹ Section 39(1) of the *Constitution* states "that the courts, tribunal or forum must consider international law and may consider foreign law in its application when interpreting the *Bill of Rights*".

Moreover, section 39 of the *Constitution provides* that when interpreting the bill of rights the courts must consider international law in its application and may also consider foreign law.¹⁸² Under the South African labour law context, depression is classified as both incapacity due to ill-health and disability. The approach adopted under South African labour law jurisprudence in relation to depression is not persuasive. On the international sphere, depression is treated as a disability.¹⁸³ For the purposes of this study, international instruments refer to labour instruments which have a binding and non-binding effect at international law such as the International Labour Organisation (ILO) conventions, treaties, *etc.*¹⁸⁴ It has been indicated that international standards serve as a source of inspiration and a guiding tool to government, employers and employees across the globe.¹⁸⁵ Significantly, international legal instruments should also be considered when interpreting labour rights.¹⁸⁶ Briefly, international instruments are there to guide the process of labour law reform in various domestic laws.

4.2.2 Compliance with international law

As indicated above, the *Constitution* recognises international law as a source of law.¹⁸⁷ Hence, South Africa has signed and ratified the *Convention on the Rights of Persons with Disabilities (CRPD)* in 2007 which subsequently came into force in 2008.¹⁸⁸ Therefore, South Africa is enjoined under this convention to fulfil its obligations in promoting, protecting and implementing the rights of disabled persons.¹⁸⁹ The *CRPD* prohibits any form of discrimination on the ground of disability in the form of denying a disabled person employment or continuing employment.¹⁹⁰ It has been stated that depression is a leading cause of disability worldwide.¹⁹¹

¹⁸² Section 39(1) of the *Constitution*.

¹⁸³ Marcus et al Depression A Global Public Health Concern 6.

¹⁸⁴ Alston and Heenan Shrinking the International Labour Code: An Unintended Consequence of the 1998 ILO Declaration on Fundamental Principles and Rights at Work? 21.

¹⁸⁵ Fuo Comparative Study on the Impact of Labour Legislation on the Role of Trade Unions in the Republic of South Africa and Cameroon 77.

¹⁸⁶ See section 3 of the *LRA*.

¹⁸⁷ Section 39(1)(b) of the *Constitution*.

¹⁸⁸ South African Human Rights Commission 2013 <http://www.sahrc.org.za>.

¹⁸⁹ Article 33 of the *CRPD*.

¹⁹⁰ Article 27 of the *CRPD*.

¹⁹¹ Depression Alliance 2016 <http://www.gofal.org.uk>.

Furthermore, *CRPD* embraces the definition of reasonable accommodation as an adjustment or modification of work to suit the disabled person, as long as it does not impose hardship on employees.¹⁹² The *CRPD* encourages member states to incorporate fair processes and procedures regarding disability in their national laws. In compliance with the *CRPD*, the South African government promotes and protects the rights of persons with disability under the *Constitution, EEA, PEPUDA, LRA, the Code, Disability Code and TAG*. However, depression as a disability is not adequately addressed under these legislative prescripts. Specifically, the regulations on incapacity based on ill-health or injury offer limited protection as compared to the manner in which other jurisdictions such as the USA and the UK deal with depression. Although South African labour law has attempted to promote and incorporate disability guidelines in line with *CRPD*, it has been criticised for dealing with disability rights in a piece-meal fashion under different legislations as it does not have comprehensive disability legislation.¹⁹³ Hence, there is a need to promulgate a legislation which could provide an integrated and comprehensive protection for persons with disabilities.¹⁹⁴

Lastly, the *CRPD* imposes obligations on the member states to designate focal points within their government for purposes of implementation of the Convention. Moreover, the member states carries the responsibilities to establish the structures which will facilitate the implementation and monitoring of the *CRDP* at various levels.¹⁹⁵

4.2.3 Significance of comparative law

As already alluded above, the courts in South Africa deliberating on matters of depression may seek guidance from foreign jurisdictions should the need arise. In essence, comparative law implies the comparison of different legal systems of the world with the purpose of ascertaining their similarities and differences.¹⁹⁶ Unsurprisingly, when comparative analysis is undertaken, the laws of different countries are examined. The primary aim of comparison of different legal system is to

¹⁹² Article 2 of the *CRPD*.

¹⁹³ Van Reenen and Combrinck 2011 SUR-International Journal on Human Rights 146.

¹⁹⁴ Holness 2014 South African Journal on Human Rights 342.

¹⁹⁵ Article 33 of the *CRDP*.

¹⁹⁶ Zweigert and Kotz An Introduction to Comparative Law 2.

attain and advance the legal knowledge.¹⁹⁷ In short, to compare legal systems of different countries may be permitted to gain valuable legal guidance. The chapter examines the approaches adopted by USA and UK respectively.

