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TITLE

The regulation of mental health in the South African workplace: a comparative analysis of South Africa, the Netherlands, Northern Ireland and the United Kingdom.

Name of candidate: Lara Keil
Student number: 3644448
Degree: Master of Laws (LLM)
Department: Department of Mercantile & Labour Law



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This thesis is dedicated to every individual who has in the past, who is currently, or who will suffer from a mental health condition in their lifetime. The tide is turning, and we will be alright.

To my mom, Victoria Keil and her selfless devotion to ensuring I achieved what I set my mind to. Without your love and support, this would not have been possible.

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Finally, to the National Research Foundation of South Africa and its belief in my research, thank you for recognising the importance of mental health.



DECLARATION

I, Lara Keil, declare that:

'The regulation of mental health in the South African workplace: a comparative analysis of South Africa, the Netherlands, Northern Ireland and the United Kingdom'

is my work and that it has not been submitted before any degree or examination in any other University, and that all the sources I have used or quoted have been indicated and acknowledged as complete references.



LARA KEIL



DATE: 30/11/2022

E HUYSAMEN

DATE: 30/12/2022

LIST OF ABBREVIATIONS

| | | |
|--------------|---|--|
| BCEA | - | Basic Conditions of Employment Act 75 of 1997 |
| CCMA | - | Commission for Conciliation, Mediation and Arbitration |
| EEA | - | Employment Equity Act 55 of 1998 |
| LRA | - | Labour Relations Act 66 of 1995 |
| OHSA | - | Occupational Health and Safety Act 85 of 1993 |
| SADAG | - | South African Depression and Anxiety Group |
| UK | - | United Kingdom |
| UN | - | United Nations |
| WHO | - | World Health Organisation |

KEY WORDS AND PHRASES

Anxiety

Depression

Disability

Discrimination

International Labour Organisation

Labour law

Mental Health

Unfair Dismissal

United Kingdom

United Nations

Workplace

World Health Organisation



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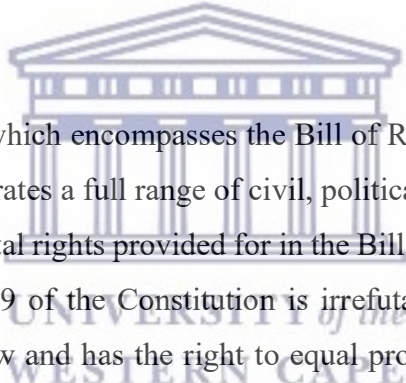
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CHAPTER 1: ABSTRACT AND INTRODUCTION

1.1. ABSTRACT

The first democratic national elections held in 1994 marked the start of a new democratic era for South Africa, built upon the foundations of non-discrimination, democracy and equality for all.¹ At the heart of the new democratic South Africa, is the Constitution of the Republic of South Africa, 1996 (hereafter “Constitution”). Constitutional supremacy is arguably one of the most important attributes of a true constitutional democracy.² Section 2 of the Constitution provides that the Constitution is the supreme law of the Republic and that any law or conduct which is inconsistent with it is invalid.³ The Constitution thus functions as the yardstick against which all laws and actions are judged.⁴ Any law or conduct inconsistent with the Constitution may be challenged.⁵



Chapter 2 of the Constitution, which encompasses the Bill of Rights, provides for basic human rights.⁶ The Bill of Rights integrates a full range of civil, political, economic, social and cultural rights.⁷ As one of the fundamental rights provided for in the Bill of Rights, the importance of the right to equality under section 9 of the Constitution is irrefutable. Section 9(1) provides that everyone is equal before the law and has the right to equal protection and benefit of the law.⁸ Sections 9(3) and (4) prohibit any person or the state from unfairly discriminating against any person on any of the grounds listed in section 9(3), which includes the ground of disability.⁹ The Employment Equity Act 55 of 1998 (hereafter “EEA”) also provides for protection against unfair discrimination in the workplace on any one or more of the grounds listed in section 6(1).¹⁰ While

¹ South Africa Baseline Country Report: United Nations Convention on the Rights of Persons with Disabilities (March 2013).

² Gardbaum S ‘Revolutionary constitutionalism’ (2017) *International Journal of Constitutional Law* 174.

³ Section 1, Constitution of the Republic of South Africa 1996 (Constitution).

⁴ Gardbaum S ‘Revolutionary constitutionalism’ (2017) *International Journal of Constitutional Law* 176.

⁵ Gardbaum S ‘Revolutionary constitutionalism’ (2017) *International Journal of Constitutional Law* 176.

⁶ Heyns C & Brand D ‘Introduction to socio-economic rights in the South African Constitution’ (2009) *Law, Democracy and Development* 153.

⁷ Heyns C & Brand D ‘Introduction to socio-economic rights in the South African Constitution’ (2009) *Law, Democracy and Development* 153.

⁸ Section 9(1), Constitution.

⁹ Section 9(3) and (4), Constitution.

¹⁰ Section 6, Employment Equity Act 55 of 1998 (EEA).

the ground of disability forms part of this list, the ground of *mental health* in itself is not specifically listed.¹¹

Mental health is a broad term which encompasses an individual's cognitive, behavioural, and emotional well-being.¹² Mental health affects the manner in which people think, feel and behave.¹³ The World Health Organisation (hereafter “WHO”) has defined good mental health as a state of well-being in which an individual realises his or her own abilities; can cope with the normal stressors of life; can work productively; and is able to make a contribution to his or her community.¹⁴

While there are numerous mental health disorders, the two that affect employees the most frequently are depression and anxiety.¹⁵ Statistics released by the WHO in 2015 show that depression cases have increased by 20% over the last decade.¹⁶ Additionally, at least one in every three people will experience a depressive episode during their lifetime.¹⁷ The WHO has warned that these statistics alone should serve as a wake-up call for governments to reconsider their overall approach to mental health issues.¹⁸

Depression remains a complex medical issue. It is said to encompass a variety of distinct types, each with its own set of symptoms and effects. As a result, there is no single, comprehensive definition of depression.¹⁹ Depression has a detrimental effect on how an individual feels, thinks,

¹¹ Section 6, EEA.

¹² Galderisi, Heinz & Kastrup et al ‘Toward a new definition of mental health’ (2015) *World Psychiatric Association (WPA)* 231.

¹³ Galderisi, Heinz & Kastrup et al ‘Toward a new definition of mental health’ (2015) *World Psychiatric Association (WPA)* 231.

¹⁴ Galderisi, Heinz & Kastrup et al ‘Toward a new definition of mental health’ (2015) *World Psychiatric Association (WPA)* 231.

¹⁵ Chopra P ‘Mental health and the workplace: issues for developing countries’ (2009) *International Journal of Mental Health Systems* 3.

¹⁶ Santomauro, Herrera & Shadid et al ‘Global prevalence and burden of depressive and anxiety disorders in 204 countries and territories in 2020 due to the COVID-19 pandemic’ (2021) *Lancet* 1701.

¹⁷ Santomauro, Herrera & Shadid et al ‘Global prevalence and burden of depressive and anxiety disorders in 204 countries and territories in 2020 due to the COVID-19 pandemic’ (2021) *Lancet* 1701.

¹⁸ Santomauro, Herrera & Shadid et al ‘Global prevalence and burden of depressive and anxiety disorders in 204 countries and territories in 2020 due to the COVID-19 pandemic’ (2021) *Lancet* 1703.

¹⁹ Keller, Leikauf & Holt-Gosselin et al ‘Paying attention to attention in depression’ (2019) *Translational Psychiatry* 4.

and behaves.²⁰ Anxiety, on the other hand, is defined as an emotion characterised by feelings of tension, worried thoughts, and physical changes.²¹ Both anxiety and depression have the capability of affecting every aspect of an individual's life, including an individual's work life.²² Addressing mental health in the workplace thus remains important.

Employers may not however always be aware of the mental health challenges experienced by employees, or where employers are aware, simply choose to ignore it. With global unemployment increasing, many employees feel they have little choice but to continue working in order to maintain their employment.²³ For many employees, the fear of losing their employment results in the decision not to disclose any mental health conditions to their employers.²⁴ The question thus becomes how mental health conditions are addressed, or ought to be addressed, in the workplace.

In the case of *Jansen v Legal Aid South Africa (2018) 39 ILJ 2020 (LC)*, Mthombeni AJ emphasised the seriousness with which matters involving mental health should be dealt with.²⁵ The learned judge confirmed that when an employer ignores an employee's mental health and subsequently dismisses such employee for reasons related to the latter's mental status, there might be an argument that the employer's actions impaired the employee's fundamental human dignity.²⁶ Failure to acknowledge the mental health of employees places the constitutional right to human dignity is at risk.²⁷

²⁰ Keller, Leikauf & Holt-Gosselin et al 'Paying attention to attention in depression' (2019) *Translational Psychiatry* 4.

²¹ Keller, Leikauf & Holt-Gosselin et al 'Paying attention to attention in depression' (2019) *Translational Psychiatry* 4.

²² Haslam, Atkinson & Brown et al 'Anxiety and depression in the workplace: Effects on the individual and organisation (a focus group investigation)' (2005) *Journal of Affective Disorders* 214.

²³ Murphy G & Athanasou J 'The effect of unemployment on mental health' (1999) *Journal of Occupational and Organizational Psychology* 90.

²⁴ Goetzel, Roemer & Chung 'Mental Health in the Workplace: A Call to Action Proceedings From the Mental Health in the Workplace – Public Health Summit' (2018) *Journal of Occupational and Environmental Medicine* 327.

²⁵ Gresse E & Mbaol ML 'An analysis of the duty to reasonably accommodate disabled employees: a comment on *Jansen v Legal Aid South Africa*' (2020) *Law, Democracy and Development* 110.

²⁶ Gresse E & Mbaol ML 'An analysis of the duty to reasonably accommodate disabled employees: a comment on *Jansen v Legal Aid South Africa*' (2020) *Law, Democracy and Development* 116.

²⁷ Gresse E & Mbaol ML 'An analysis of the duty to reasonably accommodate disabled employees: a comment on *Jansen v Legal Aid South Africa*' (2020) *Law, Democracy and Development* 116.

Upon reaching the Labour Appeal Court (LAC), the LAC provided that, as point of departure, depression must be viewed as an ill-health issue.²⁸ However, if depression is likely to permanently impact the specific individual's performance, then the employer must consider options related to reasonable accommodation based on a disability.²⁹

As indicated earlier, while disability is specifically listed in the discrimination provisions of section 9 of the Constitution³⁰ as well as and 6(1) of the EEA,³¹ the ground of *mental health* in itself is not specifically listed anywhere. Furthermore, there is no single comprehensive statute which deals with disability in the workplace, let alone mental health issues specifically. South African employers' obligations in this regard are however outlined in the Labour Relations Act 66 of 1995 (LRA) and the EEA. Common law further provides that employers have a duty to create a safe working environment for employees.³² This not only refers to a physical safe working environment, but also one which is emotionally and psychologically safe.³³

This study will discuss the approach towards mental health issues in the South African workplace. This will include a consideration of the existing legislative obligations employers have in this regard. Since depression is one of the leading forms of mental health issues, the study will to a large extent focus on depression as case study, while considering other mental health issues when appropriate. To properly assess the effectiveness, or otherwise, of the current legislative approach towards mental health in the South African workplace, the study will also consider the approaches in the jurisdictions of the United Kingdom, Northern Ireland and the Netherlands in dealing with mental health issues in the workplace. These jurisdictions were chosen because the United Kingdom and Northern Ireland are leaders in disability protection, achieving similar goals through a variety of different methods. The Netherlands was chosen for its robust anti-discrimination legal framework.

²⁸ Gresse E & Mbaio ML 'An analysis of the duty to reasonably accommodate disabled employees: a comment on *Jansen v Legal Aid South Africa*' (2020) *Law, Democracy and Development* 126.

²⁹ Gresse E & Mbaio ML 'An analysis of the duty to reasonably accommodate disabled employees: a comment on *Jansen v Legal Aid South Africa*' (2020) *Law, Democracy and Development* 126.

³⁰ Section 9, Constitution.

³¹ Section 6, EEA.

³² Tshoose CI 'Employer's duty to provide a safe working environment: A South African perspective' (2011) *Journal of International Commercial Law and Technology* 169.

³³ Tshoose CI 'Employer's duty to provide a safe working environment: A South African perspective' (2011) *Journal of International Commercial Law and Technology* 169.

1.2. SIGNIFICANCE OF THE PROBLEM

Despite the already high number of individuals suffering from mental health issues, the number is still expected to rise in the years to come.³⁴ With more than 264 million people suffering from depression worldwide during 2020, depression remains one of the leading causes of mental health problems.³⁵ And this number is anticipated to rise as a result of the ongoing COVID-19 global epidemic.³⁶ According to the American Association of Suicidology, two thirds of people who commit suicide struggled with depression.³⁷ The WHO estimates that by 2030 depression will be the most prevalent illness, having overtaken cancer, diabetes and chronic respiratory illnesses combined.³⁸

According to the WHO, approximately 268 million people worldwide will suffer from an anxiety disorder by 2021.³⁹ During 2020, the Anxiety and Depression Association of America estimated that 31% of all American adults would have experienced an anxiety disorder at some point in their life.⁴⁰

South Africa is by no means immune to the reality and consequences of mental health issues. With the high prevalence of depression and anxiety, employers simply cannot afford to ignore their employees' mental health. Despite the widespread prevalence of mental health in South Africa, by 2019 only 5% of the government's health budget was allocated to mental health issues.⁴¹

³⁴ Posel D & Oyenubi A 'Job loss and mental health during the COVID-19 lockdown: Evidence from South Africa' (2021) *PLOS ONE* 12.

³⁵ World Health Organisation 'WHO urges more investments, services for mental health' available at https://www.who.int/mental_health/who_urges_investment/en/#:~:text=Mental%20health%20is%20defined%20as,to%20her%20or%20his%20community (accessed 15 February 2021).

³⁶ Santomauro, Herrera & Shadid et al 'Global prevalence and burden of depressive and anxiety disorders in 204 countries and territories in 2020 due to the COVID-19 pandemic' (2021) *Lancet* 1704.

³⁷ Santomauro, Herrera & Shadid et al 'Global prevalence and burden of depressive and anxiety disorders in 204 countries and territories in 2020 due to the COVID-19 pandemic' (2021) *Lancet* 1704.

³⁸ Santomauro, Herrera & Shadid et al 'Global prevalence and burden of depressive and anxiety disorders in 204 countries and territories in 2020 due to the COVID-19 pandemic' (2021) *Lancet* 1704.

³⁹ Santomauro, Herrera & Shadid et al 'Global prevalence and burden of depressive and anxiety disorders in 204 countries and territories in 2020 due to the COVID-19 pandemic' (2021) *Lancet* 1704.

⁴⁰ Santomauro, Herrera & Shadid et al 'Global prevalence and burden of depressive and anxiety disorders in 204 countries and territories in 2020 due to the COVID-19 pandemic' (2021) *Lancet* 1704.

⁴¹ Docrat, Besada & Cleary et al 'Mental health system costs, resources and constraints in South Africa: a national survey' (2019) *Health Policy Plan* 712.

Mental health conditions often have a snowball effect. While it is a common misconception that mental health affects only the individual who is ill, the reality is that the effects of mental health conditions are far more widespread. Within the workplace, effects may be felt by the individual employee, his or her employer, and colleagues. Many employees struggling with mental health issues are however hesitant to speak up for fear of appearing weak or incapable.⁴² This is as a result of lingering generally tough economic times, where employer expectations from employees are higher, while salaries are generally lower.⁴³ A general lack of knowledge by employees as to their employment rights further contributes to an unwillingness to raise personal issues with employers.⁴⁴ Unfortunately, evidence of discrimination against employees with mental health disorders is easy to come by.⁴⁵

Apart from the effect on the individual worker concerned, many employers also remain unaware of the financial effects which the mental health of employees can have on the business. Work-related depression alone is estimated to cost Europe €617 billion annually,⁴⁶ of which productivity loss alone accounted for €242 billion.⁴⁷ Untreated mental health issues have a global cost of more than R15 trillion each year.⁴⁸ In South Africa, the corporate sector loses an estimated R3 billion annually as a result of untreated mental health conditions and other stress-related illnesses.⁴⁹



The presence of mental health conditions in the workplace, and its effects, are consequently undeniable. Employers simply cannot ignore the presence of such issues, both commercially and legislatively.

⁴² Goetzel, Roemer & Chung 'Mental Health in the Workplace: A Call to Action Proceedings From the Mental Health in the Workplace – Public Health Summit' (2018) *Journal of Occupational and Environmental Medicine* 328.

⁴³ Goetzel, Roemer & Chung 'Mental Health in the Workplace: A Call to Action Proceedings From the Mental Health in the Workplace – Public Health Summit' (2018) *Journal of Occupational and Environmental Medicine* 328.

⁴⁴ Goetzel, Roemer & Chung 'Mental Health in the Workplace: A Call to Action Proceedings From the Mental Health in the Workplace – Public Health Summit' (2018) *Journal of Occupational and Environmental Medicine* 328.

⁴⁵ *Jansen v Legal Aid South Africa* [2019] JOL 42192 (LC) para 65.

⁴⁶ Hassard, Teoh & Cox et al 'Calculating the cost of work-related stress and psychosocial risks' (2014) *European Risk Observatory Literature Review* 8.

⁴⁷ Hassard, Teoh & Cox et al 'Calculating the cost of work-related stress and psychosocial risks' (2014) *European Risk Observatory Literature Review* 8.

⁴⁸ Trautman, Rehm & Wittchen 'The economic costs of mental disorders' (2016) *EMBO reports* 1247.

⁴⁹ Trautman, Rehm & Wittchen 'The economic costs of mental disorders' (2016) *EMBO reports* 1247.

1.3. RESEARCH QUESTION

The main focus of this thesis is how mental health is regulated and accommodated in the South African workplace. This includes discussing whether employees with mental health conditions are properly safeguarded and accommodated in the workplace. The following questions are thus raised:

- i. How is mental health regulated in South Africa?
- ii. What are the South African governments obligations in terms of mental health regulation?
- iii. What are the obligations of employers towards employees who suffer from mental health conditions?
- iv. Are employees suffering with mental health conditions properly safeguarded and accommodated in the workplace? If not, what can be done to improve on the existing measures taken to safeguard the mental health of employees.

1.4. AIMS OF THE RESEARCH

The research considers the effects of employee mental health conditions in the workplace. This includes the effect of such conditions on both the affected individual, as well as the employer of such individual. The research establishes employers' obligations in South Africa in terms of dealing with mental health issues of employees in the workplace. This is done by examining the rights currently afforded to employees in as far as mental health conditions are concerned and the corresponding duties placed on employers. At the very least, employees suffering from mental health conditions must be protected against prejudice and unfair discrimination. The case of *Smith v Kit Kat*⁵⁰ highlights the often observed misconceptions and stigma around persons with mental health issues and the prejudicial treatment they are subjected to.⁵¹

The study further aims to:

⁵⁰ *Smith v Kit Kat Group (Pty) Ltd* [2017] 38 ILJ 483 (LC).

⁵¹ *Smith v Kit Kat Group (Pty) Ltd* [2017] 38 ILJ 483 (LC).

- i. Contextualise mental health issues, in particular anxiety and depression, within an incapacity/disability framework under South African labour law;
- ii. Critically discuss the overall duties and obligations of employers in dealing with mental health issues in the workplace. This will include considering the common law duty placed on employers to provide a “healthy and safe working environment”;⁵²
- iii. Discuss the duties and obligations of employees who suffer from mental health issues;
- iv. Analyse the possible remedies and claims available to employees whose rights have been violated;
- v. Evaluate whether the rights and obligations which are currently in place aimed at addressing mental health issues in the employment sphere adequately protect both employers and employees; and
- vi. Consider what South Africa can learn from the comparative jurisdictions of the United Kingdom, Netherlands and Northern Ireland and their approaches towards addressing mental health issues in the workplace;

1.5. LITERATURE REVIEW

Enforced by the Constitution, legislatively South Africa has made tremendous progress in the advancement of human rights, such as, equality and dignity for all. Section 23(1) of the Constitution, specifically addressing labour rights, also provide that “*everyone has the right to fair labour practices*”.⁵³ The Constitution dictates that legislation must be enacted to give effect to constitutional rights.⁵⁴ Despite constitutional protection, rights are not always implemented successfully, leaving vulnerable certain minority groups, such as employees with mental health issues.

According to the WHO, health is defined as a state of complete physical, mental, and social well-being, not simply the absence of disease or infirmity.⁵⁵ As highlighted earlier, employers in South

⁵² Tshoose CI ‘Employer’s duty to provide a safe working environment: A South African perspective’ (2011) *Journal of International Commercial Law and Technology* 169.

⁵³ Section 23(1), Constitution.

⁵⁴ Section 33, Constitution.

⁵⁵ Sartorius N ‘The Meanings of health and its Promotion’ (2006) *Croatian Medical Journal* 662.

Africa have a common law duty to provide a safe working environment,⁵⁶ which includes physical, mental and emotional safety. Employers are thus obligated to provide employees with a working environment that is safe and without risk to the mental health of their employees.⁵⁷ In *Van Deventer v Workmen's Compensation Commissioner*⁵⁸ the court held that the common law obligation of the employer includes taking reasonable precautions to ensure the employees' safety.⁵⁹ What would be regarded as reasonable care is a question of fact that must be determined by the facts of each individual case.⁶⁰

In accordance with the general common law obligation to provide a safe working environment, the Occupational Health and Safety Act 83 of 1993 (hereafter "OHSA") requires employers to create and maintain a work environment that is safe and free from risk to workers' health, to the extent reasonably practicable.⁶¹ In South Africa, the introduction of the SANS 45001 standard for Occupational Health and Safety Management⁶² explicitly confirmed that an organisation's responsibility for workplace safety includes the protection and promotion of workers' physical and mental health.⁶³ Employers are also prohibited under the EEA from discriminating unfairly against employees, whether directly or indirectly, in any employment policy or practice, on one or more specified grounds, which includes disability.⁶⁴ Additionally, under section 187(1)(f) of the LRA, a dismissal is automatically unfair if the employer discriminated against an employee unfairly, directly or indirectly, on any arbitrary ground, including disability.⁶⁵ The LRA also provides that a dismissal will only be fair where the dismissal was effected for an acceptable reason, such as ill-health,⁶⁶ and also only once the correct process had been followed.⁶⁷

⁵⁶ Tshoose CI 'Employer's duty to provide a safe working environment: A South African perspective' (2011) *Journal of International Commercial Law and Technology* 171.

⁵⁷ Section 8, Occupational Health and Safety Act 85 of 1993 (OHSA).

⁵⁸ *Van Deventer v Workman's Compensation Commissioner* 1962 (4) SA 20 (T).

⁵⁹ Le Roux W 'When is a workplace safe or unsafe?:' (2011) *The Journal of The Southern African Institute of Mining and Metallurgy* 533.

⁶⁰ Le Roux W 'When is a workplace safe or unsafe?:' (2011) *The Journal of The Southern African Institute of Mining and Metallurgy* 533.

⁶¹ Manning WG & Pillay M 'A critical analysis of the current South African occupational health law and hearing loss' (2020) *South African Journal of Communication Disorders (SAJCD)* 6.

⁶² South African Bureau of Standards 'SANS/ISO 45001: Occupational Health and Safety Management System Standard' 1ed (2018).

⁶³ South African Bureau of Standards 'SANS/ISO 45001: Occupational Health and Safety Management System Standard' 1ed (2018).

⁶⁴ Section 6(1), EEA.

⁶⁵ Section 187(1)(f), Labour Relations Act 66 of 1995 (LRA).

⁶⁶ Schedule 8, LRA (Code of Good Practice on Dismissal).

⁶⁷ Section 2(4), Code of Good Practice on Dismissal.

Dismissals related to ill-health are dealt with by way of incapacity.⁶⁸ The Code of Good Practice on Dismissal divides incapacity for dismissal into two categories in Chapter 8 of the LRA, namely poor job performance and ill health or injury.⁶⁹

Courts have been reluctant to explicitly state whether mental health is to be regulated as a disability issue or as one of ill-health but have not avoided implicitly referring to it as both. In the case of *Independent Municipal and Allied Trade Union obo Strydom v Witzenburg Municipality and Others*⁷⁰, the employee, who suffered from major depressive disorder, was dismissed following an incapacity enquiry that determined he was incapacitated to the point of being unable to perform the essential requirements of his job.⁷¹ The employee brought an unfair dismissal claim, which was eventually heard by the LAC. The LAC determined that the dismissal was indeed unfair because the employer failed to take proactive measures to eliminate stressors that contributed to the employee's mental health problems.⁷² Similarly, in the case of *Hendricks v Mercantile & General Reinsurance Co of SA Ltd*⁷³ the employee, who suffered from both anxiety and depression, was dismissed on the ground of incapacity.⁷⁴ This dismissal was however found to be both substantially and procedurally fair because the employer exhausted all possible solutions to accommodate the employee, whilst also offering medical treatment assistance to the employee.⁷⁵



⁶⁸ Section 10(1), Code of Good Practice on Dismissal.

⁶⁹ Section 10(1) and 11(1), Code of Good Practice on Dismissal.

⁷⁰ Carvalho R *Depression, Dismissals and Disability* (Unpublished LLM thesis, University of Witwatersrand, 2011) 74.

⁷¹ Carvalho R *Depression, Dismissals and Disability* (Unpublished LLM thesis, University of Witwatersrand, 2011) 74.

⁷² Carvalho R *Depression, Dismissals and Disability* (Unpublished LLM thesis, University of Witwatersrand, 2011) 74.

⁷³ *Hendricks v Mercantile & General Reinsurance Co of SA Ltd* [1994] 15 ILJ 304 (LAC).

⁷⁴ Carvalho R *Depression, Dismissals and Disability* (Unpublished LLM thesis, University of Witwatersrand, 2011) 42.

⁷⁵ Carvalho R *Depression, Dismissals and Disability* (Unpublished LLM thesis, University of Witwatersrand, 2011) 42.

In *L S v Commission for Conciliation, Mediation and Arbitration*⁷⁶ the employee also suffered from depression.⁷⁷ The employee was subsequently dismissed on the grounds of misconduct.⁷⁸ The Labour Court determined that the dismissal lacked valid legal basis⁷⁹ and consequently the dismissal was declared both substantively and procedurally unfair.⁸⁰ In *New Way Motors & Diesel Engineering v Marsland*⁸¹ the employee had gone through a sudden divorce which resulted in depression.⁸² The employer instituted disciplinary proceedings against the employee on the ground of poor work performance and subsequently dismissed the employee.⁸³ Ending up before the LAC, the court found the employer's treatment of the employee to be appalling and confirmed that the employee's dismissal was automatically unfair under section 187(1)(f) of the LRA⁸⁴ on the basis of depression being regarded as a disability.⁸⁵ In *Smith v Kit Kat Group (Pty) Ltd*,⁸⁶ an employee suffered from severe injuries and disfigurement after a suicide attempt.⁸⁷ Following his return to work, the employer was of the opinion that the employee's appearance was not "facially acceptable"⁸⁸ and that his return to work would adversely affect other employees as it would be a constant reminder of the suicide attempt.⁸⁹ Additionally, the employer believed that the employee would be incapable of fully performing his duties as a result of his injuries and disfigurement.⁹⁰



⁷⁶ Ngcobo MM *Courts' Treatment of Depression in the Workplace: Incapacity, Poor Performance, Misconduct and Disability* (Unpublished LLM thesis, University of KwaZulu-Natal, 2019) 81.

⁷⁷ Ngcobo MM *Courts' Treatment of Depression in the Workplace: Incapacity, Poor Performance, Misconduct and Disability* (Unpublished LLM thesis, University of KwaZulu-Natal, 2019) 81.

⁷⁸ Ngcobo MM *Courts' Treatment of Depression in the Workplace: Incapacity, Poor Performance, Misconduct and Disability* (Unpublished LLM thesis, University of KwaZulu-Natal, 2019) 82.

⁷⁹ Ngcobo MM *Courts' Treatment of Depression in the Workplace: Incapacity, Poor Performance, Misconduct and Disability* (Unpublished LLM thesis, University of KwaZulu-Natal, 2019) 82.

⁸⁰ Ngcobo MM *Courts' Treatment of Depression in the Workplace: Incapacity, Poor Performance, Misconduct and Disability* (Unpublished LLM thesis, University of KwaZulu-Natal, 2019) 82.

⁸¹ *New Way Motor & Diesel Engineering (Pty) Ltd v Marsland* [2009] 30 ILJ (LAC) 2877.

⁸² Rangata B & Lehutjo M 'The "invisible" illness challenge' (2015) *Without Prejudice* 1.

⁸³ Rangata B & Lehutjo M 'The "invisible" illness challenge' (2015) *Without Prejudice* 1.

⁸⁴ Rangata B & Lehutjo M 'The "invisible" illness challenge' (2015) *Without Prejudice* 1.

