Are employees suffering from depression in the South African workplace protected by the existing disability provisions within employment law?

Mini – thesis submitted in fulfilment of the requirement for the LLM degree in Labour Law.

BY

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DEDICATION

I would like to thank my parents for their continuous support. To my colleagues, in Criminal Justice and Procedure, especially Dr Chinnian, Dr Hamman, Professor Koen, Mrs Smart, Advocate Williams and Ms Southgate for all their words of encouragement and assistance throughout my L.L.M. Lastly, I would like to thank my supervisor, Mrs Huysamen for all her input and guidance throughout my L.L.M.
PLAGIARISM DECLARATION

I, Bernice Welgemoed, declare that the thesis title: Are employees suffering from depression in the South African workplace protected by the existing disability provisions within employment law? is my own work and that it has not been submitted for any degree or examination in any other university, and that all sources I have used or quoted have been indicated and acknowledged as complete references.

Signed by Bernice Welgemoed

November 2017

Signed by Supervisor, Elsabe Huysamen

http://etd.uwc.ac.za/
ABSTRACT

Depression is a mood disorder that negatively affects the way in which a person feels about himself or herself. This can ultimately affect an employee’s ability to work, through reducing his or her capabilities to perform within the workplace. Individuals who suffer from depression are often discriminated against due to the societal prejudice that continues to exist about depression. In the workplace such discrimination often prevents employees from qualifying for promotions, or prospective employees from being offered employment. The fear of being subjected to unfair discrimination because of depression frequently results in employees not disclosing their mental health status to their employers, which often then causes the depression to become worse.

In order to effectively address this issue, the legislative framework in South Africa dealing with employment rights can be broadened to include depression as a disability, thereby also further protecting depressed employees from discrimination in the workplace.
KEYWORDS

Depression

Disability

Discrimination

Convention on the Rights of Persons with Disabilities

Labour law

Unfair Dismissal

Unfair Treatment

United Kingdom

United Nations,

United States

World Health Organisation
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CHAPTER ONE

INTRODUCTION

1.1 RATIONALE/BACKGROUND

The World Health Organisation (WHO)\(^1\) estimates that around 350 million people worldwide suffer from depression.\(^2\) Depression is one of the main causes of employee absenteeism,\(^3\) both in South Africa and internationally. During 2014 it was found that employee absenteeism related costs in the South African economy amounted to roughly around R19 billion.\(^4\) From these statistics it is evident that depression is a ‘costly illness among South Africa’s workforce’.\(^5\) The way in which depression should be dealt with in the South African workplace will largely depend on whether it is classified as incapacity in the form of ill-health or incapacity in the form of a disability.

If regarded as merely an ill-health issue, employees will simply be protected against unfair dismissals in terms of s 188 of the LRA. If depression is regarded as a disability within the South African workplace, the situation should be dealt with in terms of the Code of Good Practice on the Employment of People with Disabilities (hereinafter referred to as ‘the CGP on Disability’). Employees with disabilities are furthermore protected against automatically unfair dismissals in terms of s 187(1)(f) of the LRA. They are also part of the protected group of ‘designated employees’ for purposes of the EEA,\(^6\) and protected against unfair discrimination in terms of s 6 of the EEA. In order for an employee to be considered disabled for purposes of the CGP on Disability, the following criteria must be satisfied: the disability must be a ‘long term or recurring, physical or mental impairment, which substantially limits’\(^7\) the employee’s daily activities, such as ‘caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and working’.\(^8\) In the case of Standard Bank of SA v Commissioner

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\(^3\) Smit D & Fourie L ‘A Labour Law Perspective on Employees with Depression’ (2014) 2 IJPLR 68 69.


\(^6\) Employment Equity Act 55 of 1998 s1 “designated groups means black people, women and people with disabilities”.

\(^7\) Code of Good Practice on the Employment of Persons with Disabilities Item 5.1.

\(^8\) Kobayashi T ‘Employers’ Liability for Occupational Stress and Death from Overwork in the United States and the United Kingdom’ (2009) 38 2 CLWR 137 142.
for Conciliation, Mediation & Arbitration, the court lay down a four stage test for employers on how to deal with employees with physical disabilities. South Africa’s law is therefore well established ensuring that employees with physical disabilities are not unfairly discriminated against within the workplace. However, when it comes to mental health, South Africa’s law is not as well established in protecting an individual who suffers from a mental impairment, such as depression.

In comparison, the Unites States of America (USA) and United Kingdom (UK) have fairly well established legal disciplines that ensure that employees who suffer from depression are protected. The ratification of the United Nations Convention on the Rights of Persons with Disabilities (CRPD) by these respective countries has altered their approach in dealing with depression. Depression is no longer viewed as an individualistic problem, but rather as a social problem where ‘environmental barriers’ are addressed, restoring the ‘dignity and humanity of people with disabilities’. Applicable disability laws within these jurisdictions will be considered in order to determine what SA might learn from them.

1.2 AIM/S OF THE RESEARCH

Depression is a ‘mood disorder’ that normally has a negative effect on the way in which a person eats, sleeps and generally, the way that the person feels about him-/herself. Many external and internal factors may affect an individual’s mood which may ultimately reduce an employee’s competency within the workplace. Depression is one of the primary grounds for

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employee absenteeism within the workplace." Individuals who suffer from depression are potentially also ‘subject to high levels of discriminatory treatment,’ due to stereotypes attached to mental illnesses. Due to these social prejudices, many employees or prospective employees are reluctant to disclose to their employers that they suffer from depression. In 2007 South Africa signed the United Nations Convention on the Rights of Persons with Disabilities (CRPD). South Africa’s labour law framework should give effect to the CRPD, as per section 54(1)(a) of the Employment Equity Act (EEA). The Code of Good Practice on the Employment of People with Disabilities (hereinafter referred to as ‘the CGP on Disability’) was issued in terms of section 54(1)(a) of the EEA. The EEA and the CGP on Disability is in compliance with the Constitution of the Republic of South Africa of 1996 (Constitution), particularly section 9, which protects any person from being unfairly discriminated against based on, amongst others, the ground of disability.

The CGP on Disability’s main focus is on the effect an employee’s impairment has on the working environment, rather than the effect the impairment itself has on the individual. The CGP on Disability defines mental impairment as ‘an impairment which is a clinically recognised condition or illness, that effects a person’s thought processes, judgement or emotions’. Mental impairments may include anxiety, depression and bi-polar disorders.

This mini-thesis will firstly consider what legislative protection is already in place in the SA workplace for persons suffering from depression. The research will consider the available

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23 Employment Equity Act 55 of 1998 s54(1)(a)
   
   “(1) The Minister may, on the advice of the Commission –
   
   (a) Issue any code of
   
   (b) good practice

   The comments provided on this particular section, states that the code of good practices are implement to provide employer with assistance in implementing the Employment Equity Act, predominantly the provisions of contained in Chapter III. These codes are likely to address issues where special measures need to be taken in realities to persons with disabilities including benefit schemes”.
   
   ‘(3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth’.
27 Code of Good Practice on the Employment of Persons with Disabilities Item 5.1
28 Code of Good Practice on the Employment of Persons with Disabilities Item 5.1.2 (iii).
legislative protection in the jurisdictions of the USA and United Kingdom. These jurisdictions were chosen, as both the USA and United Kingdom are the leaders in offering protection to persons with disabilities. The lessons learnt from the USA and UK could assist South Africa in drafting comprehensive legislative frameworks. Finally, the research will aim to establish how workplace/employment legislative frameworks in South Africa could be extended to further protect employees who suffer from disability in general, as well as considering how those suffering from depression specifically could be better protected under disability provisions.

1.3 PROBLEM STATEMENT

As already indicated earlier, depression is a global problem. The World Health Organisation has indicated that by 2020 depression will be the ‘leading contributor’ in diseases that affect individuals’ mental health. The South African Depression and Anxiety Group found that people suffering from mental illness is amongst one of the highest groups within South Africa. It is clear that South Africa needs to implement legislative measures to effectively address the issue of depression in the workplace, and subsequently also protect employees from discrimination.

South African courts have to date mostly addressed depression as an ill-health issue, and not necessarily a disability issue. The court in New Way Motors v Marsland held that ‘the respondent’s depression could not be considered a form of disability as set out in s 187(1)(f) of the Labour Relations Act’, as the respondent’s depression was considered to fall within incapacity due to ill-health. The court did however find that an employee who suffered from a mental impairment was discriminated against where such discrimination negatively affected the employee’s dignity. Similarly, the court in Independent Municipal & Allied Trade Unions v Witzenberg Municipality held that where an employee who suffered from depression was permanently incapacitated, such an employee could be dismissed under incapacity due to ill-

30 Smit D & Fourie L ‘A Labour Law Perspective on Employees with Depression’ (2014) 2 IJPLR 68 68.
31 Smit D & Fourie L ‘A Labour Law Perspective on Employees with Depression’ (2014) 2 IJPLR 68 68.
health.\textsuperscript{38} Due to the view that our courts mostly regard depression as an ill-health issue, but not a disability issue, it means that employees who are dismissed because of depression will not be protected under the automatically unfair dismissal and unfair discrimination provisions of the LRA and EEA respectively. The comparative study embarked upon will therefore serve the purpose of establishing whether South Africa can learn anything from the legal principles in the USA and UK in dealing with depressed employees. This comparative study will form the basis for making recommendations on how South Africa can better protect employees with depression in the workplace.

1.4 RESEARCH QUESTION

Should employees who suffer from depression in the South African workplace be classified as employees with disabilities, and thereby be protected under South Africa’s existing disability provisions within employment law?

1.5 RESEARCH HYPOTHESIS

Depression is a primary contributor to mental diseases\textsuperscript{39} and with ‘27% of South Africans suffering from depression’\textsuperscript{40} it is evident why depression is a major cause of employee absenteeism. While depression is already considered under ill-health principles, depression is not specifically included in disability provisions in any employment legislation, including the CGP on Disability. Our courts have also favoured the approach of dealing with depression as a pure ill-health issue, with only a few judgements having considered depression within disability provisions. By extending the definition of disability within the CGP on Disability to specifically include depression as a form of mental impairment, employees suffering from depression will enjoy greater legal protection in the South African workplace.

\textsuperscript{38} Independent Municipal & Allied Trade Union on behalf of Strydom v Witzenberg Municipality & Others (2012) 33 ILJ 1081 (LAC) 1087.

\textsuperscript{39} Smit D & Fourie L ‘A Labour Law Perspective on Employees with Depression’ (2014) 2 IJPLR 68 69.

\textsuperscript{40} Smit D & Fourie L ‘A Labour Law Perspective on Employees with Depression’ (2014) 2 IJPLR 68 68.
1.6 **SCOPE/LIMITATION OF RESEARCH**

The mini-thesis will set out to consider depression as a mental impairment within the workplace only, and the environmental barriers that employees with depression face in this regard. Environmental barriers refer to those obstacles that prevent a person living with a disability from actively participating in society.41

The comparative research will only consider the applicable legal principles in the jurisdictions of the United States of America and United Kingdom on how to deal with employees who suffer from depression in the workplace. These jurisdictions are however not without shortfalls. These shortcomings will be discussed to ensure that, in making recommendations for South Africa, so as to ensure that South Africa does not fall into similar traps.

1.7 **SIGNIFICANCE OF RESEARCH**

The significance of this research is that many authors have written on the topic of depression in the workplace, however none have conclusively addressed the issue of whether an employee suffering from depression can be protected under the Code of Good Practice on the Employment of People with Disabilities. The importance of this research is that depression is one of the leading causes of employee absenteeism.42 Often such absenteeism results in substantial financial loss for the employer. Thus, extending the protection afforded under workplace disability provisions to employee’s suffering from depression, will be to the benefit of these individuals as well as their employers.

1.8 **RESEARCH METHODOLOGY**

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This research will be conducted by analysing literature that has been published through secondary sources, such as journal articles, academic books, newspapers, web publications. Primary sources such as policies, laws, international conventions and original narratives by independent researchers and academic scholars will also be utilised. National and international case law will be identified and discussed. A comparative study will be conducted by considering the United States of America’s and United Kingdom’s legal principles on how employees suffering from depression are protected under their respective workplace disability laws.

1.9 PROPOSED CONTENT

Chapter one will set out the introduction to the study. This includes, but is not limited to, explaining the outline of the study, the background to the study, the problem statement and research question, the aims of the study, as well as further relevant issues.

Chapter two will consider South Africa’s current legal framework in addressing depression as a workplace issue. Where the protection against unfair discrimination afforded to employees emanates from s 23 of the Constitution, this provision has been given effect to through both the Labour Relations Act and the Employment Equity Act. Both pieces of legislation aim to protect employees against unfair discrimination, and even deem certain acts to be automatically unfair, which usually results in punitive results for the employer. This chapter will consider the Code of Good Practice on the Employment of People with Disabilities that has been enacted to ensure that the principles of substantive and procedural fairness are adhered to. Lastly, this chapter will consider the impact the CRPD has had on South African legislation, and if South Africa has measured up to these international standards.

Chapter three will consider the enactment and provisions of the United Nations Convention on the Rights of Persons with Disabilities (CRPD). This will include looking at the significance of the CRPD, in that it brought about a shift from the previously used medical model for classifying depression to a more inclusive social model.

   “(1) Everyone has the right to fair labour practices”.
Chapter four will serve as the comparative chapter. An analysis will be done on the applicable United States of America legislation, namely the Americans with Disabilities Act[^45], as well as the United Kingdom’s Disability Discrimination Act (DDA).[^46] The impact of these pieces of legislation on the treatment of employees who suffer from depression, as well as how the courts have interpreted the legislation will be considered. The shortcomings of these pieces of legislation will also be highlighted and discussed.

Chapter five will conclude with a summary of the current protection of employees with depression in the workplace. Additionally, it will contain concluding remarks and recommendations. This will include suggested possible solutions on how employment legislation in South Africa can better protect employees with depression in the workplace.

CHAPTER TWO

SOUTH AFRICA’S POSITION ON DEPRESSION AND DISABILITY IN THE WORKPLACE

2.1 INTRODUCTION

The Constitution of the Republic of South Africa, 1996, contains the fundamental rights and freedoms of all those present within South Africa’s borders.47 There are however some rights that belong to South African citizens alone, e.g. the right to vote48 and freedom of trade, occupation and profession.49 The protection afforded to employees specifically emanates from section 23 of the Constitution. Section 23 states that ‘(1) Everyone has the right to fair labour practices’. Consequently the legislator enacted three main pieces of legislation to give effect to section 23, being, the Labour Relations Act 66 of 1995 (LRA), the Employment Equity Act 55 of 1998 (EEA) and the Basic Conditions of Employment Act 75 of 1997 (BCEA).

In particular, the LRA and EEA aim to protect employees against unfair discrimination in the workplace. In terms of the LRA certain acts by employers are regarded as automatically unfair (automatically unfair dismissals),50 which usually results in punitive consequences for the employer. Through a study of the LRA and EEA specifically, this chapter will consider South Africa’s current legal framework in addressing depression in the workplace. Part of the legislative discussion will include also considering the CGP on Disability, which emanated from the EEA. The CGP on Disability was enacted to ensure that the principles of substantive and procedural fairness are adhered to. The legislation discussed in this chapter must also be considered in conjunction with the United Nations Convention on the Rights of Persons with Disabilities, which South Africa signed and ratified on 30 March 2007.51

51 The CRPD is discussed in chapter 3.
2.2 A BRIEF OVERVIEW OF DEPRESSION

While there is not one dedicated definition in labour law for depression and the effects thereof, in consulting various sources one can attempt to obtain a clear meaning. Depression may be understood to be the emotional state of an individual, where such individual continually experiences moments of despondency, sadness, discouragement and hopelessness. Others view depression as a mood disorder, which reaffirms the above notion that depression weighs heavily on an individual’s mood.

The South African Depression and Anxiety Group has held that depression is more than a mere mood disorder, depression is an illness that affects the entire body and mind. The effects of depression could be far reaching. It potentially affects an individual’s appetite, sleeping patterns, self-esteem and self-confidence. If left untreated, feelings of sadness and low self-confidence could begin to influence an individual’s work and sleep, and often these individuals lose interest in activities that they used to find joy in. Depression may also take the form of an individual experiencing extreme high and low emotional changes. These mood changes might happen instantly or over a period of time. The fluctuation in mood is often referred to as bi-polar disorder or manic-depression.