4.2.3.1 The legal position in USA

Under the USA labour law jurisprudence, there are no clear legislative guidelines dealing with incapacity due to ill-health or injury. However, the leading legislation closely regulating incapacity is the *Americans with Disability Act (ADA)*.¹⁹⁸ The *ADA* extends protection to employees suffering from depression. Depression is a leading cause of disability that is prevalent in the USA and largely affects people between the ages of fifteen and forty-four years.¹⁹⁹ Under the American labour law context, depression is treated under the umbrella term of disability.²⁰⁰ Generally, employers and employees in the USA seek guidance from this legislation when confronted with cases of depression in their workplace.²⁰¹ The *ADA* defines disability to include physical or mental impairment which substantially limits one or more major life activities.²⁰² The aim of the *ADA* is to eliminate discriminatory practice in all field of life, inclusive of work-related matters, on the basis of disability.²⁰³ After the commencement of the *ADA*, it was still challenging for American employees suffering from depression to institute a provable disability lawsuit.²⁰⁴

Depressed employees were required to prove on balance of probabilities that their depression amounted to disability.²⁰⁵ However, the enactment of *ADA*, despite its challenges, brought a relief for employees suffering from depression. For once, such depressed workers had recourse against the employer should a dismissal be instituted

¹⁹⁷ Zweigert and Kotz *An Introduction to Comparative Law* 2.

¹⁹⁸ *Americans with Disabilities Act*, 1990.

¹⁹⁹ Sandoval 2014 *Chapman Law Review* 703.

²⁰⁰ Sandoval 2014 *Chapman Law Review* 688.

²⁰¹ Anon <http://adata.org>. *Americans with Disabilities Act* was passed in 1990 by the Congress specifically to prohibit unfair discrimination in the workplace on the basis of disability.

²⁰² See Section 3 of the *Americans with Disabilities Act*, 1990.

²⁰³ Ladderud 2015 http://soundideas.Edu/psych_independent_study/1.

²⁰⁴ For example in the case of *Hoeller v Eaton Corporation* 149 F 3d 621 (7th Cir 1998) the Court held that despite periodic episode of depression suffered by the employee, the depression was not severe enough to substantially limit a major life activity. As a result the claim by the employee against the employer was dismissed.

²⁰⁵ Sandoval 2014 *Chapman Law Review* 688.

on the ground of depression.²⁰⁶ It can be deduced that the regulation governing depression under the American labour context promotes and protects the rights of employees within the framework of disability. Undoubtedly, employers who are confronted with matters of depression seek guidance from *ADA* prior contemplating a dismissal.²⁰⁷

Basically, employers are statutorily bound to comply with the provisions of *ADA*.²⁰⁸ Moreover, employers must exercise caution when addressing depression as the dismissal may be viewed as discrimination based on disability. Due to conflicting judicial interpretation of *ADA* on the definition of disability by American courts,²⁰⁹ the *Americans with Disabilities Act Amendment Act* (hereafter referred as (*ADAAA*)) was later passed to provide clarity and certainty on the definition of disability.²¹⁰ The *ADAAA* introduced some flexible elements for employees who are suffering from depression to prove with less difficulty that they are disabled employees suffering from disability.²¹¹ Therefore, the employers are compelled to follow guidelines from the Acts in matters of depression.

4.2.3.1.1 The duty to accommodate and reasonable accommodation under the *ADA*

The *ADA* enjoins the employers to provide a reasonable accommodation to the employees suffering from disability.²¹² Reasonable accommodation implies an adjustment or modification of the work to suit and adapt the employee's functions.²¹³ The concept of reasonable accommodation is self-explanatory as the terminology implies that the employment accommodation should be reasonably fair and not lead

²⁰⁶ Sandoval 2014 *Chapman Law Review* 688.

²⁰⁷ Sandoval 2014 *Chapman Law Review* 687.

²⁰⁸ See section 3 of the *ADA* which defines the term disability.

²⁰⁹ Burgdorf *Restoring the ADA and Beyond: Disability in the 21st Century* 255 opined that "...it is surprising and disappointing that the judiciary all too often has given the Act the cold shoulder. Problematic judicial interpretations have blunted the Act's impact in significant ways. The National Council on Disability, numerous legal commentators and large numbers of people with disabilities have become increasingly concerned about certain interpretation and limitations placed on the *ADA* in decisions of the U.S Supreme Court".

²¹⁰ The Act was passed in September 2008 and has expanded the definition of disability to enable individual to prove with less difficulties that they are disabled.

²¹¹ Sandoval 2014 *Chapman Law Review* 688.

²¹² Twomey *Employment Discrimination Law: A Manager's Guide* 171.

²¹³ Title 1 of the *ADA*.

to unjustifiable hardship.²¹⁴ Given the general purpose of the *ADA*, the employers are not forced to accommodate employees suffering from depression at all costs. However, employers may not merely dismiss the employee suffering from depression as this could be treated as discrimination on the ground of disability.²¹⁵

Under the *ADA*, the onerous duty of the employer to accommodate an employee suffering from depression exists within the ambit of reasonableness and not preference. For example, in *Keever v City of Middletown*,²¹⁶ the employee who was a police officer was diagnosed with depression. As a result, the employee requested to be accommodated in an environment with a minimal levels of stress. In essence, the employee suggested working during night shift.²¹⁷ The employer contemplated to accommodate the employee as a desk-officer. As a result, the employer contested that such accommodation would be suitable and adaptable to the employee. However, the employee was of a different view and submitted that the employer failed to reasonably accommodate him. The court, amongst others, held that placing an employee as a desk-officer was a reasonable accommodation although this option was not the one preferred by the employee.²¹⁸

In addition, the duty to accommodate an employee under the *ADA* requires an employer to assess the workplace and assign an employee with the accommodation deemed reasonable.²¹⁹ Therefore, the duty to accommodate an employee extends to authorising and approving leave of absence for the employee. For instance, the employer may not overlook the duty to accommodate an employee under the *ADA* by rejecting an employee leave of absence if such accommodation may be reasonable.²²⁰

Of importance, the case of *Criado v IBM Corporation*,²²¹ (hereafter referred as the *Criado* case) sheds some light regarding leave of absence. In this case, the employee was diagnosed with depression. After experiencing discomfort, the employee

²¹⁴ Ladderud 2015 http://soundideas.edu/psych_independent_study/1.