⁸⁵ Rangata B & Lehutjo M 'The "invisible" illness challenge' (2015) *Without Prejudice* 1.

⁸⁶ *Smith v Kit Kat Group (Pty) Ltd* [2017] 38 ILJ 483 (LC).

⁸⁷ *Smith v Kit Kat Group (Pty) Ltd* [2017] 38 ILJ 483 (LC) para 10.

⁸⁸ Gresse E & Mbaol ML 'An analysis of the duty to reasonably accommodate disabled employees: a comment on *Jansen v Legal Aid South Africa*' (2020) *Law, Democracy and Development* 122.

⁸⁹ Gresse E & Mbaol ML 'An analysis of the duty to reasonably accommodate disabled employees: a comment on *Jansen v Legal Aid South Africa*' (2020) *Law, Democracy and Development* 122

⁹⁰ Gresse E & Mbaol ML 'An analysis of the duty to reasonably accommodate disabled employees: a comment on *Jansen v Legal Aid South Africa*' (2020) *Law, Democracy and Development* 122

In *Jansen v Legal Aid South Africa*⁹¹, the employee had been formally diagnosed with depression and severe anxiety, which had impacted his work performance.⁹² He was subjected to a disciplinary hearing for misconduct, following which he was summarily dismissed.⁹³ The court, however, held that dismissing an employee for misconduct when the employer is aware of the employee's mental health condition constitutes an automatically unfair dismissal on the basis of unfair discrimination when the dismissal is intrinsically linked to the employee's mental health.⁹⁴ As the aforementioned cases demonstrate, courts have not taken a consistent approach to cases involving mental health in the workplace, resulting in widespread confusion and legal uncertainty.

Due regard and recognition is given to mental health within the workplace in the Netherlands.⁹⁵ It has been recognised to a much greater extent than in many other European jurisdictions.⁹⁶ Employers are legally required by the Working Conditions Act⁹⁷ (hereafter “Arbo Law”) to conduct an assessment of all risk factors to which their employees may be exposed in the field of occupational safety and health.⁹⁸ This assessment is inclusive of both the physical risks and the psychosocial risks at work.⁹⁹ The significance of this is that risks such as work related stress are recognised, as evidenced by article 3(1).¹⁰⁰ Under the Act, employers are obligated to create and implement an action plan which addresses existing risk factors.¹⁰¹ Employers are required to inform employees about all psychosocial risk factors present in the workplace, as well as the steps taken to prevent or mitigate them.¹⁰² Employers must appoint a prevention specialist in addition to a certified Arbo specialist or occupational physician.¹⁰³ The Labour Inspectorate will

⁹¹ *Jansen v Legal Aid South Africa* [2019] JOL 42192 (LC).

⁹² Gresse E & Mbao ML ‘An analysis of the duty to reasonably accommodate disabled employees: a comment on *Jansen v Legal Aid South Africa*’ (2020) *Law, Democracy and Development* 110.

⁹³ Gresse E & Mbao ML ‘An analysis of the duty to reasonably accommodate disabled employees: a comment on *Jansen v Legal Aid South Africa*’ (2020) *Law, Democracy and Development* 110.

⁹⁴ Gresse E & Mbao ML ‘An analysis of the duty to reasonably accommodate disabled employees: a comment on *Jansen v Legal Aid South Africa*’ (2020) *Law, Democracy and Development* 110.

⁹⁵ Working Conditions Act 1999.

⁹⁶ Schafel WB & Kompier MAJ ‘Managing Job Stress in the Netherlands’ (2001) *International Journal of Stress Management* 14.

⁹⁷ Working Conditions Act 1999.

⁹⁸ Working Conditions Act 1999.

⁹⁹ Arends, Baer & Miranda ‘Mental Health and Work: Achieving Well-integrated Policies and Service Delivery’ (2014) *OECD Social, Employment and Migration Working Papers* 29.

¹⁰⁰ Article 3(1), Working Conditions Act 1999.

¹⁰¹ Working Conditions Act 1999.

¹⁰² Arends, Baer & Miranda ‘Mental Health and Work: Achieving Well-integrated Policies and Service Delivery’ (2014) *OECD Social, Employment and Migration Working Papers* 29.

¹⁰³ Arends, Baer & Miranda ‘Mental Health and Work: Achieving Well-integrated Policies and Service Delivery’ (2014) *OECD Social, Employment and Migration Working Papers* 35.

sanction non-compliance, and the amount of the sanction is dependent on the number of employees employed by the employer, as well as the severity and repetition of the infraction.¹⁰⁴

The General Equal Treatment Act of 1994 also places an obligation on employers to provide workplaces that are free from discrimination.¹⁰⁵ According to section 1a, the prohibition against discrimination includes the prohibition against harassment.¹⁰⁶ Harassment, as defined in section 1, is conduct motivated by a disability or chronic illness that violates a person's dignity or creates an intimidating, hostile, degrading, humiliating, or offensive environment.¹⁰⁷ Section 4 extends this protection to the workplace, prohibiting discrimination in the following areas: job offers and treatment in filling vacancies; entering into and terminating an employment relationship; appointment and termination of employment as a civil servant; assistance in finding work; terms of employment; and allowing people to attend education and training during their employment.¹⁰⁸

Furthermore, employers in the Netherlands are also under an obligation to develop sickness management policies.¹⁰⁹ The Dutch government compelled employers and employees to assume responsibility for sickness management through the Gatekeeper Improvement Act (2002) by providing guidelines for both parties in order to expedite the employee's return to work.¹¹⁰

In the United Kingdom, individuals with mental health disorders are protected from workplace discrimination and harassment, as well as reasonable accommodations to adapt their job or work.¹¹¹ The case of *Best v Staffordshire University*¹¹² established an employer's obligation to provide administrative support to its employees in order to alleviate unreasonable work pressures that went beyond the scope of their employment.¹¹³ Such reasonable adjustments are intended to

¹⁰⁴ Arends, Baer & Miranda 'Mental Health and Work: Achieving Well-integrated Policies and Service Delivery' (2014) *OECD Social, Employment and Migration Working Papers* 35.

¹⁰⁵ General Equal Treatment Act 1994.

¹⁰⁶ Section 1A, General Equal Treatment Act 1994.

¹⁰⁷ Section 1a (2), General Equal Treatment Act 1994.

¹⁰⁸ Section 4, General Equal Treatment Act 1994.

¹⁰⁹ Working Conditions Act 1999.

¹¹⁰ Gatekeeper Improvement Act 1999.

¹¹¹ Working Conditions Act 1999.

¹¹² *Best v Staffordshire University* [2005] IRLR 651.

¹¹³ *Best v Staffordshire University* [2005] IRLR 651.

allow equal opportunity for all employees by removing an obstacle caused by the effect of their mental health disorder.¹¹⁴ The Equality Act 2010 (hereafter “Equality Act”) protects employees from discrimination based on their mental health, should it constitute a disability. According to Section 6 of the Equality Act, a person has a disability if they have a physical or mental impairment that has a substantial and long-term adverse effect on their ability to perform normal daily activities.¹¹⁵ Furthermore, section 15 explicitly provides for discrimination which arises from a disability.¹¹⁶

With the Equality Act protecting employees from discrimination on the basis of their mental health, mental health is effectively given the priority it deserves while still ensuring compliance with all applicable requirements, as illustrated by the case of *Herry v Dudley*.¹¹⁷ Employers are thus obligated to address bullying and discriminatory behaviours relating to mental health in the same manner that they would have for the more conventional grounds such as race, gender or sexual orientation.¹¹⁸ Similarly to the United Kingdom, Northern Ireland's 1995 Disability Discrimination Act protects individuals with ongoing mental health disorders who meet the statutory definition of a disability.¹¹⁹ The definition of being disabled provides that a person must have an impairment which has a substantial, adverse and long-term impact on their ability to carry out everyday tasks.¹²⁰ Employees are protected from discrimination and harassment and also have the right to reasonable accommodations in the workplace.¹²¹ The Northern Ireland Act 1998 established the Equality Commission for Northern Ireland.¹²² The Equality Commission's duties and powers are derived from a variety of statutes that provide protection against discrimination on a variety of grounds, including disability.¹²³ The Equality Commission's mission is to advance equality, advance opportunity equality, and combat discrimination through

¹¹⁴ Follmer KB & Jones KS ‘Mental Illness in the Workplace: An Interdisciplinary Review and Organizational Research Agenda’ (2017) *SAGE Journals* 329.

¹¹⁵ Section 6, Equality Act 2010.

¹¹⁶ Section 6, Equality Act 2010.

¹¹⁷ *Herry v Dudley* Metropolitan Borough Council UKEAT/101/16/LA.

¹¹⁸ Follmer KB & Jones KS ‘Mental Illness in the Workplace: An Interdisciplinary Review and Organizational Research Agenda’ (2017) *SAGE Journals* 329.

¹¹⁹ Disability Discrimination Act 1995.

¹²⁰ Hackett, Steptoe & Lang ‘Disability Discrimination and well-being in the United Kingdom: a prospective cohort study’ (2020) *BMJ Open* 7.

¹²¹ *Morgan v Staffordshire University* [2002] IRLR 190 EAT.

¹²² Equality Commission for Northern Ireland ‘About us’ available at <https://www.equalityni.org/AboutUs> (accessed 5 March 2021).

¹²³ Equality Commission for Northern Ireland ‘About us’ available at <https://www.equalityni.org/AboutUs> (accessed 5 March 2021).

promotion, advice, and enforcement.¹²⁴ Employers' accountability in Northern Ireland is emphasised by the Equality Commission's mandate, which contributes to Northern Ireland's impressive comparative standing.

1.6. CHAPTER OUTLINE

Chapter one serves as an introduction to the study. It includes, but is not limited to, an elaboration on the outline of the study, the background to the study, problem statement, and research question, the aims of the study, as well as further pertinent issues.

Chapter two provides a comprehensive overview of how mental health is addressed globally. This discussion includes an investigation into the commercial and physical implications of mental health and why it is of importance to both employers and employees. It examines South Africa's international legal framework and the international commitments which the country bears.

Chapter three presents a detailed overview of South Africa's national legislative framework to determine how mental health conditions in the workplace are regulated by legislation. It includes a full case law discussion, outlining how the courts have addressed cases involving mental health in the workplace. Finally, the value and importance of reasonable accommodation is considered.

Chapter four serves as a comparative chapter between three international jurisdictions; the Netherlands, Northern Ireland and the United Kingdom. The discussion includes an overview of each country's international commitments and how its domestic legal structure seeks to meet those obligations.

¹²⁴ Equality Commission for Northern Ireland 'About us' available at <https://www.equalityni.org/AboutUs> (accessed 5 March 2021).

Chapter five analyses if and how South Africa may model after the example of the three aforementioned international jurisdictions in their manner in which they implement their legislation. In concluding, the chapter observes what lessons can be learnt as a result of the comparative analysis of the Netherlands, Northern Ireland and the United Kingdom and the manner in which mental health is regulated in the workplace. It will also address the feasibility of putting the most pertinent lessons learned into practice in South Africa.

1.7. RESEARCH METHODOLOGY

This research has been conducted by considering the literature published through secondary sources that include articles in journals, academic books, newspapers web publications as well as those from primary sources such policies, laws, international conventions and original narratives by independent researchers, academic scholars on mental health in the workplace, the onus on employers' to provide reasonable accommodation to employees with mental health disorders as well as elements of constructive dismissal.

It largely follows a conceptual analysis and interpretation approach on the issue of mental health in the workplace and constructive dismissal in the Netherlands, Northern Ireland as well as the United Kingdom. Furthermore, it constructs a narrative on the history of labour rights in all countries, and develops arguments based on discourse analysis of existing labour laws. Lastly, it makes strong reference to recent court judgments on mental health in the workplace, an employer's obligation to its employees as well as the international conventions which South Africa is party to.

CHAPTER 2:

**AN OVERVIEW OF SOUTH AFRICA’S INTERNATIONAL
COMMITMENTS**

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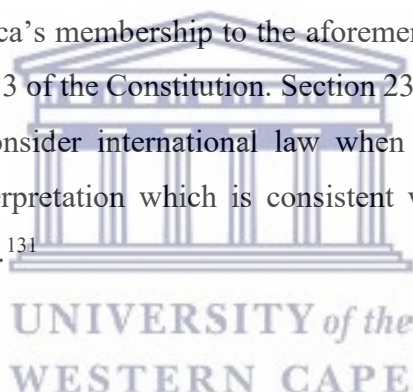
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2.1. INTRODUCTION

This chapter will provide an overview of mental health conditions and the regulation thereof in the South African workplace. This will be done against the background of international law and South Africa's domestic obligations arising from the latter.

South Africa was one of the founding members of the United Nations (hereafter "UN") in 1945.¹²⁵ However, in 1974, the UN General Assembly suspended South Africa due to international opposition of the policy of apartheid at the time.¹²⁶ South Africa was re-admitted into the UN General Assembly in 1994, following the end of apartheid and the country's transition to democracy.¹²⁷ Similarly, after withdrawing from the International Labour Organisation (hereafter "ILO") in 1964 due to mounting international political pressure, South Africa was re-admitted as a member in 1994.¹²⁸ The African Union (hereafter "AU"), formerly known as the Organisation of African Unity (hereafter "OAU"), welcomed South Africa as a member in 1994.¹²⁹ South Africa's membership to the aforementioned organisations should be considered in light of section 233 of the Constitution. Section 233 provides that an interpretation of the Bill of Rights must consider international law when interpreting any legislation.¹³⁰ Moreover, any reasonable interpretation which is consistent with international law must be preferred over that which is not.¹³¹



¹²⁵ Blum YZ *Eroding the United Nations Charter* (1993) 48.

¹²⁶ Blum YZ *Eroding the United Nations Charter* (1993) 48.

¹²⁷ Alden C & Le Pere G 'South Africa's Post-Apartheid Foreign Policy: From Reconciliation to Ambiguity?' (2004) 31 *Review of African Political Economy* 285.

¹²⁸ Van Daele 'The International Labour Organisation (ILO) in Past and Present Research' (2008) 53 *International Review of Social History* 486.

¹²⁹ Edo V & Olanrewa MA 'An assessment of the Transformation of Organisation of African (OAU) to the African Union (AU), 1963 – 2007' (2012) 21 *Journal of the Historical Society of Nigeria* 44.

¹³⁰ Section 233, Constitution.

¹³¹ Section 233, Constitution.

2.2. PREVALENCE OF MENTAL HEALTH

There exists a misconception that mental illness is uncommon.¹³² This is simply not true. Despite the fact that approximately 2 billion people suffer from mental illness each year, mental health is frequently ignored and underestimated.¹³³

COVID-19 has also caused non - work-related stress, which may amplify the consequences of workplace stress.¹³⁴ This includes fear of social isolation, the resulting loneliness, and adjusting to a new way of life until the world returns to normal.¹³⁵ COVID-19 has undoubtedly had a significant impact on employees' mental health, particularly due to changes in the nature of employment, the working environment, and employee workloads.¹³⁶ Yet, despite the fact that approximately 2 billion people suffer from mental illness each year, mental health is frequently ignored and underestimated.¹³⁷

The WHO has defined 'health' as a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity.¹³⁸ The WHO has also emphasised that without mental health, there is no health.¹³⁹ According to the WHO, mental health is "a state of well-being in which the individual realises his or her own abilities, can cope with the normal stresses of life, can work productively and fruitfully, and is able to make a contribution to his or her community".¹⁴⁰ Essentially, when referring to one's mental health, it includes emotions,

¹³² Ahmedani BK 'Mental Health Stigma: Society, Individuals and the Profession' (2011) 8 *Journal of Social Work Values and Ethics* 46.

¹³³ Chatmon BN 'Males and Mental health Stigma' (2020) 14 *American Journal of Men's Health*, 5.

¹³⁴ Basyouni SS & Keshky M 'Job Insecurity, Work-related Flow, and Financial Anxiety in the Midst of COVID-19 Pandemic and Economic Downturn' (2021) 12 *Frontiers in Psychology* 4.

¹³⁵ Basyouni SS & Keshky M 'Job Insecurity, Work-related Flow, and Financial Anxiety in the Midst of COVID-19 Pandemic and Economic Downturn' (2021) 12 *Frontiers in Psychology* 4.

¹³⁶ Basyouni SS & Keshky M 'Job Insecurity, Work-related Flow, and Financial Anxiety in the Midst of COVID-19 Pandemic and Economic Downturn' (2021) 12 *Frontiers in Psychology* 6.

¹³⁷ Chatmon BN 'Males and Mental health Stigma' (2020) 14 *American Journal of Men's Health* 5.

¹³⁸ World Health Organisation *Constitution of the World Health Organisation* (1946) Basic Documents, Geneva: World Health Organisation.

¹³⁹ World Health Organisation *Constitution of the World Health Organisation* (1946) Basic Documents, Geneva: World Health Organisation.

¹⁴⁰ World Health Organisation *Promoting Mental Health: Summary Report* (2004) 5 – 60.

thoughts, and feelings, as well as the ability to solve issues and conquer challenges, social relationships, and the comprehension of the world.¹⁴¹

Mental health issues include but are not limited to a range of conditions such as depression, anxiety and substance use disorders.¹⁴² A mental health issue can significantly impact how a person feels, thinks, behaves, and interacts with others, which consequently affects their overall mental health.¹⁴³ Mental health issues are currently one of the most pressing social and occupational issues in the world, affecting more people than any other disabling condition.¹⁴⁴ The WHO has identified mental health issues, particularly depression, as a top priority, with depression being the leading cause of global mental and physical disability.¹⁴⁵ More than 500 million people worldwide suffer from major mental health issues, and the International Labour Organisation (hereafter “ILO”) has confirmed that mental illness has a greater impact on human lives than all other forms of disability.¹⁴⁶ Mental illness is in fact, so common that more than 264 million people of all ages worldwide suffer from depression.¹⁴⁷ According to the WHO, one - quarter of the world's population will have one or more mental health or behavioral issues during their lifetime.¹⁴⁸

In recent years, mental health in the workplace appears to have gotten increasingly prevalent. This is not surprising given the already unequal balance of power which exists in an employment relationship.¹⁴⁹ An employment relationship is defined by the ILO as the legal link between employers and employees.¹⁵⁰ It exists when a person performs work or provides services in return for remuneration.¹⁵¹ The reciprocal rights and obligations of any employee and employer are

¹⁴¹ Galderisi S, Heinz A & Kastrup M et al ‘Toward a new definition of mental health’ (2015) 14 *Official Journal of the World Psychiatric Association (WPA)* 232.

¹⁴² Galderisi S, Heinz A & Kastrup M et al ‘Toward a new definition of mental health’ (2015) 14 *Official Journal of the World Psychiatric Association (WPA)* 233.

¹⁴³ Galderisi S, Heinz A & Kastrup M et al ‘Toward a new definition of mental health’ (2015) 14 *Official Journal of the World Psychiatric Association (WPA)* 233.

¹⁴⁴ Galderisi S, Heinz A & Kastrup M et al ‘Toward a new definition of mental health’ (2015) 14 *Official Journal of the World Psychiatric Association (WPA)* 231.

¹⁴⁵ United Nations *Policy Brief: COVID-19 and the Need for Action on Mental Health* (2020) 5.

¹⁴⁶ United Nations *Policy Brief: COVID-19 and the Need for Action on Mental Health* (2020) 5.

¹⁴⁷ United Nations *Policy Brief: COVID-19 and the Need for Action on Mental Health* (2020) 5.

¹⁴⁸ United Nations *Policy Brief: COVID-19 and the Need for Action on Mental Health* (2020) 5.

¹⁴⁹ Dundon T, Lucio MM, Howcroft D et al ‘Power Dynamics in Work and Employment Relationships: the capacity for employee influence’ 2017 *Chartered Institute of Personnel and Development* 5.

¹⁵⁰ International Labour Organisation (ILO) *Background Paper: Employment Relationship* (2020) 9.

¹⁵¹ ILO *Background Paper: Employment Relationship* (2020) 9.

birthed from this relationship.¹⁵² Persons with mental health issues such as those in the general population, face various forms of discrimination in the workplace, including dismissal, denial of employment, and long-term exposure to degrading and condescending attitudes from superiors and colleagues.¹⁵³ Whereas employees are by definition the most vulnerable party in a working relationship, employees who suffer from mental health issues are even more susceptible.¹⁵⁴ More often than not, persons with mental health conditions are both able and wanting to work.¹⁵⁵ Unemployment is a primary hindrance to overcoming and managing mental health conditions in many cases, thus making it critical to give effect to the right to work of persons with mental health conditions.¹⁵⁶

It is in the best interests of both parties to the employment relationship to protect employees with mental health conditions in the workplace.¹⁵⁷ Mental health disorders such as depression and anxiety are a significant occupational concern because they result in a number of negative consequences in the workplace, including absenteeism, occupational and social dysfunction, decreased employee productivity, an increased risk of suicide, and increased stigma and discrimination.¹⁵⁸ Depression is said to have a greater influence on work performance than a number of other severe health disorders, including diabetes, lumbago, rheumatoid arthritis, and hypertension.¹⁵⁹ According to a new Lancet Commission research (hereafter “the report”) on mental health, mental conditions are increasing and are on track to cost the global economy \$16 trillion by 2030.¹⁶⁰ The report further provides that an estimated 12 billion working days are missed each year because of mental illness.¹⁶¹ According to the WHO, depression and anxiety

¹⁵² ILO *Background Paper: Employment Relationship* (2020) 9.

¹⁵³ Corrigan PW & Watson AC ‘Understanding the impact of stigma on people with mental illness’ (2002) 1 *WPA* 16.

¹⁵⁴ ILO *Background Paper: Employment Relationship* (2020) 14.

¹⁵⁵ Lerner D, Adler DA & Chang H et al ‘Unemployment, Job Retention, and Productivity Loss Among Employees With Depression’ (2004) 55 *Psychiatric Services* 1375.

¹⁵⁶ Lerner D, Adler DA & Chang H et al ‘Unemployment, Job Retention, and Productivity Loss Among Employees With Depression’ (2004) 55 *Psychiatric Services* 1375.

¹⁵⁷ WHO *Mental health and well-being at the workplace – protection and inclusion in challenging times* (2019) 6.

¹⁵⁸ United Nations *Policy Brief: COVID-19 and the Need for Action on Mental Health* (2020) 6.

¹⁵⁹ United Nations *Policy Brief: COVID-19 and the Need for Action on Mental Health* (2020) 6.

¹⁶⁰ Patel V, Saxena S & Lundt C ‘The Lancet Commission on global mental health and sustainable development’ (2018) 392 *The Lancet Commissions* 1560.

¹⁶¹ Chisholm D, Sweeny K & Sheehan P et al ‘Scaling-up treatment of depression and anxiety: a global return on investment analysis’ (2016) *Lancet Psychiatry* 5.

have a large economic impact, and is predicted to cost the global economy US\$ 1 trillion due to a loss of productivity.¹⁶²

According to the WHO, every dollar invested in the treatment and support of mental health disorders results in four times the return in increased health and productivity.¹⁶³ Similarly, studies in the United Kingdom indicated that for every £1 invested in mental health training programs, companies could expect a return of up to £10, making it ten times the return.¹⁶⁴ If this is the case, then investing in mental health training and treatment should not even warrant a debate. Both employees and employers benefit from increased training and treatment. Employees are vital to the success of an employer and it can therefore be said that their well-being must be a prioritised due to the enormous personal, organisational, and economic consequences associated with not doing so. Global recognition of mental health is visibly increasing; as is the protection afforded to those with mental health conditions.

Mental health issues have been further exacerbated by the devastating effects of the COVID-19 pandemic, which has significantly increased the risk of people developing mental health disorders.¹⁶⁵ COVID-19 has wreaked havoc, causing both local and global instability and continues to do so as governments and workplaces assess the best course of action.¹⁶⁶ At the best of times, change can be difficult to manage, but rapid or continuous change can cause significant stress and anxiety and can jeopardise mental health.¹⁶⁷ Many have struggled to adjust to the changes brought on by an uncertain environment created by the COVID-19 pandemic.¹⁶⁸ Many employees find themselves facing job insecurity and/or a reduction in working hours, and are

¹⁶² Patel V, Saxena S & Lundt C 'The Lancet Commission on global mental health and sustainable development' (2018) 392 *The Lancet Commissions* 1560.

¹⁶³ Chisholm D, Sweeny K & Sheehan P et al 'Scaling-up treatment of depression and anxiety: a global return on investment analysis' (2016) *Lancet Psychiatry* 8.

¹⁶⁴ Chisholm D, Sweeny K & Sheehan P et al 'Scaling-up treatment of depression and anxiety: a global return on investment analysis' (2016) *Lancet Psychiatry* 6.

¹⁶⁵ Saladino V, Algeri D & Auriemma V 'The Psychological and Social Impact of Covid-19: New Perspectives of Well-Being' (2020) 11 *Frontiers in Psychology* 2.

¹⁶⁶ Saladino V, Algeri D & Auriemma V 'The Psychological and Social Impact of Covid-19: New Perspectives of Well-Being' (2020) 11 *Frontiers in Psychology* 2.

¹⁶⁷ Saladino V, Algeri D & Auriemma V 'The Psychological and Social Impact of Covid-19: New Perspectives of Well-Being' (2020) 11 *Frontiers in Psychology* 3.

¹⁶⁸ Saladino V, Algeri D & Auriemma V 'The Psychological and Social Impact of Covid-19: New Perspectives of Well-Being' (2020) 11 *Frontiers in Psychology* 3.

attempting to manage the financial strains associated with both.¹⁶⁹ Other employees may find themselves being required to work longer hours to maintain the same level of productivity and to react to the additional demands created by a global pandemic.¹⁷⁰

COVID-19 has also caused non-work-related stress, which may amplify the consequences of workplace stress.¹⁷¹ This includes fear of social isolation, the resulting loneliness, and adjusting to a new way of life until the world returns to normal.¹⁷² COVID-19 has undoubtedly had a significant impact on employees' mental health, particularly due to changes in the nature of employment, the working environment, and employee workloads.¹⁷³

2.3. INTERNATIONAL OBLIGATIONS

2.3.1. United Nations

2.3.1.1. International Bill of Human Rights

The possibility of adopting an International Bill of Human Rights was first considered at the United Nations Conference on International Organisation.¹⁷⁴ This was precipitated by the conduct of the Nazi party in Germany, which resulted in some of the most heinous human rights violations known to man being committed during the Second World War.¹⁷⁵ The Second World War had a powerful impact on the nature of international law, which until then had primarily

¹⁶⁹ Basyouni SS & Keshky M 'Job Insecurity, Work-related Flow, and Financial Anxiety in the Midst of COVID-19 Pandemic and Economic Downturn' (2021) 12 *Frontiers in Psychology* 3.

¹⁷⁰ Basyouni SS & Keshky M 'Job Insecurity, Work-related Flow, and Financial Anxiety in the Midst of COVID-19 Pandemic and Economic Downturn' (2021) 12 *Frontiers in Psychology* 3.

¹⁷¹ Basyouni SS & Keshky M 'Job Insecurity, Work-related Flow, and Financial Anxiety in the Midst of COVID-19 Pandemic and Economic Downturn' (2021) 12 *Frontiers in Psychology* 4.

¹⁷² Basyouni SS & Keshky M 'Job Insecurity, Work-related Flow, and Financial Anxiety in the Midst of COVID-19 Pandemic and Economic Downturn' (2021) 12 *Frontiers in Psychology* 4.

¹⁷³ Basyouni SS & Keshky M 'Job Insecurity, Work-related Flow, and Financial Anxiety in the Midst of COVID-19 Pandemic and Economic Downturn' (2021) 12 *Frontiers in Psychology* 6.

¹⁷⁴ Humphrey JP 'The International Bill of Rights: Scope and Implementation' (1976) 17 *William & Mary Law Review* 527.

¹⁷⁵ Humphrey JP 'The International Bill of Rights: Scope and Implementation' (1976) 17 *William & Mary Law Review* 527.

governed state-to-state relations. From this point, international law sought to become world law, as reflected in the United Nations Charter, which references the importance of human rights.¹⁷⁶

Today, the International Bill of Human Rights is composed of the United Nations' five main human rights treaties, namely the:

- i. Universal Declaration of Human Rights;
- ii. International Covenant on Economic, Social and Cultural Rights;
- iii. International Covenant on Civil and Political Rights;
- iv. Optional Protocol to the International Covenant on Civil and Political Rights; and
- v. Second Optional Protocol to the International Covenant on Civil and Political Rights aiming at the abolition of the death penalty.