According to one study done by the World Health Organisation (WHO), depression will by 2020 be a primary contributor to the global health burden. It is therefore clear that depression requires the attention and input of both the medical and legal professions within the realm of employment. It is argued that the effects of depression on an individual’s mind and body show

60 Smit D & Fourie L ‘A Labour Law Perspective on Employees with Depression’ (2014) 2 IJPLR 68 74.
that depression falls within the definition of mental impairment as contained in the CGP on Disability.61

2.3 THE EFFECTS OF DEPRESSION IN THE WORKPLACE

Effects of depression reach further than the individual alone. Depression could have a negative effect on the climate and economy of a company as well.62 When discussing the economic effect, one cannot only refer to the direct financial loss that a company would suffer, but must also consider the indirect loss suffered through a loss in labour and productivity.63

Indirect costs are not easily calculated, as it is more complicated to calculate the financial cost of low levels of productivity and high levels of absenteeism.64 Employee work engagement and productivity is fundamental to the success of any company, as this element is what allows a company to have a competitive edge.65 Employee engagement is an indication of the employee being immersed into his or her work, which often results in an employee having positive feelings towards his or her work.66 Having mentioned the negative effect of depression on the positivity of an employee, depression often leads to low engagement levels and could ultimately leave the employee feeling drained and unexcited about his or her work.67 A direct consequence of this might be that the employer will witness increasing levels of absenteeism.68

Because of the effects that depression might potentially have on an employee in the workplace, South African employment law must protect persons suffering from depression, particularly

61 The CGP on Disability defines mental impairment as:
   “a clinically recognised condition or illness that affects a person’s thought processes, judgement or emotions.”


since it is a no-blame situation the employee finds him or herself in. Such protection will be beneficial to both employees suffering from depression and their employers.

2.4 ANALYSIS OF SOUTH AFRICA’S EXISTING LEGISLATIVE FRAMEWORK

South Africa reached the end of the apartheid era with the adoption of the interim constitution. With the welcoming of the interim constitution, and later its successor the final Constitution of the Republic of South Africa of 1996 (the Constitution), fundamental rights became a reality for everyone, regardless of race, gender, religion etc. The Constitution is the supreme law of the country and no act or legislation may breach any of the fundamental rights contained therein.

2.4.1 The Constitution of the Republic of South Africa, 1996

The Constitution introduced constitutional supremacy as a way of safeguarding against human rights abuses, and made it clear that such abuses would not be tolerated. The concept of constitutional supremacy ensures that the Constitution remains the ‘supreme law of the Republic and that any law or conduct that is inconsistent with it, will be invalid’.

The Constitution’s founding provisions declare that the Republic of South Africa is a democratic state, founded on the values of human dignity, equality, fundamental rights and freedoms. All of these fundamental rights and freedoms are contained in the Bill of Rights. The Bill of Rights is regarded as the cornerstone of South Africa’s democracy. The Bill of Rights applies to all laws and binds all branches of government (including organs of State), as well as all natural and juristic persons. Not only does it specify the basic human rights that everyone is entitled to, it also instructs the State on how to use its powers, which powers have been distributed equally amongst the three branches of government: the executive, the legislature and the judiciary.

Bill of Rights allows for any person to challenge any legislation or action of either the
government or any person which infringes any of the fundamental rights contained therein.\(^78\)

The court in *Minister of Finance v Van Heerdan*\(^79\) held that the achievement of equality is the
core foundation upon which South Africa's Constitution is built.\(^80\) The Constitutional Court
further confirmed that the right to equality is the standard against which all South Africa's laws
must be tested.\(^81\) South Africa's Constitution thus aims for social justice which aids in the
restoration of past injustices caused by the previous government regime during the apartheid
era.\(^82\) In achieving this aim the Constitution has gone beyond the mere notion of formal equality,
which simply allows for identical treatment, to the notion of substantive equality, which
recognises that social differentiation exists as a result of past injustices.\(^83\) The right to equal
treatment is guaranteed in section 9 of the Constitution (known as 'the equality clause'), which
provides that everyone is equal before the law.\(^84\) Within the equality clause the Constitution
proscribes that neither the State nor any person may unfairly discriminate against any individual
on any or more of the listed grounds.\(^85\) Included in the list of grounds upon which unfair
discrimination is prohibited is disability.

It has been held that disability is one of the most "under-litigated" grounds.\(^86\) The court in *Singh
v Minister of Justice and Constitutional Development and others*\(^87\) held that when employing a
prospective employee, it is the duty of the employer to promote and advance the position of
persons with disabilities.\(^88\) The court further held that the duty to reasonably accommodate
persons with disabilities within the workplace is a responsibility which stems from South Africa
being a signatory to the Convention on the Rights of Persons with Disabilities (CRPD).\(^89\) This
duty is of vital importance as persons with disabilities have often been unable to actively
participate in society.\(^90\) This is largely due to the infrastructure within society which caters


\(^{79}\) *Minister of Finance and other v Van Heerdan* 2004 (11) BCLR 1125 (CC).

\(^{80}\) *Minister of Finance and other v Van Heerdan* 2004 (11) BCLR 1125 (CC) 1137.

\(^{81}\) *Minister of Finance and other v Van Heerdan* 2004 (11) BCLR 1125 (CC) 1137.

\(^{82}\) *Minister of Finance and other v Van Heerdan* 2004 (11) BCLR 1125 (CC) 1138.

\(^{83}\) *Minister of Finance and other v Van Heerdan* 2004 (11) BCLR 1125 (CC) 1138.

\(^{84}\) The Constitution of the Republic of South Africa, 1996 s 9(1).


\(^{87}\) *Singh v Minister of Justice and Constitutional Development and others* 2013 (3) SA 66 (EqC).

\(^{88}\) *Singh v Minister of Justice and Constitutional Development and others* 2013 (3) SA 66 (EqC) 75.

\(^{89}\) *Singh v Minister of Justice and Constitutional Development and others* 2013 (3) SA 66 (EqC) 75.

\(^{90}\) *MEC for Education, KwaZulu-Natal v Pillay* 2008 (1) SA 474 (CC) 501.
mostly for able-bodied persons. One way in which the Constitution strives to allow persons with disabilities to actively contribute to, and participate in, society is through guaranteeing that everyone has the right to fair labour practices. This protection of employment and labour rights is a unique feature of the Constitution. In response to this right the legislature, amongst others, enacted the LRA, the BCEA and the EEA.

The LRA was promulgated to give effect to section 23(5) of the Constitution, while the BCEA ensures that everyone has the right to basic benefits within the workplace, all of which is guaranteed in section 23(1) of the Constitution. The EEA was enacted in order to provide a framework which would specifically deal with the achievement of equality and the prohibition of unfair discrimination in the workplace.

2.4.2 The Labour Relations Act 66 of 1995 and the Code of Good Practice: Dismissal

The LRA was enacted to ‘advance economic development, social justice, labour peace and the democratisation of the workplace’. The purpose of the LRA will be achieved if the LRA ‘gives effect to and regulates the fundamental rights conferred in section 23 of the Constitution’.

The LRA, in giving effect to section 23 of the Constitution, amongst others provides that an employee has the right not be unfairly dismissed or subjected to unfair labour practices. The LRA provides that where an employer fails to prove that he or she dismissed the employee based on misconduct, incapacity or the employer’s operational requirements, such a dismissal will be considered unfair (substantive fairness). Such a dismissal will furthermore also only be considered fair where the employer followed the correct procedure in dismissing the employee (procedural fairness). Substantive and procedural fairness is fully addressed in schedule 8 of the

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96 Labour Relations Act 66 of 1995 s 1.
97 Labour Relations Act 66 of 1995 s 1(a).
98 Labour Relations Act 66 of 1995 s 185.
99 Labour Relations Act 66 of 1995 s 188(a)(i) and (ii).
LRA. Schedule 8 is referred to as the Code of Good Practice: Dismissal (hereinafter referred to as ‘the Code on Dismissal’).

Where an employee is however dismissed on any of the grounds listed in section 187(1)(f) of the LRA, which grounds include disability, such a dismissal will be considered automatically unfair.\(^{100}\) Save for two exceptions, this means that dismissal on such a prohibited ground can never be justified by the employer. The only two exceptions, or defenses, against a claim for automatic unfair dismissal are where the employee reached the agreed or normal retirement age,\(^{101}\) or where the dismissal was based on an inherent requirement of the specific job.\(^{102}\) As far as disability is concerned, it means that disability as the reason for dismissal can only be justified where the disability prevented the individual from fulfilling an inherent requirement of the job.

The court in *Department of Correctional Services v Police and Prisons Civil Rights Union*\(^{103}\) held that an inherent requirements of the job is regarded as ‘a permanent attribute or quality forming an essential element and an indispensable attribute which must relate in an inescapable way to the preforming of a job’.\(^{104}\)

The focus of this research is however not whether the dismissal of an employee suffering from depression was substantially and procedurally fair, but rather what protection there is available for employees suffering from depression. The South African judiciary to date has largely dealt with depression under the ground of incapacity, particularly incapacity as a result of ill-health (and not necessarily as part of disability).

The Code on Dismissal provides that incapacity takes one of two forms, namely incapacity due to ill health or injury, or incapacity based on poor work performance.\(^{105}\) The Code on Dismissal further sets out guidelines which employers have to follow when effecting dismissal for incapacity.

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\(^{100}\) Labour Relations Act 66 of 1995 s 187(f):

> “that the employer unfairly discriminated against an employee, directly or indirectly, on any arbitrary ground, including, but not limited to race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, political opinion, culture, language, marital status or family responsibility”.

\(^{101}\) Labour Relations Act 66 of 1995 s 187(2)(b).

\(^{102}\) Labour Relations Act 66 of 1995 s 187(2)(a).

\(^{103}\) *Department of Correctional Services and Another v Police and Prisoners Civil Rights Union (POPCRU) and Others* (2013) 34 ILJ 1375 (SCA).

\(^{104}\) *Department of Correctional Services and Another v Police and Prisoners Civil Rights Union (POPCRU) and Others* (2013) 34 ILJ 1375 (SCA) 1382.

\(^{105}\) Code of Good Practice on Dismissals clause 8 and clause 10.
In terms of Item 8 of the Code on Dismissal an employee may not be dismissed for poor work performance without the employer having completed a full inquiry into the reasons(s) for the poor performance.\textsuperscript{106} In the case of \textit{L S v Commission for Conciliation, Mediation and Arbitration},\textsuperscript{107} the employee was called to a hearing due to her work performance being poor. The court concluded that the employer in this matter wrongly dismissed the employee, who was suffering from depression, on the ground of misconduct instead of incapacity.

\textbf{2. 4.2.1 \textit{L S v Commission for Conciliation, Mediation and Arbitration} \& others}

In the case of \textit{L S v Commission for Conciliation, Mediation and Arbitration}, the employee suffered from severe depression due to several personal incidents which ultimately lead to the continuous deterioration of her work performance\textsuperscript{108}.

The employee on several occasions tried to acquire medical support, both internally and externally to the work environment, in order to ensure that she would remain focused and not under perform.\textsuperscript{109} After a period of about six months of performance issues, the employee was given notice to attend a disciplinary hearing. The employer argued that this happened after the employee failed to attend and participate in the assistance programme offered to her by the employer.\textsuperscript{110} The charges brought against the employee was based on misconduct, particularly her ‘inability to render services in line with her employment contract’.\textsuperscript{111}

At the disciplinary hearing the employee was afforded legal representation which, although unusual, was allowed by the employer because of her mental status.\textsuperscript{112} The employee argued before the chairperson that the hearing should perhaps rather be dealt with in terms of incapacity, instead of misconduct.\textsuperscript{113} The chair however held that the employee’s personal circumstances were improbable, and proceeded to dismiss her for misconduct based on her under performance.\textsuperscript{114} The employee consequently referred an unfair dismissal dispute to the CCMA.

\begin{itemize}
\item \textsuperscript{106} Code of Good Practice on Dismissals clause 8(1) and clause 8(2).
\item \textsuperscript{107} \textit{L S v Commission for Conciliation, Mediation \& Arbitration \& others (2014) 35 ILJ 2205 (LC)}.
\item \textsuperscript{108} \textit{L S v Commission for Conciliation, Mediation \& Arbitration \& others (2014) 35 ILJ 2205 (LC) 2209 and 2210}.
\item \textsuperscript{109} \textit{L S v Commission for Conciliation, Mediation \& Arbitration \& others (2014) 35 ILJ 2205 (LC) 2210 and 2214}.
\item \textsuperscript{110} \textit{L S v Commission for Conciliation, Mediation \& Arbitration \& others (2014) 35 ILJ 2205 (LC) 2214}.
\item \textsuperscript{111} \textit{L S v Commission for Conciliation, Mediation \& Arbitration \& others (2014) 35 ILJ 2205 (LC) 2215}.
\item \textsuperscript{112} \textit{L S v Commission for Conciliation, Mediation \& Arbitration \& others (2014) 35 ILJ 2205 (LC) 2216}.
\end{itemize}
After conciliation failed\textsuperscript{115} the matter was referred to arbitration. At arbitration the employee again argued that her work performance should have been dealt with under incapacity, as opposed to misconduct.\textsuperscript{116} The employee argued that she was not unwilling to work, but rather that she was unable to do so.\textsuperscript{117} The arbitrator rejected the employee’s argument and held that she had failed to produce independent evidence indicating that her mental illness was the cause of her poor work performance.\textsuperscript{118}

The employee thereafter referred her matter to the Labour Court. The court held that the arbitrator had not considered the assessment and true reason for the employee’s incapability to perform her work, which lay at the heart of her claim of unfair dismissal.\textsuperscript{119} The court held that the employer did not conduct a proper investigation as to why the employee was under performing. To simply avoid the consequences of such failure to investigate by categorising the issue as that of misconduct was unfair.\textsuperscript{120} The court held that a dismissal under misconduct was not the correct approach where the employee’s medical incapacity was in question.\textsuperscript{121} The court continued to discuss the different approaches that misconduct and incapacity cases required. In the court’s view incapacity ‘require[d] an approach of understanding, where dismissing an employee due to misconduct require[d] a more rigid disciplinary approach’.\textsuperscript{122} The court held that the dismissal was both substantively and procedurally unfair, and that the arbitrator’s finding was grossly irregular and proceeded to set it aside.\textsuperscript{123}

This case illustrates that where an employee suffers from depression, the employer cannot merely classify the consequences thereof on the employee’s performance as misconduct. As the court correctly held, when someone suffers from a mental illness there might not be a willful denial in performing, but rather the inability of the employee to perform. The Labour Court correctly held that persons who suffer from mental impairments should be dealt with under incapacity rather than misconduct.

The court in \textit{L S v Commission for Conciliation, Mediation and Arbitration} did not however consider what effect the EEA, or a claim of automatic unfair dismissal in terms of s 187(1)(f) of
the LRA, might have had on the outcome of this matter. While the outcome must be agreed with, the question remains whether, had the matter been instituted as a discrimination claim under the EEA or as an automatic unfair dismissal claim under the LRA, the court would have found that depression forms part of the listed ground of disability.

2.4.3 The Employment Equity Act 55 of 1998 and the Code of Good Practice: Key Aspects on the Employment of People with Disabilities

The purpose of EEA is to give effect to the equality clause of the Constitution in the workplace by ‘promoting equal opportunity and fair treatment in employment through the elimination of unfair discrimination’. The EEA’s purpose is furthermore to ‘implement affirmative action measures to redress the disadvantages in employment experienced by designated groups’. Designated groups are defined as ‘black people, women and people with disabilities’. The EEA defines persons with disabilities as ‘people who have long-term or recurring physical and mental impairment which substantially limits their prospects of entry into, or advancement in, employment’.

The EEA must be understood in supporting substantive equality rather than the notion of formal equality. The EEA, much like section 9 of the Constitution, lists the grounds on which an employee may not be unfairly discriminated against. It is not unfair discrimination to take affirmative action consistent with the purposes of the EEA. The EEA aims to protect persons with disabilities by including disability as one of the grounds within section 6 on which an employee may not be unfairly discriminated.