²¹⁵ Sandoval 2014 *Chapman Law Review* 687.

²¹⁶ *Keever v City of Middletown* 145 F 3d 809 (6th Cir).

²¹⁷ *Keever v City of Middletown* 145 F 3d 809 (6th Cir).

²¹⁸ *Keever v City of Middletown* 145 F 3d 809 (6th Cir).

²¹⁹ McCann 2014 *Pepperdine Law Review* 414.

²²⁰ McCann 2014 *Pepperdine Law Review* 414.

²²¹ *Criado v IBM Corporation* 145 F 3d 437 (1st Cir 1998).

requested leave of absence for one month for treatment of her depression. The employer refused to grant such leave of absence. Aggrieved by the decision of the employer, the employee alleged that she was not reasonably accommodated. Subsequently, the court held that the evidence tendered on a balance of probabilities indicated that the depression suffered by the employee was substantially limiting to major life activities as the employee was unable to sleep properly.²²² Furthermore, the court held that the employer discriminated the employee on the ground of disability and thus failed to accommodate an employee by declining to grant her leave of absence which might have assisted her to recover through the treatment she intended to undergo for that one month.²²³

Although the duty to accommodate may extend to granting of leave, however, an employee cannot expect to be accommodated for an indefinite period of absence under the *ADA*.²²⁴

4.2.3.1.2 The shortcomings of the *ADA* in regulating depression at the workplace

Under the *ADA*, an employee must prove on a balance of probabilities that he or she is suffering from depression, that he or she is qualified for the job and that the employer discriminated him or her on the ground of disability.²²⁵ As a result, the claim by the employee may be lodged successfully. On the other hand, an employee who fails to prove on a balance of probabilities that the employer dismissed him or her as a result of depression, thus discriminating him or her on the ground of disability, may lodge the claim unsuccessfully.²²⁶

For instance, in *Leisen v Shelbyville*,²²⁷ an employee who was suffering from depression was dismissed from work due to failure to secure a paramedic certificate which was a prerequisite in her employment contract. As a result, the employee

²²² *Criado v IBM Corporation* 145 F 3d 437 (1st Cir 1998).

²²³ *Criado v IBM Corporation* 145 F 3d 437 (1st Cir 1998).

²²⁴ See *Mitchell v Washingtonville Cent Sch Distr* 190 F 3d 1 (2nd Cir 1999) where the employee, who was suffering from depression, refused to disclose as to when he will resume employment. As a result the employer refused to grant leave of absence on an indefinite period.

²²⁵ Twomey Employment Discrimination Law: A Manager's Guide 171.

²²⁶ See *Pack v Mart Corporation et al* 166 F 3d 1300 (10th Cir 1999) where the employee's case was dismissed on the basis that her depression did not constitute an *ADA* covered disability.

²²⁷ 135 F 3d 808 (7th Cir 1998) referred to and discussed by Mook 1999 <http://www.bna.com>.

contended that she failed to secure the certificate because she was suffering from depression and emotional stress. The American court held that, although the employee could have had a mental impairment, she did not qualify to be categorised under *ADA* as a person with disability. The decision of the district court was later confirmed by the appeal court.²²⁸

This approach illustrates that not every employee who suffers from depression qualifies to be accommodated within the confinement of *ADA* as an employee with disability. Perhaps, the US courts refuse to apply stereotyped application when the employees claim depression as a disability. In other words, no blanket approach is applied in all cases where depression is alleged to be a disability. Another notable example can be drawn from the case of *Cody v Cigna Healthcare*,²²⁹ where an employee alleged that she was suffering from depression and anxiety emanating from dangerous parts of the city she was residing in. As a result of her unusual behaviour, her colleague reported the mental condition to the employer who in turn offered the employee leave of absence with a recommendation that she had to be evaluated by a psychiatrist. After some time, the employee refused to return to work, leading to the employer terminating her employment contract.²³⁰ Subsequently, the employee argued that her depression qualified to be a disability. The court rejected her explanation and held that there was no evidence suggesting that her mental impairment limited any of her major life activities. Therefore, the court dismissed her case. Some experts argue that depression is not easily observable and the fact that *ADA* distinguishes mental and physical disabilities causes further confusion and uncertainty.²³¹

4.2.3.1.3 Reviewing the definition of disability with a view of accommodating depression

As alluded above, the passing of the *ADAAA* clarified the definition of disability and made it more flexible for employees suffering from depression to be eligible to prove

²²⁸ 135 F 3d 808 (7th Cir 1998) referred to and discussed by Mook 1999 <http://www.bna.com>.

²²⁹ *Cody v Cigna Healthcare* 139 F3 d 595 (8th Cir 1998).

²³⁰ *Cody v Cigna Healthcare* 139 F3 d 595 (8th Cir 1998).