These human rights treaties serve to enhance fundamental freedoms and preserve the fundamental human rights of all people.¹⁷⁷ By ensuring that economic, social, and cultural rights are given top priority in the formulation and implementation of national, regional, and international policy and law, the International Bill of Human Rights has the potential to impact the decisions and actions of governments, state actors, and non-state actors alike.¹⁷⁸

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2.3.1.2. Universal Declaration of Human Rights (1948)

The Universal Declaration of Human Rights (hereafter “UDHR”) establishes universal fundamental rights and liberties.¹⁷⁹ The UN General Assembly adopted the UDHR on 10 December 1948.¹⁸⁰ As the UDHR is not a treaty, it does not directly impose legal obligations on governments.¹⁸¹ However, it is a manifestation of the fundamental ideals shared by all members

¹⁷⁶ Humphrey JP ‘The International Bill of Rights: Scope and Implementation’ (1976) 17 *William & Mary Law Review* 527.

¹⁷⁷ UN *Fact Sheet No2 (Rev.1): The International Bill of Human Rights* (1996) 2.

¹⁷⁸ UN *Fact Sheet No2 (Rev.1): The International Bill of Human Rights* (1996) 2.

¹⁷⁹ Article 1, United Nations General Assembly *Universal Declaration of Human Rights* (UDHR) 1948.

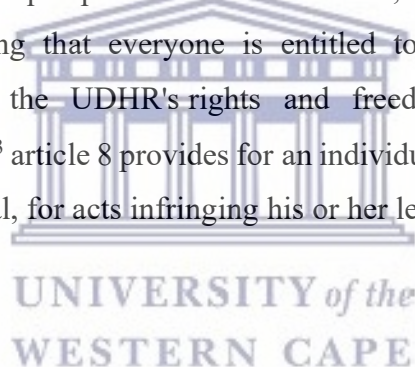
¹⁸⁰ Humphrey JP ‘The International Bill of Rights: Scope and Implementation’ (1976) 17 *William & Mary Law Review* 529.

¹⁸¹ Brown G (ed) *The Universal Declaration of Human Rights in the 21st Century: A Living Document in a Changing World* (2016) 34.

of the global community.¹⁸² The importance thereof is irrefutable and it is widely credited for inspiring the creation of over 70 human rights treaties with corresponding obligations.¹⁸³ The UDHR comprises of 30 fundamental human rights, all of which are of importance.¹⁸⁴ However, for the purposes of this thesis, only those that are pertinent to workplace mental health will be considered.

Articles 1 and 2 can be considered the UDHR's cornerstones.¹⁸⁵ According to article 1, all human beings are born free and equal in terms of human dignity and rights.¹⁸⁶ The notion of equality is emphasised further in article 2, which provides that everyone is entitled to all the UDHR's rights and freedoms and forbids the exclusion thereof on several grounds.¹⁸⁷

Article 5 provides that no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.¹⁸⁸ Reference to degrading treatment¹⁸⁹ is particularly pertinent considering the stigma and discrimination experienced by individuals with mental health issues. Discrimination is first addressed in article 7,¹⁹⁰ which provides that all people are equal before the law and so have the right to equal protection under the law, free of discrimination.¹⁹¹ Article 7 expands on this by asserting that everyone is entitled to equal protection against any discrimination that infringes the UDHR's rights and freedoms.¹⁹² Following article 7's prohibition of discrimination,¹⁹³ article 8 provides for an individual's right to an effective remedy by a competent national tribunal, for acts infringing his or her legal or constitutional rights.¹⁹⁴



¹⁸² Brown G (ed) *The Universal Declaration of Human Rights in the 21st Century: A Living Document in a Changing World* (2016) 34.

¹⁸³ Brown G (ed) *The Universal Declaration of Human Rights in the 21st Century: A Living Document in a Changing World* (2016) 37.

¹⁸⁴ Article 1, UDHR.

¹⁸⁵ Brown G (ed) *The Universal Declaration of Human Rights in the 21st Century: A Living Document in a Changing World* (2016) 37.

¹⁸⁶ Article 1, UDHR.

¹⁸⁷ Article 2, UDHR.

¹⁸⁸ Article 5, UDHR.

¹⁸⁹ Article 5, UDHR.

¹⁹⁰ Article 7, UDHR.

¹⁹¹ Article 7, UDHR.

¹⁹² Article 7, UDHR.

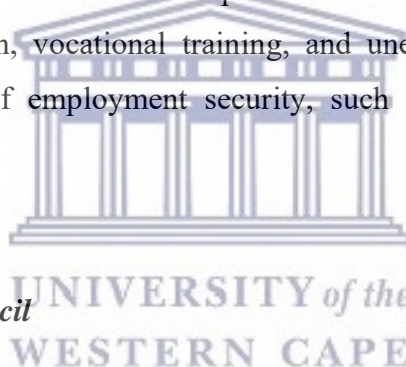
¹⁹³ Article 7, UDHR.

¹⁹⁴ Article 8, UDHR.

The human rights enshrined in article 23 of the UDHR address several aspects of employment rights.¹⁹⁵ Articles 23(1) – (4) comprehensively address the right to work by providing that:

- 1) everyone has the right to work, to free choice of employment, to just and favourable working conditions, and to protection from unemployment;¹⁹⁶
- 2) everyone has the right to equal remuneration for equal work, without regard for discrimination;¹⁹⁷
- 3) everyone who works has the right to just and favourable remuneration that ensures a dignified livelihood for himself and his family, supported when necessary by other forms of social protection;¹⁹⁸ and
- 4) everyone has the freedom to create and join trade unions for the purpose of advancing his or her interests.¹⁹⁹

In a broad sense, the right to work entails the right to seek employment and the right not to be unfairly denied employment.²⁰⁰ The first component considers factors affecting access to employment such as education, vocational training, and unemployment rates.²⁰¹ The latter component considers issues of employment security, such as protection against wrongful termination.²⁰²



2.3.1.2.1. Human Rights Council

Because the UDHR was not intended to be legally binding, no attempts to develop mechanisms for its international implementation were attempted until the 1950s.²⁰³ The Human Rights Council (hereafter “Council”), established by the UN General Assembly on 15 March 2006, succeeded the 60-year-old UN Commission on Human Rights as the primary intergovernmental

¹⁹⁵ Article 23, UDHR.

¹⁹⁶ Article 23(1), UDHR.

¹⁹⁷ Article 23(2), UDHR.

¹⁹⁸ Article 23(3), UDHR.

¹⁹⁹ Article 23(4), UDHR.

²⁰⁰ South African Human Rights Commission (SAHRC) *Promoting the Right to Work of Persons with Disabilities* (2017) 15.

²⁰¹ SAHRC *Promoting the Right to Work of Persons with Disabilities* (2017) 15.

²⁰² SAHRC *Promoting the Right to Work of Persons with Disabilities* (2017) 15.

²⁰³ Humphrey JP ‘The International Bill of Rights: Scope and Implementation’ (1976) 17 *William & Mary Law Review* 529.

organisation responsible for human rights at the UN.²⁰⁴ The Council, which is composed of 47 State delegates, is mandated with enhancing the promotion and protection of human rights worldwide by examining instances of human rights breaches and providing recommendations, and responding to human rights emergencies.²⁰⁵ The Universal Periodic Review (hereafter “Review”) is the Council’s most unique feature. This approach allows for a once-every-four-year examination of the human rights records of all 193 UN member states.²⁰⁶ The Review is a collaborative, state - led process conducted under the supervision of the Council that allows each state to report the steps taken to overcome the challenges hindering the improvement of their country’s human rights situation and comply with international responsibilities.²⁰⁷

2.3.1.2.2. United Nations High Commissioner for Human Rights

The United Nations High Commissioner for Human Rights is the primary UN human rights official.²⁰⁸ The High Commissioner is mandated to investigate significant human rights abuses and to take preventative action.²⁰⁹ It is clear that the UN lacks the authority to implement even the most fundamental human rights norms.²¹⁰ Thus, effective implementation of human rights treaties, which is currently at the center of the UN’s human rights work, requires a strong commitment from all parties, most notably governments.²¹¹ As such, the majority of key human rights treaties include an oversight body tasked with monitoring the treaty’s implementation thereof by the countries that have ratified it.²¹² Individuals whose rights have been violated may register complaints directly with the various human rights treaty committees.²¹³

²⁰⁴ Blanchfield L & Weber MA ‘The United Nations Human Rights Council: Background and Policy Issues’ (2020) *Congressional Research Service* 2.

²⁰⁵ Blanchfield L & Weber MA ‘The United Nations Human Rights Council: Background and Policy Issues’ (2020) *Congressional Research Service* 3.

²⁰⁶ Blanchfield L & Weber MA ‘The United Nations Human Rights Council: Background and Policy Issues’ (2020) *Congressional Research Service* 3.

²⁰⁷ Blanchfield L & Weber MA ‘The United Nations Human Rights Council: Background and Policy Issues’ (2020) *Congressional Research Service* 5.

²⁰⁸ Blanchfield L & Weber MA ‘The United Nations Human Rights Council: Background and Policy Issues’ (2020) *Congressional Research Service* 5.

²⁰⁹ Blanchfield L & Weber MA ‘The United Nations Human Rights Council: Background and Policy Issues’ (2020) *Congressional Research Service* 6.

²¹⁰ Blanchfield L & Weber MA ‘The United Nations Human Rights Council: Background and Policy Issues’ (2020) *Congressional Research Service* 9.

²¹¹ Lasso JA ‘Human Rights in the United Nations: The achievements so far and challenges ahead’ (1996) 1 *The International Journal of Peace Studies* 1.

²¹² Hüfner K *How to file complaints on human rights violations* (2010) 144.

²¹³ Hüfner K *How to file complaints on human rights violations* (2010) 144.

2.3.1.3. International Covenant on Economic, Social and Cultural Rights (1967)

Although having signed it in 1994 already, South Africa only became a state party to the International Covenant on Economic, Social, and Cultural Rights (hereafter “ICESCR”) on 12 January 2015. South Africa ratified the ICESCR 20 years following its signature, and in doing so demonstrated its commitment to being legally bound by its provisions. The ICESCR, along with the previously discussed UDHR, forms part of the International Bill of Human Rights, and guarantees the enjoyment of economic, social, and cultural rights, of which includes but is not limited to fair and just conditions of work;²¹⁴ and the highest attainable standard of health.²¹⁵

Articles 6 to 15 of the ICESCR outline rights to be protected. Article 6 provides for the right to work in a general sense.²¹⁶ Article 6 further upholds state parties' commitment to protect persons' freedom to freely chosen or accepted work, including the right not to be unfairly deprived of work.²¹⁷ Article 7 addresses the individual dimension of the right to work by recognising the right of everyone to enjoy just and favourable conditions of work to ensure remuneration,²¹⁸ safe and healthy working conditions,²¹⁹ and equal opportunity for everyone to be promoted in their employment subject to no considerations other than those of seniority and competence.²²⁰ Furthermore, article 12(1) recognises the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.²²¹ The obligations of state parties to achieve the realisation of these rights are outlined in articles 12(2)(a) – (b).²²² In particular, provision is made for mechanisms to improve all aspects of environmental and industrial hygiene;²²³ the prevention, treatment and control of diseases;²²⁴ as well as the creation of conditions which would allow access to medical service and attention in the event of sickness.²²⁵

²¹⁴ Article 7, United Nations International Covenant on Economic, Social and Cultural Rights (ICESCR) 1967.

²¹⁵ Article 12, ICESCR.

²¹⁶ Article 6, ICESCR.

²¹⁷ Article 6(2), ICESCR.

²¹⁸ Article 7(1)(a), ICESCR.

²¹⁹ Article 7(1)(b), ICESCR.

²²⁰ Article 7(1)(c), ICESCR.

²²¹ Article 12(1), ICESCR.

²²² Article 12(2)(a) – (b), ICESCR.

²²³ Article 12(2)(b), ICESCR.

²²⁴ Article 12(2)(c), ICESCR.

²²⁵ Article 12(2)(d), ICESCR.

Although the ICESCR encompasses a broad scope of rights to be protected, the terms used in the drafting thereof are general in nature and thus have the potential to be misinterpreted. This was considered in the drafting process with the consensus being that the broad phrases used best ensured its longevity.²²⁶ While it was noted that more general language may allow for conflicting interpretations, it was decided that more broadly phrased interpretations would be preferred to avoid not only restricting the scope of the ICESCR but also to avoid conflicting with standards established by specialised agencies.²²⁷ A further shortcoming of the ICESCR is its failure to identify groups other than women and children that may require further protection.²²⁸ Specific consideration ought to have been given to the plight of other vulnerable groups, such as those with physical or mental disabilities.²²⁹ Notably, other vulnerable groups are not expressly excluded from the ICESCR's scope of protection. On the contrary, the rights contained in the ICESCR are that of "everyone".²³⁰ In fact, the only way for this protection to be limited is by virtue of article 2(3) which allows developing countries to determine the extent to which they would guarantee economic rights to non-nationals.²³¹ To strengthen the scope of its protection, article 2(2) prohibits discrimination of any kind on the grounds of including but not limited to race, colour, sex, language or "other status".²³²



2.3.1.3.1. *Optional Protocol to the International Covenant on Economic, Social and Cultural Rights*
(hereafter "OP-ICESCR")

The OP-ICESCR is an international treaty that enables victims of economic, social, and cultural rights violations to bring international complaints forward.²³³ It was adopted by the UN General

²²⁶ Chinkin C 'The Protection of Economic, Social and Cultural Rights Post-Conflict' (2007) *Women's International League for Peace and Freedom* 34.

²²⁷ Chinkin C 'The Protection of Economic, Social and Cultural Rights Post-Conflict' (2007) *Women's International League for Peace and Freedom* 34.

²²⁸ Chinkin C 'The Protection of Economic, Social and Cultural Rights Post-Conflict' (2007) *Women's International League for Peace and Freedom* 14.

²²⁹ Chinkin C 'The Protection of Economic, Social and Cultural Rights Post-Conflict' (2007) *Women's International League for Peace and Freedom* 14.

²³⁰ UN *Fact Sheet No2 (Rev.1): The International Bill of Human Rights* (1996) 2.

²³¹ Article 2(3), ICESCR.

²³² Article 2(2), ICESCR.

²³³ Biglino I & Golay C 'The Optional Protocol to the International Covenant on Economic, Social and Cultural Rights' (2013) *Geneva Academy of International Humanitarian Law and Human Rights* 7.

Assembly on 10 December 2008.²³⁴ Where persons are unable to seek justice through their country's courts for abuses of economic, social, and cultural rights, they may file a complaint with the United Nations Committee on Economic, Social, and Cultural Rights (CESCR) where their country has assented to or ratified the treaty.²³⁵

2.3.1.3.2. United Nations Committee on Economic, Social, and Cultural Rights

(hereafter “UN CESCR”)

The UN CESCR was established in 1985 under ECOSOC Resolution 1985/17.²³⁶ The primary purpose of the establishment of the UN CESCR was the creation of a body that oversees implementation of the ICESCR and its OP-ICESCR through its consideration of reports, individual complaints, inter-state complaints, and inquiry requests.²³⁷ The UN CESCR is composed of 18 independent experts who are acknowledged as having a high moral character and expertise in the field of human rights.²³⁸ Members of the UN CESCR serve four-year terms and are eligible for re-election if state parties to the ICESCR re-nominate them.²³⁹

Among its duties, the UN CESCR is mandated to publish its authoritative guidance, also known as general comments, on the provisions of the ICESCR. General comments may provide substantive guidance on specific treaty provisions or may address broader issues.²⁴⁰ General comments and recommendations not only assist State parties in implementing treaties but can also be utilised to monitor and advocate for full treaty implementation thereby enhancing the

²³⁴ Biglino I & Golay C ‘The Optional Protocol to the International Covenant on Economic, Social and Cultural Rights’ (2013) *Geneva Academy of International Humanitarian Law and Human Rights* 11.

²³⁵ Biglino I & Golay C ‘The Optional Protocol to the International Covenant on Economic, Social and Cultural Rights’ (2013) *Geneva Academy of International Humanitarian Law and Human Rights* 13.

²³⁶ Biglino I & Golay C ‘The Optional Protocol to the International Covenant on Economic, Social and Cultural Rights’ (2013) *Geneva Academy of International Humanitarian Law and Human Rights* 32.

²³⁷ Biglino I & Golay C ‘The Optional Protocol to the International Covenant on Economic, Social and Cultural Rights’ (2013) *Geneva Academy of International Humanitarian Law and Human Rights* 32.

²³⁸ Biglino I & Golay C ‘The Optional Protocol to the International Covenant on Economic, Social and Cultural Rights’ (2013) *Geneva Academy of International Humanitarian Law and Human Rights* 34.

²³⁹ Biglino I & Golay C ‘The Optional Protocol to the International Covenant on Economic, Social and Cultural Rights’ (2013) *Geneva Academy of International Humanitarian Law and Human Rights* 34.

²⁴⁰ Biglino I & Golay C ‘The Optional Protocol to the International Covenant on Economic, Social and Cultural Rights’ (2013) *Geneva Academy of International Humanitarian Law and Human Rights* 32.

enjoyment of particular rights.²⁴¹ The following general comments, which are discussed below, serve as guidelines addressing provisions of the ICESCR.

2.3.1.3.3. General Comment No. 5: Persons with Disabilities (1994)

Even in nations with a relatively high standard of living, persons with disabilities often lack access to the entire spectrum of economic, social, and cultural rights recognised by the ICESCR.²⁴² The international community has therefore regularly emphasised the ICESCR's significance for the human rights of persons with disabilities.²⁴³ Regarding employment, the comment specifically provides that States should actively promote the inclusion of persons with disabilities into the regular labour market.²⁴⁴ Additionally, governments should adopt laws that encourage and regulate flexible and alternative employment arrangements that reasonably meet disabled workers' requirements.²⁴⁵

2.3.1.3.4. General Comment No. 14: The right to the highest attainable standard of health (2000)

As provided for by the ICESCR, health is a fundamental human right that is necessary for the exercise of all other human rights.²⁴⁶ Every human being is entitled to the highest attainable standard of health which enables them to live a dignified life.²⁴⁷ Moreover, the emphasis is placed on the importance of ensuring that the public health sector and commercial suppliers of health services and facilities, adhere to the non-discrimination of individuals with disabilities.²⁴⁸

²⁴¹ Biglino I & Golay C 'The Optional Protocol to the International Covenant on Economic, Social and Cultural Rights' (2013) *Geneva Academy of International Humanitarian Law and Human Rights* 32.

²⁴² Paragraph 1, UN Committee on Economic, Social and Cultural Rights (CESCR) General Comment No.5: Persons with Disabilities (1994) (General Comment 5).

²⁴³ Paragraph 1, UN CESCR General Comment 5.

²⁴⁴ Paragraph 20, UN CESCR General Comment 5.

²⁴⁵ Paragraph 22, UN CESCR General Comment 5.

²⁴⁶ Paragraph 1, UN CESCR General Comment No.14: The right to the highest attainable standard of health (2000) (General Comment 14).

²⁴⁷ Paragraph 2, UN CESCR General Comment 14.

²⁴⁸ Paragraph 26, UN CESCR General Comment 14.

2.3.1.3.5. General Comment No. 20: Non-discrimination in economic, social and cultural rights (2009)

The ICESCR's article 2 prohibits discrimination on the basis of "race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status".²⁴⁹ The inclusion of "other status" suggests that this list is not exhaustive and that further grounds may be included.²⁵⁰ As discrimination may present itself in different forms, a broad interpretation of the ground of "other status" is required to include alternative forms of differentiated treatment which cannot be rationally or factually justified but which are similar to recognised grounds.²⁵¹ These additional grounds are commonly considered when they reflect the experience of vulnerable social groups who have endured and continue to endure marginalisation.²⁵² With regards to the ground of disability, this comment further provides that the denial of reasonable accommodation should be classified as a prohibited form of disability discrimination in national legislation.²⁵³

Explicit mention is made of mental health under the ground of "health status" where it provides that health status refers to the physical and mental health of an individual.²⁵⁴ States parties should ensure that a person's actual or perceived health status does not constitute an impediment to exercising their ICESCR rights and should take measures to remove widespread stigmatisation associated with certain health conditions, such as mental illness, which frequently impair individuals' ability to fully exercise their rights.²⁵⁵

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2.3.1.3.6. General Comment No. 23: The right to just and favourable conditions of work (2016)

Article 7(b) of the ICESCR provides for safe and healthy working conditions.²⁵⁶ Preventing occupational accidents and disease is a critical component of the right to reasonable and

²⁴⁹ Article 2, ICESCR.

²⁵⁰ Paragraph 15, UN CESCR General Comment No.20: Non-discrimination in economic, social and cultural rights (2009) (General Comment 20).

²⁵¹ Paragraph 27 and 28, UN CESCR General Comment 20.

²⁵² Paragraph 27, UN CESCR General Comment 20.

²⁵³ Paragraph 28, UN CESCR General Comment 20.

²⁵⁴ Paragraph 33, UN CESCR General Comment 20.

²⁵⁵ Paragraph 33, UN CESCR General Comment 20.

²⁵⁶ Article 7(1)(b), ICESCR.

favourable working conditions, and is also inextricably linked to other Covenant rights, most notably the right to the highest attainable standard of physical and mental health.²⁵⁷ To achieve this, states parties are obligated to establish a national strategy aimed at preventing accidents and occupational health injuries by minimising dangers in the workplace.²⁵⁸

National policies should encompass all spheres of economic activity and all worker categories.²⁵⁹ Furthermore, unique dangers to the safety and health of workers with disabilities should be taken into account, without discriminating against them.²⁶⁰ Without fear of retaliation, workers should be allowed to evaluate working conditions.²⁶¹ Additionally, the national strategy should address the relationship between the primary elements of work and workers' physical and mental capacities.²⁶² It is not unusual for workers with disabilities to require special accommodations to ensure that they are able to enjoy the same right to reasonable and favorable working conditions as others.²⁶³ They should thus benefit from an accessible work environment and should not be denied reasonable accommodations such as work adaptations or flexible work arrangements.²⁶⁴



2.3.2. International Labour Organisation

The ILO was founded in 1919 on the premise that universal and permanent peace can only be achieved through social justice.²⁶⁵ In 1946, the ILO was designated as a UN specialised agency.²⁶⁶ Among its objectives are:

- i. the promotion and realisation of workplace norms, fundamental principles and rights;
 - ii. the expansion of opportunities for women and men to obtain decent work and income;
- and

²⁵⁷ Paragraph 25, UN CESCR General Comment No.23: The right to the just and favourable conditions of work (2016) (General Comment 23).

²⁵⁸ Paragraph 25, UN CESCR General Comment 23.

²⁵⁹ Paragraph 26, UN CESCR General Comment 23.

²⁶⁰ Paragraph 26, UN CESCR General Comment 23.

²⁶¹ Paragraph 26, UN CESCR General Comment 23.

²⁶² Paragraph 27, UN CESCR General Comment 23.

²⁶³ Paragraph 47, UN CESCR General Comment 23.

²⁶⁴ Paragraph 47, UN CESCR General Comment 23.

²⁶⁵ Maul D *The International Labour Organization: 100 Years of Global Social Policy* (2019) 54.

²⁶⁶ Maul D *The International Labour Organization: 100 Years of Global Social Policy* (2019) 54.

- iii. the expansion of the coverage and quality of social protection for all.²⁶⁷

Essentially, the ILO works to advance the creation of decent labour and economic and working circumstances that enable workers and people in business, to participate in lasting peace, prosperity, and progress.²⁶⁸

2.3.2.1. Discrimination (Employment and Occupation) Convention (1958)

(hereafter “Discrimination Convention”)

The Discrimination Convention establishes principles aimed at fostering equality of treatment, opportunities, and possibilities for employment and work, as well as prohibiting and precluding discrimination in employment and work.²⁶⁹ Its fundamental purpose is to implement national measures and procedures in order to eradicate disparities in treatment, opportunities, occupation, and employment, as well as to repeal or change any laws that are inconsistent with this policy.²⁷⁰ South Africa ratified the Discrimination Convention on 5 March 1997.²⁷¹

An inclusive two-fold definition of discrimination is provided through articles 1(a) and (b) of the Discrimination Convention.²⁷² First, article 1(a) provides that discrimination includes “any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin, which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation”²⁷³ whereafter article 1(b) provides for: “such other distinction, exclusion or preference which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation as may be

²⁶⁷ Maul D *The International Labour Organization: 100 Years of Global Social Policy* (2019) 62.

²⁶⁸ Maul D *The International Labour Organization: 100 Years of Global Social Policy* (2019) 62.

²⁶⁹ Laci A, Maxheluka A & Rusi I ‘Equality at Work and Discrimination in Employment and Occupation’ (2017) 7 *Journal of Educational and Social Research* 67.

²⁷⁰ Laci A, Maxheluka A & Rusi I ‘Equality at Work and Discrimination in Employment and Occupation’ (2017) 7 *Journal of Educational and Social Research* 67.

²⁷¹ International Labour Organisation ‘Ratifications of C111 - Discrimination (Employment and Occupation) Convention, 1958 (No. 111)’ available at https://www.ilo.org/dyn/ENT_ID:312256 (accessed 19 June 2021).

²⁷² Articles 1(a) and (b), ILO *Discrimination (Employment and Occupation) Convention* (1958).

²⁷³ Article 1(a), *Discrimination (Employment and Occupation) Convention*.

determined by the Member concerned after consultation with representative employers' and workers' organisations, where such exist, and with other appropriate bodies.”²⁷⁴ Although no explicit mention is made of mental health, article 1(b) effectively allows for the inclusion of mental health should it have the effect of impairing the equality of opportunity or treatment in employment or occupation.²⁷⁵

South Africa's legal obligations arise from article 2, which details members' responsibilities.²⁷⁶ According to article 2, each member undertakes to declare and pursue a national policy designed to promote equality of opportunity and treatment in respect of employment and occupation, with the view to eliminate all discrimination in respect thereof.²⁷⁷ Furthermore, this is to be achieved through methods appropriate to national conditions and practice.²⁷⁸ South Africa is thus required to establish and align national policies to ensure equal treatment and opportunity.

2.3.2.2. Occupational Safety and Health Convention (1981)

(hereafter “*OSH Convention*”)

The OSH Convention was promulgated with the intent of establishing a consistent national occupational safety and health policy, as well as to provide guidance as to the actions which governments and businesses ought to take to promote occupational safety and health; and to improve working conditions.²⁷⁹ South Africa ratified the OSH Convention on 18 February 2003.²⁸⁰

²⁷⁴ Article 1(b), Discrimination (Employment and Occupation) Convention.

²⁷⁵ Article 1(b), Discrimination (Employment and Occupation) Convention.

²⁷⁶ Article 2, Discrimination (Employment and Occupation) Convention.

²⁷⁷ Article 2, Discrimination (Employment and Occupation) Convention.

²⁷⁸ Article 2, Discrimination (Employment and Occupation) Convention.

²⁷⁹ Hilgert J ‘The future of workplace health and safety as a fundamental human right’ (2013) 34 *Comparative Labor Law & Policy Journal* 724.

²⁸⁰ Hilgert J ‘The future of workplace health and safety as a fundamental human right’ (2013) 34 *Comparative Labor Law & Policy Journal* 724.

Article 3(e) of the OSH Convention defines the term “health”.²⁸¹ According to article 3(e), the term health, in relation to work, indicates not merely the absence of disease or infirmity; but also includes the physical and mental elements affecting health which are directly related to safety and hygiene at work.²⁸² The recognition of mental health in the workplace is also noted in article 5(b) which provides that the effect of organisation of work processes to both the physical and mental capabilities of workers’ should be considered.²⁸³ Moreover, mental health is additionally recognised under articles 11(d) and (e), both of which refer to “any other injuries to health which arise in the course of or in connection with work”.²⁸⁴ From these provisions, mental health is not expressly excluded.

2.3.2.3. Code of Good Practice on the Managing of Disability in the Workplace (2001)

(hereafter “*Disability Code*”)

The ILO's Code of Good Practice on the Managing of Disability in the Workplace (Disability Code) was promulgated to assist employers in implementing a constructive plan for addressing disability-related concerns in the workplace.²⁸⁵ It is to be understood in light of national circumstances and applied in conformity with applicable national law and practice.²⁸⁶ Additionally, it advocates for the protection of individuals with disabilities.²⁸⁷ The Disability Code promotes and safeguards equitable employment opportunities for persons with disabilities. It also promotes safe, healthy, and accessible work environments for these individuals.²⁸⁸ It recognises that disabilities can arise at any point in a person's life and can have either a significant or minor impact on an individual's capacity to work and contribute to society.²⁸⁹

²⁸¹ Article 3(e), ILO Occupational Safety and Health Convention (1981).

²⁸² Article 3(e), Occupational Safety and Health Convention.

²⁸³ Article 5(b), Occupational Safety and Health Convention.

²⁸⁴ Articles 11(d) and (e), Occupational Safety and Health Convention.

²⁸⁵ Preface, ILO Code of Good Practice for Managing Disability in the Workplace (2001) (ILO Disability Code).

²⁸⁶ Preface, ILO Disability Code.

²⁸⁷ ILO Disability Code.

²⁸⁸ Preface, ILO Disability Code.

²⁸⁹ Item 1.1, ILO Disability Code.