The CGP on Disability was published in terms of section 54(1) of the EEA. Section 54(1) of the EEA allows the Minister of Labour, on the advice of the Commission of Employment Equity, to

125 Employment Equity Act 55 of 1998 s 2(b).
129 Employment Equity Act 55 of 1998 s 6(1).
131 Employment Equity Act 55 of 1998 s 6(1).
issue any code of Good Practice.\textsuperscript{132} The Minister of Labour issued the CGP on Disability during 2002 to further address the definition of persons with disabilities contained in the EEA.\textsuperscript{133} The CGP on Disability was issued with the aim of assisting and educating employers on the role they play in the inclusion of persons with disabilities within the workplace.\textsuperscript{134} The CGP on Disability’s key focus is creating awareness in the employment of persons with disabilities, as these individuals have historically been disadvantaged, impoverished and marginalised.\textsuperscript{135} As a result of past, and continued, marginalisation, a large percentage of persons with disabilities remain living in a state of poverty partly due to the reluctance on the part of employers to employ these individuals.\textsuperscript{136}

The EEA and the CGP on Disability has thus aimed to eliminate the social barriers created by many workplace policies that still primarily focus on able-bodied and able-mindedness of both job applicants and employees.\textsuperscript{137} Many workplace policies are designed to place emphasis on the incapacity of employees with disabilities, rather than their capacities.\textsuperscript{138} It can therefore be said that employment policies follow the medical model approach to disability, while the definition of disability in the CGP on Disability rather embraces the social model approach.\textsuperscript{139} The social model shifts the focus from the individual’s impairment and rather considers the barriers that are created by society which prevent persons with disabilities from actively participating in society.\textsuperscript{140}

\begin{itemize}
\item \textsuperscript{132} Employment Equity Act 55 of 1998 s 54(1).
\item \textsuperscript{139} Ngwena C & Pretorius L. ‘Code of Good Practice on the Employment of People with Disabilities: An Appraisal’ (2003) 24 ILJ 1816 1819. For a fuller discussion on the two approaches to disability see chapter 3.
\end{itemize}
The definition of disability contained in the CGP on Disability lays down certain criteria that an individual will have to satisfy in order to be protected thereunder. The CGP on Disability provides that a person will be considered disabled provided that the impairment must be long standing or recurring, a mental or physical impairment, and substantially limits the individual’s capabilities. The CGP on Disability further defines what mental and physical impairments are. The aim of limiting disability to either of these two forms of impairments allows for legal certainty to be created. Physical impairment is the ‘partial or total loss of bodily function or part of the body, including sensory impairment’. Mental impairment is a ‘clinically recognised condition or illness that affects a person’s thought processes, judgement or emotions’. 

2.4.4 The Difference between Incapacity based on Ill-health and Disability

Incapacity is one of three grounds on which an employer may dismiss an employee. The Code on Dismissal further categorises incapacity into incapacity based on poor work performance and incapacity based on ill-health or injury. Incapacity (specifically in the form of ill-health and injury) and disability are not interchangeable terms. In South Africa’s legal system these two terms, while not always easily distinguishable from each other, are separate issues. An employee will be deemed to be incapacitated where he or she cannot perform the essential
requirements of the position that they are in. Disability is viewing the potential employee as being ‘suitably qualified for the position but who requires reasonable accommodation’. In cases of incapacity due to ill-health dismissal must be the last resort after all reasonable alternatives short of dismissal were considered. These alternatives need to consider certain factors around the employee’s incapacity. These factors mainly stem around whether the employee’s incapacity is temporary or permanent, and the effect of the incapacity on the employee’s ability to perform.

Where the incapacity is of a permanent nature, the Code on Dismissal stipulates that the employer is required to either find alternative employment for the employee, or adapt the employee’s working duties so as ‘to accommodate the employee’s disability’. Reasonable accommodation is discussed below. Item 10 is the first time that disability as a separate term is referred to in the Code on Dismissal. Disability therefore seems to form part of incapacity for ill-health and injury as it is referred to in that context. The Code on Dismissal however does not allude to what disability means, nor does it elaborate in any meaningful terms on how disability should be dealt with. One is therefore required to turn to the CGP on Disability. In terms of this code the employer is required to reasonably accommodate people with disabilities.

Neither the Code on Dismissal, nor the CGP on Disability are classified as legislation, but rather act as quasi-legislation in that employers have to follow them. The Code on Dismissals has been effectively used in the South Africa’s judicial system. The CGP on Disability was established to serve as a guide to employers in promoting awareness around the equalisation of opportunities for persons with disabilities.

The case of Standard Bank of SA v Commissioner for Conciliation, Mediation & Arbitration serves as a landmark judgement relating to disability and how employer’s should approach such issues. The employee in this matter suffered from severe back pain after she had been in a motor

155 Code of Good Practice on Dismissals clause 10(1).
156 Code of Good Practice on Dismissals clause 10(1).
157 Code of Good Practice on Dismissals clause 11(ii).
vehicle accident. After the motor vehicle accident she was placed in various positions by the employer in an attempt to cater for her disability.

While the case does not specifically deal with mental impairment, the court in this case established a four-stage enquiry on how to deal with employees with physical disabilities. The first stage of the four-stage enquiry requires the employer to determine ‘whether or not the employee with a disability is able to perform his or her work’. If the employer finds that the employee with a disability is able to perform his or her duties, then the enquiry ends there, and the employee must be restored to his or her previous position. If however the employer during this stage determines that ‘the employee is unable to perform his or her work’ then the next stages must follow.

The second stage requires that the employer embarks on a factual enquiry to determine to what extent the employee is able to perform his or her duties. During the third stage the employer will need to assess how to adapt the employee’s current working conditions to accommodate the employee’s disabilities. If the employer is unable to adapt the employee’s working conditions, then the employer must consider all alternatives that are short of dismissing the employee. The fourth, and final, stage of the enquiry provides that if an employer is unable to adapt the employee’s working conditions, then the employer is required to provide other suitable employment. The court in this matter erred by creating a fourth stage, when the fourth stage is directly linked to the third stage of the enquiry, the court should have connected these two stages into one.

The court held that when an employee is dismissed, the fairness of such a dismissal has to be in line with the Constitution, as well as foreign and international instruments that aim at protecting employees with disabilities. The court held that where an employee with a disability is dismissed based on the ground of incapacity, such a dismissal affects the employee’s rights to ‘equality, human dignity, the right to choose a trade, occupation or profession freely and right to fair labour practices’. The court thus applied the social model approach to disability. Judge Pillay held that as persons with disabilities already have a burden of complying with “mainstream society”, the least that employers could do is to adapt and embrace such persons’ differences, and through this also achieve substantive equality as protected in the Constitution.

The court further held that where an employer accommodates an employee with disabilities, it also serves as a means through which to restore dignity to that employee. While the court treated the employee’s disability as an incapacity enquiry, the court held that ‘disability is not synonymous with incapacity’.

While at first glance it may seem as if there are distinct differences between disability and incapacity for ill-health or injury, practically the lines between these two concepts often becomes blurred, such as in the case of depression. In assessing the differences between incapacity and disability, one of the most noticeable differences is that there is a dedicated Code of Good Practice dealing with disability.

Whilst depression can clearly be regarded as an ill-health issue, the question is whether it should be dealt with under the wider notion of ill-health, or whether it should rather be dealt with under the more narrow understanding of disability. To date there has been no clear guidance in this regard from either the legislature or South Africa’s court system. Considering the definition of mental impairment in the CGP on Disability, as well as the effect that mental impairments have on individuals, it might be argued that depression falls under a mental impairment. And as

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mental impairments fall within the definition of disability under the CGP on Disability, depression could therefore be regarded as a disability.\(^{174}\)

**2.5 REASONABLE ACCOMMODATION**

It seems trite (when considering the CGP on Disability) that where an employee is incapacitated and the employer, after having conducted a thorough investigation, cannot reasonably accommodate the employee in performing his or her work duties, or where the employee does not accept the accommodation offered by the employer, such a dismissal will be considered to be fair.\(^{175}\) An employer is not required to provide reasonable accommodation where the reasonable accommodation required will place an undue hardship on the employee.\(^{176}\) When referring to undue hardship, the CGP on Disability provides that this is where the accommodation required will cause the employer “significant or considerable difficulty or expense, which will seriously disrupt the operation of business.”\(^{177}\)

The CGP on Disability requires that the employer looks at ways in which to reduce the impact that the impairment will have on the employee, while still ensuring that the employee can meet the essential requirements of the job.\(^{178}\) While the CGP on Disability places a burdensome duty on the employer to make reasonable accommodation, the CGP on Disability acknowledges that such accommodations must be cost effective.\(^{179}\) Reasonable accommodation must also be extended towards prospective employees who are found to be suitably qualified for the position during the selection and recruitment process.\(^{180}\) Whilst the CGP on Disability places great emphasis on the fact the employer is required to make reasonable accommodation, the CGP on Disability acknowledges that there is a duty on the employee to disclose the disability and the need for reasonable accommodation.\(^{181}\) Reasonable accommodation includes:

‘(i) adapting existing facilities to make them accessible;\(^{182}\)"

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\(^{174}\) Refer to paragraph 4 below where this issue is further addressed.

\(^{175}\) Christianson M ‘Incapacity and Disability: A Retrospective and Prospective Overview of the Past 25 Years (2004) ILJ 879 889.

\(^{176}\) Code of Good Practice on the Employment of Persons with Disabilities clause 6.1

\(^{177}\) Code of Good Practice on the Employment of Persons with Disabilities clause 6.2

\(^{178}\) Code of Good Practice on the Employment of Persons with Disabilities clause 6.3.i

\(^{179}\) Code of Good Practice on the Employment of Persons with Disabilities clause 6.4
(ii) adapting existing equipment or acquiring new equipment including computer hardware and software;

(iii) re-organizing workstations;

(iv) changing training and assessment materials and systems;

(v) restructuring jobs so that non-essential functions are re assigned;

(vi) adjusting working time and leave; and

(vii) providing specialized supervision, training and support in the workplace.\(^{182}\)

2.6 SOUTH AFRICAN CASE LAW AND DEPRESSION

South Africa’s courts remain undecided whether an employee suffering from depression should be protected under the CGP on Disability, or whether an employer should use incapacity for ill-health proceedings in terms of the Code on Dismissal.

Most of South Africa’s available literature is largely based on providing reasonable accommodation for persons with physical disabilities, with very little acknowledgment being given to persons who suffer from mental impairments. South African courts to date seem to favour the approach that depression is mostly an ill-health issue. There however seems to be a steady increase in the number of cases in which depression is being accepted as part of disability protection.

2.6.1 New Way Motors v Marsland\(^{183}\)

In the case of New Way Motors v Marsland, the respondent, Mr Marsland, fell into a state of depression after his wife of 24 years suddenly left him in 2001.\(^{184}\) On returning to work, after being hospitalised for four days, Mr Marsland was treated with great hostility by his employer.\(^{185}\) He was isolated and branded for having a ‘contagious disease’.\(^{186}\) Prior to his


\(^{183}\) New Way Motor & Diesel Engineering (Pty) Ltd v Marsland (2009) 30 ILJ (LAC).

\(^{184}\) New Way Motor & Diesel Engineering (Pty) Ltd v Marsland (2009) 30 ILJ (LAC) 2877.

\(^{185}\) New Way Motor & Diesel Engineering (Pty) Ltd v Marsland (2009) 30 ILJ (LAC) 2877.
hospitalisation Mr Marsland was actively involved in many of the employer’s core operations. After his return to work, Mr Marsland found that he was excluded from performing the essential requirements of his job.\textsuperscript{187} He alleged that the employer’s managing director began threatening and verbally abusing him.\textsuperscript{188}

As a result Mr Marsland relapsed into a state of severe depression.\textsuperscript{189} Mr Marsland was booked off from work for a week, and upon his return he was handed a notice to attend a disciplinary enquiry.\textsuperscript{190} The grounds for the disciplinary enquiry were indicated as poor work performance, breaching of company rules and misuse of company benefits.\textsuperscript{191} The chairperson of the enquiry found Mr Marsland ‘guilty of poor work performance’,\textsuperscript{192} and required the employer to provide Mr Marsland with counseling.\textsuperscript{193}

Subsequent to the above hearing Mr Marsland was prevented from performing any of his duties and was subjected to continuous threats and verbal abuse.\textsuperscript{194} Mr Marsland eventually resigned.\textsuperscript{195} He lodged a claim of unfair dismissal against the employer based on constructive dismissal.\textsuperscript{196} The Labour Court held that the conduct of the employer towards Mr Marsland amounted to unfair discrimination based on a mental impairment.\textsuperscript{197} Judge Stein held that Mr Marsland’s mental health was the factual basis for his dismissal, and therefore it amounted to an automatically unfair dismissal.\textsuperscript{198}

On appeal to the Labour Appeal Court, the latter found that an employee who suffered from a mental impairment was discriminated against where such discrimination negatively affected the employee’s dignity.\textsuperscript{199} The Labour Appeal Court agreed that the employer’s conduct impaired the dignity of Mr Marsland based on the fact that the employee suffered from depression.\textsuperscript{200} The Labour Appeal Court further found that the employer’s treatment of the employee was

\begin{footnotesize}
\begin{itemize}
  \item \textsuperscript{186} New Way Motor & Diesel Engineering (Pty) Ltd v Marsland (2009) 30 ILJ (LAC) 2877.
  \item \textsuperscript{187} New Way Motor & Diesel Engineering (Pty) Ltd v Marsland (2009) 30 ILJ (LAC) 2877.
  \item \textsuperscript{188} New Way Motor & Diesel Engineering (Pty) Ltd v Marsland (2009) 30 ILJ (LAC) 2878.
  \item \textsuperscript{189} New Way Motor & Diesel Engineering (Pty) Ltd v Marsland (2009) 30 ILJ (LAC) 2878.
  \item \textsuperscript{190} New Way Motor & Diesel Engineering (Pty) Ltd v Marsland (2009) 30 ILJ (LAC) 2878.
  \item \textsuperscript{191} New Way Motor & Diesel Engineering (Pty) Ltd v Marsland (2009) 30 ILJ (LAC) 2878.
  \item \textsuperscript{192} New Way Motor & Diesel Engineering (Pty) Ltd v Marsland (2009) 30 ILJ (LAC) 2880.
  \item \textsuperscript{193} New Way Motor & Diesel Engineering (Pty) Ltd v Marsland (2009) 30 ILJ (LAC) 2880.
  \item \textsuperscript{194} New Way Motor & Diesel Engineering (Pty) Ltd v Marsland (2009) 30 ILJ (LAC) 2880.
  \item \textsuperscript{195} New Way Motor & Diesel Engineering (Pty) Ltd v Marsland (2009) 30 ILJ (LAC) 2881.
  \item \textsuperscript{196} New Way Motor & Diesel Engineering (Pty) Ltd v Marsland (2009) 30 ILJ (LAC) 2881.
  \item \textsuperscript{197} New Way Motor & Diesel Engineering (Pty) Ltd v Marsland (2009) 30 ILJ (LAC) 2882.
  \item \textsuperscript{198} New Way Motor & Diesel Engineering (Pty) Ltd v Marsland (2009) 30 ILJ (LAC) 2882.
  \item \textsuperscript{199} New Way Motor & Diesel Engineering (Pty) Ltd v Marsland (2009) 30 ILJ (LAC) 2877.
  \item \textsuperscript{200} New Way Motor & Diesel Engineering (Pty) Ltd v Marsland (2009) 30 ILJ (LAC) 2883.
\end{itemize}
\end{footnotesize}
appalling\textsuperscript{201} and confirmed that the employee’s dismissal was automatically unfair since the dismissal was based on s187(1)(f) of the LRA.\textsuperscript{202}

### 2.6.2 Independent Municipal \& Allied Trade Unions v Witzenberg Municipality\textsuperscript{203}

The court in Independent Municipal \& Allied Trade Unions v Witzenberg Municipality held that where an employee who suffered from depression was permanently incapacitated, such an employee might be dismissed under incapacity due to ill-health.\textsuperscript{204} Such a dismissal would be considered fair if substantive and procedural requirements were met.\textsuperscript{205}

Mr Strydom, the first respondent, held the position of municipal manager within the employer’s operations.\textsuperscript{206} Mr Strydom was booked off from work for a period of about eight months between May 2014 and January 2005 due to major depression.\textsuperscript{207} In January 2005 Mr Strydom applied to be medically boarded based on ill-health.\textsuperscript{208} During July 2005 the employer held an enquiry into Mr Strydom’s capacity, and found that he was incapacitated to the extent that he could not perform the essential requirements of his employment.\textsuperscript{209} Mr Strydom was subsequently dismissed.\textsuperscript{210} Mr Strydom instituted an unfair dismissal claim against his employer.\textsuperscript{211} The Labour Court found that the dismissal of Mr Strydom had been both

\textsuperscript{201} New Way Motor \& Diesel Engineering (Pty) Ltd v Marsland (2009) 30 ILJ (LAC) 2886.
\textsuperscript{202} New Way Motor \& Diesel Engineering (Pty) Ltd v Marsland (2009) 30 ILJ (LAC) 2886.
\textsuperscript{203} Independent Municipal \& Allied Trade Union on behalf of Strydom v Witzenberg Municipality & Others (2012) 33 ILJ 1081 (LAC).
\textsuperscript{204} Independent Municipal \& Allied Trade Union on behalf of Strydom v Witzenberg Municipality & Others (2012) 33 ILJ 1081 (LAC) 1087.
\textsuperscript{205} Independent Municipal \& Allied Trade Union on behalf of Strydom v Witzenberg Municipality & Others (2012) 33 ILJ 1081 (LAC) 1087.
\textsuperscript{206} Independent Municipal \& Allied Trade Union on behalf of Strydom v Witzenberg Municipality & Others (2012) 33 ILJ 1081 (LAC) 1084.
\textsuperscript{207} Independent Municipal \& Allied Trade Union on behalf of Strydom v Witzenberg Municipality & Others (2012) 33 ILJ 1081 (LAC) 1084.
\textsuperscript{208} Independent Municipal \& Allied Trade Union on behalf of Strydom v Witzenberg Municipality & Others (2012) 33 ILJ 1081 (LAC) 1084.
\textsuperscript{209} Independent Municipal \& Allied Trade Union on behalf of Strydom v Witzenberg Municipality & Others (2012) 33 ILJ 1081 (LAC) 1084.
\textsuperscript{210} Independent Municipal \& Allied Trade Union on behalf of Strydom v Witzenberg Municipality & Others (2012) 33 ILJ 1081 (LAC) 1084.
\textsuperscript{211} Independent Municipal \& Allied Trade Union on behalf of Strydom v Witzenberg Municipality & Others (2012) 33 ILJ 1081 (LAC) 1084.
substantively and procedurally unfair. The employer thereafter took the matter on appeal to the Labour Appeal Court.