²³¹ Korn 2003 University of Michigan Journal of Law Reform 617.

disability.²³² The *ADAAA* consolidated the definition of disability in part to provide that an impairment that substantially limits a major activity does not require an extension to other major life activities to qualify as a disability.²³³ The Act shifted the burden of proof from the employee to the employer. The employer has to prove that the employee is not disabled. On the other hand, however, it has been argued that the *ADA* failed to adequately promote and protect the rights of mentally-ill employees.²³⁴

Apart from the *ADA*, the Equal Employment Opportunity Commission (EEOC) was established to regulate and implement guidelines related to Title 1 of the *ADA*.²³⁵ Also, it clarified for employees and employers who may require proving or disproving a disability under *ADA*.²³⁶ Title 1 is regulated and enforced by this Commission with a view of providing proper guidance to the courts and litigants on equal employment opportunities for individuals with disabilities.²³⁷ The EEOC Enforcement Guidance on the Americans with Disabilities Act and Psychiatric Disabilities²³⁸ (hereafter referred as Enforcement Guidance) also attempted to expand the understanding of disability within the classification of the psychiatric disability.²³⁹ More significantly, the Enforcement Guidance provides some guidelines that mental impairment is also inclusive of mental illness, amongst other illness, depression is cited as a form of mental illness.²⁴⁰

In addition, the Enforcement Guidance addresses the vital principle of reasonable accommodation. From an employment perspective, reasonable accommodation for employees with depression is a prerequisite of disability. Separating the two may be a daunting task. In essence, the *ADAAA* embodied the broader ideology that the employers must provide a reasonable accommodation to employee with a disability.²⁴¹ The inclusion of the principle of reasonable accommodation existed within the *ADA*,

²³² Sandoval 2014 *Chapman Law Review* 691.

²³³ Title 42 of the *ADAAA*.

²³⁴ Korn 2003 *University of Michigan Journal of Law Reform* 589.

²³⁵ Centre for Psychiatric Rehabilitation 2018 <http://cpr.bu.edu>.

²³⁶ Pacific *ADA* Centre 1997 <http://www.adapacific.org>.

²³⁷ Centre for Psychiatric Rehabilitation 2018 <http://cpr.bu.edu>.

²³⁸ Pacific *ADA* Centre 1997 <http://www.adapacific.org>.

²³⁹ *ADAAA* embrace the fact that an impairment that substantially limit a major life activity does not need to extend to other major life activity to qualify as a disability.

²⁴⁰ Pacific *ADA* Centre 1997 <http://www.adapacific.org>.

²⁴¹ See Title 42 Chapter 126 subchapter III of the *ADAAA*.

although revised by the *ADAAA*. Before the revision of the coverage of reasonable accommodation of disability by the *ADAAA*, the courts offered protection to depressed employees in a few selected cases. For example, the *Criado* case outlined above reflects the outcry the employee with depression was experiencing as far as accommodation and treatment of depression was concerned.²⁴²

Over and above, generally the American employment law recognises depression as a form of disability. Furthermore, the *ADA* and *ADAAA* provides for a reasonable accommodation of employees suffering from depression. In order to pursue the purpose and objective of *ADA* and *ADAAA*, the EEOC is entrusted with enforcement powers to monitor compliance with both legislations.²⁴³

4.2.3.1.4 Similarities and differences between USA and South Africa on dealing with depression

It has been illustrated above that depression is classified as a form of disability under the American law. Unlike in South Africa, depression is classified as either incapacity due to ill-health or disability. Under the American employment law and to a significant extent, the *ADAA* and *ADAAA* legislations regulate the matters of depression. On the other hand, under the South Africa employment law, the Code of Good Practice on incapacity provides some guidelines on matters of depression. However, this Code is not legislation, it serves as a guidelines. An attempt to define disability has been covered under the *EEA*.²⁴⁴ Under the South African labour context, employers and employees have to seek guidance under the ambit of *EEA* and *LRA* as well as the relevant code under these respective legislations. On the other hand, American employment law relies heavily on the *ADAA* and *ADAAA* legislations when contemplating a dismissal of a depressed employee. Generally, the regulations of incapacity based on ill-health under the South African labour law offer limited protection on the ground of disability as compared to the *ADAA* or *ADAAA* which extends adequate protection to depression as a disability.

²⁴² *Criado v IBM Corporation* 145 F 3d 437 (1st Cir 1998).

²⁴³ Korn 2003 University of Michigan Journal of Law Reform 598.

²⁴⁴ See section 1 of the *EEA*.

Similarly, the *ADAAA* places the onus of proving the fairness of dismissal upon the employer.²⁴⁵ Both the American and South African employment law acknowledge that the employees suffering from depression require reasonable accommodation and such accommodation should not lead to undue hardship. However, in South Africa an employee who suffers from depression enjoys much more protection if accommodated under the ambit of disability rather than incapacity due to ill-health whilst the Americans enjoy better protection under the *ADAAA*.

4.2.3.2 The legal position in United Kingdom (UK)

Under the UK labour context, the protection of the rights of employees with disability is regulated under the *Equality Act (EA-UK)*.²⁴⁶ Prior to the enactment of the *EA (UK)*, disability was regulated under the *Disability Discrimination Act (DDA)*.²⁴⁷ The *DDA* amongst others prohibited unfair discrimination on the grounds of disability.²⁴⁸ However, the current provisions regulating disability discrimination are contained in the *EA (UK)*.²⁴⁹ In essence, the UK legislature revived its disability law to prohibit discrimination in the workplace against employees suffering from depression, amongst others, by expanding the statutory protection for disabled employees.²⁵⁰

Moreover, in the UK depression is treated as a form of mental illness and it may affect every person, including employees.²⁵¹ Hence, the aim of the *EA (UK)* is to eliminate discrimination and to harmonise the equality laws in the UK.²⁵² The *EA (UK)* defines disability as a

...physical or mental impairment that has a substantial and long term adverse effect on the ability of a person to carry out normal day-to-day activities.²⁵³

²⁴⁵ Welgemoed Are Employees Suffering from Depression in the South African Workplace Protected by the Existing Disability Provisions within the Employment Law 70.