2.3.2.4. Convention for the Vocational Rehabilitation and Employment (Disabled Persons) (1983)

(hereafter “VRE Convention”)

The ILO has specifically articulated its position on disability employment through the VRE Convention which advocates for the equality and equal treatment of disabled people in the workplace and further applies to all categories of persons with disabilities.²⁹⁰ The VRE Convention is a promotional convention in the sense that it establishes objectives and outlines the fundamental principles to be followed in achieving them.²⁹¹ Owing to the fact that its rules are flexible in the realisation of its objectives, due consideration is given to the unique circumstances of each member state.²⁹² The provisions of the VRE Convention are applicable in all member states, irrespective of the stage at which their vocational rehabilitation and employment operations for disabled persons have progressed to.²⁹³

According to the VRE Convention, a “disabled person” is “an individual whose possibilities for obtaining, retaining, and advancing in suitable employment are significantly diminished as a result of a duly recognised... mental impairment”.²⁹⁴ The use of this definition of a “disabled person” expanded on essential provisions of preceding treaties relating to vocational training mainstreaming, equality of opportunity, non - discrimination in remuneration for equal effort, and research promotion.²⁹⁵ Furthermore, provision is made for the steps that must be taken at the national level to carry out the policy.²⁹⁶ In doing so, guidance is provided for the laying of the foundation of national legislation, consequently encouraging governments to seek methods to assist people with disabilities in adapting to labour market requirements.²⁹⁷

²⁹⁰ Articles 1(4) and 4, ILO Vocational Rehabilitation and Employment (Disabled Persons) Convention (1983).

²⁹¹ O’Reilly A *The Right To Decent Work of Persons with Disabilities: Working Paper* (2003), 19.

²⁹² O’Reilly A *The Right To Decent Work of Persons with Disabilities: Working Paper* (2003), 19.

²⁹³ O’Reilly A *The Right To Decent Work of Persons with Disabilities: Working Paper* (2003), 19.

²⁹⁴ Article 1(1), Vocational Rehabilitation and Employment (Disabled Persons) Convention.

²⁹⁵ Article 1(1), Vocational Rehabilitation and Employment (Disabled Persons) Convention.

²⁹⁶ Article 1(1), Vocational Rehabilitation and Employment (Disabled Persons) Convention.

²⁹⁷ O’Reilly A *The Right To Decent Work of Persons with Disabilities: Working Paper* (2003), 19.

2.3.3. African Regional Conventions

The Organisation of African Unity (hereafter “OAU”) was founded on 25 May 1963 with the objective of promoting African unity and solidarity, defending members' sovereignty, eradicating all forms of colonialism, promoting international cooperation in accordance with the UN Charter and the UDHR, and co-ordinating Member States' economic, diplomatic, educational, and cultural activities.²⁹⁸

The 1999 Sirte Declaration advocated for the establishment of an African Union with the purpose of expediting the continent's process of integration thus enabling effective participation in the global economy and social, economic, and political challenges.²⁹⁹ As a result, the OAU was legally transformed into the African Union (hereafter “AU”) on 26 May 2001.³⁰⁰

2.3.3.1. African Charter on Human and Peoples' Rights (1981)

The African Charter on Human and Peoples' Rights (hereafter “African Charter”) was adopted following numerous conferences by the UN, African governments, and non-governmental organisations (hereafter “NGOs”). These conferences focused on the establishment of an African regional system to promote and protect human rights and fundamental freedoms considering international standards and regional experiences.³⁰¹ The African Charter outlines a series of rights and responsibilities that should always be upheld.³⁰² Additionally, the African Commission was established to oversee its implementation.³⁰³

²⁹⁸ Adenyini O, Opara NM & Adeyemo ‘African Union and Development’ (2016) 5 *Journal of African Union Studies* 68.

²⁹⁹ Adenyini O, Opara NM & Adeyemo ‘African Union and Development’ (2016) 5 *Journal of African Union Studies* 71.

³⁰⁰ Adenyini O, Opara NM & Adeyemo ‘African Union and Development’ (2016) 5 *Journal of African Union Studies* 71.

³⁰¹ D’Sa RM ‘The African Charter on Human and Peoples’ Rights: Problems and Prospects for Regional Action’ (1987) 10 *Australian Year Book of International Law* Online 104.

³⁰² D’Sa RM ‘The African Charter on Human and Peoples’ Rights: Problems and Prospects for Regional Action’ (1987) 10 *Australian Year Book of International Law* Online 105.

³⁰³ D’Sa RM ‘The African Charter on Human and Peoples’ Rights: Problems and Prospects for Regional Action’ (1987) 10 *Australian Year Book of International Law* Online 105.

South Africa ratified the African Charter on 9 July 1996.³⁰⁴ Article 1 of Chapter 1 immediately requires member states to recognise the Charter's rights, obligations, and freedoms and to commit to enacting legislation or other measures to give effect to them.³⁰⁵ Article 2 expands on this by noting that every individual is entitled to all of the Charter's rights and freedoms, without regard for any distinction.³⁰⁶ The state is thus prohibited from discriminating against an individual based on a list of grounds, which is not exhaustive.³⁰⁷ Authorities are also obligated to provide the same level of protection to everyone.³⁰⁸ Article 5 safeguards an individual's right to be treated with respect for the inherent dignity of a human being. Additionally, it prohibits all forms of human degradation, most notably degrading treatment.³⁰⁹ Article 15 makes clear reference to the right to work, providing that every individual has the right to work under equitable and satisfactory conditions and to get equal remuneration for equal work.³¹⁰ Essentially, the state has a responsibility to ensure that employers protect their employees' health and safety.³¹¹ Furthermore, article 16 provides that everyone has the right to reach the best possible state of physical and mental health.³¹² While a state cannot guarantee everyone's physical and mental well - being, it can and should establish an environment that promotes rather than inhibits the enjoyment of good health.



2.3.3.1.1. Protocol to the African Charter on Human and Peoples' Rights on the Rights of Persons with Disabilities in Africa (2018)
(hereafter "*Disability Protocol*")

The Disability Protocol recognises and acknowledges the prevalence of disability issues in Africa.³¹³ Through the Disability Protocol, individuals with disabilities in Africa now have a

³⁰⁴ African Union 'African Charter on Human and Peoples' Rights' available at

https://au.int/sites/default/files/treaties/36390-sl-african_charter_on_human (accessed 3 July 2021).

³⁰⁵ Article 1, Organisation of African Unity (OAU) African Charter on Human and Peoples' Rights 1981 (African Charter).

³⁰⁶ Article 1, African Charter.

³⁰⁷ Gittleman R 'The African Charter on Human and Peoples' Rights: A Legal Analysis' (1982) 22 *Virginia Journal of International Law* 683.

³⁰⁸ Gittleman R 'The African Charter on Human and Peoples' Rights: A Legal Analysis' (1982) 22 *Virginia Journal of International Law* 683.

³⁰⁹ Article 5, African Charter.

³¹⁰ Article 15, African Charter.

³¹¹ Article 15, African Charter.

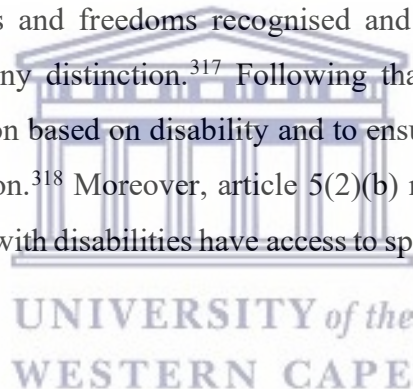
³¹² Article 16, African Charter.

³¹³ African Union *Protocol to the African Charter on human and Peoples' Rights on the Rights of Persons with Disabilities in Africa* (2018) (Disability Protocol).

mechanism to hold their governments accountable for the lack of support and inclusion they face.³¹⁴

The primary purpose of the Disability Protocol, as per article 2, is “to promote, protect and ensure the full and equal enjoyment of all human and people’s rights by all persons with disabilities and to ensure respect for their inherent dignity”.³¹⁵ Persons with disabilities are defined in article 1 of the Disability Protocol as those who have physical, mental, psychosocial, intellectual, neurological, developmental, or other sensory impairments that, when combined with environmental, behavioral, or other barriers, prevent them from participating fully and effectively in society on an equal footing with others.³¹⁶

Article 5(1) addresses non-discrimination, asserting that every person with a disability is entitled to the enjoyment of the rights and freedoms recognised and provided for in the Disability Protocol, without regard for any distinction.³¹⁷ Following that, article 5(2)(a) requires state parties to prohibit discrimination based on disability and to ensure equitable and effective legal protection against discrimination.³¹⁸ Moreover, article 5(2)(b) mandates member states to take steps to ensure that individuals with disabilities have access to specific procedures for eradicating discrimination.³¹⁹



The right to work is extensively addressed in article 19 of the Disability Protocol.³²⁰ Article 19(1) provides that every person with a disability has the right to decent work, to just and favourable conditions of work and to protection against unemployment.³²¹ The obligations placed on state parties are outlined in article 19(2) which provide that they shall take effective and appropriate

³¹⁴ Disability Protocol.

³¹⁵ Article 2, Disability Protocol.

³¹⁶ Article 1, Disability Protocol.

³¹⁷ Article 5(1), Disability Protocol.

³¹⁸ Article 5(2)(a), Disability Protocol.

³¹⁹ Article 5(2)(b), Disability Protocol.

³²⁰ Article 19, Disability Protocol.

³²¹ Article 19(1), Disability Protocol.

measures to facilitate full enjoyment by persons with disabilities of this right on an equal basis with others, by:

- a) Prohibiting discrimination on the basis of disability with regard to all matters concerning all forms of employment, including employment opportunities, vocational training, conditions of recruitment, hiring and employment, continuance of employment, promotion, career advancement and safe and healthy working conditions;³²²
- b) Protecting the rights of persons with disabilities, on an equal basis with others, to just and favourable conditions of work and the right by persons with disabilities to exercise their labour and trade union rights;³²³
- c) Promoting opportunities for persons with disabilities to initiate self-employment, entrepreneurship and to access financial services;³²⁴
- d) Employing persons with disabilities in the public sector, including by reserving and enforcing minimum job-quotas for employees with disabilities;³²⁵
- e) Promoting the employment of person with disabilities in the private sector through appropriate policies and measures, including through the use of specific measures such as tax incentives;³²⁶
- f) Ensuring that reasonable accommodation is provided to persons with disabilities in the workplace;³²⁷ and
- g) Ensuring that employees with disabilities or those who become disabled are not unfairly dismissed from employment on the basis of their disability.³²⁸

The Disability Protocol therefore assists state parties by providing clear and defined obligations to be fulfilled.

³²² Article 19(2)(a), Disability Protocol.

³²³ Article 19(2)(b), Disability Protocol.

³²⁴ Article 19(2)(c), Disability Protocol.

³²⁵ Article 19(2)(d), Disability Protocol.

³²⁶ Article 19(2)(e), Disability Protocol.

³²⁷ Article 19(2)(f), Disability Protocol.

³²⁸ Article 19(2)(g), Disability Protocol.

2.4. CONCLUSION

Establishing legislative standards and procedures is fundamental in promoting and protecting human rights.³²⁹ Fortunately, the scope of topics covered by such agreements have expanded.³³⁰ International agreements are however only as effective as the parties who sign them.³³¹ While many states are *prima facie* compliant with majority of international agreements, national implementation and compliance with international agreements are not always effective, and what implementation occurs, varies significantly between countries.³³²

Under section 39 of the Constitution, South African courts, tribunals and forums are mandated to consider international law when interpreting the Bill of Rights.³³³ The chapters following will illustrate the approach of South Africa in its attempts to do so.



³²⁹ Jacobson HK & Weiss EB 'National Implementation and Compliance with International Accords' (1990) 44 *Social Science Research Council* 31.

³³⁰ Jacobson HK & Weiss EB 'National Implementation and Compliance with International Accords' (1990) 44 *Social Science Research Council* 31.

³³¹ Jacobson HK & Weiss EB 'National Implementation and Compliance with International Accords' (1990) 44 *Social Science Research Council* 31.

³³² Jacobson HK & Weiss EB 'National Implementation and Compliance with International Accords' (1990) 44 *Social Science Research Council* 31.

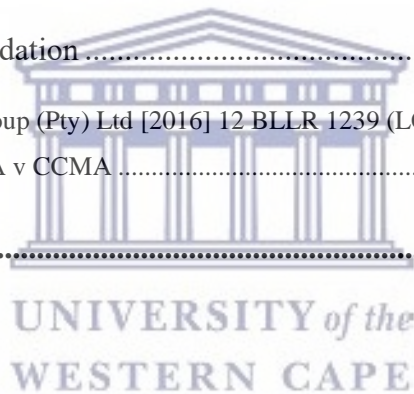
³³³ Section 39(1)(b), Constitution.

CHAPTER 3:

SOUTH AFRICA'S NATIONAL LEGISLATIVE FRAMEWORK REGULATING MENTAL HEALTH IN THE WORKPLACE

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3.1. INTRODUCTION

Employers and employees are legally bound by the employment relationship.³³⁴ Such a relationship exists when an individual performs work or provides services under specified conditions in exchange for compensation.³³⁵ The employment relationship establishes reciprocal rights and obligations between the employee and the employer³³⁶ and is the primary mechanism through which workers obtain employment rights and benefits.³³⁷ South Africa has rather detailed employment legislation which provides for, and regulates, various rights and obligations in the workplace. This includes the Labour Relations Act 66 of 1995, Basic Conditions of Employment Act 75 of 1997 and the Employment Equity Act 55 of 1998, amongst others.

Against the aforesaid background and given South Africa's international obligations discussed in the previous chapter, chapter three will provide an overview of South Africa's national legislative framework in so far as addressing mental health concerns in the workplace. This will include a discussion on how courts have addressed such issues in the workplace. As part of the aforesaid discussion, the provision of reasonable accommodation will also be discussed.



³³⁴ International Labour Organisation (ILO) 'Employment Relationship' available at http://www.ilo.int/ifpdial/areas-of-work/labour-law/WCMS_CON_TXT_IFPDIAL_EMPREL_EN/lang--en/index.htm (accessed 2 August 2021).

³³⁵ International Labour Organisation (ILO) 'Employment Relationship' available at http://www.ilo.int/ifpdial/areas-of-work/labour-law/WCMS_CON_TXT_IFPDIAL_EMPREL_EN/lang--en/index.htm (accessed 2 August 2021).

³³⁶ International Labour Organisation (ILO) 'Employment Relationship' available at http://www.ilo.int/ifpdial/areas-of-work/labour-law/WCMS_CON_TXT_IFPDIAL_EMPREL_EN/lang--en/index.htm (accessed 2 August 2021).

³³⁷ International Labour Organisation (ILO) 'Employment Relationship' available at http://www.ilo.int/ifpdial/areas-of-work/labour-law/WCMS_CON_TXT_IFPDIAL_EMPREL_EN/lang--en/index.htm (accessed 2 August 2021).

3.2. Constitution of the Republic of South Africa, 1996

3.2.1. Background

Exploitation of labour during Apartheid was the societal norm in South Africa at the time.³³⁸ Apartheid prospered on cheap labour, with very little protection for workers, resulting in job reservation, grossly unequal pay and widespread discrimination.³³⁹ There was thus an urgent need to provide comprehensive protection to a group of persons which had historically been vulnerable.

The enactment of first the interim Constitution of 1993,³⁴⁰ and thereafter the final Constitution in 1996,³⁴¹ was required to not only recognise the injustices of the past, but also to reiterate that unification in diversity was the manner in which South Africa was proceeding forward.³⁴² The principle of constitutional supremacy guarantees that the Constitution remains South Africa's supreme law, thus rendering any law or conduct that conflicts with it invalid.³⁴³ The adoption of the Constitution was aimed at healing the divisions of the past and establishing a society based on democratic values, social justice and fundamental human rights.³⁴⁴ The Constitution's purpose was to lay foundations for a democratic society based on the principle that every citizen is protected by law and to improve the quality of life of all citizens.³⁴⁵ Lastly, the Constitution sought to free the potential of all persons, something which was impossible under the previous legislative rule.³⁴⁶

Constitutional supremacy and its importance is first mentioned in section 1 of the Constitution which provides that South Africa is a republic founded on the value thereof.³⁴⁷ Section 2 expands

³³⁸ Constitutional Court of South Africa 'Workers' Rights' available at <https://www.concourt.org.za/index.php/workers-rights> (accessed 9 August 2021).

³³⁹ Constitutional Court of South Africa 'Workers' Rights' available at <https://www.concourt.org.za/index.php/workers-rights> (accessed 9 August 2021).

³⁴⁰ Act 200 of 1993.

³⁴¹ Constitution of the Republic of South Africa, 1996.

³⁴² Preamble, Constitution.

³⁴³ Section 2, Constitution.

³⁴⁴ Preamble, Constitution.

³⁴⁵ Preamble, Constitution.

³⁴⁶ Preamble, Constitution.

³⁴⁷ Section 1, Constitution. "The Republic of South Africa is one, sovereign, democratic state founded on the following values: a) Human dignity, the achievement of equality and the advancement of human rights and

thereon and provides that the Constitution is thus the supreme law and any law or conduct inconsistent therewith is invalid.³⁴⁸ The Constitution is the supreme authority for enacting laws and determining what constitutes lawful behaviour.³⁴⁹ All legislation which fails to uphold and protect the rights contained in the Constitution may therefore be reviewed and declared unconstitutional.

3.2.2. The right to equality (section 9)

The right to equality is a fundamental human right and provided for in section 9 of the Constitution.³⁵⁰ The right to equality is one of the cornerstones of the Constitution, which further emphasises the importance thereof.³⁵¹

Section 9 provides that everyone is equal before the law and furthermore has the right to equal protection and benefit of the law.³⁵² Section 9(2) expands on the notion of equality and provides that it is inclusive of the full and equal enjoyment of all rights and freedoms.³⁵³ In addition, provision is made for legislative and other measures designed to protect or advance those disadvantaged by unfair discrimination, to be taken.³⁵⁴ Moreover, section 9 prohibits unfair discrimination against anyone based on one or more of the listed grounds contained in section 9(3) of which include race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.³⁵⁵ Section 9(4) provides that national legislation should be enacted to prevent or prohibit unfair discrimination.³⁵⁶

freedoms; b) Non-racialism and non-sexism; c) Supremacy of the constitution and the rule of law; d) Universal adult suffrage, a national common voters roll, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness”.

³⁴⁸ Section 2, Constitution.

³⁴⁹ Section 2, Constitution.

³⁵⁰ Section 9, Constitution.

³⁵¹ Section 1, Constitution.

³⁵² Section 9, Constitution.

³⁵³ Section 9(2), Constitution.

³⁵⁴ Section 9(2), Constitution.

³⁵⁵ Section 9(3), Constitution.

³⁵⁶ Section 9(4), Constitution.

In *Prinsloo v Van der Linde and Others*³⁵⁷ the Constitutional Court (CC) interpreted the term "discrimination" to include a negative connotation referring to the unequal treatment of people based on their features or characteristics.³⁵⁸ Section 9, the equality clause, aims to prohibit the unfair treatment of people or groups.³⁵⁹ As held in the case of *Harksen v Lane*,³⁶⁰ discrimination is unfair if it impairs, or is likely to impair, an individual's fundamental human dignity or adversely impacts them in any comparable serious way.³⁶¹ Furthermore, the court in the case of *Minister of Finance v Van Heerden*³⁶² held that achieving equality is a central tenet of the South African Constitution.³⁶³

When referring to equality, it must be noted that both formal and substantive equality exists.³⁶⁴ Formal equality assumes that all South Africans are equal rights holder and, as such, any discriminating legislation is unconstitutional and void.³⁶⁵ Notably, formal equality does not recognise the consequences of the socio - economic inequities occasioned by the apartheid era.³⁶⁶ Formal equality further conceals the fact that there is a lack of equality by declaring that all humans are "equal before the law".³⁶⁷ As a result, the formal law treats all individuals equally regardless of their particular circumstances.³⁶⁸ Substantive equality, as defined by the CC, is equality that takes into consideration the unique circumstances of people or categories of persons, thereby ensuring equality.³⁶⁹ Substantive equality requires that a court or the state investigate a category of individuals or individual's actual socio - economic circumstances to determine whether their right to equality is being upheld.³⁷⁰ The Constitution ventures beyond the concept of formal equality, which simply allows for similar treatment, to the concept of substantive equality, which acknowledges the existence of social differentiation as a result of historical injustices.

³⁵⁷ *Prinsloo v Van der Linde and Another* (1997) 3 SA 1012 (CC), para 31.

³⁵⁸ *Prinsloo v Van der Linde and Another* (1997) 3 SA 1012 (CC), para 31.

³⁵⁹ Deane T 'The Constitutional Dimensions of Affirmative Action in SA' (2011) *PELJ* 211.

³⁶⁰ *Harksen v Lane No and Others* (1997) 11 BCLR 1489 (CC).

³⁶¹ *Harksen v Lane No and Others* (1997) 11 BCLR 1489 (CC), para 50.

³⁶² *Minister of Finance and other v Van Heerden* 2004 (11) BCLR 1125 (CC).

³⁶³ *Minister of Finance and other v Van Heerden* 2004 (11) BCLR 1125 (CC) 1137.

³⁶⁴ Deane T 'The Constitutional Dimensions of Affirmative Action in SA' (2011) *PELJ* 313.

³⁶⁵ Deane T 'The Constitutional Dimensions of Affirmative Action in SA' (2011) *PELJ* 313.

³⁶⁶ Deane T 'The Constitutional Dimensions of Affirmative Action in SA' (2011) *PELJ* 313.

³⁶⁷ Deane T 'The Constitutional Dimensions of Affirmative Action in SA' (2011) *PELJ* 313.

³⁶⁸ Deane T 'The Constitutional Dimensions of Affirmative Action in SA' (2011) *PELJ* 313.

³⁶⁹ Deane T 'The Constitutional Dimensions of Affirmative Action in SA' (2011) *PELJ* 313.

³⁷⁰ Deane T 'The Constitutional Dimensions of Affirmative Action in SA' (2011) *PELJ* 313.

Both affirmative action and protection against unfair discrimination have functioned as the engine for realising equality in the workplace.³⁷¹ The CC justifies affirmative action by stating that not all differentiations will be barred as discriminatory.³⁷² It argued that whether or not society will tolerate discrimination is determined by the discrimination's objective and method of implementation.³⁷³ Affirmative action policies are justified by the intended outcome, namely the eventual attainment of substantive equality for all members of society, regardless of race, gender, disability, or any other inherent personal feature.³⁷⁴

3.2.3. The right to dignity (section 10)

Human beings have the right to be treated with dignity and respect.³⁷⁵ Section 10 of the Constitution provides that everyone has inherent dignity and the right to have their dignity respected and protected.³⁷⁶ Consideration of human dignity is essential in achieving an objective and normative value system in that the realisation of the right to human dignity is dependent on the realisation of all other socio – economic rights.³⁷⁷ Recognising the right to dignity demonstrates an appreciation for the intrinsic worth of human beings.³⁷⁸ Courts have also emphasised the importance of human dignity with Langa J in *S v Makwanyane and Another*³⁷⁹ noting that the value of human dignity had been diminished by decades of human rights violations committed during the apartheid era.³⁸⁰ The court in *Minister of Home Affairs v Fourie*³⁸¹ emphasised the significance of human dignity by outlining its role in equality legislation.³⁸² In this case, Cameron AJ held that where it is necessary to give effect to a right contained in the Constitution, a court must apply or develop the common law to the extent that legislation does not already give effect to it.³⁸³

³⁷¹ Deane T 'The Constitutional Dimensions of Affirmative Action in SA' (2011) *PELJ* 313.

³⁷² *City Council of Pretoria v Walker* (CCT8/97) [1998] ZACC 1, para 26.

³⁷³ *City Council of Pretoria v Walker* (CCT8/97) [1998] ZACC 1, para 46.

³⁷⁴ Deane T 'The Constitutional Dimensions of Affirmative Action in SA' (2011) *PELJ* 313.

³⁷⁵ Van den Berg J 'Human Rights Day: Your right to human dignity' available at <https://www.phfirms.co.za/nvr/NewsResources/NewsArticle.aspx?ArticleID=2352> (accessed 5 August 2021).

³⁷⁶ Constitution of the Republic of South Africa 1996, section 10.

³⁷⁷ Van den Berg J 'Human Rights Day: Your right to human dignity' available at <https://www.phfirms.co.za/nvr/NewsResources/NewsArticle.aspx?ArticleID=2352> (accessed 5 August 2021).

³⁷⁸ Van den Berg J 'Human Rights Day: Your right to human dignity' available at <https://www.phfirms.co.za/nvr/NewsResources/NewsArticle.aspx?ArticleID=2352> (accessed 5 August 2021).

³⁷⁹ *S v Makwanyane and Another* (CCT3/94) [1995] ZACC 3.

³⁸⁰ *S v Makwanyane and Another* (CCT3/94) [1995] ZACC 3, para 218.

³⁸¹ *Minister of Home Affairs and Another v Fourie and Others* 2006 (1) SA 524 (CC).

³⁸² *Minister of Home Affairs and Another v Fourie and Others* 2006 (1) SA 524 (CC), para 13.

³⁸³ *Minister of Home Affairs and Another v Fourie and Others* 2006 (1) SA 524 (CC), para 13.

3.2.4. The right to fair labour practices (section 23)

The Constitution enshrines the fundamental rights of South African citizens, as employees, to not only health and safety at work, but also to fair labour relations.³⁸⁴ The right to health and safety of employees, as well as the accompanying duty of care imposed on employers to maintain health and safety, are enshrined in section 23(1) of the Constitution.

The right to fair labour practices is also provided for in section 23(1) of the Constitution.³⁸⁵ Fair labour practices necessitate the right of employees to work in environments that are safe and free of hazards to their health or likelihood of injury.³⁸⁶ The right to fair labour practices is encompassed by an employer's duty of care and responsibility to provide a safe working environment for its employees.³⁸⁷ Where an employer is found to have violated their constitutional duty of care, employees may be entitled to constitutional damages.³⁸⁸

Section 23 of the Constitution thus establishes a fundamental framework within which labour legislation must be understood,³⁸⁹ and promotes the fundamental values of fairness at individual levels, freedom of association and the right to organise, collective bargaining and the right to strike.³⁹⁰ This provision allows persons with disabilities to actively participate in and contribute to society by ensuring that everyone is entitled to fair labour practices.

Both sections 9 and 23 of the Constitution afford persons with fundamental rights, and accordingly mandates the government to enact legislation to address the right contained in these sections. Therefore, to best give effect to the rights within the employment sector, legislation including the Labour Relations Act, Employment Equity Act, Basic Conditions of Employment Act and the Occupational Health and Safety Act was promulgated.

³⁸⁴ Constitution, section 23(1).

³⁸⁵ Constitution, section 23(1).

³⁸⁶ Constitution, section 23(1).

³⁸⁷ *Piliso v Old Mutual Life Assurance Co (SA) Ltd & Others* [2007] JOL 18897 (LC), para 26.

³⁸⁸ *Piliso v Old Mutual Life Assurance Co (SA) Ltd & Others* [2007] JOL 18897 (LC), para 93.

³⁸⁹ Du Toit D, Godfrey S & Cooper C et al *Labour Relations Law* 6 ed (2015) 75.

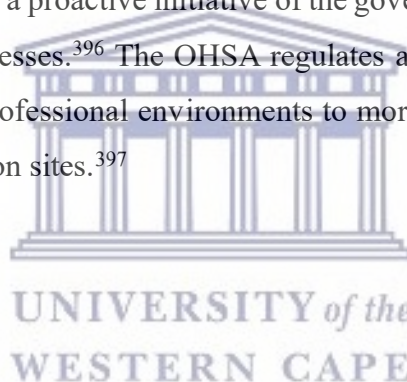
³⁹⁰ Du Toit D, Godfrey S & Cooper C et al *Labour Relations Law* 6 ed (2015) 75.

3.3. Occupational Health and Safety Act 85 of 1993.

3.3.1. Introduction

An environment that is not harmful to one's health or well-being is a right which is afforded to everyone through the provisions in section 24(a) of the of the Constitution.³⁹¹ However, according to the ILO, there are more than 2.78 million deaths and 374 million non-fatal injuries and illnesses caused by occupational accidents or diseases each year.³⁹² Keeping employees healthy and safe at work by reducing occupational injuries had thus become a priority for many employers, worldwide.³⁹³ The health and safety of South African employees is regulated by the Health and Safety Act 85 of 1993 (hereafter "OHSA").³⁹⁴ To facilitate the compliance with minimum requirements, there are international standards which are introduced for the purpose of clarifying what is expected of employers.³⁹⁵

The OHSA can be thought of as a proactive initiative of the government to prevent and eliminate work-related accidents and illnesses.³⁹⁶ The OHSA regulates and controls health and safety in all workplaces, from regular professional environments to more hazardous workplaces such as industrial plants and construction sites.³⁹⁷



3.3.2. Duties of employers

The OHSA remains clear on what is expected from employers towards their employees. Section 8 of the OHSA expands on the duties of employers to their employees in a general manner by providing that 'every employer shall provide and maintain, as far reasonably practicable, a working environment that is safe and without risk to the health of his employees'.³⁹⁸ If interpreted using the definitions contained in section 1 of the OHSA, section 8(1) thus provides that every employer has the duty to provide and maintain a working environment which is 'free from any

³⁹¹ Section 24(a), Constitution.