The Labour Appeal Court held that when dismissing an employee based on incapacity the ‘enquiry considers whether the employee is capable of performing his or her duties before the enquiry took place or whether the employee is suitable for an alternative position’. The court went further to hold that where the employee was found to be permanently incapacitated, the enquiry did not automatically end. In such instance the employer was required to determine whether the employee required adjustments to be made to his current employment conditions or whether an alternative position is available which will be suited to the employee’s incapacity.

Judge Molemela held that where the employer through a thorough investigation concluded that it was unable to adapt the employee’s working conditions in order to accommodate the incapacity, or where it was unable to offer the employee a suitable alternative position, such dismissal would be considered procedurally and substantively fair. Based on the medical evidence submitted, the court found that Mr Strydoms’ employer did not actively take steps to eliminate the stressors that caused Mr Strydom’s mental health issues. The court found that the dismissal of Mr Strydom was substantively and procedurally unfair.

2.6.3 Hendricks v Mercantile & General Reinsurance Co of SA

In the case of Hendricks v Mercantile & General Reinsurance Co of SA the court found the dismissal of the appellant to have been substantively and procedurally fair. The appellant had been dismissed based on the ground of incapacity. The previous industrial court system found that

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The respondent had exhausted all possible solutions in an attempt to accommodate the appellant’s depression and anxiety, while at the same time offering the appellant medical treatment. The court found that the appellant’s unwillingness to repair the relationship between himself and his fellow colleagues and employer would have required the employer to restructure the entire department. The court found that to have expected this from the employer would have been unreasonable. The respondent offered the appellant an alternative position, one which would not have negatively affect his salary, and also agreed that no probation period would have applied to the appellant in the new position. The court found that the appellant’s rejection of the solutions offered by the employer was unreasonable and resulted in the dismissal of the appellant being fair.

2.7 CONCLUSION

The enactment of the Constitution has entrenched the right to equality. While the right to equality includes a list of grounds on which no person may be discriminated against, this is not a closed list of grounds. This is evident by the word “including”. While the Constitution expressly protects the right to equality and fair labour practices, it is unable to cater for day-to-day governance of these rights. The Constitution has therefore tasked the legislature with enacting legislation to give effect to these rights.

The legislation that aims at protecting persons with disabilities in the workplace is the EEA, LRA and the BCEA. Employees suffering from depression are able to find protection under any of the three legislative frameworks. Uncertainty however remains whether an employee should bring depression related claims under ill-health arguments or based on disability. The effects of depression are far reaching and would therefore require South Africa’s legal system to develop greater protection mechanisms for this marginalised group of people. While, as indicated in this chapter, one could perhaps argue that the EEA and the CGP on Disability aim at protecting employees suffering from depression under disability provisions, depression is not expressly

221 Hendricks v Mercantile & General Reinsurance Co of SA Ltd (1994) 15 ILJ 304 (LAC) 315.
222 Hendricks v Mercantile & General Reinsurance Co of SA Ltd (1994) 15 ILJ 304 (LAC) 316.
mentioned in the definition of mental impairment in either of these documents. There remains a substantial amount of local literature on physical disability, but not much on mental impairments and even less on depression. From the viewpoints of the courts it is evident that there is much uncertainty as to how to deal with depression. Depression can be viewed as either a disability or ill-health incapacity issue. The manner in which our courts deal with depression largely depends on the ground the complainant basis his or her claim on. The South African judiciary is yet to clarify under exactly which ground a person suffering from depression is protected. Although the courts have not yet set a consistent precedent in this regard, it is noted that depression is increasingly being recognised as a mental impairment.

The case of Standard Bank of SA v Commissioner for Conciliation, Mediation & Arbitration (hereinafter referred to as the “Standard Bank case”) as discussed in paragraph 2.4.4 above, provides a four-stage enquiry with which an employer has to comply with before dismissing an employee. While the case of Standard Bank mainly focuses on physical impairment, it provided the foundational groundwork on which an employee who suffers from depression can be afforded protection under, provided that South Africa’s courts recognise depression as a disability. This then indicates that South Africa has already placed the basic protection mechanisms in place for persons with disabilities, including employees suffering from depression.

The case of New Way Motors v Marsland, as discussed in paragraph 2.6.1 above, provided employees suffering from depression some hope as the court recognised depression as a disability. The court emphasised that dismissing an employee for reasons related to depression (which in terms of the CGP on disabilities is considered to be a disability) amounts to automatically unfair discrimination.

The case of Independent Municipal & Allied Trade Unions v Witzenberg Municipality, as discussed in paragraph 2.6.2 above, considered depression as an incapacity issue. This is unfortunately indicative that South African courts still differ in their approach to depression. This still leaves employees suffering from depression in a position of uncertainty as to the protection available to them under employment law.

The case of Hendricks v Mercantile & General Reinsurance reasoned along similar lines to the case of Independent Municipal & Allied Trade Unions v Witzenberg Municipality. In the

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Hendricks case the dismissal of the employee was considered fair based on the appellant’s rejection of the employer’s attempts at making working conditions reasonable. The court however did not challenge the ground on which the employee brought the claim of the unfair dismissal, which was based on incapacity.

It is unfortunate that South Africa’s courts still remain undecided on whether or not depression should be considered to be a disability, especially in light of the fact that the CGP on disability has alluded to depression falling within the definition of disability. The indecisiveness of South Africa’s courts has allowed for employees suffering from depression to remain in a vulnerable position. South Africa presently offers minimalistic protection to employees suffering from depression.

The position in South Africa will be addressed and considered in the next chapter. In order to determine how South Africa has incorporated the provisions of the CRPD into national laws, it will be seen that South Africa has been criticised for not being able to give full effect to the CRPD. This is partly due to the fact that South Africa does not have a dedicated national set of laws that deals with disability.
The enactment of the Convention on the Rights of Persons with Disabilities\(^228\) (CRPD) has brought about significant change in how society approaches and views disability.\(^229\) The main theme addressed within the CRPD is to empower persons with disabilities, with an ancillary theme being to create awareness around the diversity of humanity within society.\(^230\) While the CRPD’s predecessors contained provisions which aimed at preventing discrimination against persons with disabilities, these conventions failed in safeguarding against the violations of fundamental human rights and freedoms.\(^231\)

Persons with disabilities have traditionally been viewed as being dependant,\(^232\) with the result that governments had to provide these individuals with financial assistance as a result of the belief that they were unable to actively participate in society.\(^233\) Persons with disabilities were viewed as ‘objects that required care, rather than legal subjects who are entitled to the full and equal enjoyment of human rights’.\(^234\) While, as will be seen below, historically many persons living with disabilities were in theory, and on paper, entitled to basic human rights, the reality was that these individuals were often denied basic rights as a result of disability.\(^235\)

This chapter will provide a brief overview of the history of the CRPD’s predecessors and the enactment of the CRPD. The chapter will further consider how the CRPD differs from its predecessors. In particular the CRPD is different in that it shifted away from the restrictive medical model approach adopted in earlier documents to a more inclusive social model approach. While the CRPD has largely been praised for the effort it has made in bringing about such shift, it is not without shortcomings, which will also be discussed in this chapter.

The chapter will also consider the significance of the CRPD, particularly how it has empowered the lives of persons living with disabilities. Finally, the chapter will also examine whether the CRPD has in fact successfully empowered persons living with disabilities.


3.2 THE ENACTMENT OF THE CRPD AND THE PROTECTION AFFORDED BY THE CRPD

3.2.1 A brief overview of the history leading up to the enactment of the CRPD

It was only from the 1960’s that the United Nations (UN) began focusing on restoring the dignity and enjoyment of fundamental freedoms of person with disabilities.\(^{236}\) Since then the UN has continuously aspired to protect vulnerable groups of individuals in society.\(^{237}\) This was done through adopting various conventions. The first of these were ‘two twin covenants’,\(^{238}\) namely the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights.\(^{239}\)

During the 1970’s the UN adopted the Rights of Mentally Retarded Persons\(^{240}\) and the Declaration on the Rights of Disabled Persons.\(^{241}\) Both these documents, although very ambitious for their time, failed to fully protect persons with disabilities.\(^{242}\) The protection only extended as far as the medical care and rehabilitation of persons with disabilities were concerned.\(^{243}\)

The 1980’s was marked as the turning point in affording protection of fundamental freedoms to persons with disabilities, during which an international decade of disabled persons was embarked on.\(^{244}\) During the decade of disabled persons an action programme was established which called upon the public to participate and assist in affording full and equal protection to persons with disabilities.\(^{245}\) The international decade of disabled persons encouraged

international participation in putting forward recommendations to the UN to encourage the active involvement of disabled person in society. The UN campaigned to promote the equalisation of opportunities for persons with disabilities.

During the 1990’s Italy and Sweden made a recommendation that the UN should adopt a convention aimed at protecting the rights and freedoms of persons with disabilities specifically. The majority of the UN member states however rejected this recommendation, as they felt that such convention would be a duplication of mechanisms already contained in the then-existing conventions. Most treaties at the time however failed to allow for the full and equal enjoyment of rights and freedoms and the empowerment of persons with disabilities.

Subsequently the Standard Rules on the Equalization of Opportunities for People with Disabilities (SREOPD) was enacted from the experiences gained during the international decade for disabled persons. The SREOPD aimed to eliminate the discrimination suffered by persons with disabilities. Although the standards contained in the SREOPD were headed in the right direction, they were not legally binding on member states. Therefore whilst good on paper, the standards contained in the SREOPD practically failed to eliminate discrimination suffered by persons with disabilities.

Another predecessor of the CRPD was the UN Millennium Goals Convention. Although persons with disabilities received protection under the broad standards of the convention, there was no explicit reference made to disability. Persons with disabilities found protection under the UN Millennium Goals Convention, specifically under the goal to eradicate extreme poverty.

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and hunger.\textsuperscript{257} Persons with disabilities historically lacked the ability to access state resources such as “education, employment, health care and the social and legal support systems”.\textsuperscript{258} This resulted in high levels of poverty amongst persons with disabilities.

While all of the above treaties offered persons with disabilities some form of protection, these treaties did not contain appropriate protective mechanisms in safeguarding the human rights and fundamental freedoms of persons with disabilities.\textsuperscript{259}

### 3.2.2 The enactment of the CRPD

The United Nations General Assembly in 2001 established the Committee on the Rights of Persons with Disabilities. This committee comprised of eighteen independent members,\textsuperscript{260} which all acted in their personal capacities and not in the capacity of government representatives.\textsuperscript{261} The committee was mandated to accept ‘proposals for an international convention which would ultimately protect and promote the rights and dignity of persons with disabilities’.\textsuperscript{262} The international community actively responded to this mandate. The proposals made were compiled and, to a large extent, formed the substantive content of the final text of the CRPD, which was adopted by the UN General Assembly on 13 December 2006.

The CRPD was enacted with the purpose to,

\begin{quote}
“promote, protect and ensure that persons with either mental or physical impairments, have the full enjoyment of all human rights and fundamental freedoms, while aiming to
\end{quote}


\textsuperscript{260} Committee on the Rights of Persons with Disabilities Members consist of: Mr Ahmad Al Saif, Mr Danlami Umaru Basharu, Mr Monthian Buntan, Mr Imed Eddine Chaker and Ms Theresia Degener. A complete list of all memembers can be accessed at [http://www.ohchr.org/EN/HRBodies/CRPD/Pages/Membership.aspx](http://www.ohchr.org/EN/HRBodies/CRPD/Pages/Membership.aspx) (accessed on 24 November 2017).


remove the various barriers that may hinder an individual’s full and effective participation in society, placing individuals on an equal basis with others”.

The CRPD remains the fastest negotiated convention in UN history, as well as the convention which received the highest number of member state signatures on the day it was published for ratification. This supports the view that there was indeed a worldwide need for the protection offered by the CRPD.

The CRPD is the first convention which comprehensively aims at realising the rights of nearly 650 million people (that is, nearly ten percent of the world’s population). Of the ten percent of people that are now afforded protection under the CRPD, twenty percent are living in a state of poverty. This places persons with disabilities as one of the largest, if not the largest, minority groups globally.

The United Nations former Deputy Secretary-General, Mark Malloch Brown, stated that the CRPD has ‘put an end to an era were persons with disabilities are discriminated against, thus allowing persons with disabilities to contribute equally to development of society’. The CRPD has been praised for being a forward looking convention, which moved away from the traditional medical model to a more social model approach, of which a detailed discussion will follow in paragraph 3.2.3 below.

3.2.3 The revolutionary departure from the medical model approach to disability to a social model approach

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The CRPD has taken a revolutionary stance in moving away from the traditional medical model approach to disability to a more objective, social model, approach where disabilities are viewed from the perspective of society’s social construction.\(^2\)\(^7\)\(^0\)

The medical model approach is the analysis of disability from a medical perspective. Within this approach the disability is viewed from an individual’s inability to participate in everyday, what is perceived as “normal”, anatomical functions.\(^2\)\(^7\)\(^1\) The CRPD’s predecessors aimed at protecting persons with disabilities using the medical model approach. The individual’s disability, and consequently the inability to do certain “normal” things, formed the basis for most of these conventions’ provisions.

In terms of the CRPD the focus shifted away from the individual’s abilities, or inabilities, and rather considered society’s infrastructure as the main source of an individual’s disability.\(^2\)\(^7\)\(^2\) This approach has been termed the social model approach to disability. The social model therefore extends beyond physical barriers that prevent persons with disabilities from actively participating in society. It extends beyond the opinions of society, which have often contributed to the re-enforcement of stereotypes and stigmas against persons with disabilities.\(^2\)\(^7\)\(^3\)

The social model embraced by the CRPD aims to restore the dignity and rights of persons with disabilities, and to integrate them as active participants in society. These mechanisms are not aimed at trying to “fix” persons with disabilities so that they can fit, what is regarded to be, the “social norm”. They are rather there to break down the barriers that have historically prevented these individuals from enjoying the benefits of equal opportunities.\(^2\)\(^7\)\(^4\) The CRPD therefore aims at promoting the integration of persons with disabilities into society, and allowing persons with disabilities to lead a “normal life”.\(^2\)\(^7\)\(^5\)

\(3.3\) **MONITORING AND IMPLEMENTATION OF THE CRPD**

One critique of previous conventions\textsuperscript{276} was that these conventions were largely “teethless”. While many member states, in ratifying these conventions, seemed eager to empower and restore the dignity of persons with disabilities, attempts to actually do so often ended up being abandoned. Conventions were often only ratified to show that member states were attempting to deliver on the promises set out in the CRPD predecessors\textsuperscript{277} Practically however the implementation of these conventions was largely left in the discretion of member states (as many previous human rights conventions tried to avoid political debate), which achieved little success\textsuperscript{278}.

Article 33 of the CRPD lays down four key obligations imposed on member states in the implementation and monitoring of the CRPD at a national level\textsuperscript{279}. The first obligation is that the member states should identify one or more focal points which their respective national governments will be responsible for implementing\textsuperscript{280}. Secondly, member states are responsible for the establishment of structures that will facilitate the implementation and monitoring of the CRPD at different levels within different sectors\textsuperscript{281}. Thirdly, member states must set up an independent organisation that oversees the promotion, protection and monitoring of the CRPD\textsuperscript{282}. Lastly, an important process in the monitoring of the CRPD at national level is that civil society, more specifically persons with disabilities, are allowed to actively participate in these processes\textsuperscript{283}.

With the introduction of the Optional Protocol to the Convention on the Rights of Persons with Disabilities (herein referred to as “Optional Protocol”)\textsuperscript{284}, the CRPD created an additional feature which introduced monitoring provisions to ensure that the CRPD is implemented at a national level\textsuperscript{285}, as well as ensuring that implementation does not conflict with the purpose of

\textsuperscript{276} Conventions as mentioned in paragraph 3.2.1 above.
the CRPD. These monitoring mechanisms ensure that the convention will remain effective in affording persons with disabilities protection, as well as ensuring that the convention does not become outdated as was the case with many of the CRPD predecessors.