²⁴⁶ Equality Act (UK) of 2010.

²⁴⁷ The *Disability Discrimination Act* was passed by Parliament in 1995, and was later amended in 2001 and 2005.

²⁴⁸ See part 1 of the *DDA*.

²⁴⁹ Lookwood, Henderson and Thornicroft 2012-2013 *Journal of Workplace Rights* 138.

²⁵⁰ Health and Safety Executive 2017 <https://www.hse.gov.uk/statistics> reflects the statistics of work related stress, depression or anxiety in the Great Britain as a sign of increasing ill-health condition in the workforce.

²⁵¹ Stapley, Target and Midgley 2017 *Journal of Clinical Psychology* 1429.

²⁵² See the preamble of the *EA (UK)*.

²⁵³ Section 6(1) of the *EA (UK)*.

The *EA* (UK) adopted the definition of disability as it was in the *DDA*. In other words, the *EA* (UK) retains the definitional element of disability as it was before without any changes.

The *EA* (UK) has brought some significant changes by extending protection on discrimination arising from disability.²⁵⁴ In essence, this means that disability discrimination is prohibited when the person is treated unfavourably based on something related to his disability. An example which seems to have gained popularity emanates from depression related incidents, for instance, a depressed employee who is frequently absent from work could be issued with a warning by an employer for absenteeism.²⁵⁵ Thus, an employer relies on the employee's absenteeism other than depression itself to discharge such an employee from work. Accordingly, the Act prohibits this practice as the employer would be deemed discriminating the employee unfavourably because of the frequent absenteeism from work arising from depression.²⁵⁶ It is clear that the employers are encouraged to exercise reasonable caution when confronted with depression at the workplace. The burden of proof rests on the employee to show cause that the employer discriminated against them on the ground of disability.²⁵⁷ The burden of proof found its basis within the landscape of *DDA* and it is retained by the provision of *EA*.²⁵⁸

Generally, employees often institute action against the employers on the ground of discrimination emanating from mental-health disability such as depression.²⁵⁹ More likely, employees succeed in the actions if the employers had prior knowledge that the employee suffers from depression, but then proceeds to discriminate such an employee unfavourably based on such a disability.²⁶⁰ It can be inferred that under the UK labour context, depression falls within the domain of disability. Hence, employers

²⁵⁴ University of St Andrews 2018 <https://www.st-andrews.ac.uk>.

²⁵⁵ Lookwood, Henderson and Thornicroft 2012-2013 *Journal of Workplace Rights* 139.

²⁵⁶ Lookwood, Henderson and Thornicroft 2012-2013 *Journal of Workplace Rights* 139.

²⁵⁷ Lerpiniere and Stalker 2009 *British Journal of Learning Disabilities* 246.

²⁵⁸ Lerpiniere and Stalker 2009 *British Journal of Learning Disabilities* 246.

²⁵⁹ Lookwood, Henderson and Thornicroft 2012-2013 *Journal of Workplace Rights* 143.

²⁶⁰ Lookwood, Henderson and Thornicroft 2012-2013 *Journal of Workplace Rights* 148.

and employees seeking clarity in cases of depression rely on *EA* (UK).²⁶¹ In addition, depression as a disability is a serious concern in the UK as well as around the globe and it is mental illness capable of accelerating absenteeism at the workforce.²⁶²

4.2.3.2.1 Reasonable adjustment under the *EA* (UK)

Under the current statutory framework, reasonable adjustment must be provided by an employer to a disabled employee who experiences a substantial disadvantage.²⁶³ The *EA* (UK) provides extensive explanation that the duty to provide reasonable adjustment is mandatory and the disabled employee cannot be expected to pay the cost of such adjustment.²⁶⁴ When interpreting the Act, it can be inferred that an employer who fails to adhere to this duty to reasonably adjust employment to the standard suitable to the disabled employee may be sued for discrimination on the ground of failure to reasonably adjust employment. For instance, in *Archibald v Fife Council*,²⁶⁵ the court held that the duty to provide reasonable adjustment is broad and the employer is statutorily bound to comply with such a duty.²⁶⁶

Research studies in UK also demonstrate that some of the employees attempt to work despite signs of depressive symptoms without alerting the employer and as a result they frequently abscond from work.²⁶⁷ However, employers may not simply dismiss the employee before they provide him or her with a reasonable adjustment. Thus, the employer would be perceived as discriminating the employee if he or she cannot, with certainty, show that the dismissal was not as a result of achieving a proportionate legitimate claim.²⁶⁸ It has been argued that the duty to provide reasonable adjustment

²⁶¹ Chapter 2 of the *EA* (UK) deals with discrimination, specifically, section 15(1)(a) provides that a "person discriminate against a disable person if he unfavourably treats the person because of something arising from his or her disability".

²⁶² Evans-Lacko and Knapp 2016 *Social Psychiatry Psychiatric Epidemiology* 1525.