³⁹² ISO International Standard 45001(2018).

³⁹³ ISO International Standard 45001(2018), Introduction.

³⁹⁴ Occupational Health and Safety Act 85 of 1993 (OHSA).

³⁹⁵ Introduction, OHSA.

³⁹⁶ Introduction, OHSA.

³⁹⁷ A Farish 'Occupational Health and Safety Act Summary' available

<https://absolutehealth.co.za/blog/occupational-health-and-safety-act-summary/> (accessed 5 September 2021).

³⁹⁸ Section 8(1), OHSA.

hazard’,³⁹⁹ meaning free from any source of exposure to danger which may cause injury or damage to persons or property.⁴⁰⁰

Section 8(2) further provides that notwithstanding the general nature of an employer’s duties in the aforementioned section, those duties particularly include the duty to take steps which are reasonably practicable to eliminate or mitigate any potential harm to the health or safety of employees.⁴⁰¹ Reasonably practicable means practicable having regard to the severity and scope of the risk in question; the state of knowledge reasonably available about the risk itself or about manners in which to mitigate it; the availability of means for mitigating or removing the risk and the overall cost of mitigating or removing the risk in relation to the benefits derived therefrom.⁴⁰²

The duty to determine, as far as is reasonably practicable, the hazards to the health or safety of persons associated with any work performed, as well as what precautionary measures should be taken, is also placed on employers.⁴⁰³ Subsequently, the duty to provide information, training and supervision to ensure the health and safety of employees at work, also rests on employers.⁴⁰⁴ Lastly, the duty to enforce measures which may be necessary in the interest of health and safety is also a duty of the employer.⁴⁰⁵ The employer carries the onus of informing the employee of such hazards and ensuring that employees understand the potential risks present in the workplace.⁴⁰⁶ Employees thus retain the right to be informed of the hazards to his/her health and safety which accompany the work required to be performed.⁴⁰⁷

³⁹⁹ Section 1, OHSA.

⁴⁰⁰ Section 8(1), OHSA.

⁴⁰¹ Section 8(2)(a), OHSA.

⁴⁰² Section 1, OHSA.

⁴⁰³ Section 8(2)(d), OHSA.

⁴⁰⁴ Section 8(2)(e), OHSA.

⁴⁰⁵ Section 8(2)(f), OHSA.

⁴⁰⁶ A Farish ‘Occupational Health and Safety Act Summary’ available <https://absolutehealth.co.za/blog/occupational-health-and-safety-act-summary/> (accessed 5 September 2021).

⁴⁰⁷ Section 13(a), OHSA.

3.3.3. ISO 45001:2018

As mentioned previously, there are international standard that are introduced with the purpose of providing minimum requirements.⁴⁰⁸ Section 44 of the OHS Act regulates the incorporation of such health and safety standards in regulations and provides that the Minister may incorporate any health and safety standard into regulations.⁴⁰⁹ Currently, the recently introduced SANS 45001 standard dealing with Occupational Health and Safety management in South Africa (SANS 45001) is the international standard against which the country's occupational health and safety laws are placed.⁴¹⁰

It is a tremendous acknowledgement of mental health that the SANS 45001 specifically acknowledges an organisation's responsibility for promoting and protecting both the physical and mental health and safety of workers.⁴¹¹ In August 2018, the South African Bureau of Standards (hereafter "SABS") adopted the SANS 45001 which expands on the requirements for South Africa.⁴¹² The inclusion of mental health in the realm of occupational health and safety is clear from the provisions of SANS 45001.⁴¹³ This position is only further confirmed by the acknowledgement of negative stress as a hazard.⁴¹⁴

According to SANS 45001, an organisation's identification processes should also consider human factors which relate to an individual's capabilities and limitations as well as the effect which normal work activities may influence the creation of hazards.⁴¹⁵ When analysing the different methods which can be taken to reduce or eliminate hazards and risks in the workplace, specific mention is made as to the re-organising of work, isolating persons from the hazard and reducing an unhealthy amount of working hours and workload.⁴¹⁶

⁴⁰⁸ A Farish 'Occupational Health and Safety Act Summary' available <https://absolutehealth.co.za/blog/occupational-health-and-safety-act-summary/> (accessed 5 September 2021).

⁴⁰⁹ Section 44, OHS Act.

⁴¹⁰ Yeates M 'OHS Act – yes this includes mental health – what does the law say?' available at <https://www.cliffedekkerhofmeyr.com/en/news/publications/2020/Employment/employment-alert-2-march-ohsa-yes-this-includes-mental-health-what-does-the-law-say.html> (accessed 10 September 2021).

⁴¹¹ International Organisation for Standardisation (ISO) International Standard 45001(2018), Introduction.

⁴¹² Yeates M 'OHS Act – yes this includes mental health – what does the law say?' available at <https://www.cliffedekkerhofmeyr.com/en/news/publications/2020/Employment/employment-alert-2-march-ohsa-yes-this-includes-mental-health-what-does-the-law-say.html> (accessed 10 September 2021).

⁴¹³ ISO International Standard 45001(2018), item 6.1.2.1.

⁴¹⁴ ISO International Standard 45001(2018), item A.8.1.2.

⁴¹⁵ ISO International Standard 45001(2018), item A.6.1.2.1 (a)(1) and (b)(1).

⁴¹⁶ ISO International Standard 45001(2018), item A.8.1.2(a) –(d)

In this premise, SANS 45001 enables an organisation to integrate wellness and well – being through its occupational health and safety system.

Although the OHS Act imposes a duty on employers to maintain a safe and health work environment, it is the Labour Relations Act and the Employment Equity Act which primarily regulate the manner in which mental health as a disability is regulated by employers, as is the focus of this chapter.

3.4. Labour Relations Act 66 of 1995

3.4.1. Introduction

Following the establishment of South Africa's new constitutional democracy, the need for stability and reform in the employment sector, an area notoriously rife with uncertainty and inequity, became patently apparent.⁴¹⁷ This resulted in the introduction of employment legislation in an effort to transform a sector which had previously been plagued by inequality, unfairness, and discrimination.⁴¹⁸ Numerous negotiations resulted in the enactment of the most influential piece of employment legislation, i.e., the Labour Relations Act 66 of 1995 (hereafter “LRA”) which serves as the cornerstone of current labour relations.⁴¹⁹

The LRA remains the primary labour statute in South African employment law, regulating issues such as collective rights, and protection against unfair labour practices and unfair dismissals.⁴²⁰ The LRA regulates trade unions and employers' organisations and it notably established the Commission for Conciliation, Mediation and Arbitration (hereafter “CCMA”),⁴²¹ the Labour

⁴¹⁷ Subramanien DC & Joseph JL ‘The Right to Strike under the *Labour Relations Act* 66 of 1995 (LRA) and Possible Factors for Consideration that Would Promote the Objectives of the LRA’ (2019) 22 *PELJ* 1.

⁴¹⁸ Subramanien DC & Joseph JL ‘The Right to Strike under the *LRA* and Possible Factors for Consideration that Would Promote the Objectives of the LRA’ (2019) 22 *PELJ* 1.

⁴¹⁹ Labour Relations Act 66 of 1995 (LRA).

⁴²⁰ Section 187, LRA.

⁴²¹ Section 112(1), LRA.

Court (hereafter “LC”)⁴²² and the Labour Appeal Court (hereafter “LAC”) respectively,⁴²³ and important dispute resolution forums.⁴²⁴ In addition, the LRA aims to give effect to section 23 of the Constitution by promoting and facilitating collective bargaining in the workplace;⁴²⁵ promoting employee participation in decision making through the establishment of workplace forums;⁴²⁶ and providing simple procedures for the resolution of labour disputes.⁴²⁷

3.4.2. Code of Good Practice on Dismissal

The Code of Good Practice on Dismissal (hereafter “Dismissal Code”) is encompassed in Schedule 8 of the LRA which regulates various primary aspects of dismissal for reasons related to conduct and capacity.⁴²⁸ The Dismissal Code comprises a set of guidelines which according to section 188(2) of the LRA, must be followed when determining whether a dismissal is fair.⁴²⁹

The Code’s provisions on incapacity will be discussed more fully below.

3.4.3. Unfair dismissals

Section 188(1) of the LRA provides that for a dismissal to be fair, it must be both procedurally and substantively fair.⁴³⁰ Given the aforesaid, the LRA provides protection to employees suffering from mental health conditions in two particular ways: protection against dismissals based on incapacity, and automatically unfair dismissals where the dismissal is as a result of discrimination against the employee on the ground of, amongst others, disability.⁴³¹

The scope of protection against unfair dismissals is extended by section 187 which provides for automatically unfair dismissals. An automatic unfair dismissal means that there is an automatic presumption of unfairness in instances where the dismissals falls within one of the grounds listed

⁴²² Section 151(1), LRA.

⁴²³ Section 167(1), LRA.

⁴²⁴ Preamble, LRA.

⁴²⁵ Preamble, LRA.

⁴²⁶ Preamble, LRA.

⁴²⁷ Preamble, LRA.

⁴²⁸ Labour Relations Act 66 of 1995, schedule 8 (Dismissal Code).

⁴²⁹ Section 188(2), LRA.

⁴³⁰ Section 188(1), LRA.

⁴³¹ Section 187(1)(f), LRA.

in section 187(1).⁴³² Of relevance to this study is section 187(1)(f) which provides that a dismissal is automatically unfair if the reason for the dismissal is that the employer unfairly either directly or indirectly discriminated against an employee on any arbitrary ground, including but not limited to the ground of disability.⁴³³ Item 2(3) of the Dismissal Code echoes the position on automatically unfair dismissals by providing that a dismissal is automatically unfair if the reason amount to an infringement of the fundamental rights of employees or those listed in section 187.⁴³⁴

3.4.3.1. Definition of a dismissal

Section 186 of the LRA expands on the definition of a dismissal and provides for a wider meaning thereof.⁴³⁵ Section 186(1) stipulates that a dismissal occurs where:

- i. an employer has terminated a contract of employment with or without notice;⁴³⁶
- ii. an employee reasonably expected the employer to renew a fixed term contract of employment on the same or similar terms but the employer offered to renew it on less favourable terms, or did not renew it;⁴³⁷
- iii. an employer refused to allow an employee to resume work after she took maternity leave in terms of any law, collective agreement or her contract of employment;⁴³⁸ or was absent from work for up to four weeks before the expected date, and up to eight weeks after the actual date, of the birth of her child;⁴³⁹
- iv. an employer who dismissed a number of employees for the same or similar reasons has offered to re-employ one or more of them but has refused to re-employ another;⁴⁴⁰ or
- v. where an employee terminated a contract of employment with or without notice because the employer made continued employment intolerable for the employee.⁴⁴¹

⁴³² Section 187, LRA.

⁴³³ Section 187(1)(f), LRA.

⁴³⁴ Item 2(3), Dismissal Code.

⁴³⁵ Section 186(1), LRA.

⁴³⁶ Section 186(1)(a), LRA.

⁴³⁷ Section 186(1)(B), LRA.

⁴³⁸ Section 186(1)(c)(i), LRA.

⁴³⁹ Section 186(1)(c)(i), LRA.

⁴⁴⁰ Section 186(1)(d), LRA.

⁴⁴¹ Section 186(1)(E), LRA.

3.4.3.2. Standard of fairness

For a dismissal to be fair, it must be both substantially and procedurally fair.⁴⁴² This is emphasised in section 188(1) of the LRA which provides that a dismissal is only fair if it is justified by a fair reason and carried out in accordance with a fair procedure.⁴⁴³ Generally, the only grounds that are acceptable are those that relate to an employee's conduct or capacity or that are based on the employer's operational requirements.⁴⁴⁴

3.4.4. Incapacity

Dismissals due to incapacity involves an employer's legitimate loss of confidence in the employee's ability to perform in line with the terms of the employment contract.⁴⁴⁵ Dismissals due to incapacity can be based on ill-health, injury or poor work performance of the employee.⁴⁴⁶ Item 9(a) of the Dismissal Code provides that in determining whether a dismissal related to poor work performance is fair, whether the employee failed to meet a performance standard must be considered.⁴⁴⁷ If an employee has in fact failed to meet a performance standard, whether the employee was given a fair opportunity to meet the required standard must also be considered.⁴⁴⁸

According to item 10(1) of the Dismissal Code, incapacity due to ill-health or injury can be temporary or permanent.⁴⁴⁹ If an employee is temporarily unable to work in these circumstances, the employer should conduct an investigation into the extent of the disability or injury.⁴⁵⁰ If the employee is projected to be away for an extended period of time, the employer should consider all feasible alternatives to dismissal.⁴⁵¹ In instances of permanent incapacity, employers should explore the possibilities of arranging alternative employment or altering the employee's duties or work circumstances to accommodate the employee's disability.⁴⁵² Item 10(4) provides that

⁴⁴² Labour Relations Act 66 of 1995, section 188(1).

⁴⁴³ Labour Relations Act 66 of 1995, section 188(1).

⁴⁴⁴ Labour Relations Act 66 of 1995, section 188(1).

⁴⁴⁵ Du Toit *et al Labour Relations Law* 461.

⁴⁴⁶ Labour Relations Act 66 of 1995, section 188(1)(a)(i).

⁴⁴⁷ Item 9(a), Dismissal Code.

⁴⁴⁸ Item 9(b)(ii), Dismissal Code.

⁴⁴⁹ Item 10(1), Dismissal Code.

⁴⁵⁰ Item 10(1), Dismissal Code.

⁴⁵¹ Item 10(1), Dismissal Code.

⁴⁵² Item 10(1), Dismissal Code.

employees who are injured during the scope of their employment or who are incapacitated by work-related illnesses should receive particular consideration.⁴⁵³ Courts have stated that the employer's obligation to accommodate the employee's incapacity is particularly onerous in these instances.⁴⁵⁴

When dealing with dismissals relating to capacity due to ill-health or injury, the Dismissal Code is more transparent with what duties are placed on employers.⁴⁵⁵ Item 11 provides that in determining whether a dismissal due to ill-health or injury is unfair, consideration must be given to whether the employee is able to perform the work.⁴⁵⁶ Where the employee is unable to perform the work, item 11(b) provides that consideration should be given to:

- i. the extent to which the employee is able to perform the work;⁴⁵⁷
- ii. the extent to which the employee's work circumstances might be adapted to accommodate a disability, or, where this is not possible, the extent to which the employee's duties might be adapted;⁴⁵⁸ and
- iii. the availability of any suitable alternative work.⁴⁵⁹

3.4.4.1. Standard Bank of South Africa v Commission for Conciliation, Mediation and Arbitration and Others (2008) ILJ 1239 (LC)

(hereafter "Standard Bank v CCMA")

The importance of employers complying with the duties placed on them is illustrated in the case of *Standard Bank of South Africa v Commission for Conciliation, Mediation and Arbitration* where the court found that the employer had not done enough to assist the employee before they had dismissed her for incapacity.⁴⁶⁰ In this case, the Labour Court analysed the proposed duties

⁴⁵³ Item 10(4), Dismissal Code.

⁴⁵⁴ Item 10(4), Dismissal Code.

⁴⁵⁵ Item 11, Dismissal Code.

⁴⁵⁶ Item 11, Dismissal Code.

⁴⁵⁷ Item 11(b)(i), Dismissal Code.

⁴⁵⁸ Item 11(b)(ii), Dismissal Code.

⁴⁵⁹ Item 11(b)(iii), Dismissal Code.

⁴⁶⁰ *Standard Bank of South Africa (SA) v Commission for Conciliation, Mediation and Arbitration (CCMA)* [2008] 4 BLLR 356 (LC).

placed on employers by the Dismissal Code and concluded that employers must adopt a four - stage enquiry before dismissing an employee for incapacity.⁴⁶¹ This enquiry poses four questions to employers, namely;

1. Is the employee unable to perform his / her work?
2. If not, to what extent is the employee capable of working?
3. Can the employees work circumstances be adapted?
4. If not, is there alternative work available?

3.4.4.2. *IMATU v Witzenburg Municipality [2012] 7 BLLR 660 (LAC)*

(hereafter “IMATU v Witzenburg Municipality”)

Employers’ compliance with their duties was further highlighted in the case of *IMATU v Witzenburg Municipality*⁴⁶² where the LAC held that non-compliance the proper considerations contained in Items 10 and 11 of the Dismissal Code may render a dismissal due to injury or disability unfair.⁴⁶³ The *IMATU* case also confirmed that the cause of incapacity may include mental illness or depression in circumstances where such condition is causally linked to an employee’s ability to perform his / her work.⁴⁶⁴

Mr Strydom (hereinafter referred to as “the employee”) was employed as a municipal manager.⁴⁶⁵ As a result of depression, he was absent from work for approximately eight continuous months.⁴⁶⁶ Following his absence, he applied to be medically boarded and his capacity was consequently investigated by his employer where it was determined that he was so severely incapacitated that he failed to perform the essential requirements of his employment.⁴⁶⁷ He was thus dismissed on the basis that he was incapacitated.⁴⁶⁸

⁴⁶¹ *Standard Bank of SA v CCMA* [2008] 4 BLLR 356 (LC), para 72 – 76.

⁴⁶² *IMATU v Witzenburg Municipality* [2012] 7 BLLR 660 (LAC).

⁴⁶³ *IMATU v Witzenburg Municipality* [2012] 7 BLLR 660 (LAC), para 7.

⁴⁶⁴ *IMATU v Witzenburg Municipality* [2012] 7 BLLR 660 (LAC).

⁴⁶⁵ *IMATU v Witzenberg Municipality & Others* (2012) 33 ILJ 1081 (LAC) 1084.

⁴⁶⁶ *IMATU v Witzenberg Municipality & Others* (2012) 33 ILJ 1081 (LAC) 1084.

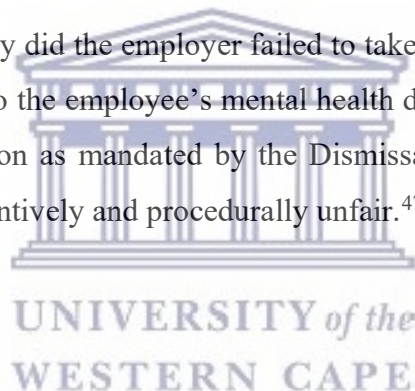
⁴⁶⁷ *IMATU v Witzenberg Municipality & Others* (2012) 33 ILJ 1081 (LAC) 1084.

⁴⁶⁸ *IMATU v Witzenberg Municipality & Others* (2012) 33 ILJ 1081 (LAC) 1084.

Thereafter, an unfair dismissal claim was instituted against his employer.⁴⁶⁹ At the CCMA, the commissioner found that the employees' dismissal was both substantively and procedurally fair.⁴⁷⁰ The matter was then taken on review where the LC subsequently held that the dismissal was both substantively and procedurally unfair.⁴⁷¹ The employer thereafter appealed to the LAC where it was held that when an employee is dismissed for incapacity, the employer must carry out a thorough investigation as to whether the employee's working conditions could be adapted to accommodate the incapacity or whether a suitable alternative position could be offered.⁴⁷²

Where an employer determines through a thorough investigation that it is unable to adapt the employee's working conditions to accommodate the incapacity or to offer the employee a suitable alternative position, such dismissal is considered procedurally and substantively fair.⁴⁷³

The court thus held that not only did the employer failed to take proactive measures to alleviate the pressures that contributed to the employee's mental health difficulties and but also failed to conduct a thorough investigation as mandated by the Dismissal Code.⁴⁷⁴ In this premise, the dismissal was held to be substantively and procedurally unfair.⁴⁷⁵



3.4.4.3. *General Motors (Pty) Ltd v NUMSA obo Ruiters [2015] 36 ILJ 1493 (LAC)*

(hereafter “General Motors (Pty) Ltd v NUMSA”)

This case highlighted the importance of considering all possible alternatives short of dismissal when dealing with a dismissal due to incapacity.⁴⁷⁶ In this case, Ruiters (hereafter “the employee”) began experiencing pain in his left wrist and arm following an injury that occurred

⁴⁶⁹ *IMATU v Witzenberg Municipality & Others* (2012) 33 ILJ 1081 (LAC) 1084.

⁴⁷⁰ *IMATU v Witzenberg Municipality & Others* (2012) 33 ILJ 1081 (LAC) 1083.

⁴⁷¹ *IMATU v Witzenberg Municipality & Others* (2008)29 ILJ 2947 (LC) 2962.

⁴⁷² *IMATU v Witzenberg Municipality & Others* (2012) 33 ILJ 1081 (LAC) 1086.

⁴⁷³ *IMATU v Witzenberg Municipality & Others* (2012) 33 ILJ 1081 (LAC) 1084.

⁴⁷⁴ *IMATU v Witzenberg Municipality & Others* (2012) 33 ILJ 1081 (LAC) 1084.

⁴⁷⁵ *IMATU v Witzenberg Municipality & Others* (2012) 33 ILJ 1081 (LAC) 1092.

⁴⁷⁶ *General Motors (Pty) Ltd v NUMSA obo Ruiters* [2015] 36 ILJ 1493 (LAC), para 34.

outside of the workplace.⁴⁷⁷ The injury however began affecting his work performance.⁴⁷⁸ The employee was moved to a different work area but his work performance continued to suffer.⁴⁷⁹ The employer then held an incapacity inquiry after which he was declared permanently incapacitated and was subsequently dismissed.⁴⁸⁰

The employee referred an unfair dismissal claim to the CCMA whereby his dismissal was held to be fair.⁴⁸¹ The employee reviewed the arbitrator's decision on the ground that the commissioner failed to take into account that the employer had not considered accommodating the employee in the position of a driver, a position which he was medically cleared to perform.⁴⁸² The employer however, alleged that it had done everything possible to accommodate the employee's physical condition.⁴⁸³

On review, the LC held that the mere fact that there had been some discussion amongst management regarding the employee fulfilling the position of a driver was enough to warrant further investigation into the possibility.⁴⁸⁴ The employer failed to call the required witnesses to rebut this allegation and the LC thus held that the employer failed to refute the claims of the employee.⁴⁸⁵ The employee's dismissal was declared unfair.⁴⁸⁶

The decision of the LC was thereafter taken on appeal to the LAC where it was subsequently upheld.⁴⁸⁷ The LAC ruled that the commissioner failed to give appropriate consideration to the evidence regarding possible alternative placement of the employee as a driver.⁴⁸⁸ It was held that the issue being raised at both the incapacity inquiry and the arbitration warranted the employer

⁴⁷⁷ *General Motors (Pty) Ltd v NUMSA obo Ruiters* [2015] 36 ILJ 1493 (LAC), para 4.

⁴⁷⁸ *General Motors (Pty) Ltd v NUMSA obo Ruiters* [2015] 36 ILJ 1493 (LAC), para 4.

⁴⁷⁹ *General Motors (Pty) Ltd v NUMSA obo Ruiters* [2015] 36 ILJ 1493 (LAC), para 5.

⁴⁸⁰ *General Motors (Pty) Ltd v NUMSA obo Ruiters* [2015] 36 ILJ 1493 (LAC), para 6.

⁴⁸¹ *General Motors (Pty) Ltd v NUMSA obo Ruiters* [2015] 36 ILJ 1493 (LAC), para 20.

⁴⁸² *General Motors (Pty) Ltd v NUMSA obo Ruiters* [2015] 36 ILJ 1493 (LAC), para 21.

⁴⁸³ *General Motors (Pty) Ltd v NUMSA obo Ruiters* [2015] 36 ILJ 1493 (LAC), para 22.

⁴⁸⁴ *General Motors (Pty) Ltd v NUMSA obo Ruiters* [2015] 36 ILJ 1493 (LAC), para 23.

⁴⁸⁵ *General Motors (Pty) Ltd v NUMSA obo Ruiters* [2015] 36 ILJ 1493 (LAC), para 22.

⁴⁸⁶ *General Motors (Pty) Ltd v NUMSA obo Ruiters* [2015] 36 ILJ 1493 (LAC), para 24.

⁴⁸⁷ *General Motors (Pty) Ltd v NUMSA obo Ruiters* [2015] 36 ILJ 1493 (LAC), para 56.

⁴⁸⁸ *General Motors (Pty) Ltd v NUMSA obo Ruiters* [2015] 36 ILJ 1493 (LAC), para 43.

to thoroughly investigate same.⁴⁸⁹ The appeal was therefore dismissed and the dismissal was confirmed to be unfair.⁴⁹⁰

This case further confirms that inadequate investigation into possible alternatives short of dismissal, is likely to render a dismissal due to incapacity unfair. The extent to which an employer is seemingly required to investigate possible alternatives is particularly onerous given that in this case, the employee had already been accommodated to some degree by being moved to another work area. This case illustrates that where an employee has been accommodated and the injury / illness continues affecting work performance, further accommodation is required.

It is important to note that whilst there is an onus placed on the employer to conduct investigations and determinations, an employee may not unreasonably refuse the attempts made by the employer to accommodate them. Unreasonable refusal by an employee may result in the dismissal being fair, as is evidenced by the case of *Hendricks v Mercantile & General Reinsurance*.⁴⁹¹

3.4.4.4. *Hendricks v Mercantile & General Reinsurance Co of SA Ltd (1992) 15 ILJ 3014 (LAC)*
(hereafter “*Hendricks v Mercantile & General Reinsurance*”)

In this case, the LAC held that the appellant's dismissal was substantively and procedurally fair where he had been dismissed as a result of his disability.⁴⁹²

The LAC held that the test for substantive fairness was whether the employer could fairly be expected to continue the employment relationship bearing in mind the interests of both the employee and the employer.⁴⁹³ In determining same, relevant factors to be considered include:

⁴⁸⁹ *General Motors (Pty) Ltd v NUMSA obo Ruiters* [2015] 36 ILJ 1493 (LAC), para 54.

⁴⁹⁰ *General Motors (Pty) Ltd v NUMSA obo Ruiters* [2015] 36 ILJ 1493 (LAC), para 54.

⁴⁹¹ *Hendricks v Mercantile & General Reinsurance Co of SA Ltd* (1994) 15 ILJ 304 (LAC).

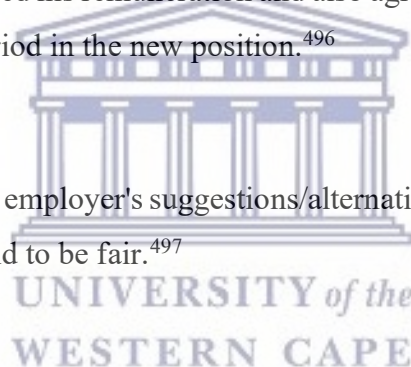
⁴⁹² *Hendricks v Mercantile & General Reinsurance Co of SA Ltd* (1994) 15 ILJ 304 (LAC) 317.

⁴⁹³ *Hendricks v Mercantile & General Reinsurance Co of SA Ltd* (1994) 15 ILJ 304 (LAC) 312I-J.

- i. The nature of the incapacity;
- ii. The cause of the incapacity;
- iii. The likelihood of recovery;
- iv. Improvement or recurrence;
- v. The period of absence and its effect on the employer's operations;
- vi. The effect of the employee's disability on other employees;
- vii. The employees work record; and
- viii. Length of service.

The LAC found that the employer had exhausted all reasonable alternatives for accommodating the appellant's depression and anxiety whilst also providing medical care.⁴⁹⁴ The court held that the appellant's refusal to bridge the divide with his coworkers and employer would have compelled the company to restructure the entire department which would undoubtedly have been unreasonable to expect.⁴⁹⁵ Moreover, the employer offered him an alternative position which would not have adversely affected his remuneration and also agreed that the employee would not be subject to a probationary period in the new position.⁴⁹⁶

The employee's rejection of the employer's suggestions/alternatives was held to be unreasonable. The dismissal was therefore held to be fair.⁴⁹⁷



3.4.4.5. Legal Aid South Africa v Jansen (CA3/2019) [2020] ZALAC 37

(hereafter “Legal Aid v Jansen”)

In *Legal Aid v Jansen*, Mr Jansen (hereafter “the employee”) began working for Legal Aid South Africa (hereafter “the employer”) in 2007 whereafter he was diagnosed and treated for depression and later booked off for a week due to depression and high anxiety.⁴⁹⁸ The

⁴⁹⁴ *Hendricks v Mercantile & General Reinsurance Co of SA Ltd* (1994) 15 ILJ 304 (LAC) 315.

⁴⁹⁵ *Hendricks v Mercantile & General Reinsurance Co of SA Ltd* (1994) 15 ILJ 304 (LAC) 316.