The Optional Protocol has been ratified by 105 countries out of the 153 member states which ratified the CRPD. The Optional Protocol allows member states to lodge a complaint with the Committee on the Rights of Persons with Disabilities in cases where either an individual’s or group of persons with disabilities, rights have been violated. The complaint will only be entertained if the complainant can prove that all national remedies have been exhausted, but failed.

3.4 SHORTCOMINGS OF THE CRPD

Although the CRPD has largely been praised for its innovative approach in affording persons with disabilities the protection and enjoyment of their human rights and fundamental freedoms, there has been certain features of the CRPD which have been criticised. What follows below is a detailed discussion of the specific provisions of the CRPD that have been critiqued.

3.4.1 Persons with disabilities lack the necessary legal capacity to make their own decisions

The CRPD not only provides protection to individuals with physical disabilities, but extends its protection to persons with mental impairments. This includes individuals who suffer from psychological disabilities such as depression.291

Article 12 of the CRPD has taken a novel approach in Mental Health law, which allows ‘persons with disabilities to enjoy legal capacity on an equal basis with others on all aspects of life’.292 This allows for a person to make his or her own decision, and to have those decisions respected.293

To appreciate this approach, consideration needs to be given to how most state laws approach legal capacity. Within most jurisdictions legal capacity is determined by age and mental health.294 Incapacity is commonly associated with mental impairments, thus persons with mental impairments are often viewed as having to be controlled, and their decision making restricted.295 Many state laws view persons suffering from psychological disabilities as being unable to make their own decisions.296

The CRPD adopted the interpretation of legal capacity as contained in Article 15 of the Convention on the Elimination of Discrimination against Women (CEDAW). In terms of this article, legal capacity needs to be understood in terms of an individual’s autonomy - thus having the legal capacity to make one’s own decisions.297 Article 12 upholds the autonomy of the individual,298 rebutting the presumption that an individual who suffers from a mental impairment lacks the ability to make his or her decisions.299 Article 12 allows an individual to either consent

or refuse treatment.\textsuperscript{300} This provision ultimately allows for the individual concerned to enjoy legal independence including the right to make his or her own decisions.\textsuperscript{301}

Article 12 of the CRPD strives to restore the inherent dignity and autonomy of persons with disabilities which, amongst others, allows for persons with disabilities to make their own decisions.\textsuperscript{302} The CRPD however overlooks the fact that many of those suffering from mental impairments may be hindered from being able to make sound decisions, which decisions may have a negative impact upon their lives.\textsuperscript{303} The inability of these individuals to make sound decisions is the reason why persons with mental impairments are often the subjects of abuse. This renders them a vulnerable group of individuals in society, and who requires extensive protection.\textsuperscript{304} The CRPD fails to consider the fact that not all forms of care will be a threat to an individual’s dignity and independence, but rather a vital aspect in the repairing/healing of the individual.\textsuperscript{305}

Article 12 caused majority of the debate by the delegates on whether persons with mental impairments did indeed have the necessary legal capacity to make sound decisions.\textsuperscript{306} Many of these delegates were in favour of building a guardianship model into the provision.\textsuperscript{307} This was rejected by the UN Commission, as a guardianship model previously caused individuals with mental impairments grave injustices - the very injustices that the CRPD aimed at eliminating.\textsuperscript{308}

\textit{3.4.2 Institutionalisation of persons with disabilities}

Article 14 of the CRPD protects persons with disabilities from torture or cruel, inhuman or degrading treatment or punishment. Article 15 of the CRPD further provides that:

\begin{itemize}
\end{itemize}

\begin{thebibliography}{99}
\footnotesize
\bibitem{301} Schulze M \textit{Understanding the UN Convention on the Rights of Persons with Disabilities} (2009) 60.
\bibitem{306} Schulze M \textit{Understanding the UN Convention on the Rights of Persons with Disabilities} 3ed (2009) 60.
\bibitem{307} Schulze M \textit{Understanding the UN Convention on the Rights of Persons with Disabilities} 3ed (2009) 60.
\bibitem{308} Schulze M \textit{Understanding the UN Convention on the Rights of Persons with Disabilities} 3ed (2009) 61.
\end{thebibliography}
“1. States Parties shall ensure that persons with disabilities, are on an equal basis with others:

(a) Enjoy the right to liberty and security of person;
(b) Are not deprived of their liberty unlawfully or arbitrarily, and that any deprivation of liberty is in conformity with the law, and that the existence of a disability shall in no case justify a deprivation of liberty.

2. States Parties shall ensure that if persons with disabilities are deprived of their liberty through any process, they are, on an equal basis with others, entitled to guarantees in accordance with international human rights law and shall be treated in compliance with the objectives and principles of the present Convention, including by provision of reasonable accommodation.”

Article 15 aims at preventing individuals who are suffering from a mental impairment from being a danger to either themselves or others, to be placed in treatment without obtaining their consent. This has been argued to be involuntary treatment.

The UN High Commissioner held that any law, be it international or national, which allows for institutionalisation without obtaining the individual’s consent, must conforms to both national laws and international human rights standards. If not the institutionalisation of the individual will be in direct contravention of the CRPD and must be abolished. Many have argued that national mental health laws call for the institutionalisation of mentally ill persons as these laws aim to protect mentally impaired individuals from themselves where appropriate. This idea was rejected by the UN High Commissioner of Human Rights who claimed that such analysis would be no justification for the deprivation of liberty. The CRPD makes a shift away from the traditional harm-preventative measures as contained in many national mental health laws, as these laws only further endorse the stigmas and stereotypes persons with mental impairments are subjected to.

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Article 17 provides that ‘every person with disabilities has the right to the respect of his or her physical or mental integrity on an equal basis with others’. Article 17 prevents the use of ‘forced interventions, forced institutionalisation, equal treatment and limitation on involuntary treatment’, all of which proved to be problematic. The construction of this provision was found to be problematic as most of this provision has already been covered by articles 12 and 25 of the CRPD. Article 25 provides that persons with disabilities receive the highest possible standard of health care. Health care services which promote the fundamental rights, ‘dignity, autonomy and needs of persons with disabilities through training and the promulgation of ethical standards for public and private health care’.

Articles 12, 14 and 17 of the CRPD are interrelated as they all aimed to protect an individual from involuntary treatment. The question that needs to be asked is whether there ‘is a reasonable basis for singling out persons with mental impairments, when it comes to intrusive interventions’? Answering this question needs to be done in light of national mental health laws which allow for involuntary psychiatric hospitalisation. The High Commissioner for Human Rights held that the involuntary treatment of persons with mental impairments is the general practice within the Mental Health profession. This is based on the stereotype that persons suffering from mental health impairments are dangerous, and lack the required capacity to make informed decisions.

Articles 14 and 17 further entrench the principles set out in article 12, in restoring the legal capacity of individuals with mental impairments, and thus allowing these individuals to make their own decisions.

The issue on whether there is a need for ‘harm-prevention’ mechanisms on the one hand, while on the other hand mentally impaired individuals should have the right to make their own

decisions, has created tension between the implementation of these provisions by member states into national laws.\textsuperscript{324}

Much of the tension hinges on the provisions of article 12 of the CRPD granting persons with mental impairments the ability to make their own decisions, and having those decisions respected regardless of whether an individual’s decision-making capability is impaired.\textsuperscript{325}

The CRPD does however allow for supportive decision making. This is not to be confused with substitute decision making which the CRPD strongly prohibits.\textsuperscript{326} Supportive decision making ensures that the ‘will and preferences’\textsuperscript{327} of the individual is considered when making a decision on behalf of another.\textsuperscript{328} Supportive decision making will only be allowed where an individual is unable to understand material information in order to make any decisions, and equally unable to appreciate the consequences of such decisions.\textsuperscript{329}

The problem that arises with this approach is that the CRPD is silent on what amount of respect needs to be given to the will and preference of persons with mental impairments.\textsuperscript{330} Thus the CRPD passes the buck to member states to ensure that their respective national mental health laws make a shift from substituted decision making to supportive decision making methods,\textsuperscript{331} while also ensuring that if an individual could have done so, the individual would have made the same decision. The CRPD does not provide member states with clear guidelines on how to go about this.

3.5 CONCLUSION

With the CRPD’s revolutionary move away from the medical model approach to disability to the social model approach to disability, the focus has shifted away from the individual’s inability, and rather moved towards the hurdles created by society’s attitude and barriers. The CRPD’s adoption of the social model has allowed for persons with disabilities to actively participate in society. The CRPD witnessed the largest amount of ratifications on its first day of ratification, which indicates that states were eager to ratify the CRPD. After ratification of the CRPD many member states however objected to allowing persons with mental impairments exactly the same legal capacity, on an equal basis with others. The CRPD has remained silent on remedying the confusion around the full incorporation of article 12 into national laws, which article grants persons with mental impairments the ability to make their own decisions. The CRPD however requires that member states are responsible for the incorporation of the supportive- decision making model into their national laws, without offering guidance.

When embarking on a determination of how South Africa has incorporated the provisions of the CRPD into national laws, it will be seen that South Africa has been criticised for not having contributed to the area of disability, as one would have hope South Africa would. This criticism has largely emanated from the fact that South Africa does not have ‘all-inclusive disability legislation’. The uncertain position in South Africa was addressed in chapter 2.

The next chapter looks at the United States of America and the United Kingdom. In assessing these jurisdictions, the research will consider what laws these nations have set in place in affording protection to persons with disabilities. This will be done in an attempt to establish what SA can do to further to protect employees suffering from disability and whether protecting them under disability laws might be feasible.


CHAPTER FOUR

EXAMINING THE DISABILITY LAWS OF THE UNITED STATES OF AMERICA AND THE UNITED KINGDOM

4.1 INTRODUCTION

Having considered the South African position on disability in the work environment specifically, some might argue that South Africa still has a far way to go in affording persons with disabilities adequate protection. This chapter will examine the disability laws of the United Kingdom and Unites States of America. The examination will serve as an indication as to how far South Africa has already come, but also how far it still has to go when it comes to disability protection in the workplace.

The United Kingdom has since as early as 1944 acknowledged that persons with disabilities should be allowed a fair opportunity to contribute to the economy of the country. This was done by means of the Disabled Persons (Employment) Act. 334 This Act was later repealed by the Disability Discrimination Act of 1995 (DDA), while the latter again was repealed by the Equality Act of 2010. With each new enacted piece of legislation further improvement was made in the disability law of the United Kingdom. The case of the UK could serve as great insight for South Africa on how to better protect persons with disabilities and further advance them in the workplace.

The United States of America is another country which clearly acknowledges that persons with either a physical or mental disability (or both) require protection. In particular, the Rehabilitation Act of 1973 was praised for its ability to break barriers. Today the USA is one of the forerunners of disability protection by means of the American with Disabilities Act (ADA) of 1990.

The chapter will now turn to a more detailed discussion of the relevant disability legislation of the UK and the USA.

4.2 THE UNITED STATES OF AMERICA

For years the United States of America (USA), like so many other countries, excluded people with disabilities from actively participating in society. As a result many people with disabilities were left socially and economically dependent on others. The unemployment rate of people with disabilities was amongst the highest when compared to other marginalised minority groups within the USA. This also contributed to the rise in labour shortages experienced in the USA. Subsequently the USA government proceeded to enact the Americans with Disabilities Act (ADA) of 1990.

4.2.1 The Americans with Disabilities Act (ADA)

4.2.1.1 Introduction to the ADA

The ADA came into operation on 26 July 1990. The main aim of the Act was to present equal employment opportunities and new employment rights to people with disabilities. The ADA set forth a national mandate to end discrimination against people with disabilities, thus allowing people with disabilities to gain social and economic independence.

The USA in enacting the ADA aimed at creating legislation that would offer equal employment opportunities for people with disabilities. The ADA further extended and secured the civil rights of people with disabilities. The ADA was not legislation passed to simply prevent discrimination against people with disabilities, but rather legislation aimed at empowering people with disabilities to seek and find employment, thus re-gaining their independence.


impairment\textsuperscript{343} reduced the capabilities of an individual to actively participate in society, but that such individual was rather prevented from doing so due to societal and institutional barriers stemming from archaic attitudes and stereotypes.\textsuperscript{344} The ADA aimed at removing these outdated prejudices suffered by people with disabilities by shedding light and promoting the capabilities of people with disabilities.\textsuperscript{345} It is however argued by some that despite the broad scope given to employers in offering employment to people with disabilities, the employment of people with disabilities still remains problematic even after the enactment of the ADA.\textsuperscript{346}

\textit{4.2.1.2 Title I of the ADA and the Equal Employment Opportunity Commission (EEOC)}

The ADA was not enacted with the purpose of creating quotas, which would have required employers to employ a certain number of people with disabilities.\textsuperscript{347} Title I of the ADA specifically deals with non-discriminatory practices in the employment, promotion,\textsuperscript{348} and any other privileges associated with employment of persons with disabilities.\textsuperscript{349} The non-discriminatory practices to which Title I mainly refers are ‘job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms and conditions’.\textsuperscript{350}

Title I fulfils the ADA’s aim of providing equal employment opportunities to people with disabilities. Section 102(b) of Title I of the ADA provides several methods by which an employer may not discriminate against an employee or a potential employee on the basis of disability.\textsuperscript{351} The methods included within section 102(b) of Title I are that an employer may not prevent an employee with disability from seeking promotion opportunities.\textsuperscript{352} Nor may an

\textsuperscript{343} Paragraph 4.2.1.3 below discusses whether depression is considered to be a mental impairment.
\textsuperscript{344} American with Disabilities Act of 1990 s 2(a)(2).
\textsuperscript{346} American with Disabilities Act of 1990 s 102(a).
\textsuperscript{347} American with Disabilities Act of 1990 s 102(b).
\textsuperscript{348} American with Disabilities Act of 1990 s 102(a).
\textsuperscript{349} American with Disabilities Act of 1990 s 102(a).
\textsuperscript{350} American with Disabilities Act of 1990 s 102(b).
\textsuperscript{351} American with Disabilities Act of 1990 s 102(b)(1).
employer deny an employee with a disability employment in hopes to avoid providing reasonable accommodation to such an employee.  

The ADA prevents an employer or potential employer from discriminating against any qualified person with disabilities through simply refusing to provide reasonable accommodation in response to the individual’s mental or physical impairment. Reasonable accommodation however means that the ADA does not prohibit the refusal of accommodation to an employee where the accommodation will impose an undue hardship on the operation of the employer’s business. 

Upon the enactment of the ADA, most claims of discrimination emanated from Title I of the ADA. In response to this the Equal Employment Opportunity Commission (EEOC) was established. The EEOC is an agency that was established to deal with both interpretative and enforcement powers. The EEOC was granted interpretative powers, to assist employers and federal governments through various educational programmes to ensure that federal organisations and employers policies and practices are in compliance with the provisions of the ADA. 

The EEOC’s enforcement powers allows the EEOC to receive and investigate charges of employment discrimination filed against private sector employers, employment agencies, labour unions, and state and local governments. The EEOC upon receiving these charges will attempt to resolve these disputes through either conciliation methods or in serious cases by instituting legal proceedings against the party responsible for alleged discrimination.

In March 1997 the EEOC published a detailed guideline which comprehensively dealt with how provisions within the ADA protected and applied to those employees who suffered from mental

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health disabilities. The guidelines were enacted to provide employers with clarity regarding the terminology used within the ADA which specifically relates to mental impairment. With the release of the EEOC guidelines in 1997 the courts experienced an influx of cases. Majority of the cases related to mental impairments, particularly depression.

4.2.1.3 Definition of Disability within the ADA

When the ADA was enacted, the USA Congress intended for the definition of disability in terms of the ADA to be interpreted broadly. Such broad interpretation of the definition of disability would have allowed for many people with disabilities to be protected under the ADA. However, a narrow interpretation given to disability by the courts resulted in many persons with disabilities being excluded from the protection offered by the ADA.

The ADA defines disability as ‘a physical or mental impairment that substantially limits one or more major life activities of such an individual, a record of such impairment; or being regarded as having such an impairment.’ The definition of disability is divided into three parts. The first part of the definition is where an impairment “substantially limits one or more major life activities”. The ADA further defines major life activities by dividing them into two categories, namely, general life activities and those activities related specifically to major bodily functions. General life activities that the ADA refers to are activities such as “caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and

367 American with Disabilities Act s 3(1).
368 American with Disabilities Act s 3(2).
working".\textsuperscript{371} The major bodily functions that the ADA refers to are not a closed list, but include “functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions”\textsuperscript{372}.