²⁶³ Section 20 of the *EA* (UK).

²⁶⁴ Section 20(7) of the *EA* (UK).

²⁶⁵ *Archibald v Fife Council* 2004 IRLR 65 referred to and cited by Lookwood, Henderson and Thornicroft 2012-2013 *Journal of Workplace Rights* 141.

²⁶⁶ *Archibald v Fife Council* 2004 IRLR 65 referred to and cited by Lookwood, Henderson and Thornicroft 2012-2013 *Journal of Workplace Rights* 141.

²⁶⁷ Sallis and Birkin 2013 *Journal of Occupational Rehabilitation* 479.

²⁶⁸ Section 15(1)(b) of the *EA* (UK).

may not arise if the employer is not aware or ought to have been aware that the employee is disabled and likely to be exposed to substantial disadvantage.²⁶⁹

Given this brief analysis, the *EA* (UK) recognises the duty to reasonably adjust employment to accommodate the disability of the employee with a view of assisting him or her to perform his or her work. Although the *EA* (UK) introduced significant changes which are positively embraced, Lawson²⁷⁰ observes that sustaining the requirement on the *EA* (UK) that the impairment should have an effect on a day-to-day activity is far-fetched as it burdens the employees to prove that they are disabled with much difficulty.²⁷¹ In this present study, depression as a mental-illness may arise on a daily basis from an employee who is suffering from it. Therefore, an employee who cannot prove that his or her depression is a condition arising on a day to day activity may find it difficult to convince the court that he or she is suffering from disability. Broadly, it can be argued that the employees with depression are sufficiently protected under the *EA* (UK).

4.2.3.2.2 Similarities and differences between United Kingdom and South Africa

Under the United Kingdom labour context, depression is classified under the ambit of disability whereas in South African employment jurisprudence, depression is either dealt with under the regulation of incapacity due to ill-health or *EEA*. The *EA* (UK) is the legislation solely relied upon when seeking clarity for disability discrimination.²⁷² Employees who lodge a claim in United Kingdom for dismissal arising from disability discrimination seek guidance from *EA* (UK). More significantly, the *EA* (UK) advanced protection from discrimination that occurs because of a reality condition connected with a person's disability, whereas, under the South Africa law, such a protection has not yet been sufficiently clarified.

What seems to be a major shortcoming under the United Kingdom employment law is the element of onus of proof. The employees have to prove that the employer

²⁶⁹ Lawson 2011 Industrial Law Journal 368.

²⁷⁰ Lawson 2011 Industrial Law Journal 368

²⁷¹ Lawson 2011 Industrial Law Journal 368.

²⁷² Easton 2011 International Journal of Law and Information Technology 22.

discriminated them on the ground of disability whereas under the South African employment context such onus is placed on the employer.²⁷³ In conclusion, both South Africa and United Kingdom recognise the duty to accommodate a disabled employee. Although the terminology used in these countries refers interchangeably to reasonable adjustment and reasonable accommodation, however, these principles serve to achieve the same purpose.

4.3 Conclusion

After examining the legal position governing depression in USA and UK as well as the international law, it can be deduced that depression is classified as a form of disability. Under USA and UK, the laws governing depression are well-structured under the framework of protective legislations. As already indicated above, South African regulation on incapacity based on ill-health or injury as contained in Schedule 8 of the *LRA*, offer limited protection regarding depression in the workplace. In addition, there are legislations attempting to address disability in South Africa.²⁷⁴ From the above analysis, it can be deduced that South African labour jurisprudence may draw valuable lessons from USA and United Kingdom regarding the guidelines regulating depression as a form of disability.

Furthermore, it is worth noting that the laws of USA and UK are progressive in providing adequate protection of employees suffering from depression. Persuasively, USA and UK advanced their legislations on disability to protect employees suffering from depression consistent with international law (*CRDP* standard requirements). In contrast, under South African employment law, depression is treated as a form of incapacity resulting in ill-health due to non-existence of an all-inclusive legislation dealing with disability in the workplace.²⁷⁵ Significantly the USA, UK and South Africa incorporated the approach of reasonable accommodation for employees suffering from

²⁷³ Easton 2011 International Journal of Law and Information Technology 22.

²⁷⁴ Mitra The Recent Decline in the Employment of Persons with Disabilities in South Africa, 1998-2006 3.

²⁷⁵ Van Reenen and Combrinck 2011 SUR-International Journal on Human Rights 153.

disability in their legislative framework consistent with the standards in the *CRDP* as long as it does not cause undue hardship to the employers.

CHAPTER 5

CONCLUSION AND RECOMMENDATIONS

5.1 Introduction

The chapter outlines the general conclusion of the study and recommendations. Many employees in South Africa suffer from depression.²⁷⁶ Employers are confronted with challenging matters emanating from depression from time to time within their respective employment environments. Some employees suffer from depression because of work-load whereas others succumb to external factors. It is evident that depression is a mental illness which requires medical treatment. Some of the employers know little about how to deal with employees suffering from depression. In essence, the key question explored in this study is to what extent does the regulation of incapacity based on ill-health or injury under the South African labour law protect the employees with specific reference to depression. This chapter provides a conclusion and submits recommendations for possible law reform.