⁴⁹⁶ *Hendricks v Mercantile & General Reinsurance Co of SA Ltd* (1994) 15 ILJ 304 (LAC) 316.

⁴⁹⁷ *Hendricks v Mercantile & General Reinsurance Co of SA Ltd* (1994) 15 ILJ 304 (LAC) 317.

⁴⁹⁸ *Legal Aid South Africa v Jansen* [2020] 41 ILJ 2580 (LAC), para 4.

employer thus became aware of the employee's depression through the medical certificate.⁴⁹⁹ Over the next several years, the employee's depression resulted in his absence becoming more frequent.⁵⁰⁰ He received a final written warning prior for unauthorised absenteeism and failing to provide an explanation for his absence.⁵⁰¹

Despite his ongoing battle with depression, the employee's performance at work was unaffected, and he was in fact, appointed as one of the employer's brand ambassadors.⁵⁰² According to the employee, his condition deteriorated shortly thereafter, and he began withdrawing socially and missing work more frequently.⁵⁰³ In November 2013, the employee was charged with being absent from work for 17 days between 30 August and 5 November; neglecting to notify his management of his absence; insolence toward a supervisor; and insubordination for refusing to attend to a prisoner as ordered.⁵⁰⁴ The employee admitted to all of the transgressions but defended his actions by claiming that he acted out of character due to his depression.⁵⁰⁵ The employer then terminated the employee after he was found guilty of the charges.⁵⁰⁶

In an attempt to challenge the fairness of his dismissal, the employee filed a complaint with the LC asserting two distinct causes of action.⁵⁰⁷ The first is a claim that his dismissal was inherently unjustified under section 187(1)(f) of the LRA, because the reason for his dismissal was that his employer discriminated against him unfairly on the basis of his disability.⁵⁰⁸ In his second claim, the employee asserted that he was subjected to unfair discrimination as a result of his depression, citing provisions of the EEA.⁵⁰⁹

⁴⁹⁹ *Legal Aid South Africa v Jansen* [2020] 41 ILJ 2580 (LAC), para 4.

⁵⁰⁰ *Legal Aid South Africa v Jansen* [2020] 41 ILJ 2580 (LAC), para 9.

⁵⁰¹ *Legal Aid South Africa v Jansen* [2020] 41 ILJ 2580 (LAC), para 9.

⁵⁰² *Legal Aid South Africa v Jansen* [2020] 41 ILJ 2580 (LAC), para 10.

⁵⁰³ *Legal Aid South Africa v Jansen* [2020] 41 ILJ 2580 (LAC), para 10.

⁵⁰⁴ *Legal Aid South Africa v Jansen* [2020] 41 ILJ 2580 (LAC), para 15.

⁵⁰⁵ *Legal Aid South Africa v Jansen* [2020] 41 ILJ 2580 (LAC), para 21.

⁵⁰⁶ *Legal Aid South Africa v Jansen* [2020] 41 ILJ 2580 (LAC), para 23.

⁵⁰⁷ *Legal Aid South Africa v Jansen* [2020] 41 ILJ 2580 (LAC), para 25.

⁵⁰⁸ *Legal Aid South Africa v Jansen* [2020] 41 ILJ 2580 (LAC), para 25.

⁵⁰⁹ *Legal Aid South Africa v Jansen* [2020] 41 ILJ 2580 (LAC), para 26.

During the LC proceedings, the court strangely ruled that the employer should present its evidence first, despite the parties' disagreement over the reason for the employee's dismissal.⁵¹⁰ Employer chose not to present any evidence in light of this finding. Ms Farre, the employee's clinical psychologist, was the only witness for the employee.⁵¹¹ Her testimony was that the employee displayed 'severe signs of temporary reactive depression' in 2013 and was clearly unable to cope with his work environment.⁵¹² She also testified that he showed signs of burnout and that, in her opinion, he was emotionally spent and hence unable to do his everyday job adequately.⁵¹³ The LC determined that the employee had established a prima facie case in favor of the asserted reasons for his dismissal and that he had been subjected to unfair discrimination.⁵¹⁴ In the lack of any evidence to refute the employee's version before the court, the employer was instructed to reinstate him retroactively and to compensate him with six months' wages.⁵¹⁵

On appeal, the LAC reaffirmed the notion that an employee alleging an automatically unfair dismissal bears the evidentiary burden of establishing a credible likelihood that their dismissal was for the asserted reason.⁵¹⁶ This is accomplished by satisfying both the factual and legal criteria for causality.⁵¹⁷ The LAC's fundamental concern was thus to determine whether there was a 'credible likelihood' that the respondent received discriminatory treatment on the unlawful basis of depression.⁵¹⁸

The LAC noted that while the employee agreed to all four counts of misconduct, he maintained that his actions were a result of his depression, which impaired his capacity to behave in a manner that would allow him to comprehend the wrongfulness of his actions and impair his self-control.⁵¹⁹ Despite the fact that the employee suffered from depression, he had failed to make a convincing case that his actions of misconduct were motivated by his depression.⁵²⁰ His

⁵¹⁰ *Legal Aid South Africa v Jansen* [2020] 41 ILJ 2580 (LAC), para 31.

⁵¹¹ *Legal Aid South Africa v Jansen* [2020] 41 ILJ 2580 (LAC), para 18.

⁵¹² *Legal Aid South Africa v Jansen* [2020] 41 ILJ 2580 (LAC), para 16.

⁵¹³ *Legal Aid South Africa v Jansen* [2020] 41 ILJ 2580 (LAC), para 16.

⁵¹⁴ *Legal Aid South Africa v Jansen* [2020] 41 ILJ 2580 (LAC), para 35.

⁵¹⁵ *Legal Aid South Africa v Jansen* [2020] 41 ILJ 2580 (LAC), para 1.

⁵¹⁶ *Legal Aid South Africa v Jansen* [2020] 41 ILJ 2580 (LAC), para 33.

⁵¹⁷ *Legal Aid South Africa v Jansen* [2020] 41 ILJ 2580 (LAC), para 48.

⁵¹⁸ *Legal Aid South Africa v Jansen* [2020] 41 ILJ 2580 (LAC), para 28.

⁵¹⁹ *Legal Aid South Africa v Jansen* [2020] 41 ILJ 2580 (LAC), para 19.

⁵²⁰ *Legal Aid South Africa v Jansen* [2020] 41 ILJ 2580 (LAC), para 49.

psychologist interviewed him a year prior to the incident, and she, too, was unable to place any evidence before the court that his depression caused his acts of misconduct.⁵²¹

The court held that while it is possible that had it not been for his depression factually (*conditio sine qua non*), the employee would not have committed some of the misconduct. However, the employee failed to establish a credible possibility that his depression was the dominant or proximate cause of his dismissal.⁵²² The mere fact that his depression was a contributing factual cause is insufficient to establish a causal link between the respondent's depression and his dismissal in concluding that depression was the reason for his dismissal.⁵²³ After concluding that the employee had not made a convincing case supporting his asserted reasons for dismissal, the LAC upheld the appeal.⁵²⁴ Notably, the court reiterated that depression would be taken into account in considering the substantive fairness of an employee's dismissal.⁵²⁵ However, the employee did not contest the substantive fairness of his dismissal in light of the acts of misconduct for which he was terminated in his arguments before the LC so the LAC refrained from addressing that.⁵²⁶

3.4.5. Constructive dismissal

From the case law discussion above, it becomes apparent that there must be recourse available for employees where employers fail to reasonably accommodate an employee suffering from a mental health condition but opt to rather dismiss such employee. Apart from dismissals based on incapacity and automatically unfair dismissals on the ground of disability, recourse may also be found in section 186(1)(e) of the LRA which provides for constructive dismissal.⁵²⁷ The LRA defines constructive dismissal as the 'termination of employment by the employee where the employer has made continued employment intolerable', as was evidenced in the case of *Legal Aid v Jansen*.⁵²⁸

⁵²¹ *Legal Aid South Africa v Jansen* [2020] 41 ILJ 2580 (LAC), para 45.

⁵²² *Legal Aid South Africa v Jansen* [2020] 41 ILJ 2580 (LAC), para 49.

⁵²³ *Legal Aid South Africa v Jansen* [2020] 41 ILJ 2580 (LAC), para 2.

⁵²⁴ *Legal Aid South Africa v Jansen* [2020] 41 ILJ 2580 (LAC), para 53.

⁵²⁵ *Legal Aid South Africa v Jansen* [2020] 41 ILJ 2580 (LAC), para 50.

⁵²⁶ *Legal Aid South Africa v Jansen* [2020] 41 ILJ 2580 (LAC), para 50.

⁵²⁷ Section 186(1)(e), LRA.

⁵²⁸ Section 186(1)(e), LRA.

Previously, courts had interpreted constructive dismissal to mean ‘actions on the part of an employer which drive the employee to leave’.⁵²⁹ There has been concern regarding the aforementioned interpretation in that the actions and circumstances resulting in a constructive dismissal are ‘infinitely various’, resulting in it having to be a question of fact before a court.⁵³⁰ The test was held by the court to be two-fold, with the onus resting on the employee in respect of both questions.⁵³¹ The first question needing to be determined is whether the employee would have intended to terminate the employment relationship had it not been for the employers conduct.⁵³² If answered in the affirmative, the enquiry ceases. However, if answered in the negative, the final question to be answered is whether the employers conduct amounts to constructive dismissal.⁵³³

The provisions of section 186(1)(e) establishes a criterion for determining whether an employer’s conduct amounts to constructive dismissal.⁵³⁴ The LAC has addressed constructive dismissal and held that where an employee has resigned to due constructive dismissal, they are effectively confirming that the situation has become so unbearable that employee is unable to perform the most important function, which is to complete work.⁵³⁵ Essentially, there ought to be wrongful or unfair conduct by the employer which causes the employee to resign.⁵³⁶ This conduct need not be intentional and courts have reaffirmed that regardless of the subjective intention, it is nevertheless sufficient for an employer’s conduct to have been ‘objectively calculated to coerce the employee into leaving’.⁵³⁷ Where there exists a legal remedy short of terminating the employment relationship, an employee’s resignation will not amount to constructive dismissal.⁵³⁸ This does not require resignation to be the absolute last resort however, employees ought to have reasonably attempted to resolve the problem.⁵³⁹

⁵²⁹ *Amalgamated Beverage Industries (Pty) Ltd v Jonker* 91993] 14 ILJ 1232 (LAC) 1248H.

⁵³⁰ *Jooste v Transnet Ltd* [1995] 5 BLLR 1 (LAC) 4.

⁵³¹ *Jooste v Transnet Ltd* [1995] 5 BLLR 1 (LAC) 8 – 9.

⁵³² *Jooste v Transnet Ltd* [1995] 5 BLLR 1 (LAC) 8 – 9.

⁵³³ *Jooste v Transnet Ltd* [1995] 5 BLLR 1 (LAC) 8 – 9.

⁵³⁴ Section 186(1)(e), LRA.

⁵³⁵ *Pretoria Society for the Care of the Retarded v Loots* [1997] 6 BLLR 721 (LAC).

⁵³⁶ *Van der Riet v Leisurennet* [1998] 5 BLLR 471 (LAC) para 43.

⁵³⁷ *Van der Riet v Leisurennet* [1998] 5 BLLR 471 (LAC) para 43.

⁵³⁸ *Albany Bakeries Ltd v Van Wyk* (2005) 26 ILJ 2142.

⁵³⁹ *Mafomane v Rustenburg Platinum Mines Ltd* [2003] 10 BLLR 999 (LC) para 49.2.

3.4.5.1. *New Way Motor & Diesel Engineering (Pty) Ltd v Marsland [2009] 30 ILJ (LAC)*

(hereafter “*New Way Motors v Marsland*”)

In *New Way Motors v Marsland*,⁵⁴⁰ Mr Marsland (hereafter “the employee”) suffered a nervous breakdown following the unexpected separation from his wife of 24 years.⁵⁴¹ Upon returning to work following a four-day hospitalisation, the employee was isolated and stigmatized as a carrier of a 'contagious illness.'⁵⁴² The employee had been actively involved in a number of the employer's primary operations prior to his hospitalisation but upon his return to work, he was barred from executing the basic functions of his position.⁵⁴³ As a result of the continuous verbal threats and harassment, the employee suffered a relapse and fell into a severe state of depression.⁵⁴⁴ He was further scheduled to be absent from work for a week and upon his return was served with a notice to appear in a disciplinary hearing based on poor work performance, violation of corporate regulations, and misuse of company benefits.⁵⁴⁵ The employee was subsequently found guilty of poor work performance by the chairperson of the inquiry, and the employer was ordered to provide him with counselling.⁵⁴⁶ As a result, he was barred from doing any of his duties following the aforementioned hearing and was exposed to persistent threats and verbal harassment.⁵⁴⁷

The employee consequently resigned and referred an automatically unfair constructive dismissal claim against his employer.⁵⁴⁸



The LC held that the employer's behaviour toward the employee constituted unfair discrimination based on a mental impairment and thus his dismissal was unfair.⁵⁴⁹ The LC further held that the actions of the employer suggest a deliberate strategy on the part of the employer to exclude the employee from work he had previously been involved in. In conclusion,

⁵⁴⁰ *New Way Motor & Diesel Engineering (Pty) Ltd v Marsland* (2009) 30 ILJ (LAC).

⁵⁴¹ *New Way Motor & Diesel Engineering (Pty) Ltd v Marsland* (2009) 30 ILJ (LAC) 2877.

⁵⁴² *New Way Motor & Diesel Engineering (Pty) Ltd v Marsland* (2009) 30 ILJ (LAC) 2877.

⁵⁴³ *New Way Motor & Diesel Engineering (Pty) Ltd v Marsland* (2009) 30 ILJ (LAC) 2877.

⁵⁴⁴ *New Way Motor & Diesel Engineering (Pty) Ltd v Marsland* (2009) 30 ILJ (LAC) 2877.

⁵⁴⁵ *New Way Motor & Diesel Engineering (Pty) Ltd v Marsland* (2009) 30 ILJ (LAC) 2878.

⁵⁴⁶ *New Way Motor & Diesel Engineering (Pty) Ltd v Marsland* (2009) 30 ILJ (LAC) 2880.

⁵⁴⁷ *New Way Motor & Diesel Engineering (Pty) Ltd v Marsland* (2009) 30 ILJ (LAC) 2880.

⁵⁴⁸ *New Way Motor & Diesel Engineering (Pty) Ltd v Marsland* (2009) 30 ILJ (LAC) 2881.

⁵⁴⁹ *New Way Motor & Diesel Engineering (Pty) Ltd v Marsland* (2009) 30 ILJ (LAC) 2882.

the LC held that the conduct of the employer against the employee amounted to unfair discrimination on the grounds of his mental health.

On appeal, the employer argued that the conduct of the employee was likely to destroy or seriously damage the relationship of trust and confidence between the two parties. The LAC however found that an employee with a mental impairment is deemed to have been discriminated against in circumstances where the discrimination jeopardises the employee's dignity.⁵⁵⁰ In this premise, it was held that the employer's actions as a result of his depression, had diminished the employee's dignity. Emphasising same, the LAC considered the employer's treatment of the employee to be appalling and subsequently confirmed that the employee's dismissal was automatically unfair in terms of s187(1)(f) of the LRA.⁵⁵¹

3.5. Employment Equity Act 55 of 1998 (EEA)

The EEA is a critical legislative and policy initiative within the spirit of South Africa's Constitution, allowing for the implementation of laws relating to the abolition of policies that had previously contributed to disparities in the country.⁵⁵² There is a particular emphasis on ensuring equality, the right to equal protection and benefit of the law for all persons, including those with disabilities.⁵⁵³ The court in the case of *South African Airways (Pty) Ltd v Jansen van Vuuren and Another*⁵⁵⁴ emphasised that two of the primary objectives of the EEA are to promote and protect employees' constitutional rights to equality and dignity and to eliminate unfair discrimination in any employment policy or practice.⁵⁵⁵

Numerous impediments such as widespread misinformation, fear, and stereotypes have resulted in unfair discrimination against individuals with disabilities in society and employment, and the

⁵⁵⁰ *New Way Motor & Diesel Engineering (Pty) Ltd v Marsland* (2009) 30 ILJ (LAC) 2877.

⁵⁵¹ *New Way Motor & Diesel Engineering (Pty) Ltd v Marsland* (2009) 30 ILJ (LAC) 2886.

⁵⁵² Foreword, EEA.

⁵⁵³ Foreword, EEA.

⁵⁵⁴ *South African Airways (Pty) Ltd v Jansen van Vuuren and Another* (2014) 35 ILJ 2774 (LAC).

⁵⁵⁵ *South African Airways (Pty) Ltd v Jansen van Vuuren and Another* (2014) 35 ILJ 2774 (LAC), para 28.

enactment of the EEA was as a result thereof.⁵⁵⁶ The EEA not only seeks to promote the constitutional right of equality but also gives effect to the obligations placed upon South Africa, as a member of the ILO.⁵⁵⁷ Lastly, the EEA places much emphasis on the achievement of a diverse workforce which broadly represents the people of our country.

3.5.1. Unfair discrimination

Section 6(1) of the EEA prohibits unfair discrimination.⁵⁵⁸ According to this section, no person may discriminate directly or indirectly against an employee on various grounds including disability or any other arbitrary ground.⁵⁵⁹ Section 6(1) of the EEA prohibits unfair discrimination directly or indirectly against an employee, in any employment policy or practice, on one or more grounds including but not limited to disability.⁵⁶⁰ Moreover, section 6(3) of the EEA provides that harassment of an employee is a form of unfair discrimination and is prohibited on any one or a combination of grounds of unfair discrimination listed in subsection 6(1) of the EEA.⁵⁶¹

The test for determining whether unfair discrimination on an arbitrary ground has occurred is provided in section 9(2) of the EEA.⁵⁶² Section 9(2) provides that a complainant alleging unfair discrimination must prove on a balance of probabilities that the conduct complained of is not rational; that the conduct amounts to discrimination; and that the discrimination is unfair.⁵⁶³ Moreover, an “other arbitrary ground” is not intended to be a self – standing ground, but it is rather meant to refer to a specified ground so as to include a ground of a similar kind.⁵⁶⁴

⁵⁵⁶ Foreword, EEA.

⁵⁵⁷ Preamble, EEA.

⁵⁵⁸ Section 6(1), EEA.

⁵⁵⁹ Section 6(1), EEA.

⁵⁶⁰ Section 6(1), EEA.

⁵⁶¹ Section 6(3), EEA.

⁵⁶² Section 9(2), EEA.

⁵⁶³ Section 9(2), EEA.

⁵⁶⁴ Para 29, *Minister of Justice and Correctional Services and Others v Ramaila and Others* (2021) 42 ILJ 339 (LAC).

3.5.1.1. Code of Good Practice on the Prevention and Elimination of Harassment in the Workplace

(hereafter “Harassment Code”)

The Harassment Code became effective on 18 March 2022.⁵⁶⁵ The objective of the Harassment is to eliminate all forms of harassment in the workplace and in any activity linked to or arising out of work.⁵⁶⁶

As such, the Harassment Code provides guidelines to employers and employees on the prevention and elimination of all forms of harassment as a form of discrimination in the workplace;⁵⁶⁷ and on human resource policies, procedures, and practices related to harassment and appropriate procedures to deal with harassment and prevent its recurrence.⁵⁶⁸

Furthermore, the Harassment Code identifies the steps which employers must take to eliminate harassment, of which includes the development and implementation of policies, procedures and practices that will lead to the creation of workplaces that are free from harassment and in which employers and employees respect one another’s integrity, dignity, privacy and their right to equality in the workplace.⁵⁶⁹ The protection provided to employees against harassment by the Harassment Code is applicable in any situation in which the employee is working or which is related to their work.⁵⁷⁰

Although harassment itself is not defined in the provisions of the EEA, it is generally understood to be:

- a) Unwanted conduct which impairs dignity;⁵⁷¹

⁵⁶⁵ Code of Good Practice on the Prevention and Elimination of Harassment in the Workplace (hereafter “Harassment Code”).

⁵⁶⁶ Item 1, Harassment Code.

⁵⁶⁷ Item 1.2.1, Harassment Code.

⁵⁶⁸ Item 1.2.2, Harassment Code.

⁵⁶⁹ Item 1.3, Harassment Code.

⁵⁷⁰ Item 2.3, Harassment Code.

⁵⁷¹ Item 4.1.1, Harassment Code.

- b) Which creates a hostile or intimidating work environment for one or more employees or is calculated to, or has the effect of inducing submission by actual or threatened adverse consequences;⁵⁷² and
- c) Is related to one or more grounds in respect of which discrimination is prohibited in terms of section 6(1) of the EEA.⁵⁷³

Item 4.3 of the Harassment Code further provides that harassment includes physical abuse, psychological abuse, emotional abuse, sexual abuse, racial abuse and gender-based abuse.⁵⁷⁴ Unwanted conduct distinguishes acts of harassment from acceptable conduct in the workplace. In determining whether harasser knew or ought to have known that the conduct was unwanted, two issues arise. The first issue which presents itself is whether the complainant communicated to the harasser that the conduct was unwelcome. This communication may be verbal or non – verbal and may also be communicated either directly or indirectly.⁵⁷⁵ Where no such communication has occurred, one is required to determine whether the conduct was of such a nature that the harasser knew or ought to have known that such conduct is generally considered to be unacceptable.⁵⁷⁶

Whether conduct constitutes harassment must be objectively determined from the perspective of the employee who alleges harassment.⁵⁷⁷ This is because the primary focus of determining whether there has been harassment is the impact the conduct has had on the employee.⁵⁷⁸ However, where the perception of the complainant is not consistent with the views of a reasonable person, one must then establish whether they are consistent with the societal values reflective of our constitutional ethos.⁵⁷⁹

⁵⁷² Item 4.1.2, Harassment Code.

⁵⁷³ Item 4.1.3, Harassment Code.

⁵⁷⁴ Item 4.3, Harassment Code.

⁵⁷⁵ Item 4.4.2, Harassment Code.

⁵⁷⁶ Item 4.4.3, Harassment Code.

⁵⁷⁷ Item 4.4.5, Harassment Code.

⁵⁷⁸ Item 4.4.5, Harassment Code.

⁵⁷⁹ Item 4.4.5, Harassment Code.

Factors which ought to be taken into account when determining whether harassment has occurred include the context of the harassment,⁵⁸⁰ the circumstances of the complainant⁵⁸¹ and the impact that the conduct has had on the employee,⁵⁸² and the respective positions of the harasser and complainant.⁵⁸³ In addition, the Harassment Code provides that harassment can be either direct or indirect.⁵⁸⁴ Direct harassment occurs where the harassment is directly aimed at the complainant.⁵⁸⁵ Where harassment is indirect, the conduct has the effect of undermining the complainant's dignity or threatening the complainant's safety even where not aimed directly at them.⁵⁸⁶

There are various types of harassment, including but not limited to physical, verbal and psychological conduct.⁵⁸⁷ Moreover, the Harassment Code provides verbal bullying may include threats, shaming, hostile teasing, insults, or racist, sexist language.⁵⁸⁸ The Harassment Code provides examples of harassment which includes but is not limited to:

1. Slandering or maligning an employee or spreading rumours maliciously;⁵⁸⁹
2. Conduct which humiliates, insults or demeans an employee;⁵⁹⁰ and
3. Intolerance of psychological, medical, disability or personal circumstances.⁵⁹¹

The Harassment Code also provides for passive-aggressive or covert harassment which may include one or more of the following:⁵⁹²

- a) Negative gossip;⁵⁹³
- b) Negative joking at someone's expense;⁵⁹⁴

⁵⁸⁰ Item 4.5.4.1, Harassment Code.

⁵⁸¹ Item 4.5.4.2, Harassment Code.

⁵⁸² Item 4.5.4.2, Harassment Code.

⁵⁸³ Item 4.5.4.3, Harassment Code.

⁵⁸⁴ Item 4.6.4, Harassment Code.

⁵⁸⁵ Item 4.6.4, Harassment Code.

⁵⁸⁶ Item 4.6.4, Harassment Code.

⁵⁸⁷ Item 4.7.1, Harassment Code.

⁵⁸⁸ Item 4.7.3, Harassment Code.

⁵⁸⁹ Item 4.7.5.1, Harassment Code.

⁵⁹⁰ Item 4.7.5.2, Harassment Code.

⁵⁹¹ Item 4.7.5.7, Harassment Code.

⁵⁹² Item 4.7.9, Harassment Code.

⁵⁹³ Item 4.7.9, Harassment Code.

⁵⁹⁴ Item 4.7.9, Harassment Code.

- c) Sarcasm;⁵⁹⁵
- d) Condescending eye contact;⁵⁹⁶
- e) Facial expression;⁵⁹⁷
- f) Gestures;⁵⁹⁸
- g) Mimicking to ridicule;⁵⁹⁹
- h) Deliberately causing embarrassment and insecurity;⁶⁰⁰
- i) Deliberately sabotaging someone's dignity, well-being, happiness, success and career performance.⁶⁰¹

The existence of a hostile work environment is also addressed in the Harassment Code.⁶⁰² Item 4.6.1 of the Harassment Code provides that a hostile work environment is present where conduct related to a prohibited ground impacts on the dignity of one or more employees.⁶⁰³ This occurs where the conduct has had a negative impact on the employee's ability to work and/or their personal well – being.⁶⁰⁴

3.5.1.2. Code of Good Practice on the Employment of Persons with Disabilities

(hereafter “Disability Code”)

The Code of Good Practice on the Employment of Persons with Disabilities (hereafter “Disability Code”) forms part of a broader equality agenda for persons with disabilities to have their rights recognised in the labour market.⁶⁰⁵ The Disability Code was issued pursuant to section 54(1)(a) of the EEA and is predicated on the constitutional premise that no one may be subjected to unfair discrimination on the ground of disability.⁶⁰⁶ The primary objective of the Disability Code is to serve as a guide for employers and employees in promoting equal

⁵⁹⁵ Item 4.7.9, Harassment Code.

⁵⁹⁶ Item 4.7.9, Harassment Code.

⁵⁹⁷ Item 4.7.9, Harassment Code.

⁵⁹⁸ Item 4.7.9, Harassment Code.

⁵⁹⁹ Item 4.7.9, Harassment Code.

⁶⁰⁰ Item 4.7.9, Harassment Code.

⁶⁰¹ Item 4.7.9, Harassment Code.

⁶⁰² Item 4.6, Harassment Code.

⁶⁰³ Item 4.6.1, Harassment Code.

⁶⁰⁴ Item 4.6.1, Harassment Code.

⁶⁰⁵ GG 21/10/2015 – 9 NOVEMBER 2015 No. 39383

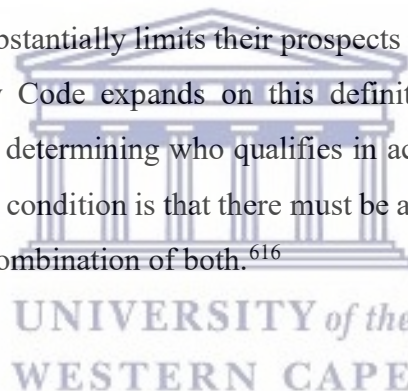
⁶⁰⁶ Section 54(1)(a), EEA.

opportunity and treating people with disabilities fairly, as mandated by the EEA.⁶⁰⁷ It is furthermore intended to assist employers and employees in understanding their rights and responsibilities, to foster certainty, and to resolve conflicts, in order to ensure that individuals with disabilities can enjoy and exercise their rights at work.⁶⁰⁸

The EEA provides protection for employees with mental health conditions, in various forms. This includes the recognition of mental health in the definition of persons with disabilities;⁶⁰⁹ protection against discrimination based on a disability;⁶¹⁰ voluntary disclosures of one's disability status;⁶¹¹ and the provision of reasonable accommodation.⁶¹²

3.5.2. Defining disability

Although there is no specific definition of a disability itself, section 1 of the EEA provides for the definition of “people with disabilities” as those who have a long-term or recurring physical or mental impairment which substantially limits their prospects of entry into, or advancement in, employment.⁶¹³ The Disability Code expands on this definition by elaborating on each of the qualifying conditions when determining who qualifies in accordance with the provisions of the EEA.⁶¹⁴ The first qualifying condition is that there must be an impairment.⁶¹⁵ An impairment may be physical, mental, or a combination of both.⁶¹⁶



The second qualifying condition providing that impairment must be long-term or recurring,⁶¹⁷ is elaborated on in the Disability Code and provides for the distinction between long-term and recurring.⁶¹⁸ For an impairment to be regarded as being long-term, it must have lasted for or is likely to last for at least twelve months.⁶¹⁹ An impairment which is regarded as recurring is one

⁶⁰⁷ Para 2(3), Code of Good Practice on the Employment of People with Disabilities (Disability Code).

⁶⁰⁸ Para 2(4), Disability Code.

⁶⁰⁹ Section 1, EEA.