The extent to which an individual’s physical or mental impairment will substantially limit their ability to perform a major life activity is the crux in determining whether such an individual will qualify as disabled under the ADA. The extent to which a major life activity is limited will differ from person to person.\textsuperscript{373} Generally, mental impairment negatively affects a person from learning, thinking, concentrating, interacting with others, caring for oneself, speaking, performing manual tasks, or working and sleeping'.\textsuperscript{374} Working is a highly contested area, as many have argued whether it is indeed a major life activity.\textsuperscript{375}

The term “substantially limits” means that an individual is unable to perform a major life activity which the average person is able to perform.\textsuperscript{376} Two factors are considered in assessing whether the impairment substantially limits an individual’s performance of a major life activity, namely, duration and impact.\textsuperscript{377} Duration refers to the length that the impairment is likely to persist. Impact again refers to the lasting effect that the impairment is likely to have on the individual. Determining how an individual is likely to be limited by the impairment is by far the most challenging task within this first requirement of the definition of disability.\textsuperscript{378}

The term mental impairment has been defined by the EEOC in the \textit{EEOC Enforcement Guidance on the ADA and Psychiatric Disabilities} (hereinafter referred to as “the guide”) as any ‘mental or psychological disorder, such as emotional or mental illness’.\textsuperscript{379} Emotional and mental illness includes ‘major depression, bipolar disorder, anxiety disorders (which includes panic disorder, obsessive compulsive disorder, and post-traumatic stress disorder), schizophrenia, and personality disorders.’\textsuperscript{380} In order for an individual suffering from a mental impairment to be protected under the ADA, the mental impairment must be considered a disability. In proving that

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{371} American with Disabilities Act s 3(2)(A).
\item \textsuperscript{372} American with Disabilities Act s 3(2)(B).
\item \textsuperscript{373} EEOC Enforcement Guidance on the Americans with Disabilities Act and Psychiatric Disabilities Item 1.
\item \textsuperscript{374} EEOC Enforcement Guidance on the Americans with Disabilities Act and Psychiatric Disabilities Item 1.
\item \textsuperscript{375} Fersh D & Thomas PW \textit{Complying with the Americans with Disabilities Act: A Guide for Management and People with Disabilities} 1 ed (1993) 27.
\item \textsuperscript{379} EEOC Enforcement Guidance on the Americans with Disabilities Act and Psychiatric Disabilities Item 1.
\item \textsuperscript{380} EEOC Enforcement Guidance on the Americans with Disabilities Act and Psychiatric Disabilities Item 1.
\end{enumerate}
\end{footnotesize}
the mental impairment is a disability, the mental impairment must satisfy the definition of disability as set out in the ADA.

The requirement of ‘regarded as’ of the definition of disability was included in the definition of disability in the ADA to ensure that employees who may suffer from temporary impairments, such as broken limb, will also be regarded as an employee who has a disability, although these employees may be considered “healthy”\(^\text{381}\). Thus the ADA in inserting the term ‘regarded as’ aligns itself with the ADA’s broader aim of eradicating ‘discriminatory practices and attitudes’ within the society\(^\text{382}\). The ‘regarded as’ requirement widens the class of persons that the ADA offers protection to\(^\text{383}\). The term of “regarded as” wishes to replace the idea that persons will only be considered disabled if their conditions are medically recognised as disabilities, to the idea of persons who display the effects of being disabled to be regarded as being disabled\(^\text{384}\).

Therefore, persons who may be temporarily limited from performing major life activities, will be regarded as being disabled, under the ‘regarded as’ requirement of the definition of disability.

An essential element of the definition of disability is reasonable accommodation. While the term reasonable accommodation does not explicitly appear in the definition of disability, it is an essential element of Title I of the ADA\(^\text{385}\). The ADA unlike its predecessor, the Rehabilitation Act, developed the concept of reasonable accommodation, to a broader and more interactive process, whereby both employer and employee could engage in determining the needs of the employee\(^\text{386}\). This means an employer is required to make reasonable accommodation to either the employer’s premises or employee’s working conditions, which ultimately contributes to a favourable working environment for the employee with disabilities\(^\text{387}\). The purpose of reasonable accommodation is to identify and eliminate possible barriers that will prevent an employee from

\(^{381}\) Simmons T ‘“Working” with the ADA’s “Regarded as” Definition of a Disability’ (2000) 5 Texas Forum on Civil Liberties & Civil Rights 27 31-32.

\(^{382}\) Simmons T ‘“Working” with the ADA’s “Regarded as” Definition of a Disability’ (2000) 5 Texas Forum on Civil Liberties & Civil Rights 27 32.

\(^{383}\) Simmons T ‘“Working” with the ADA’s “Regarded as” Definition of a Disability’ (2000) 5 Texas Forum on Civil Liberties & Civil Rights 27 33.

\(^{384}\) Simmons T ‘“Working” with the ADA’s “Regarded as” Definition of a Disability’ (2000) 5 Texas Forum on Civil Liberties & Civil Rights 27 43.


performing the essential requirements\textsuperscript{388} of the job.\textsuperscript{389} Although the ADA places a duty on the employer to reasonably accommodate employees with disabilities, the ADA does not require that the employer in doing so suffer an undue hardship.\textsuperscript{390} In terms of the ADA, undue hardship is defined as measures ‘that require significant difficulty or expense’\textsuperscript{391} on behalf of the employer to reasonably accommodate an employee with disabilities. In assessing whether an employer will suffer undue hardship, the following factors will be considered, the nature and cost of the accommodation,\textsuperscript{392} the complete costs involved in providing the accommodation to the employee,\textsuperscript{393} the overall size of the company\textsuperscript{394} and the type of business concluded by the employer.\textsuperscript{395}

4.2.1.4 Interpretation of the Definition of Disability according to the Universal Approach and Minority Group Approach

The ADA’s definition of disability was constructed on the social model of disability.\textsuperscript{396} Within the social model approach there are two different approaches namely, the universal approach and the minority group approach.\textsuperscript{397} The minority group approach is where society identifies disabled persons as a group of persons whose impairments result in them consistently remaining a disadvantaged group within society.\textsuperscript{398} These disadvantages are usually based on impairments which have historically been stigmatised.\textsuperscript{399} These stigmas often centre on ‘the idea that those with disabilities are different

\begin{itemize}
\item The essential requirements of the job are those functions that are fundamental to the employee completing the tasks that his or her position requires, as mentioned in Mickey PF & Pardo M ‘Dealing with Mental Disabilities Under the ADA’ (1993) 9 The Labor Law 531 540.
\item American with Disabilities Act of 1990 s 101(10)(A).
\item American with Disabilities Act of 1990 s 101(10)(B)(i).
\item American with Disabilities Act of 1990 s 101(1)(B)(ii).
\item American with Disabilities Act of 1990 s 101(1)(B)(iii).
\item American with Disabilities Act of 1990 s 101(1)(B)(iv).
\end{itemize}
from the “norm” or are “abnormal” from the majority of society. The minority group approach mimics the medical model approach to disability which largely focuses on the individual’s disability preventing him or her from actively participating in society. Before an individual can be protected under the minority group approach, the impairment, be it physical or mental, has to have been around long enough for such an impairment to have gained a specific stigma.

If the impairment has not been subjected to some form of stigmatisation, the disabled individual will be unable to seek protection.

The universal approach, while still forming part of the broader social model approach to disability, acknowledges that every person has some form of impairment, and further provides that everyone is at risk of being disabled. The universal approach does not limit impairments to those that have been historically stigmatised. The universal approach offers protection to any or all persons who have been denied an opportunity to actively participate in society, based on any form of impairment. Important to note that the universal approach does not offer protection to persons who have been discriminated against based on certain characteristics, such as height, weight or even eye colour, as an individual is protected against such discrimination in terms of the Civil Rights Act of 1964. The universal approach removes the focus away from disability that limits bodily functions, to any limitation that disability causes. This approach aligns itself with the true form to which the social model to disability was constructed around. However, the universal approach protects any person that finds themselves on the spectrum of abled-bodied to disabled. This approach does not factor in stigmatised impairments. The

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universal approach acknowledges that a person with a disability is not discriminated against once, but rather that discrimination is recurring, having a large impact on the quality of their lives. The universal approach by including non-stigmatised impairments into the definition of disability, neglects to take into account the lived reality of many of the persons that continuously face discrimination based on stigmatised impairments.

The explanation of both the minority and universal approach sets the foundation as to where the courts in the USA have erred greatly when interpreting the definition of disability found in the ADA. While the ADA called for a broad interpretation of the definition of disability, in the application of the ADA’s definition of disability, the ADA favoured the minority group approach in order for the ADA to win political support. While there was an influx of cases that came before the courts after the ADA was enacted, ninety-seven percent of these cases brought against employer’s who discriminated against an employee due to disability were unsuccessful as the courts found that the employee was not disabled in terms of the definition of disability within the ADA. Many employees who suffer from depression were deemed not to be disabled in terms of the ADA.

As mentioned above, the definition of disability in the ADA is comprised of three parts. The ‘substantially limiting’ element, namely the performance of major life activities, has been discussed above. However the Supreme Court’s interpretation of the ‘regarded as’ requirement of the definition has resulted in the definition excluding many persons with disabilities from being protected under the ADA. Given the literal meaning of the words ‘regarded as’ requirement will extend protection to an individual who has a stigmatised impairment which has

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the effect of substantially limiting their ability to perform major life activities.\textsuperscript{419} This interpretation finds itself supporting the minority approach.\textsuperscript{420}

\textbf{4.2.1.5 Case law pertaining to the definition of disability}

In the case of \textit{Sutton v United Airlines}\textsuperscript{421} the applicants, twin sisters, had applied to become pilots for United Airlines.\textsuperscript{422} Their applications were rejected based on the fact that their eyesight did not meet the standard requirements which were set by the airline.\textsuperscript{423} The sisters brought a claim of discrimination against United Airlines on the basis of disability.\textsuperscript{424} The United States Court of Appeals for the Tenth Circuit found that the sisters were not disabled in terms of the definition of disability as found within the ADA.\textsuperscript{425} The court’s reasoning was that wearing glasses did not substantially limit their abilities to perform major life activities.\textsuperscript{426} The sisters then appealed this decision to the Supreme Court. The Supreme Court however concurred with the court a quo’s finding.\textsuperscript{427} The Supreme Court held that where an individual with an impairment uses methods to mitigate the impairment, such a person does not fall within the scope of individuals that the ADA aims at protecting.\textsuperscript{428} The court further held that if they had to allow an individual who uses mitigating measures to correct an impairment to be protected under the definition of disability, this would result in a floodgate of cases, and an over-extention of the protection under the ADA.\textsuperscript{429} The court did however indicate that while someone might not fall under the “substantially limits” test, that person might perhaps be covered under the “regard as”

\textsuperscript{421} Sutton v. United Airlines, Inc. 119 S. Ct 2139 (1999).
test of the definition of disability.  The court mentioned that the sisters were not prevented from performing a major life activity, the activity being able to work, as they were only excluded from becoming pilots and not any other job within aviation. The court considered the EEOC guidelines, however found that disability applied to a limited minority group, and not the large group of persons the EEOC had included.

In the case of Murphy v United Parcel Service, United Parcel Service employed Mr Murphy as a mechanic which required him to drive commercial vehicles. In terms of the Department of Transportation’s requirements, a person suffering from clinically diagnosed high blood pressure would not be able to drive a commercial vehicle. Despite Mr Murphy’s high blood pressure, he was mistakenly granted the certificate to operate commercial vehicles. When United Parcel Service discovered the mistake they dismissed Mr Murphy. Mr Murphy instituted a claim of unfair dismissal based on Title I of the ADA. On appeal the court held that when making use of the ‘regarded as’ requirement of the definition, Mr Murphy’s high blood pressure is not considered a disability. The court reasoned that Mr Murphy’s high blood pressure did not substantially limit him from performing a major life activity. The Court of Appeals for the Tenth Circuit (hereinafter referred to as “Court of Appeal”) held that although Mr Murphy was unable to drive, he was able to perform a number of functions required of a mechanic. The Court of Appeal further entrenched the reasoning of the Sutton case. The court held that where an individual used mitigating measures to correct his impairment, such an individual will not be ‘regarded as’ being disabled in terms of the definition of disability.

The court in the Albertson’s, Inc v Kirkingburg, held that the where an employee does meet the minimum vision requirements set by the Department of Transport, an employee would not be considered disabled as the employee is not prevented from a class of jobs. The employee was only excluded from working in a certain position based on the fact that he did not meet the

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minimum requirements of the job.\textsuperscript{437} The court held that Title 1 of the ADA allows for an employer to use qualifying standards to exclude certain person, provided that the reasons provided are job related and consistent with business necessity.\textsuperscript{438}

In \textit{Toyota Motor Manufacturing, Kentucky, Inc v Williams},\textsuperscript{439} (\textit{Toyota}) the court’s narrow interpretation of the definition of disability made it near to impossible for any claimant to succeed in their claim of disability related discrimination by an employer. In the case of \textit{Toyota}, Ella Williams had worked for Toyota for many years. She subsequently developed various physical problems which negatively impacted on her ability to do her job.\textsuperscript{440} Ms Williams, upon her doctor’s recommendations, was assigned to a new position which did not require much physical labour.\textsuperscript{441} Toyota later required Ms Williams to wipe down the cars with highlighting oil, as a result of this new task Ms Williams’ physical condition began to deteriorate.\textsuperscript{442} Ms Williams requested to be reassigned to a position which did not require such intense physical labour.\textsuperscript{443} Toyota refused to reassign Ms Williams and ultimately Ms Williams’ employment was terminated.\textsuperscript{444} Ms Williams filed a claim of discrimination against Toyota, based on the allegation that their failure to accommodate her was a violation of the ADA.\textsuperscript{445} The trial court held that the Ms Williams’ condition did not fall within the ambit of disabled in terms of the ADA.

Ms Williams appealed against the decision of the trial court, and the Sixth Circuit Court found that the evidence Ms Williams presented met the requirements laid down in the \textit{Sutton} case.\textsuperscript{446} The court held that working is considered a major life activity, however, working should be

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\item \textsuperscript{439} Toyota Motor Manufacturing, Kentucky, Inc v. Williams, 122 S.Ct. 681 (2002).
\end{itemize}
considered as a ‘residual life activity’. Thus, the court in Toyota held that working is at the very bottom of life activities. The court would then only consider work as a life activity, if Ms Williams was not substantially limited from performing any other major life activities. The court ruled that Ms Williams’ impairments did in fact render her disabled under the ADA.

The Supreme Court, after having considered the EEOC guidelines, the history which led to the ADA’s enactment and the decision of Sutton, proceeded to reverse the decision of the Sixth Circuit Court. The Supreme Court ruled that the definition of disability in the ADA required a narrow interpretation as Congress only intended it to protect a small group of disabled persons. The Supreme Court held that Ms Williams could perform major life activities such as brushing her teeth, bathing and doing laundry. The Supreme Court’s ruling was approached from a pure business perspective, the court failed to use a holistic approach. On this basis the Supreme Court found that Ms Williams was not disabled in terms of the ADA.

The various cases which followed from the Sutton and Toyota cases closed the door for many employees who had untraditional impairments and who sought protection under the ADA. Professor Nicole Porter, in her article, “The New ADA Backlash” tries to establish a reason as to how the courts got the interpretation of the disability so wrong. Professor Porter considered various reasons, and the explanation that seemed to gain the most support, was that the courts, employers and society as a whole believed that inserting the reasonable accommodation provision allowed for persons with disabilities to be treated favourably, but such favourable treatment should be limited to those who were truly in need. Professor Porter goes on to add that what exactly amounted to the employer making reasonable accommodation was confusing,

thus the courts preferred not to deal with the complexity of what reasonable accommodation meant and simply denied many claims under the ADA.\(^{457}\)

4.2.2 Establishment of the Americans with Disabilities Amendment Act (ADAAA)

The National Council of Disability (NCD) was dissatisfied with the narrow interpretation given to the definition of disability by the Supreme Courts. Consequently, in their report “Righting the ADA”,\(^{458}\) the NCD put forth the idea of enacting the ADA Restoration Act.\(^{459}\) The ADA Restoration Act would aim to correct the interpretation given by the Supreme Court decisions.\(^{460}\) The NCD and disability rights advocates began working on a new legislative language for the ADA Restoration Act.\(^{461}\) After several proposals were made for the amendments, former USA president, George W. Bush, signed the ADA Amendments Act (ADAAA) into law.\(^{462}\)

The most prominent and important change effected by the ADAAA was revising of the definition of disability.\(^{463}\) While the definition remained the same as that founded in the ADA, the ADAAA included several rules within the purposes and findings of the ADAAA.\(^{464}\) These rules aimed to assist the courts in interpreting the definition, thus giving effect to the universal approach.\(^{465}\) Congress explicitly stated that the purpose behind the enactment of the ADAAA was to reject the findings of the \textit{Sutton} case, where the court found that where an employee made use of mitigating measures to correct or manage the impairment, the use of such measures did not qualify the employee to find protection under the ADA.\(^{466}\)

The ADAAA further proceeded to reject the finding of the \textit{Toyota} case where the court set unattainably high standards to which a disabled applicant had to prove that an impairment

\(^{466}\) American with Disabilities Amendment Act of 2008 s 12101(b)(2).
limited his/her activity.\textsuperscript{467} The ADAA further provided that an impairment which substantially limited the carrying out of a major life activity was now an activity which played a significant role in the daily lives of these individuals.\textsuperscript{468} The ADAAA added that it no longer needed to be major life activities, it could also be one activity which was substantially limiting.\textsuperscript{469}

One of the major changes made by the ADAAA, which held specific benefits to individuals who suffered from depression, was that an impairment which substantially limited an individual when the impairment seemed active, was regarded as remaining substantially limiting when in remission or controlled.\textsuperscript{470} The ADAAA now only required claimants to prove that they suffered adverse treatment. This then shifted the onus of proof to the employer to motivate why the employer’s actions were adverse towards the employee.\textsuperscript{471} This significant shift in onus away from the claimant having to prove the seriousness of their impairment, removed the hurdle for employees to first having to prove that they were disabled, thus falling within the definition of disability.\textsuperscript{472} This particular amendment allowed for an employee to be protected before having to prove disability.