5.2 Conclusion

In order to arrive at a logical and sound conclusion, reference is made from time to time to the arguments previously raised in the respective chapters of the study. In the past, there were relatively little if any material on how depression was dealt with in the employment law, specifically prior the Wiehahn Commission. However, the recommendations made by the Wiehahn Commission addressed the previous distortions on the area of labour law. Transformation from apartheid to new democratic state brought significant changes by reviewing the rights to fair labour practice and prohibition of unfair labour practice based on the ground of disability. There is a plethora of legislation which deals with the rights of employees suffering from disability in South Africa.²⁷⁷ However, depression as a mental illness is not yet adequately addressed under the South African labour law. Presumably, the regulation on incapacity due to ill-health or injury was crafted to deal with normal ill-health and

²⁷⁶ Stander, Bergh, Miller-Janson 2016 *South African Journal of Psychiatry* 1-2.

²⁷⁷ See chapter two of this study above.

injuries. Therefore, the regulations provide limited protection to employees suffering from depression. In addition, mental ill-health cannot be equated to ordinary ill-health.

From the second chapter, the existing literature on the subject matter is dominated by two lines of arguments: that depression is either a disability and on the other hand is perceived as incapacity due to ill-health or injury. The difference between incapacity and disability is explored with a view to determining the extent to which depression or stress-related illness may fit in. Based on the analogy, incapacity and disability are two different concepts. However, incapacity due to ill-health and disability often interacts when the ill-health or injury becomes permanent or is recurring. Nevertheless, these terms are used interchangeably. It emerges from judicial precedents that some of the employers confronted with employees suffering from depression are likely to use the regulations on incapacity due to ill-health solely when contemplating a dismissal. On the other hand, some of the employers supplement the regulations on incapacity with the *EEA*.

The adverse consequences of this approach remain etched in the fact that the employee whose case is dealt within the confinement of disability under the *EEA* enjoys far better protection as compared to the employee whose case is dealt with under the regulations of incapacity based on ill-health or injury as contained in the *LRA* and the Code of Good Practice. In addition, when a depressed employee is dismissed from employment such an employee may argue that depression amounts to disability which provides a threshold to rely on discrimination under the *EEA*. Whereas, an employee who rely on the regulation of incapacity based on ill-health or injury may not raise a ground of discrimination based on disability. It has been persuasively argued that the law has not yet find clarity on the interaction between disability and incapacity in so far as depression cases are concern.

Moreover, the duty to accommodate disability is more onerous as the employers are statutorily bound by the *EEA* in supplementary of the *TAG* and Disability Code. Although the Code regulating incapacity also imposes an onerous duty to accommodate an incapacitated employee, it cannot be equated with the *EEA* simply because it is not a comprehensive legislation but merely a guideline. Apparently, the courts emphasise that the guidelines imposed by the code regulating incapacity should

be followed. Hence, failure to follow the guidelines provided in the Code may be at the employer's peril.²⁷⁸

It was also clarified in the *Jansen* case that South African labour law seem not to be rigid to litigants who follow a blanket approach when making an application to court in cases of dismissal as a result of depression. Arguably, it is emerging that regardless of the procedures used regarding depression cases, they are inextricably linked. It could be safely drawn from decided cases that an employer who is confronted with an employee who frequently absconds from work could dismiss such an employee. Raising depression as a cause of long absence cannot balance the harm of prejudice. The fundamental argument in this study is that South African labour law has not yet clarified how to deal with depression within the confinement of incapacity due to ill-health/injury or rather disability. Hence, it is argued that the regulations on incapacity based on ill-health or injury offer limited protection in relation to depression. Currently, it is concerning that depression is not adequately dealt with despite the fact that is gradually increasing.²⁷⁹

The analysis that ran throughout the study has been the regulation of incapacity due to ill-health or injury with specific reference to depression. However, in the comparative survey it emerged that other countries have different approaches on dealing with depression in the workplace. USA and UK were selected as countries under which a comparative analysis was undertaken. The study revealed that USA categorises depression as a disability. USA has an all-inclusive legislation promoting and protecting unfair discrimination based on the ground of disability. The *ADA* which was later consolidated by the *ADAAA* is the frontrunner legislation.

In USA, the *ADAAA* has adequately extended protection of disability by providing a comprehensive definition of disability. Significantly, the *ADAAA* framed the disability definition to include impairment that substantially limits a major life activity. Furthermore, a major life activity does not need to be supplemented by another major life activity to qualify as a disability. The *ADAAA* simplified the law to accommodate

²⁷⁸ *Moropane v Gilbeys Distillers and Vintners (Pty) Ltd* 1998 19 ILJ 635 (LC) as discussed in chapter two.

²⁷⁹ Tomita et al 2017 *The Lancet Planetary Health*.

people with depression to prove with less difficulty that they suffer from disability. Therefore, the employee who is discharged from employment due to his condition may lodge a claim against the employer for discrimination based on the ground of disability.²⁸⁰ Given the *ADAAA*'s focus, as long as the employee can show that the depression limits one of a major life activity may be successful in the lawsuit. The USA has used advanced protective measures to frame the definition of disability to the extent that it adequately addresses depression as a form of disability in the workplace. The EEOC is also helpful as it is tasked to act as a watchdog overseeing the implementation of the legislation. South Africa can draw guidance from this Act. In addition, the *ADAAA* embraces the logic that employers should reasonably accommodate the employees suffering from depression provided that it does not lead to undue hardship.