⁶¹⁰ Section 5, EEA.

⁶¹¹ Section 25, EEA.

⁶¹² Section 15, EEA.

⁶¹³ Section 1, EEA.

⁶¹⁴ Para 5, Disability Code.

⁶¹⁵ Para 5(1)(i), Disability Code.

⁶¹⁶ Para 5(1)(1)(i), Disability Code.

⁶¹⁷ Para 5(1)(ii), Disability Code.

⁶¹⁸ Para 5(3)(2)(a) – (b), Disability Code.

⁶¹⁹ Para 5(1)(2)(i), Disability Code.

which is likely to happen again and when it does, it remains substantially limiting.⁶²⁰ A recurring impairment may subside for a period of time and return again but it is not cured.⁶²¹ The Disability Code makes further mention of progressive conditions and defines it as a condition that is likely to develop, change or recur.⁶²² It elaborates by providing that persons living with progressive conditions are only considered to as a person with a disability in terms of the EEA once the impairment becomes substantially limiting.⁶²³

The third and final qualifying condition is that the impairment must be substantially limiting in that in its nature, duration or effects, it substantially limits that person's ability to perform the essential functions of the job for which they are being considered.⁶²⁴ Where there is uncertainty regarding the qualification of this condition, an assessment may be done by a qualified person to determine whether it is substantially limiting.⁶²⁵

3.5.3. Employee disclosures

Employee disclosures are addressed in Item 14 of the Disability Code and the point of departure is that persons with disabilities are entitled to keep their disability status confidential.⁶²⁶ However, if an employer is unaware of a disability or the need for accommodation, the employer is not tasked with providing for it.⁶²⁷ Where an employee's disability or accommodation needs are not self-evident, the employer may require the employee to give adequate information to confirm the disability or accommodation needs.⁶²⁸ If an employer requests further information of an employee's disability, it must be pertinent to a specific job and its essential functions.⁶²⁹ If the employer contests that the employee is disabled or requires accommodation, the employer may request the employee to take a test to evaluate his or her ability or disability at the expense

⁶²⁰ Para 5(1)(2)(ii), Disability Code.

⁶²¹ Para 5(1)(2)(ii), Disability Code.

⁶²² Para 5(1)(2)(iii), Disability Code.

⁶²³ Para 5(1)(2)(iii), Disability Code.

⁶²⁴ Para 5(1)(iii), Disability Code.

⁶²⁵ Para 5(1)(3)(iv), Disability Code.

⁶²⁶ Item 14(2)(1), Disability Code.

⁶²⁷ Item 14(2)(1), Disability Code.

⁶²⁸ Item 14(2)(2), Disability Code.

⁶²⁹ Item 14(2)(5), Disability Code.

of the employer.⁶³⁰ Information regarding a disability may be technical and thus employers should ensure that it is interpreted by a competent individual.⁶³¹

The duties placed on employers are found in chapter 3 of the EEA and include but are not limited to affirmative action procedures aimed at ensuring that appropriately qualified members of designated groups receive equal employment opportunities and representation.⁶³² The most appropriate mechanism in which to do this is in identifying and eliminating employment barriers that jeopardise workplace diversity, such as failing to provide reasonable accommodations for designated groups.⁶³³

3.5.4. Reasonable accommodation

Reasonable accommodation, according to section 1 of the EEA is defined as any modification or adjustment to a job or to the working environment that will enable a person from a designated group to have access to or participate or advance in employment.⁶³⁴ Employers should provide reasonable accommodation for the needs of persons with disabilities.⁶³⁵ The importance of providing reasonable accommodation was highlighted in the case of *Senekal v MEC for Education*,⁶³⁶ where the court held that in failing to reasonably accommodate the employee, the employee was subjected to intolerable working conditions which consequently violated the employees fundamental dignity.⁶³⁷

The purpose of accommodation is to mitigate the impact of a person's impairment of their ability to perform the essential functions of their employment.⁶³⁸ Employers should engage with employees and, when possible, technical specialists in formulating appropriate methods for accommodating employees.⁶³⁹

⁶³⁰ Item 14(2)(3), Disability Code.

⁶³¹ Item 14(2)(4), Disability Code.

⁶³² Chapter 3, EEA

⁶³³ Chapter 3, EEA.

⁶³⁴ Section 1, EEA.

⁶³⁵ Item 6(1), Disability Code.

⁶³⁶ *Senekal v MEC for Education (Gauteng Province) and Another* (JEQ01/2010; J1980/2005) [2015] ZALCJHB 303, para 62.

⁶³⁷ *Senekal v MEC for Education (Gauteng Province) and Another* (JEQ01/2010; J1980/2005) [2015] ZALCJHB 303, para 62.

⁶³⁸ Item 6(1), Disability Code.

⁶³⁹ Item 6(6), Disability Code.

The type of accommodation required will vary according to the individual, the impairment, and its impact on the individual, as well as the job and working environment.⁶⁴⁰ According to the nature and extent of the disability, reasonable accommodations may be temporary or permanent.⁶⁴¹ If an employee becomes ill or injured and is unable to perform the work, the employer may ask the employee to consent to a functional disability determination.⁶⁴² This medical or other suitable testing shall be conducted to determine if the employee is capable of performing the job safely or to identify reasonable accommodations for the employee.⁶⁴³ Reasonable accommodation may include, but is not limited to, the following: adapting existing facilities to make them accessible;⁶⁴⁴ adapting existing equipment or acquiring new equipment, including computer hardware and software;⁶⁴⁵ re-organising workstations;⁶⁴⁶ changing training and assessment materials and systems;⁶⁴⁷ restructuring jobs to redistribute non-essential functions;⁶⁴⁸ adjusting working hours and leave;⁶⁴⁹ and providing readers and sign language interpreters;⁶⁵⁰ as well as specialised supervision, training, and assistance.⁶⁵¹

Employers may use the most cost-effective methods consistent with adequately eliminating obstacles to a person performing the work and to enjoy equal access to employment benefits and opportunities.⁶⁵² However, employers are not compelled to accommodate a disabled employee if doing so would place unjustifiable hardship on their business.⁶⁵³ Unjustifiable hardship is defined as action that entails considerable or considerable difficulty or expense and would substantially impair the businesses viability.⁶⁵⁴ This entails assessing the accommodation's effectiveness and the amount to which it would significantly impair the operations of the business.⁶⁵⁵ Unjustifiable hardship implies more than negligible effort and necessitates the

⁶⁴⁰ Item 6(7), Disability Code.

⁶⁴¹ Item 6(8), Disability Code.

⁶⁴² Item 8(2)(1), Disability Code.

⁶⁴³ Item 8(2)(2), Disability Code.

⁶⁴⁴ Item 6(9)(i), Disability Code.

⁶⁴⁵ Item 6(9)(ii), Disability Code.

⁶⁴⁶ Item 6(9)(iii), Disability Code.

⁶⁴⁷ Item 6(9)(iv), Disability Code.

⁶⁴⁸ Item 6(9)(v), Disability Code.

⁶⁴⁹ Item 6(9)(vi), Disability Code.

⁶⁵⁰ Item 6(9)(vii), Disability Code.

⁶⁵¹ Item 6(9)(vii), Disability Code.

⁶⁵² Item 6(2), Disability Code.

⁶⁵³ Item 6(11), Disability Code.

⁶⁵⁴ Item 6(12), Disability Code.

⁶⁵⁵ Item 6(12), Disability Code.

application of a proportionality test.⁶⁵⁶ What constitutes unjustifiable hardship for one employer at a particular time will not necessarily constitute unjustifiable hardship at another time.⁶⁵⁷ Similarly, the determination of whether hardship is justifiable will vary according to the facts of each case.⁶⁵⁸

Disabled applicants and employees are entitled to reasonable accommodations which may be required during the recruitment and selection processes;⁶⁵⁹ in the workplace;⁶⁶⁰ in the way work is typically performed, assessed, and rewarded;⁶⁶¹ and in the employment perks and privileges.⁶⁶² Furthermore, employers must also accommodate employees when their employment or work environment changes or their impairment varies, thus limiting their ability to perform essential job functions.⁶⁶³ Employers are required to make reasonable accommodations when an applicant or employee reports a disability-related accommodation requirement voluntarily or when the employer is reasonably aware of the need.⁶⁶⁴

3.5.4.1. *Smith v Kit Kat Group (Pty) Ltd [2016] 12 BLLR 1239 (LC)*

(hereafter “*Smith v Kit Kat*”)

The court in the case of *Smith v Kit Kat*⁶⁶⁵ held that the exercise of consulting with the employee on ways in which to accommodate his disability was essential for any discrimination against the employee to be considered fair.⁶⁶⁶

⁶⁵⁶ *Standard Bank of SA v CCMA* [2008] 4 BLLR 356 (LC), para 98.

⁶⁵⁷ Item 6(13), Disability Code.

⁶⁵⁸ Item 6(13), Disability Code.

⁶⁵⁹ Item 6(3)(i), Disability Code.

⁶⁶⁰ Item 6(3)(ii), Disability Code.

⁶⁶¹ Item 6(3)(iii), Disability Code.

⁶⁶² Item 6(3)(iv), Disability Code.

⁶⁶³ Item 6(5), Disability Code.

⁶⁶⁴ Item 6(4), Disability Code.

⁶⁶⁵ *Smith v Kit Kat Group (Pty) Ltd* [2016] 12 BLLR 1239 (LC), para 61.

⁶⁶⁶ *Smith v Kit Kat Group (Pty) Ltd* [2016] 12 BLLR 1239 (LC), para 61.

In this case, an employee who had survived an attempted suicide attempt, was left with severe facial injuries which resulted in a minor speech impediment. Despite numerous attempts to resume his duties at work, the employer considered the employee “not facially acceptable” and “cosmetically unacceptable” and prohibited him from returning to work. The employee was however not dismissed, effectively placing him in limbo.

The employee therefore referred an unfair discrimination dispute to the LC in terms of section 10 of the EEA which prohibits discrimination based on disability. The referral was also premised on the Disability Code which provides that employers are obliged to reasonably accommodate the needs of persons with disabilities. In doing so, employers are required to, at the very least, consult the employee in the accommodation process. According to the LC, when an employer believes that an employee’s disability may impact his / her job, the employer must ensure that they do not discriminate against an employee based on that disability. The LC further held that although the employer had not dismissed the employee, the refusal to allow the employee to resume his duties was tantamount to a dismissal. The employee was awarded R1 500 000.00 consisting of 30 months remuneration plus an amount for the humiliation suffered by the employee by the hands of the employer.

This judgment illustrates that a blatant failure to address the needs of a disabled employee is to be done at employers’ own peril as the LC does not look kindly thereon.

3.5.4.2. *Standard Bank of SA v CCMA*

In the case of *Standard Bank of SA v CCMA*⁶⁶⁷, the court held that the quest for accommodation is a collaborative effort.⁶⁶⁸ Although the employer is ultimately responsible for completing the investigation, the company must consult with the disabled employee, her trade union or workplace representative.⁶⁶⁹ If the employer requires information that it does not have, such as medical records, he or she must confer with medical or other specialists, as well as maybe other

⁶⁶⁷ *Standard Bank of SA v CCMA* [2008] 4 BLLR 356 (LC).

⁶⁶⁸ *Standard Bank of SA v CCMA* [2008] 4 BLLR 356 (LC), para 91.

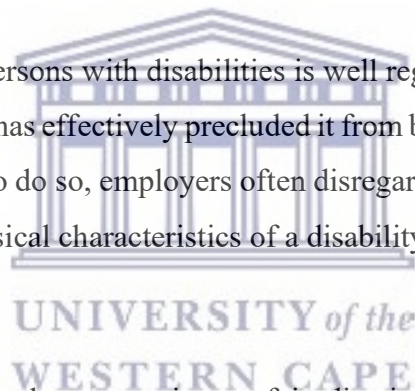
⁶⁶⁹ *Standard Bank of SA v CCMA* [2008] 4 BLLR 356 (LC), para 91.

employees.⁶⁷⁰ The process should be interactive, consisting of a debate and an examination of possibilities with a give-and-take mindset.⁶⁷¹

Discrimination occurs when an employer disregards medical advice when attempting to reasonably accommodate an employee.⁶⁷² Absolute reluctance to accommodate demonstrates a lack of flexibility that is contrary to the spirit and purpose of the duty to accommodate.⁶⁷³ The court subsequently held that the employer had failed to meaningfully consult with the employee because it had not sought the expertise of an occupational therapist and had not been receptive to the employee's proposals for accommodation.⁶⁷⁴ As such, the court held that dismissing the employee on the ground of incapacity constituted unfair discrimination under the EEA due to its failure to provide reasonable accommodation.⁶⁷⁵

3.6. Conclusion

Although the employment of persons with disabilities is well regulated within South Africa, the stigmatisation of mental health has effectively precluded it from being considered under the same category. Although mandated to do so, employers often disregard employees' mental health and instead focus solely on the physical characteristics of a disability.



The protection afforded to employees against unfair discrimination, unfair dismissals and harassment through the various pieces of legislation exists and is comprehensive in nature. Employees possess rights and responsibilities which are applicable to mental health in the workplace. The stigmatisation of mental health has however manifested into the application of laws within the workplace and is enough to signal the need for more education and awareness on the topic. Without first addressing and dispelling the myths surrounding mental health, challenges particularly in relation to the application of the law, will continue to surface.

⁶⁷⁰ *Standard Bank of SA v CCMA* [2008] 4 BLLR 356 (LC), para 91.

⁶⁷¹ *Standard Bank of SA v CCMA* [2008] 4 BLLR 356 (LC), para 91.

⁶⁷² *Standard Bank of SA v CCMA* [2008] 4 BLLR 356 (LC), para 91.

⁶⁷³ *Standard Bank of SA v CCMA* [2008] 4 BLLR 356 (LC), para 91.

⁶⁷⁴ *Standard Bank of SA v CCMA* [2008] 4 BLLR 356 (LC), para 74.

⁶⁷⁵ *Standard Bank of SA v CCMA* [2008] 4 BLLR 356 (LC).

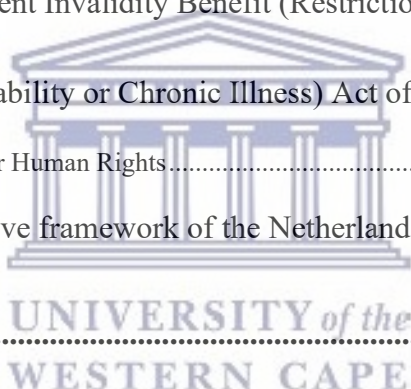
In analysing the legislative protections which South African employees are entitled to, an overarching framework is created, against which we are able to compare other international jurisdictions, as will be done in chapter 4.



CHAPTER FOUR

COMPARATIVE DISCUSSION OF THE NETHERLANDS, UNITED KINGDOM AND NORTHERN IRELAND

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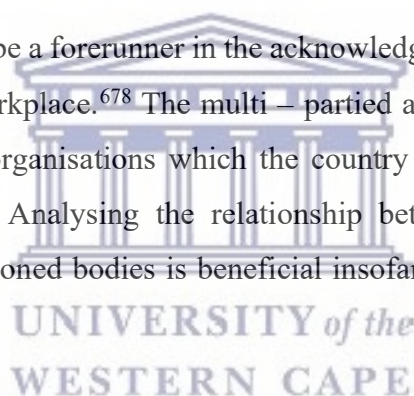
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4.1. INTRODUCTION

This chapter will consider the recognition given to mental health in the workplace under the legal frameworks of the comparative jurisdictions of the Netherlands, Northern Ireland (NI), and the United Kingdom (UK). Examining these jurisdictions may provide insights and lessons for addressing and resolving the ambiguities and lacunae in the South African legal environment with regard to the recognition, challenges and implementation of mental health in the workplace. In addition, the Constitution of South Africa supports the consideration of both international law as well as foreign law. Section 39(1) provides that in the interpretation of the Bill of Rights, international law must be considered and foreign law may be considered.⁶⁷⁶ Moreover, section 233 provides that in the interpretation of any legislation, every court must give preference to any reasonable interpretation that is consistent with international law over an alternative interpretation which is inconsistent therewith.⁶⁷⁷

The Netherlands has proven to be a forerunner in the acknowledgment and recognition of mental health in society and in the workplace.⁶⁷⁸ The multi – partied approach involving government, trade unions and employers’ organisations which the country has followed, is crucial to the success experienced thus far. Analysing the relationship between legislation, the working relationship and the aforementioned bodies is beneficial insofar as determining what role each agent is to perform.⁶⁷⁹



Northern Ireland’s Equality Commission’s objective is to promote equality eliminate unlawful discrimination, review relevant legislation and to oversee the efficacy of statutory duties on public authorities.⁶⁸⁰ The operation of an independent body possessing oversight on not only the implementation of legislation but also the efficacy thereof is both unique and vital when

⁶⁷⁶ Constitution of the Republic of South Africa 1996, section 39(1).

⁶⁷⁷ Constitution of the Republic of South Africa 1996, section 233.

⁶⁷⁸ Eurofound (2021), *Living, working and COVID-19 (Update April 2021): Mental health and trust decline across EU as pandemic enters another year*, Publications Office of the European Union, Luxembourg.

⁶⁷⁹ McDaid D ‘Joint budgeting: can it facilitate intersectoral action’ in World Health Organisation *Intersectoral Governance for Health in All Policies* 26 ed (2021) 111 – 128.

⁶⁸⁰ Equinet European network of equality bodies ‘Equality Commission for Northern Ireland’ available at <https://adsdatabase.ohchr.org/IssueLibrary/EQUALITY%20COMMISSION%20FOR%20NORTHERN%20IRELAND.pdf>

considering the strides taken by Northern Ireland in the recognition of mental health in the workplace.

The United Kingdom's disability discrimination legislation encompasses mental illness as a disability and as such, their courts have grappled with issues surrounding protection for those employees with mental health conditions.⁶⁸¹ Furthermore, the government has acknowledged the plight of employees suffering with mental health conditions in the workplace and has previously ordered a review thereof.⁶⁸² Any action taken in response to the results of same review provide for a useful analytic tool in that the measures implemented would be current and adaptable to today's society, as opposed to measures introduced ten to fifteen years prior.⁶⁸³

4.2. THE NETHERLANDS

After statistics showed that mental health problems accounted for approximately 43% of disability inflow in the Netherlands, the Dutch government began proactively acknowledging mental health in the workplace in 2014 by launching campaigns aimed at raising awareness about risk factors.⁶⁸⁴ This was largely due to the Netherlands already being party to all major international agreements relevant to the combatting of discrimination based on disability, including but not limited to the European Convention on Human Rights (including Protocol No. 12), the International Covenant on Civil and Political Rights (ICCPR), the Optional Protocol to the Covenant, the Covenant on Economic, Social and Cultural Rights (ECOSOC), the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), including the Optional Protocol to this Convention, and the Convention of the Rights of the Child

⁶⁸¹ Sayce L & Boardman J 'Disability rights and mental health in the UK: recent developments of the Disability Discrimination Act' 14 *Advances in Psychiatric Treatment* (2008) 267.

⁶⁸² Sayce L & Boardman J 'Disability rights and mental health in the UK: recent developments of the Disability Discrimination Act' 14 *Advances in Psychiatric Treatment* (2008) 267.

⁶⁸³ Sayce L & Boardman J 'Disability rights and mental health in the UK: recent developments of the Disability Discrimination Act' 14 *Advances in Psychiatric Treatment* (2008) 269.

⁶⁸⁴ Eurofound (2021), *Living, working and COVID-19 (Update April 2021): Mental health and trust decline across EU as pandemic enters another year*, Publications Office of the European Union, Luxembourg.

(UNCRC).⁶⁸⁵ The Netherlands has also ratified the International Convention on the Rights of Persons with Disabilities (UNCRPD).⁶⁸⁶ The above-mentioned instruments constitute part of the domestic legal order after they have been published in the official Dutch Law Gazette and may be applied directly by domestic courts and tribunals if the provision in question is sufficiently clear and precise.⁶⁸⁷

4.2.1. Constitution of the Kingdom of the Netherlands

Similar to South Africa, the legislative framework of the Netherlands is underpinned by the Constitution of the Kingdom of the Netherlands (hereafter “Dutch Constitution”).⁶⁸⁸ In 1989, the principle of equal treatment was introduced into the Dutch Constitution with Article 1 providing that ‘*all persons in the Netherlands shall be treated equally in equal circumstances*’.⁶⁸⁹ Furthermore, discrimination is not permitted, and the grounds upon which discrimination is prohibited is not a closed list.⁶⁹⁰ This effectively enshrines the constitutional equality and non-discrimination guarantee of all persons in the Netherlands.

4.2.2. Dutch Civil Code of 1838⁶⁹¹

To ensure the equality principle's applicability, this Constitutional guarantee has been strengthened through statutory equal treatment legislation.⁶⁹² The employment relationship in the Netherlands is governed by the Dutch Civil Code (hereafter “Civil Code”).⁶⁹³ Article 7 regulates employment contracts.⁶⁹⁴ Issues including but not limited to basic principles, pay and

⁶⁸⁵ de Vries, K ‘Country report non-discrimination. The Netherlands 2020’ (2020). Available at: <https://research.vu.nl/en/publications/country-report-non-discrimination-the-netherlands-2020>.

⁶⁸⁶ de Vries, K ‘Country report non-discrimination. The Netherlands 2020’ (2020). Available at: <https://research.vu.nl/en/publications/country-report-non-discrimination-the-netherlands-2020>.

⁶⁸⁷ de Vries, K ‘Country report non-discrimination. The Netherlands 2020’ (2020). Available at: <https://research.vu.nl/en/publications/country-report-non-discrimination-the-netherlands-2020>.

⁶⁸⁸ *Constitution of the Kingdom of the Netherlands* [Netherlands], 22 September 2008, available at: <https://www.refworld.org/docid/3ae6b5730.html>.

⁶⁸⁹ Article 1, Constitution of the Kingdom of the Netherlands 2018.

⁶⁹⁰ Article 1, Constitution of the Kingdom of the Netherlands 2018.

⁶⁹¹ Dutch Civil Code of 1838 accessible at <http://www.dutchcivillaw.com/civilcodegeneral.htm>.

⁶⁹² Gerards J ‘The Irrelevance of the Netherlands Constitution, and the impossibility of Changing It’ (2016) 77 *Revue Interdisciplinaire Detudes Juridiques* 213.

⁶⁹³ Gerards J ‘The Irrelevance of the Netherlands Constitution, and the impossibility of Changing It’ (2016) 77 *Revue Interdisciplinaire Detudes Juridiques* 213.

⁶⁹⁴ Articles 7:646 - 7:649, Dutch Civil Code.

termination of contracts are addressed.⁶⁹⁵ According to the Civil Code, employers are liable in instances where they fail to guarantee physically and emotionally safe working conditions.⁶⁹⁶

4.2.3. Working Conditions Act of 1999⁶⁹⁷

The Working Conditions Act (hereafter “WCA”) was enacted on 18 March 1999 and provides the foundation for a sound health and safety policy within the workplace.⁶⁹⁸ The WCA applies to all employers and employees in the Netherlands, and comprises of general principles, obligations and procedures for both employers and employees to best approach occupational health and safety.⁶⁹⁹

All companies in the Netherlands are required to appoint a Prevention Officer, who is to be an employee of the company.⁷⁰⁰ The Prevention Officer has a general duty to support the management in the implementation of obligations imposed by working conditions legislation.⁷⁰¹ Duties of the Prevention Officer include but are not limited to completing risk assessments, collaborating with the Works Council and providing assistance to the company doctor.⁷⁰²

Article 5 of WCA requires employers to conduct a Risk Assessment & Evaluation (hereafter “RA&E”) which assesses whether sufficient precautions have been implemented to prevent damage to the health of its employees.⁷⁰³ The objective of the RA&E is to identify possible occupational health risks.⁷⁰⁴ The RA&E is required to be accompanied by a plan of action, which is based on the RA&E itself.⁷⁰⁵ The action plan is required to provide what an employer

⁶⁹⁵ Gerards J ‘The Irrelevance of the Netherlands Constitution, and the impossibility of Changing It’ (2016) 77 *Revue Interdisciplinaire Detudes Juridiques* 213.

⁶⁹⁶ Article 7:658, Dutch Civil Code

⁶⁹⁷ Working Conditions Act 1999 (Working Conditions Act). Available at: [https://www.ilo.org/dyn/natlex/natlex4.detail?p_isn=68800&p_lang=.](https://www.ilo.org/dyn/natlex/natlex4.detail?p_isn=68800&p_lang=)

⁶⁹⁸ Working Conditions Act.

⁶⁹⁹ Article 1, Working Conditions Act.

⁷⁰⁰ Article 13(1), Working Conditions Act.

⁷⁰¹ Article 13(4), Working Conditions Act.

⁷⁰² Articles 13(4) – (9), Working Conditions Act.

⁷⁰³ Article 5, Working Conditions Act.

⁷⁰⁴ Article 5(1), Working Conditions Act.

⁷⁰⁵ Article 5(1), Working Conditions Act.

intends on doing to prevent the identified risks.⁷⁰⁶ In addition, employers are obliged to inform all employees of the risks and measures taken.⁷⁰⁷

The provisions of the WCA effectively placed several duties on employers.⁷⁰⁸ As a result of the WCA, employers are now responsible for the protection of employees' health and safety in all aspects of employment, and are mandated to implement a policy aimed at attaining the best possible working conditions.⁷⁰⁹ Employers are effectively required to organise employees' work in such a manner that has no detrimental effect on the health and safety of its employees.⁷¹⁰ Such workplace should prevent physical and psychological strain.⁷¹¹ This includes the design of workstations, working methods, tools, as well as the actual job being required to be adapted to the unique characteristics of the employees, where reasonable.⁷¹²

Where an employer employs more than 50 employees, a Works Council is required to be established to guarantee proper consultation with and representation of employees.⁷¹³ The size of a Works Council is dependent on the number of employees within a company.⁷¹⁴ Works Council representatives have the authority to:

- a) Request the Inspectorate conduct an investigation of the workplace as well as have access to the final report of said investigation;⁷¹⁵
- b) Access occupational health and safety information;⁷¹⁶
- c) Be present at interviews with inspectors;⁷¹⁷
- d) Accompany inspectors on visits to the workplace;⁷¹⁸
- e) Make use of the employers' resources to perform their duties;⁷¹⁹ and

⁷⁰⁶ Article 5(4), Working Conditions Act.

⁷⁰⁷ Article 5(5), Working Conditions Act.

⁷⁰⁸ Article 3, Working Conditions Act.

⁷⁰⁹ Article 3(1), Working Conditions Act.

⁷¹⁰ Article 3(1)(a), Working Conditions Act.

⁷¹¹ Netherlands Enterprise Agency 'Working Conditions for employees' available at <https://business.gov.nl/regulation/working-conditions-employees/> (accessed 17 September 2021).

⁷¹² Article 3(1)(c), Working Conditions Act.

⁷¹³ Article 2, Wet op de Ondernemingsraden (Work Councils Act).

⁷¹⁴ Article 6, Work Councils Act.

⁷¹⁵ Article 25, Work Councils Act.

⁷¹⁶ Article 31, Work Councils Act.

⁷¹⁷ Article 25(2), Work Councils Act.

⁷¹⁸ Article 25(3), Work Councils Act.

⁷¹⁹ Article 25(2), Work Councils Act.

- f) Have time off work with pay to perform their duties.⁷²⁰

The WCA was amended in 2017, which amendments became effective as of 1 July 2017. The amendments included issues around the minimum requirements for contracts between employers and health and safety service providers.⁷²¹ These minimum requirements allowed for greater involvement of employees in establishing working conditions policies; contributes to the sound professional practice of occupational health doctor; and emphasises prevention within companies.⁷²² All agreements between employers and health and safety service providers must expressly address:

- i. Access to the occupational health doctor insofar as employees' being afforded the right to consult with a company doctor without an employer's permission or knowledge;⁷²³
- ii. Visits of the workplace insofar as company doctors being given free access to the workplace which will allow for an improved preventative service for the organisation.⁷²⁴
- iii. Second opinions insofar as an employee being permitted to request a second opinion.⁷²⁵ This request is usually granted by the company doctor and may only be denied for compelling reasons.⁷²⁶ The cost of the second opinion is for the employer's account.⁷²⁷
- iv. Complaints procedure insofar as every company doctor being obligated to have a complaint handling procedure in place.⁷²⁸
- v. All contracts must clarify how the occupational health doctor can identify, recognize, diagnose and report occupational diseases to the Netherlands Centre for Occupational Diseases.⁷²⁹

The monitoring institution for compliance with the WCA is the Inspectorate SZW (hereafter "the Inspectorate"). Designated by the Minister of Social Affairs and Employment, the Inspectorate has the authority to launch investigations into any accidents occurring at work. In

⁷²⁰ Article 18(1), Work Councils Act.

⁷²¹ Amended Working Conditions Act, 2017.