While much of the literature on the ADAAA considers how the changes positively affect a person who has a physical impairment, there is also a small body of commentary on the positive impact the ADAAA has had on mental impairment situations. After the cases of \textit{Sutton} and \textit{Toyota}, it was near to impossible for those with mental impairments to succeed in their claims brought under the ADA.\textsuperscript{473} However, in many cases brought after the ADAAA was passed, the courts have ruled that depression is to be considered a disability, even in the absence of a doctor’s formal diagnosis, or where the depression was episodic.\textsuperscript{474}

Several cases have since been brought before the courts, and in majority of those cases the employee’s depression was deemed to be a disability, as the effects of depression had substantially limited numerous of the individuals’ capability to perform a major life activities.\textsuperscript{475} It was found that the most common major life activities which were affected by an employee’s depression were the ability to concentrate at work, the ability to look after personal well-being,

\textsuperscript{467} American with Disabilities Amendment Act of 2008 s 12102(b)(5).
\textsuperscript{468} American with Disabilities Amendment Act of 2008 s 12102(b)(4).
\textsuperscript{472} Porter NB ‘The New ADA Backlash’ (2014) 82 \textit{Tennessee Law Review} 1 34.
and the ability to take care of the well-being of dependants. The courts even afforded protection to an employee who had isolated instances of depression and who required inpatient treatment. In this sense the shift from the approach under the ADA to the ADAAA has been significant as employees who are now able to submit evidence that they suffer symptoms of depression are likely to be protected under the ADA. The ADAAA eases the burden on employees to first having to prove that he or she is disabled, which historically has been problematic as employees often do not make it past this initial step.

Professor Porter holds that while the ADAAA has made it easier for applicants to make it pass the initial step of first having to prove that he or she is disabled, she wonders how long it might be before courts will become reluctant to have the ADAAA realise its full transformational potential. Professor Porter holds that where employers are continuously requesting more from their employees in order to remain ahead of their competition, she doubts that both the courts and employers will so easily respond to the ADAAA requiring that an employer make significant changes in the functions of a disabled person’s job description.

The ADAAA restoring the ‘regarded as’ requirement of the definition of disability to its original broad interpretation, has removed many of the boundaries which previously separated disabled form abled-body persons. What now distinguishes persons under the ADAAA is that an individual who suffers negative treatment based on the stigma attached to certain impairments, is also afforded protection. While the ADAAA has been praised for removing the unattainable high standards by which one has to prove disability, the ADAAA has been critiqued for upholding the requirement of ‘substantially limits’, as this aligns itself with the medical model approach to disability. Furthermore this requirement follows the minority group approach, which approach the drafters of the ADAAA tried to avoid, as their aim was for

the ADAAA to make use of the universal approach. The ADAAA in using the minority group approach still only offers protection to impairments that are stigmatised. It does not appreciate the view that stigma itself is often what disables an individual. Considering the effects of stigma would be in line with the broader universal approach.

While the ADAAA has made great strides in restoring the position to that of the ADA’s predecessor, there is still much that the ADAAA has not done to protect persons with disabilities. The ADAA has failed to provide incentives to encourage employers to employ people with impairments, as well as including instances where a prospective employee is denied employment due to their impairment. A prospective employee often finds it difficult to prove, that he or she was denied employment based on his or her physical or mental impairments. However despite these shortcomings the overall protection offered has been a substantial breakthrough for those who have been discriminated against due to impairments.

4.3 THE UNITED KINGDOM

The United Kingdom (UK) is one of the leaders in attempting to prevent disability discrimination within the workplace. The UK has acknowledged that persons with disabilities require special attention and these individuals have been protected in the UK since 1944 under the Disabled Persons (Employment) Act.

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4.3.1 The Enactment of the Disability Discrimination Act

The Disabled Persons (Employment) Act required that three percent of an employer’s workforce would have to be registered disabled persons. This Act therefore only extended protection to persons with disabilities in as far as reaching a certain quota was concerned. The Disabled Persons (Employment) Act was repealed and replaced with the Disability Discrimination Act (DDA) in 1995. The DDA aimed to remove the quota system approach in favour of a more inclusive rights-based approach.

The DDA was enacted to address the issues around the employment prospective of persons with disabilities and removing prejudices that those that were employed suffer. The DDA gave persons with disabilities specific rights, which could be enforced in tribunals that were specifically created to deal with such matters. Persons with disabilities would however only be protected under the DDA if they satisfied the DDA’s definition of disability.

4.3.2 Definition of Disability in terms of the DDA

In terms of section 1 of the DDA, disability is defined as a ‘person who has a physical and mental impairment which has a substantial and long-term adverse effect on his/her ability to carry out normal day-to-day activities’. While the definition contained in the DDA is flexible, the definition has proven to be rather complex and lend itself to litigation on the basis of who the definition applies to, as well as actually proving that an employee suffers from a disability.

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http://etd.uwc.ac.za/
The interpretation of the definition, specifically with regards to mental impairment, is that the mental impairment has to be clinically recognised. The DDA therefore requires that a ‘respected medical body’ recognises what type of mental impairment the employee suffers from. The requirement that the mental impairment must be clinically recognised has proven difficult as many medical practitioners avoid diagnosing employees with mental illness largely due to the stigma attached. Thus there is tension created between the mechanisms of the DDA and the ability to make findings on medical conditions. The court in the matter of Morgan v Staffordshire held that determining whether an employee suffered from a mental impairment or not was dependent on an informed finding made by a qualified expert. Other courts in the UK have also pointed out that making a finding on whether a person has a mental impairment or not is a factual issue that many courts grapple with.

4.3.3 The Incorporation of the Employment Equality Directive

In 2000, the European Union (EU) published the Employment Equality Directive (EED) which required that all member states incorporate the directive into their national laws. The focus of the Employment Equality Directive is to achieve equal treatment in employment, with special focus on religion or belief, age disability and sexual orientation. The main purpose behind the establishment of the Employment Equality Directive was to provide greater social inclusion of persons with disabilities within the labour market by eradicating every form of discrimination that persons with disabilities generally suffer. The EED places a duty on employers to provide reasonable accommodation to ensure that employees who suffer from disability are accommodated in such a manner that allows for their advancement in employment. The EED

acknowledges that while the employer has a duty to provide reasonable accommodation to employees who are disabled, the accommodation should not be financially burdensome on the employer. The EED approach has followed what many of the other European Union Members have already incorporated into their national laws, specifically with regards to the protection of persons with disabilities.

With the incorporation of the Employment Equality Directives into the United Kingdom’s national legislation, the DDA’s definition of disability fell short of offering protection to those persons that the DDA initially aimed at protecting. The definition of disability within the DDA was phrased in such manner to make it readily understandable and easy to apply. The directive has heavily critiqued the definition in the DDA for having a ‘highly medicalised approach to defining disability’.

Once the Employment Equality Directive was incorporated into the United Kingdom’s national legislation the DDA removed the requirement that a mental impairment had to be clinically recognised. The reasoning behind the removal of the words clinically recognised was that this required that an employee could only lay a claim of discrimination against the employer if the employee could prove that he or she is in fact disabled. This initial step in proving that the employee is disabled shifted the question away from whether the employee has been discriminated against due to his or her disability to a question of whether or not the employee was ‘disabled enough to qualify for protection’. This then excluded many employees from receiving protection under the DDA, as well leaving many of these employees without recourse, as the definition only protects a select few.

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4.3.4 The Equality Act

The Equality Act (EA) took effect on 01 October 2010. The Act was a consolidation of the three pieces of the UK’s most prominent anti-discrimination legislation at the time that aimed to combat discrimination within the workplace. These pre-existing pieces of legislation were the DDA, the Sex Discrimination Act 1975 and Race Relations Act 1976. While the EA has not strayed too far away from the initial provisions found within the DDA, the EA set out to align itself with the Convention on the Rights of Persons with Disabilities (CRPD) and the Employment Equality Directive. The EA has adopted the social model approach in its application. The social model approach adopted within the EA looks at disability rather than impairment. Impairment focuses on an individual’s impaired abilities or capacities, thus the focus is on the individual’s limitations. Whereas disability of the individual considers the societal barriers which lead to an individual being excluded and even disadvantaged.

4.3.4.1 Definition of Disability in the EA

As mentioned above, the EA has maintained many of the DDA’s content; therefore the definition of disability has remained the same. The definition of disability found within the EA provides that “a person who has a physical or mental impairment and the impairment has a substantial and long-term adverse effect on the person’s ability to carry out normal day-to-day activities”. Many have critiqued the EA for having kept the definition the same as it was found in the DDA. It is felt that this has not improved the position of persons with disabilities, nor has it extended

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526 Equality Act 2010 s 6(1).
protection to those that were excluded from protection under the DDA.\textsuperscript{527} The definition still requires that a person first prove a disability before the claim of discrimination can be considered.\textsuperscript{528} Having kept the definition the same as it was under the DDA indicates that persons with disabilities are left in a similar position that they were under the DDA.

Another critique of the EA is that the EA has kept the requirements that a person’s disability must have a negative effect on his/her ability to carry out normal day-to-day activities, as well as the disability being substantial and long-term.\textsuperscript{529} The requirements of ‘normal day-to-day activities and ‘substantial and long term’ have remained within the definition of disability. Had the EA removed these requirements it would have been considerably easier for an individual to bring a claim against his or her employer for less favourable treatment.\textsuperscript{530} In terms of the EA, less favourable treatment will only be considered unfair when such treatment is considered to be unjustified.\textsuperscript{531}

The United Kingdom government aimed to limit the number of justifications on which an employer could rely on to substantiate why less favourable treatment was reasonable.\textsuperscript{532} The EA has replaced all the various justifications available within the DDA with one objective justification test. The test considers whether the employer’s conduct is “proportionate in achieving a legitimate aim”.\textsuperscript{533} This test further then considers whether an employer’s conduct would be deemed to be fair where employers have considered both the conditions under which the employee requires accommodating and whether the accommodation is significantly burdensome on the employer.\textsuperscript{534}

\textsuperscript{532} Keen S & Oulton R Disability Discrimination in Employment 1 ed (2009) 12.
4.3.4.2 Developments the EA made to the Definition of Disability

4.3.4.2.1 Removal of listed capacities

The EA has however made changes that have been welcomed by many of those who seek protection in terms of this EA.\(^{535}\) One of the most welcomed change made by the EA is the removal of list of the day-to-day activities which a person with a disability needs to prove that they are unable of performing due his or her disability.\(^ {536}\) This change has in particular had a positive impact on those who suffer from mental illness. Not only did the amendment remove an extra requirement which persons with disabilities had to meet, but also alleviated the burden of having to prove that the disability had the effect of diminishing one of the listed capacities.\(^ {537}\)

4.3.4.2.2 Removal of ‘less favourable treatment’

The second welcomed change made by the EA, which initially presented a problem when the Equality Bill was before Parliament, was to determine the extent to which to determine whether an individual has been discriminated against based on his or her disabilities.\(^ {538}\) The EA did away with the comparator test of ‘less favourable treatment’ as laid out in the House of Lords judgement of London Borough of Lewisham v Malcolm.\(^ {539}\)

In the case of Clark v Nova cold (Novacold), the court of appeal was faced with interpreting and applying the then DDA’s definition of what constituted discrimination.\(^ {540}\) The DDA defined discrimination as the employer treating the person with disability “less favourably” than they would treat an employee to whom the DDA did not apply.\(^ {541}\) While the applicant, Mr Clark, in the Novacold case based his claim on a physical impairment and not a mental impairment, the principle laid down within this case applied to all persons with disabilities.

Mr Clark, sustained an injury while on duty work. Mr Clark’s doctors could not provide Novacold with an indication of when he would be able to return to work. The uncertainty of his return lead to Novacold dismissing Mr Clark. Mr Clark brought a claim against Novacold in the Industrial Tribunal. The Industrial Tribunal had to determine whether Mr Clark was

\(^ {539}\) London Borough of Lewisham v Malcolm [2008] UKHL 43.
\(^ {540}\) London Borough of Lewisham v Malcolm [2008] UKHL 43 par 1.
\(^ {541}\) Disability Discrimination Act 1995 s 5(1)(a).
discriminated against due to his disability. The court applied section 5(1) of the DDA, and found that Novacold did not treat Mr Clark less favourably than Novacold would have treated any another abled bodied employee.

On appeal, the Employment Appeal Tribunal (EAT) held that the court a quo did not err in applying the comparator clause of less favourable treatment of Mr Clark, as he was unable to fulfil the requirements of his job. These requirements were not connected to Mr Clark’s disability. Mr Clark then further appealed to the Supreme Court of Judicature. The court held that Novacold did in fact discriminate against Mr Clark based on disability and due to Novacold failing to provide alternative employment arrangements as required in section 6 of the DDA, Novacold’s actions amounted to discrimination.

This case was considered a landmark judgement, as the courts clarified the ambiguity found within section 5(1) and 5(2) of the DDA. The court held that a complainant would only have to prove that he or she has been treated less favourably to that of a non-disabled employee, to whom such treatment which would ordinarily not apply. The court went further to hold that the complainant does not have to prove the connection between the reason why the employer treated the employee less favourably and the employee’s disability.

The case of London Borough of Lewisham v Malcolm (Malcolm) overturned the judgement of Novacold. This judgement concerned itself with the manner in which a mentally impaired person may be discriminated against outside of the employment sphere. While the case of Malcolm, deals with matters outside of the scope of this thesis, the test laid down in Malcolm negatively affects all person who wish to claim protection under the DDA.

The case of Malcolm dealt with Mr Malcolm who signed a lease agreement with the respondent London Borough of Lewisham (Lewisham). The terms of the lease agreement was that Mr Malcolm could not sublet the property to any other person. The respondents discovered that Mr Malcolm had sublet the property to another; the respondent held that Mr Malcolm was in breach of the lease agreement. Lewisham terminated the lease agreement with Mr Malcolm.

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Mr Malcolm brought a claim against Lewisham for “seeking possession” due to his disability.\(^{548}\)

The court of first instance held that Mr Malcolm, suffered from schizophrenia, therefore was not considered disabled in terms of the DDA. The court reasoned that Mr Macolm was not influenced by his mental impairment when he sublet his property.\(^{549}\) The court of appeal overturned the court a quo’s judgement and found that Mr Malcolm was in fact “disabled in terms of the DDA”,\(^{550}\) and was treated less favourably due to his disability.

When the matter appeared before the House of Lords, the court found that the decision reached in the Novacold case was incorrectly decided.\(^{551}\) The court held that the court in Novacold interpreted less favourable treatment too broadly, and that the comparator test in section 5(1) of the DDA required a narrower interpretation.\(^{552}\) The House of Lords found that where the courts consider whether the complainant was treated less favourably compared to such a person to whom such treatment would ordinarily not apply weakens the notion of disability related discrimination.\(^{553}\) The court then went on to emphasise that without the reason there would not ordinarily be a need to treat the complainant in such a manner.\(^{554}\)

The case of Malcolm has been critiqued as this case only considers a situation where a disabled person has only been victim to direct discrimination; the decision did not consider that a person may be discriminated against indirectly.\(^{555}\)

The case of Malcolm served as precedent until the EA did away with the comparator test.\(^{556}\) Section 15 of the EA did away with the term less favourable treatment and inserted unfavourable treatment.\(^{557}\) This allowed for claims of disability related discrimination to be claimed where there has been both or either direct and indirect discrimination. The change made by the EA favoured the approach in the Novacold case.\(^{558}\)

\(^{549}\) Keen S & Oulton R Disability Discrimination in Employment 1 ed (2009) 162.
4.3.4.2.3 Extension of protection offered to persons associated with persons with disabilities

The third welcomed change made by the EA is found within section 13. The section provides that a person who is not disabled, but falls victim to direct discrimination based on a connection to a disabled person, may bring a claim of unfavourable treatment against the that person. However, the EA does not require that such a person’s working conditions be adjusted in order for such an employee to care for the disabled person. Section 13 of the EA has extended the protection beyond the disabled person. However, the practicality of conferring protection to persons who are connected to persons with disabilities has proved to be problematic, based on the construction of the definition of disability within the EA.