Under the UK labour context, it has been detected that employees suffering from depression heavily rely on the *EA* (UK) to advance their claim. The *EA* (UK) consolidated the definition of disability under the framework of its predecessor the *DDA* discussed above. Similarly, the *EA* (UK) promotes and protects the rights of people with disabilities. The *EA* (UK) also covers an instance where discrimination may arise from disability. An employer may not discriminate the employee based on something related to his disability. Unlike in South Africa, an employee who is dismissed for something related to disability may be deemed to have been fairly dismissed if such an employee did not alert an employer of the medical condition. Furthermore, the *EA* (UK) prohibits a practice whereby an employee may be unfavourably discriminated based on disability. From the interpretation of the context of the Act, an employee suffering from depression falls within the category of disability. Moreover, depressed employees who feel aggrieved after being discharged from work may initiate application to court for discrimination on the ground of disability. The *EA* (UK) also recognises reasonable adjustment of employment to suit the disabled employee.

Lastly, the South African government as a role player on the international platform ratified the *CRDP*, however, to date South Africa has not yet adequately addressed the

²⁸⁰ See Chapter four of the study.

challenges suffered by employees with depression. Surprisingly, South Africa has not yet enacted a disability legislation to adjust their national laws in line with international convention specifically the *CRDP*. Notwithstanding the provisions of the *EEA* and *PEPUDA* in so far as disability is concern, employees suffering from depression are not adequately protected. From emerging case law, it can be deduced that some employers rely heavily on the guidelines of the Code in effecting dismissal of employee suffering from depression.

5.3 Recommendations

It is prudent to address the future of depression in the workplace. Depression is a worldwide concern and it is a mental-illness which is not easily observable. Depression may not be seen as a disability because it is not a physical impairment. South Africa has made efforts to address the disability discrimination in the workplace. Undoubtedly, the *EEA* and the Disability Code are in the fore front in disability matters. However, the current practice adopted by employers and employees in dealing with depression cases raises some serious concerns.

The recent case of *Jansen*,²⁸¹ which has been extensively discussed in this study triggered immediate reaction about the manner in which depression is dealt with under the South African labour law. It is an emerging issue that litigants who draft application to court in relation to matters involving employees suffering from depression, may follow the guidelines on regulations of incapacity under the *LRA*, ill-health or injury and *EEA* (disability). Clearly, this illustrates that the law is not certain on the regulation of depression in the workplace. There should be clear legislative prescripts guiding both the employers and employees about depression and stress related illness in the workplace. Hence, the employers should not be confronted with problematic issues regarding adoption of guidelines when handling depression related cases. Depression should not be dealt with as a normal ill-health as it also encompasses some form of disability.

²⁸¹ Discussed in chapter two.

It is also proposed that South African policy makers should draw some valuable lessons for legal developments from the UK and USA in relation to the touchstone model of comprehensive disability legislation. The disability legislation should be crafted to accommodate employees suffering from depression. For instance, the definition of disability should be widened to benefit employees suffering from depression, enabling them to prove that they are disabled with less difficulty and expenses. Depression as a form of mental-illness substantially limits a major life activity and measures should be undertaken to categorise types of ill-health which may potentially limits such major life activities.

Similarly in the USA, the manner in which the definition of disability is framed adequately protects the employee suffering from depression. Moreover, the wide definition of disability also advances the principle of major life activities to prove depression. A one major life activity should suffice. The disability legislation should not be a duplication of the *EEA*, but it should be an all-inclusive disability legislation augmenting the *EEA*. The *EEA* has strived to define people with disability. Although, the definition encompass that the disability should be a long term or on-going physical or mental impairment which substantially limits advancement in employment, it failed to include substantially limiting of a major life activity. Therefore, it is suggested that a comprehensive list of examples of major life activities should be incorporated in the legislation.

Furthermore, the disability legislation should also clearly provide scope and content of the concept of 'reasonable accommodation'. The obligation to accommodate employees suffering from depression related conditions should not cause undue hardship on the employer. The legislation should also be reflective of the values underlying the spirit of the *Constitution* and *CRDP*.

In addition, the need to develop a comprehensive legislative framework on depression at the workplace indicts the government and private entities to raise public awareness about the knowledge to deal with depression as a form of mental ill-health or disability. Some employers lack knowledge about depression and it becomes hard for them to detect signs of depression from employees. In the event that employer awareness is

quickened, it will be easier for the employers to detect signs of depression and immediately react upon their duty to reasonably accommodate the employees.

The purpose of awareness should, amongst other things, be to enlighten employers, employees as well as stakeholders to move away from stigmatising depression. From emerging case law, it can be deduced that some of the employees end up being dismissed from employment without disclosing their ill-health. Generally, employers only become aware after dismissal has been effected that the employee was suffering from depression. Furthermore, employees are also reluctant to disclose that they are suffering from depression for fear of victimisation.

5.4 Conclusion

Depression is globally recognised as a mental ill-health which requires psychiatric treatment. Employers in South Africa frequently interact with employees suffering from depression. As a result, adopting the regulations on ill-health or injury seems to be a miscarriage of process as the regulations offers limited protection. All-inclusive disability legislation could enhance the practice currently adopted. Hopefully, employees will be adequately protected knowing that under the disability legislation they have a recourse that their dismissal was as a ground of disability. Therefore, dismissing an employee for depression without following substantive and procedural fairness may be deemed to be disability discrimination. In conclusion, should a comprehensive disability legislation be enacted it would crystallise depression matters far better than the current position.

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