The EA aimed at bringing about consistency in disability related claims, and making it simpler for victims of disability related discrimination to lay a claim. The minor changes made by the EA have been welcomed, however with the enactment the EA, Parliament missed an opportunity to reduce the difficulty in bringing a claim of disability related discrimination against the employer. Another opportunity that the EA has missed was to develop and improve the definition of disability, by removing the requirement of substantial and long term. These missed opportunities have prevented disabled persons from being able to actively participate in society, and enjoy the benefits of being treated equally.

4.4 CONCLUSION

From the above discussion, both the USA and the UK have been the leaders in recognising the need for person with disabilities to be afforded greater protection from discriminatory practices within society, more importantly within the realm of employment.

The USA’s initial aim when enacting the ADA was not simply to prevent discrimination but to empower persons with disabilities. The USA government acknowledged that having either a mental or physical impairment did not reduce individual’s capabilities. Title 1 of the ADA specifically focuses on removing discriminatory practices in employer’s policies, thus allowing for more equal employment opportunities to persons with disabilities.

Initially the ADA seemed to have addressed many of the issues that persons with disabilities had in actively contributing to society. The success of the ADA in addressing these issues was short lived, when the USA courts restricted the definition of disability. The effects of the narrow interpretation given to the definition of disability, allowed for only a few individuals who could prove that they are in fact disabled, to find protection under the ADA. The enactment of the ADAAA aimed to remove the barriers put into place by the USA courts. This allowed for many persons with disabilities to find protection under the ADAAA. The unique feature of the ADAAA is that persons who suffer negative treatment based on the stigma’s attached to certain impairments would now be able to seek protection under the ADAAA. The ADAAA has however lacked in encouraging employers to employ persons with disabilities.

The UK, having recognised the need to protected persons with disabilities some thirty years before the USA, has not been as successful in their attempt. The UK has however moved away from the quota system in the employment of persons with disabilities, to a practice where legislation, such as the DDA has aimed to empower persons with disabilities. The definition of disability in the DDA was highly medicalised, resulting in many persons specifically with mental impairments, being prevented from seeking protection. The DDA required that an individual would first have to prove that his or her impairment was clinically recognised. The adoption of the Employment Equity Directive resulted in the term ‘clinically recognised’ being removed from the definition of disability. This did not resolve the difficulty persons with disabilities had in seeking protection under the DDA. This was largely due to the UK’s courts limiting the application of the definition and giving a narrow interpretation to the definition of disability.

The enactment of the EA, aimed at removing the hurdles created in the DDA. The EA failed to do so, as they kept the definition of disability the same as in the DDA. The EA then inherited many of the problems that arose in the DDA. The EA however did limited the various defences an employer could raise in proving that the dismissal of an employee and denial of an employment opportunity to a potential employee, who is impaired, to one.
While both the USA and the UK have each seen the practical difficulties in the implementation of the definition. Both the USA and the UK have maintained the definition of disability as contained in the CRPD, South Africa being a member state of the CRPD has incorporated the definition of disability into its national laws. The definition of disability features in both the Employment Equity Act and within in the Code of Good Practice on the Employment of Persons with Disabilities.\textsuperscript{567} South Africa, therefore has a solid body of authority from both the USA and the UK, as to what to avoid when enacting possible legislation to better offer persons with disabilities protection.

Upon examining the disability laws of the USA and the UK, South Africa can benefit greatly from using the disability laws of the USA and the UK as a basis to ensure that persons with disabilities within South Africa are afforded better protection. The next chapter will consider the lessons learnt from the USA and the UK’s disability laws and how South Africa can incorporate these lessons into national laws.

\textsuperscript{567} Good Practice on the Employment of Persons with Disabilities discussed in chapter 2 above on page 26-28.
CHAPTER FIVE

CONCLUSION AND RECOMMENDATIONS

5.1 AN OVERVIEW

One of the biggest difficulties around addressing depression in the workplace is that as a mental impairment it is not as easily identifiable as physical impairments. Many employees or prospective employees wish not to disclose mental impairments to employers. Firstly, because of the stigma attached to such an impairment and, secondly, due to the fear that where such an impairment is disclosed, the employee may end up being isolated or even discriminated against.

Chapter two considered the South African position on protection afforded to persons, particularly employees in the workplace, suffering from depression. Since the adoption of the Constitution, 1996 the fundamental rights and freedoms of all South African citizens have been safeguarded. Of particular importance in this regard is section 9 of the Constitution, known as the equality clause, which prohibits unfair discrimination against any person on any one or more of the listed grounds. One such ground listed is that of disability. The Constitution also goes further to protect the employment and labour rights of individuals in section 23.

As a result of section 23 of the Constitution, three key statutes were enacted to ensure that employment and labour rights are effectively enforced. In this regard the most important piece of legislation protecting the rights of persons with disabilities is the Employment Equity Act (EEA). The EEA includes disability as one of the listed grounds against which an employee may not be unfairly discriminated against. Under the EEA, the Code of Good Practice Key Aspects on the Employment of People with Disabilities (hereinafter referred to as ‘the CGP on Disabilities’) was also issued. The CGP on Disabilities aims to create awareness around the employment of persons with disabilities and the protection to be offered to them. The CGP on Disabilities further aims at eliminating the social barriers that prevent employees from actively participating in society. The CGP on Disabilities does not however provide a clear framework for implementing employer workplace policies to break down these barriers. The CGP on Disabilities, expressly provides that workplace policies should be developed in such a manner to assert the rights of persons with disabilities,\(^{568}\) in compliance with objectives of the Employment

\(^{568}\) Code of Good Practice on the Employment of Persons with Disabilities clause 3.4.
Equity Act. The CGP on Disabilities provides that workplace policies be drafted in a manner that will align with the needs of the employer.\textsuperscript{569}

South Africa’s case law provides very little guidance on how to deal with depression as a disability. The court in \textit{L S v Commission for Conciliation, Mediation and Arbitration} held that an employee suffering from depression cannot be dismissed on the ground of misconduct, but rather that depression should be viewed as incapacity. The court in \textit{New Way Motors v Marsland} again held that depression is considered a disability. The court in \textit{Independent Municipal & Allied Trade Unions v Witzenberg Municipality} however held that depression should be dealt with as incapacity due to ill health. Workplace policies have continued to make use of the medical model approach to disability with the result that many persons with disabilities are still being excluded from meaningful employment opportunities. The difficulty in not having a uniformed approach within South Africa’s case law is that it does not create legal certainty within South Africa’s legal system. The difficulty of not having legal certainty is that people are unsure whether they will be granted protection in terms of the law.

Chapter three provided a brief overview of the history around the enactment of the Convention on the Rights of Persons with Disabilities (CRPD). The CRPD’s predecessors failed to allow for the full and equal enjoyment of the fundamental rights and freedoms of persons with disabilities. When the CRPD was enacted its primary aim was to ensure that persons with disabilities were empowered. The CRPD attempted to do so by shifting away from the restrictive medical model approach to disability to the more inclusive social model approach.\textsuperscript{570}

Article 33 was another unique feature of the CRPD. Article 33 introduced monitoring provisions to ensure that member states incorporate the CRPD into their respective national laws so as to allow persons with disabilities a chance to actively participate in society. The CRPD was not without its shortfalls though, as indicated in chapter three. Article 12 of the CRPD which aims at restoring of persons who suffer from mental impairment’s legal capacity, allows for persons with disabilities to enjoy legal independence. As discussed in Chapter 2 above, mental impairments result in persons losing an interest in many of the activities that they once found joy in. Allowing persons with mental impairments to have complete control over their decision making, could result in, decisions that would not always be in their best interest. Article 12, in its attempt to restore an individual’s capacity, has left it up to member states to incorporate what they refer to

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{569} Code of Good Practice on the Employment of Persons with Disabilities clause 3.4.
\item \textsuperscript{570} The discussion on the medical and social model approach is discussed in Chapter 3 above on pages 44-45.
\end{itemize}
\end{footnotesize}
as the “guardianship model” of decision making into their national laws.\textsuperscript{571} Article 17 prevents persons with mental impairments from being institutionalised without their consent. Article 17 and Article 12 are interrelated as the CRPD aims at restoring the legal capacity of individuals to make their own decision as to whether to be institutionalised. The CRPD has left this issue in the hands of member states to decide on and implement provisions into their national legalisation.

Chapter four examined how the United States of America (USA) and the United Kingdom (UK) each deals with affording protection to persons suffering from depression. The USA enacted the American with Disabilities Act (ADA) which offers equal employment opportunities to persons with disabilities. The ADA is also aimed at preventing persons with disabilities from being discriminated against. The ADA does not promote preferential treatment however; it rather aims to eliminate discriminatory practices within society and more specifically the workplace.

The USA courts initially interpreted the definition of disability by using the universal approach, which aligned itself with the social model. The court in \textit{Toyota Motor Manufacturing, Kentucky. Inc v Williams}\textsuperscript{572} however restricted the interpretation of the definition, which again left many employees with disabilities without protection. The onus of proof shifted from the employer to the employee and the employee was required to prove that he or she was in fact disabled. The National Council of Disability was unsatisfied with this narrow interpretation given by the court in \textit{Toyota} and the consequences thereof. Congress, in response to the National Council of Disability grievances, enacted the Americans with Disabilities Amendment Act (ADAAA) which restored the interpretation of the definition of disability to the previous\textsuperscript{573} broad interpretation. The broader interpretation removed many of the barriers that previously prevented persons with disabilities from being protected under the ADA.\textsuperscript{574} The broader definition included various guidelines which would be of assistance to the courts. This was a mechanism to ensure that the courts do not give the definition of disability a narrow interpretation.

The UK acknowledged that persons with disabilities need protection some thirty years before the USA did. The Disability Discrimination Act (DDA) was enacted to protect the right of persons with disabilities. The DDA aimed to remove the prejudices that persons with disabilities encountered when seeking employment. The UK, as a member state of the European Union,

\textsuperscript{571} The discussion on the guardian model approach is discussed in Chapter 3 above on page 48.
\textsuperscript{572} The case of \textit{Toyota Motor Manufacturing, Kentucky. Inc v Williams} is discussed in Chapter 4 above on page 67 - 69.
\textsuperscript{573} The broad definition of disability, is found in the American with Disabilities Act. The discussion around broad interpretation of the definition discussed in Chapter 4 above on page 59.
\textsuperscript{574} The discussion around broad interpretation of the definition discussed in Chapter 4 above on page 59.
required that UK to incorporate the Employment Equity Directive (EED)\textsuperscript{575} into their laws. The EED in its construction of the definition of disability aimed at addressing the issues that resulted in many persons with disabilities still being excluded from employment opportunities. The EED’s definition of disability was aimed at being more inclusive. As a result of this, the definition of disability in the DDA fell short of offering effective protection to persons with disabilities. The DDA’s definition of disability required that a mental impairment be clinically recognised, which lead to the definition only applying to those who could prove that they suffered from a mental impairment.

The shortcomings of the DDA resulted in the enactment of the Equality Act. The Equality Act aimed at restoring the shortcomings of the DDA. The Equality Act brought about many welcomed changes. One of these was the limit placed on an employer’s argument that providing reasonable accommodation would place an undue hardship on the employer. Despite this, overall it was felt that the Equality Act still failed to offer better protection to persons with disabilities. The Equality Act had not been as successful as it retained the definition of disability as was found in the DDA. This meant that many of the challenges that person with disabilities faced under the DDA continued under the Equality Act. The Equality Act was however praised for removing the comparator test which was laid down in the \textit{London Borough of Lewisham v Malcolm}\textsuperscript{576}. The Equality Act thus brought about consistency in addressing disability discrimination claims.

5.2 RECOMMENDATIONS

5.2.1 Is depression a disability for purposes of employment law?

South Africa’s position on whether depression is considered a disability for purposes of employment law remains uncertain. This is evident through the majority of South African case law, some of which have been discussed in this research, which recognises depression as either a disability or incapacity for ill health reasons. The different findings raise inconsistency and as such uncertainty. While both disability and ill-health fall under the wider concept of incapacity as recognised in South African law, they remain distinct concepts which are subject to different employment processes.

\textsuperscript{575} The Employment Equity Directive is discussed in Chapter 4 above on page 74-75.
\textsuperscript{576} The case of \textit{London Borough of Lewisham v Malcolm} is discussed in Chapter 4 above on page 79-80.
Bassuday and Rycroft argue that the ground on which an individual brings a claim (i.e. the manner in which an individual chooses to word a claim) will determine whether the claim falls under incapacity based on ill-health or disability reasons. What is however clear is that disability and incapacity are not interchangeable terms, though South African courts have treated them as such on various occasions. Majority of the case law discussed in chapter two above indicated that South African courts recognised depression as a disability. Therefore, before an employee can be dismissed, an employer is required to ensure that the four stages as laid out in Standard Bank of SA v CCMA was followed to ensure that such a dismissal is to be considered fair. The courts have however failed to consider that an disabled employee is capable of performing and is not suffering from an illness, and should thus be treated accordingly. This is of little assistance to the many South African employees who suffer from depression. It is problematic as it creates uncertainty within South Africa’s legal system.

Both the United Kingdom and United States of America clearly consider depression to be a disability in terms of employment law. As such they afford protection to employees who are discriminated against because of the stigma attached to this particular mental impairment. The World Health Organisation has also requested that employees who suffer from depression be accommodated within the workplace, and acknowledged that depression is on the rise. The CRPD also acknowledges that depression falls under mental impairment. From all of this it should become apparent that while there may be varying degrees of depression, the effect of depression has the ability to prevent an employee from actively engaging in either their work environment or prospective work environment. It then calls for South Africa to develop, or at the very least clarify, its laws so that those suffering from depression are afforded protection under disability provisions specifically. The Code on Dismissal recognises that an employee suffering from depression can seek protection from an unfair dismissal under incapacity based on ill-health. This is however problematic as it creates the impression that the Code on Dismissal deals with depression and incapacity due to ill-health as one of the same. In line with the approach in the USA and UK, it should be clarified in South African legislation that depression should be dealt with as a form of disability under incapacity.

579 The case of Standard Bank of SA v CCMA is discussed in Chapter 2 above on page 29 - 30.
As a member state to the CRPD, South Africa is obligated to incorporate the CRPD into its national laws. South Africa did this by including the definition of disability into the CGP on Disabilities. However the CGP on Disabilities only serves as a guideline and is not considered law. As a result, there is not a one set of specialised disability laws that assist employees in seeking protection from disability related discrimination. Protection for employees are scattered across various pieces of legislation, which makes it difficult for employees to know what their rights are and what protection they have.

Both the UK and the USA has provided South Africa with a solid foundation on which the legislature can begin to consider enacting legislation that will effectively offer protection to persons with disabilities, and in particular those that suffer from depression. The lessons learnt from both the UK and the USA are that disability legislation should be drafted broad enough to accommodate most disabilities, even those who suffer from temporary disabilities. As was however seen through the case law discussion of the USA and UK the courts, in interpreting and applying the definition of disability in a narrow sense often, albeit unintentionally so, excluded many individuals whom disability law initially aimed to protect from the scope of such laws. South Africa, in enacting specialised disability legislation, can learn from this by putting measures in place which would prevent courts from interpreting the definition of disability too narrowly.

South Africa has made great progress in affording previously marginalised groups of persons with fundamental rights and freedoms. South Africa specifically recognises that persons with disabilities is a marginalised group that require greater protection. South Africa as a fairly young democratic country could benefit greatly from the USA’s approach of eliminating discriminatory practices, which included doing away with preferential treatment in the ADA. However, in order to achieve the objectives of the Constitution South Africa cannot, at this stage, entirely do away with preferential treatment.

The CGP on Disability, together with already exiting provisions in labour legislation that protects employees with disabilities in the workplace, has given South Africa a solid foundation on which to develop a specialised set of employment disability laws. South Africa should furthermore use the lessons learnt and experiences gained from the jurisdictions of the USA and the UK to develop such specialised laws In keeping with the approaches adopted in the USA and UK employees suffering from depression will then also be fully protected under disability legalisation. This would bring a welcome end to the current uncertainty around the issue of
whether disability is to be dealt with as an ill-health incapacity issue, or a disability incapacity issue.
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