⁷²² Amended Working Conditions Act, 2017.

⁷²³ Amended Working Conditions Act, 2017.

⁷²⁴ Amended Working Conditions Act, 2017.

⁷²⁵ Amended Working Conditions Act, 2017.

⁷²⁶ Amended Working Conditions Act, 2017.

⁷²⁷ Amended Working Conditions Act, 2017.

⁷²⁸ Amended Working Conditions Act, 2017.

⁷²⁹ Amended Working Conditions Act, 2017.

addition, the WCA has granted the Inspectorate authority to conduct inspections of the workplace without the consent of employers. Where employers have failed to comply with their duties or have violated provisions of the WCA, the Inspectorate may impose penalties.

4.2.4. Eligibility for Permanent Invalidity Benefit (Restrictions) Act of 2002⁷³⁰

The Netherlands prohibits the termination of employment during the first two years of an employee's sickness.⁷³¹ This rule is strictly applied and nearly impossible to deviate from.⁷³² As such, the Dutch Civil Code provides that employers are obligated to remunerate employees' 70% of their regular salary during the first 104 weeks of their sickness / disability.⁷³³ However, should an employee's salary exceed the statutory maximum daily wage, then 70% of the maximum daily wage should be paid to the employee.⁷³⁴

The European Agency for Safety and Health at Work (EU-OSHA) has confirmed that there is a greater possibility of employees successfully returning to work where they receive individual attention, active support from their supervisor, facilitation of coping skills and an early graded return to work.⁷³⁵ As such, the Eligibility for Permanent Invalidity Benefit (Restrictions) Act (hereafter "GIA") was introduced with the objective of increasing the reintegration of sick employees into the working environment, preferably with their current employer. The GIA introduced obligations for employers and employees in instances where an employee is unable to work, and also introduced sanctions in the event of inadequate performance or failure to perform.

⁷³⁰ Eligibility for Permanent Invalidity Benefit (Restrictions) Act of 2002, accessible at <https://splash-db.eu/policydocument/eligibility-for-permanent-invalidity-benefit-restrictions-act/>.

⁷³¹ Article 7:671(a) – (b), Dutch Civil Code.

⁷³² Article 7:671(a) – (b), Dutch Civil Code.

⁷³³ Article 7:629, Dutch Civil Code.

⁷³⁴ Article 7:629, Dutch Civil Code.

⁷³⁵ Johari RE & Molster M 'The Netherlands Introduces Compensation Regulation to Discourage "Dormant Employment"' (2020) 7 *Insights* 13.

According to Chapter 3 of the GIA, where long-term disability is applicable, an employer must engage a company doctor.⁷³⁶ The company doctor must then advise the employer as to the employee's capabilities and reintegration.⁷³⁷ After being reported to the company doctor, the employer together with the employee must collaboratively draft an action plan on how to proceed with the employees' reintegration.⁷³⁸ Employers are given eight weeks within which to culminate an action plan to facilitate the return.⁷³⁹

In instances where an employee has been sick for more than 42 weeks, employers are obligated to report the employee sickness to the Uitvoeringsinstituut Werknemersverzekeringe (hereafter "Employee Insurance Agency").⁷⁴⁰ Following 52 weeks of the sickness of an employee, both employer and employee must produce a first year evaluation which will discuss the reintegration to that point as well as arrangements for the coming year.⁷⁴¹ Where it is decided that the employee is unable to return to his / her own job position or another suitable position within the company, parties must commence a second track reintegration within six weeks after the first year evaluation.⁷⁴² Second track reintegration is reintegration outside the employers company.⁷⁴³

Where an employee has been sick for 88 weeks, they will be contacted by the Employee Insurance Agency concerning an application for long-term sick benefits (hereafter "WIA benefits").⁷⁴⁴ The employee will also be informed of the deadline within which they are to apply for WIA benefits.⁷⁴⁵ Before an employee has been sick for 91 weeks, both parties are obligated to produce a final reintegration report containing the status of the reintegration process.⁷⁴⁶ The employee is then tasked with submitting the report to the Employee Insurance Agency who will then decide whether the employer complied with its reintegration obligations.⁷⁴⁷ Where the

⁷³⁶ Chapter 3, Eligibility for Permanent Invalidity Benefit (Restrictions) Act 2003.

⁷³⁷ Chapter 3, Eligibility for Permanent Invalidity Benefit (Restrictions) Act.

⁷³⁸ Chapter 3, Eligibility for Permanent Invalidity Benefit (Restrictions) Act.

⁷³⁹ Chapter 3, Eligibility for Permanent Invalidity Benefit (Restrictions) Act.

⁷⁴⁰ Chapter 3, Eligibility for Permanent Invalidity Benefit (Restrictions) Act.

⁷⁴¹ Chapter 3, Eligibility for Permanent Invalidity Benefit (Restrictions) Act.

⁷⁴² Chapter 3, Eligibility for Permanent Invalidity Benefit (Restrictions) Act.

⁷⁴³ Johari RE & Molster M 'The Netherlands Introduces Compensation Regulation to Discourage "Dormant Employment"' (2020) 7 *Insights* 17.

⁷⁴⁴ Chapter 3, Eligibility for Permanent Invalidity Benefit (Restrictions) Act.

⁷⁴⁵ Johari RE & Molster M 'The Netherlands Introduces Compensation Regulation to Discourage "Dormant Employment"' (2020) 7 *Insights* 17.

⁷⁴⁶ Chapter 3, Eligibility for Permanent Invalidity Benefit (Restrictions) Act.

⁷⁴⁷ Chapter 3, Eligibility for Permanent Invalidity Benefit (Restrictions) Act.

Employee Insurance Agency finds that an employer has failed to promulgate an action plan or has not sufficiently assisted the employee, they may order the employer to compensate the employees' wages for a further year until the case can be reassessed, thus prolonging an employers' obligation to pay wages.⁷⁴⁸

4.2.5. Equal Treatment (Disability or Chronic Illness) Act of 2003

The Equal Treatment on the grounds of Disability or Chronic Illness Act (hereafter "Equal Treatment Act") entered into force on 1 December 2003 and established an anti-discrimination prohibition on the basis of disability.⁷⁴⁹ The field of employment to which the Equal Treatment Act is applicable is extensive and covers recruitment, dismissal, promotions, employment conditions, employment mediation, training as well as self-employment.⁷⁵⁰

The Equal Treatment Act applies in both the public and private sectors. Although the Equal Treatment Act does not provide a definition for the term 'disability', the Court of Justice of the European Union (hereafter "CJEU"), which is responsible for ensuring that all European Union law is applied consistently in all EU countries, handed down a landmark decision on the concept of disability in 2013.⁷⁵¹ In the judgment of *Mohamed Daouidi v Bootes*⁷⁵² the CJEU underlined the importance of interpreting legislation in a manner which is consistent with UN Directive 2000/78/EC⁷⁵³ on establishing a general framework for equal treatment in employment and occupation, and held that 'disability' must be interpreted as 'a limitation which results in particular from physical, mental or psychological impairments which in interaction with various

⁷⁴⁸ Johari RE & Molster M 'The Netherlands Introduces Compensation Regulation to Discourage "Dormant Employment"' (2020) 7 *Insights* 17.

⁷⁴⁹ Act on Equal Treatment on the grounds of Disability or Chronic Illness 2003 (Equal Treatment Act).

⁷⁵⁰ Open Society Institute 'Rights of People with Intellectual Disabilities: Access to Education and Employment' (2005) Netherlands Monitoring Report, 28.

⁷⁵¹ European Commission 'A comparative analysis of non-discrimination law in Europe 2019' (2019) 41.

⁷⁵² Case C-395/15 *Mohamed Daouidi v Bootes*⁷⁵² Plus SL, Fondo de Garantía Salarial, Ministerio Fiscal, ECLI: EU: C:2016:917.

⁷⁵³ Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation [2000] OJ L 303/16.

barriers may hinder the full and effective participation of the person concerned in professional life on an equal basis with other workers'.⁷⁵⁴

The Dutch government has adopted an approach which is premised on the fact that determines what disability is not only not solely based on an individual's physical or psychological characteristics, but also on the physical and social context that enables or precludes an individual from participating on an equal footing.⁷⁵⁵ This line of reasoning has since been adopted, as evidenced by the decision of the CJEU in the case of *Ring and Werge*⁷⁵⁶ where the court held that Directive 2000/78 is not intended to solely cover disabilities that are congenital or result from accidents, to the exclusion of those caused by illnesses which effectively broadened the definition of disability.⁷⁵⁷

The concept of reasonable accommodation is also regulated by the Equal Treatment Act which affords persons with disabilities with the right to adaptations that are necessary to enable them to participate fully in society.⁷⁵⁸ This duty is underpinned by Article 5 of the EU's Employment Equality Directive which provides that employers must 'take appropriate measures, where needed in a particular case, to enable a person with a disability to have access to, participate in, or advance in employment, or to undergo training, unless such measures would impose a disproportionate burden on the employer'.⁷⁵⁹

As of 1 January 2017, the Equal Treatment Act expanded on the requirement to provide reasonable accommodation and in addition to the obligation to adopt reasonable accommodation in individual circumstances,⁷⁶⁰ also enshrined a general duty to promote accessibility for persons

⁷⁵⁴ Case C-395/15 *Mohamed Daouidi v Bootes* Plus SL, Fondo de Garantía Salarial, Ministerio Fiscal, ECLI: EU: C:2016:917.

⁷⁵⁵ Open Society Institute 'Rights of People with Intellectual Disabilities: Access to Education and Employment' (2005) Netherlands Monitoring Report, 24.

⁷⁵⁶ Joined cases C- 335/11 and C- 337/11, *HK Danmark, acting on behalf of Jette Ring v Dansk almennyttigt Boligselskab (C-335/11) and HK Danmark, acting on behalf of Lone Skouboe Werge v Dansk Arbejdsgiverforening, acting on behalf of Pro Display A/S*, EU: C:2013:222.

⁷⁵⁷ Open Society Institute 'Rights of People with Intellectual Disabilities: Access to Education and Employment' (2005) Netherlands Monitoring Report, 24.

⁷⁵⁸ Article 2, Equal Treatment Act.

⁷⁵⁹ Article 5, Directive 2000/78/EC.

⁷⁶⁰ European Commission 'Country report: Non – discrimination: Netherlands' (2019) 29.

with disabilities.⁷⁶¹ Accessibility extends to all work related activities, including during the recruitment process with the NIHR ruling that discrimination can also occur where an employer decides not to hire a candidate due to poor performance in the selection standards.⁷⁶² This is applicable where such poor performance was as a result of a disability which had duly been disclosed to the employer, and where such employer applied the selection standards uniformly without having considered, enquired or researched whether reasonable accommodation was necessary.⁷⁶³ Practically, this provides that the onus rests on employers to enquire as to whether candidates in the recruitment process require accommodations to compete with their able bodied counterparts.

4.2.5.1. Netherlands Institute for Human Rights

The forum and body which monitors compliance with the enforcement of provisions of the Equal Treatment Act is Netherlands Institute for Human Rights (NIHR), demands a high level of accommodation that is closely linked with the specific wishes of the individuals.⁷⁶⁴ The NIHR also emphasises that the provision of reasonable accommodations are intended to optimise the autonomy of disabled individuals.⁷⁶⁵ Therefore, consultations with employees with disabilities should not be a mere formality and should involve effective participation, meaning parties should have a sincere aim to reach a collective agreement.⁷⁶⁶

The NIHR was established in 2012 following its approval by the Dutch House of Representatives and the Dutch Senate.⁷⁶⁷ For years preceding its establishment, human rights organisations and parliamentarians lobbied for the establishment of a National Human Rights Institute, however the existence of several other national bodies dealing with human rights contributed to the slow

⁷⁶¹ European Commission ‘Country report: Non – discrimination: Netherlands’ (2019) 29.

⁷⁶² The Netherlands, the Netherlands Institute for Human Rights, 2 January 2014, 2014-1.

⁷⁶³ The Netherlands, the Netherlands Institute for Human Rights, 2 January 2014, 2014-1.

⁷⁶⁴ European Commission ‘Country report: Non – discrimination: Netherlands’ (2019) 31.

⁷⁶⁵ European Commission ‘Country report: Non – discrimination: Netherlands’ (2019) 31.

⁷⁶⁶ CRPD, General comment no. 7 on the participation of persons with disabilities, including children with disabilities, through their representative organizations, in the implementation and monitoring of the convention, CRPD/C/GC/7, 21 September 2018, paras 47 - 48.

⁷⁶⁷ Donders Y ‘The Newly Established Netherlands Institute for Human Rights: Integrating Human Rights and Equal Treatment’ in Wouters J & Meeuwissen National Human Rights Institutions in Europe, Comparative, European and International Perspectives (2013) 91 – 112.

establishment of the NIHR.⁷⁶⁸ Due to the existence of other bodies dealing with human rights, the Dutch government was not supportive of the establishment of an entirely new institute, and as such the Dutch Equal Treatment Commission was assimilated in the new NIHR.⁷⁶⁹

Persons who have been discriminated against may approach the NIHR and file a complaint.⁷⁷⁰ Following the complaint the NIHR obtains information from parties and holds an inquiry.⁷⁷¹ Within 8 weeks after the inquiry is held the NIHR renders a verdict.⁷⁷² Although rulings made by the NIHR are not legally binding, civil judges are obligated to consider the rulings.⁷⁷³ Civil courts considering rulings by the NIHR will often attempt settlement between the parties but where this proves unsuccessful, the courts will deliver their verdict on the matter after approximately four weeks.⁷⁷⁴

4.2.6. Analysing the regulative framework of the Netherlands

Although the legislation in the Netherlands which regulate mental health in the workplace is extensive, the practicability thereof continues to experience challenges due to the uncertainty which exists.⁷⁷⁵ Even the NIHR itself has acknowledged that due to the complexity of proposed



⁷⁶⁸ Donders Y ‘The Newly Established Netherlands Institute for Human Rights: Integrating Human Rights and Equal Treatment’ in Wouters J & Meeuwissen National Human Rights Institutions in Europe, Comparative, European and International Perspectives (2013) 91 – 112.

⁷⁶⁹ Donders Y ‘The Newly Established Netherlands Institute for Human Rights: Integrating Human Rights and Equal Treatment’ in Wouters J & Meeuwissen National Human Rights Institutions in Europe, Comparative, European and International Perspectives (2013) 91 – 112.

⁷⁷⁰ Donders Y ‘The Newly Established Netherlands Institute for Human Rights: Integrating Human Rights and Equal Treatment’ in Wouters J & Meeuwissen National Human Rights Institutions in Europe, Comparative, European and International Perspectives (2013) 91 – 112.

⁷⁷¹ Donders Y ‘The Newly Established Netherlands Institute for Human Rights: Integrating Human Rights and Equal Treatment’ in Wouters J & Meeuwissen National Human Rights Institutions in Europe, Comparative, European and International Perspectives (2013) 91 – 112.

⁷⁷² Donders Y ‘The Newly Established Netherlands Institute for Human Rights: Integrating Human Rights and Equal Treatment’ in Wouters J & Meeuwissen National Human Rights Institutions in Europe, Comparative, European and International Perspectives (2013) 91 – 112.

⁷⁷³ Donders Y ‘The Newly Established Netherlands Institute for Human Rights: Integrating Human Rights and Equal Treatment’ in Wouters J & Meeuwissen National Human Rights Institutions in Europe, Comparative, European and International Perspectives (2013) 91 – 112.

⁷⁷⁴ Donders Y ‘The Newly Established Netherlands Institute for Human Rights: Integrating Human Rights and Equal Treatment’ in Wouters J & Meeuwissen National Human Rights Institutions in Europe, Comparative, European and International Perspectives (2013) 91 – 112.

⁷⁷⁵ Para 67, CRPD General Comment no 6 on equality and non – discrimination CRPD/C/GC/6, 26 April 2018.

and existing legislation, it is often challenging individuals with disabilities and employers to determine which rules apply to them and which solutions may be available.⁷⁷⁶

It has therefore been suggested that when establishing laws which affect persons with disabilities, the legislature must be required to at an early stage conduct a comprehensive assessment of proposed legislation in light of the CRPD.⁷⁷⁷ This assessment is required to illustrate how the legislative proposal might contribute to the CRPD's implementation and whether or not individuals with disabilities and their organisations have been consulted.

Furthermore, despite the prohibition thereof, the NIHR has addressed the continued existence of disability discrimination and the denial of reasonable accommodation.⁷⁷⁸ This is evident by the publishing of General Comment on Article 5 of the CRPD which provided what state parties should do to achieve de facto equality in terms of the CRPD.⁷⁷⁹ State parties should therefore be strongly encouraged to expressly recognise the denial of reasonable accommodation as discrimination.⁷⁸⁰

The functioning of the Netherlands' NIHR can be compared to that of South Africa's Commission for Conciliation, Mediation and Arbitration (hereafter "CCMA"). Similar to the CCMA, the NIHR is relatively more accessible than that of the traditional courts. Although, unlike the NIHR who conducts an inquiry, the CCMA has a two - stage process of conciliation and arbitration. It is however worth noting that the distinguishing feature between the two is the binding nature of the awards handed down by each forum. The NIHR hands down rulings which need to be enforced by Dutch Civil courts before they are binding, whereas an arbitration award handed down by the CCMA is already legally binding and carries the same weight as a court order.⁷⁸¹

⁷⁷⁶ Para 67, CRPD General Comment no 6 on equality and non – discrimination CRPD/C/GC/6, 26 April 2018.

⁷⁷⁷ Para 67, CRPD General Comment no 6 on equality and non – discrimination CRPD/C/GC/6, 26 April 2018.

⁷⁷⁸ Para 67, CRPD General Comment no 6 on equality and non – discrimination CRPD/C/GC/6, 26 April 2018.

⁷⁷⁹ Para 67, CRPD General Comment no 6 on equality and non – discrimination CRPD/C/GC/6, 26 April 2018.

⁷⁸⁰ Para 67, CRPD General Comment no 6 on equality and non – discrimination CRPD/C/GC/6, 26 April 2018.

⁷⁸¹ Section 143(1), Labour Relations Act 66 of 1995.

Furthermore, the proactive obligations placed on Dutch employers to prevent occupational health and safety risks to their employees are more substantive than those placed on South African employers insofar as the appointment of company doctors, prevention officers and work councils. South Africa could benefit from the appointment of these individuals, which would undoubtedly contribute

Finally, the remuneration of employees whilst they are ill is by far the starkest difference between the Netherlands and South Africa and their acknowledgement of health in the workplace. Whilst Dutch employees benefit from a minimum remuneration of 70% of their regular wages, South African employees are entitled to paid sick leave equal to the number of days they have worked over six weeks.⁷⁸²



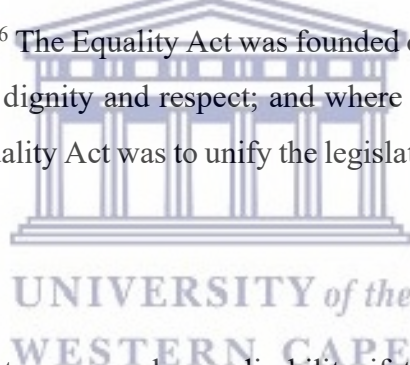
⁷⁸² Section 22(1) – (4), Basic Conditions of Employment Act 75 of 1997.

4.3. UNITED KINGDOM

Poor mental health is predicted to cost employers in the United Kingdom upwards of GBP 45 billion each year.⁷⁸³ While not all mental health conditions result in sickness absences, employers are increasingly recognising the crucial role which mental health plays in productivity, overall employee engagement, and the need to foster an open culture that eradicates the stigma surrounding mental health.⁷⁸⁴ The interpretation of legislation has evolved swiftly in response to the critical need to safeguard persons suffering from mental health issues, same being discussed below.

4.3.1. Equality Act of 2010⁷⁸⁵

The Equality Act of 2010 (hereafter “Equality Act”) became effective in 2010 and, amongst others, replaced the Disability Discrimination Act of 1995 which was previously applicable in England, Scotland and Wales.⁷⁸⁶ The Equality Act was founded on the vision of a modern Britain where everyone is treated with dignity and respect; and where all have a chance to succeed.⁷⁸⁷ The inherent purpose of the Equality Act was to unify the legislation which previously prohibited discrimination.⁷⁸⁸



The Equality Act provides that a person has a disability if they have a physical or mental impairment and such impairment has a substantial and long term adverse effect on the ability to carry out normal day to day activities.⁷⁸⁹ However, one of the unique challenges of a disability, in comparison to other protected characteristics under the Equality Act, is that there is often

⁷⁸³ Kurnatowska M ‘United Kingdom: Employee Mental Health in a COVID-19 world’ available at <https://www.acas.org.uk/about-us> (accessed 29 September 2021).

⁷⁸⁴ Kurnatowska M ‘United Kingdom: Employee Mental Health in a COVID-19 world’ available at <https://www.acas.org.uk/about-us> (accessed 29 September 2021).

⁷⁸⁵ Equality Act of 2010, accessible at <https://www.legislation.gov.uk/ukpga/2010/15/contents>.

⁷⁸⁶ <https://www.equalityhumanrights.com/sites/default/files/equalityact2010-technicalguidance-feandhe-2015.pdf>

⁷⁸⁷ <https://www.equalityhumanrights.com/sites/default/files/equalityact2010-technicalguidance-feandhe-2015.pdf>

⁷⁸⁸ <https://www.equalityhumanrights.com/sites/default/files/equalityact2010-technicalguidance-feandhe-2015.pdf>

⁷⁸⁹ Section 6 (1)(a) – (b), Equality Act 2010 c.15. Available at https://www.ilo.org/dyn/natlex/natlex4.detail?p_isn=88238&p_lang=en.

uncertainty between employer and employee regarding whether an employee is disabled and whether the employer was aware, or should have been aware, of the employee's disability.⁷⁹⁰

Chapter 2 of the Equality Act prohibits conduct based on a protected characteristic.⁷⁹¹ The effect of this is that it is unlawful to discriminate against employees based on a mental or physical disability.⁷⁹² Discrimination arising from a disability is expressly recognised by section 15 providing that where someone is treated unfavourably due to something arising as a result of their disability and it cannot be shown that such treatment was a proportionate means of achieving a legitimate aim, they have been discriminated against.⁷⁹³ The aforementioned provision is however only applicable where the person committing the acts of discrimination knew or could have reasonably been expected to know of the disability.⁷⁹⁴

The Equality Act provides a wide scope of protection against discrimination by recognising four main types of discrimination, namely direct discrimination,⁷⁹⁵ indirect discrimination,⁷⁹⁶ harassment⁷⁹⁷ and victimisation.⁷⁹⁸ Direct discrimination occurs when a person is treated less favorably as a result of either a protected characteristic they possess, a protected characteristic someone with whom they are associated possesses, or a protected characteristic they are believed to possess, regardless of whether that belief is accurate or not.⁷⁹⁹ These forms of direct discrimination are commonly referred to as ordinary direct discrimination; direct discrimination by association and direct discrimination by perception, respectively.⁸⁰⁰

Indirect discrimination occurs where a 'provision, criterion or practice' (PCP) is applied equally amongst a group of people where only some share the protected characteristic, where it has or

⁷⁹⁰ Lauren Applebey 'Mental ill in court: Disability and discrimination' available at <https://www.shponline.co.uk/occupational-health/mental-ill-health-court-disability-discrimination/> (accessed 5 October 2021).

⁷⁹¹ Chapter 2, Equality Act 2010 (*Equality Act*).

⁷⁹² Chapter 2, Equality Act.

⁷⁹³ Section 15(1)(a) – (b), Equality Act.

⁷⁹⁴ Section 15(2), Equality Act.

⁷⁹⁵ Section 13, Equality Act.

⁷⁹⁶ Section 19, Equality Act.

⁷⁹⁷ Section 26, Equality Act.

⁷⁹⁸ Section 27, Equality Act.

⁷⁹⁹ Section 27, Equality Act.

⁸⁰⁰ Chapter 2, Equality Act.

will have the effect of placing those who possess the protected characteristic at a disadvantage compared to those who do not possess it, where it puts or would put the person at a disadvantage and where the employer is unable to objectively justify the PCP.⁸⁰¹ Although there is no definition of a PCP contained in the Equality Act, it is accepted that it includes an employers' formal, informal, written and unwritten policies, procedures, requirements, rules and arrangements.⁸⁰² Although all four elements must be applicable for a successful claim, an employee bears the onus of demonstrating that such PCP will have the effect of placing those who possess the protected characteristic at a disadvantage and that it has or would place themselves personally at a disadvantage.⁸⁰³

Harassment as the third form of discrimination, refers to unwanted conduct related to a protected characteristic where the conduct has the effect of violating ones dignity or creating an intimidating, hostile, degrading or offensive environment.⁸⁰⁴ In determining whether conduct constitutes harassment, consideration must be given to alleged victims perception of the conduct, other circumstances of the case and whether it would be reasonable for the conduct to have that effect.⁸⁰⁵ Victimisation as the fourth form of discrimination, occurs where an employee experiences a 'disadvantage' as a result of doing or being suspected of doing one of the following in good faith: making an allegation of discrimination, supporting a discrimination allegation, providing evidence in support of a discrimination complaint or raising a grievance concerning equality or discrimination.⁸⁰⁶

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Where an employee is disadvantaged by their disability and they fall within the definition of a disabled person, employers are required to make reasonable adjustments to any employment aspects that place a disabled person at a substantial disadvantage relative to non-disabled

⁸⁰¹ Falconer, K 'The 4 types of discrimination: What every employer needs to know' available at <https://www.hrsolutions-uk.com/4-types-of-discrimination/> (accessed 2 October 2021).

⁸⁰² Falconer, K 'The 4 types of discrimination: What every employer needs to know' available at <https://www.hrsolutions-uk.com/4-types-of-discrimination/> (accessed 2 October 2021).

⁸⁰³ Falconer, K 'The 4 types of discrimination: What every employer needs to know' available at <https://www.hrsolutions-uk.com/4-types-of-discrimination/> (accessed 2 October 2021).

⁸⁰⁴ Section 26(1), Equality Act 2010.

⁸⁰⁵ Section 26(4)(a) – (c), Equality Act 2010.

⁸⁰⁶ Section 27(1) – (4), Equality Act 2010.

people.⁸⁰⁷ Employers are solely tasked with providing accommodations which are reasonable.⁸⁰⁸ Essential considerations to be taken into account when determining the reasonableness of an accommodation include the expense and practicability of making a modification, as well as the employer's resources.⁸⁰⁹

As per section 21(2) of the Equality Act, discrimination against a person with a disability occurs where an employer fails to comply with a duty to make reasonable adjustments.⁸¹⁰ The duty to make reasonable adjustments arises where persons with disabilities are placed at a substantial disadvantage because of either of the following;

- a) where a PCP is applied by or on behalf of the employer;⁸¹¹
- b) where a physical feature of the premises occupied by an employer;⁸¹² or
- c) where there is a lack of auxiliary aids.⁸¹³

Although the Equality Act omits a specific list of reasonable adjustments, the Equality Act 2010 Code of Practice⁸¹⁴ supplements the Equality Act in this regard.



4.3.1.1. Equality Act 2010 Code of Practice

The Equality and Human Rights Commission (EHRC) was established by the Equality Act of 2006 (hereafter “Old Equality Act”).⁸¹⁵ The purpose of the EHRC was to work towards the elimination of unlawful discrimination and promote equality and human rights.⁸¹⁶ To achieve this purpose, the Equality Act 2010 Code of Practice (hereafter “Employment Statutory Code of Practice”) was promulgated. The Employment Statutory Code of Practice functions as an

⁸⁰⁷ Government Equalities Office ‘Equality Act 2010: Duty on employers to make reasonable adjustments for their staff’ 2.

⁸⁰⁸ Government Equalities Office ‘Equality Act 2010’ 3.

⁸⁰⁹ Government Equalities Office ‘Equality Act 2010’ 3.

⁸¹⁰ Section 21(2), Equality Act.

⁸¹¹ Section 20(3), Equality Act.

⁸¹² Section 20(4), Equality Act.

⁸¹³ Section 20(5), Equality Act.

⁸¹⁴ Equality and Human Rights Commission ‘Who are we’ available at <https://www.equalityhumanrights.com/en/about-us/who-we-are> (accessed 24 May 2022).

⁸¹⁵ Introduction, Equality Act 2010 Code of Practice.

⁸¹⁶ Introduction, Equality Act 2010 Code of Practice.

authoritative and comprehensive technical guide to the application of the Equality Act.⁸¹⁷ As such, the main purpose of the Employment Statutory Code of Practice is to provide a detailed explanation of the Equality Act.⁸¹⁸ Therefore, because the Equality Act omits a specific list of adjustments, the Employment Statutory Code of Practice⁸¹⁹ supplements the Equality Act.

Section 6(33) the Employment Statutory Code of Practice provides that adjustments can include changing the location of work or allowing work from home, allowing flexible working, allowing extra time off work for counselling and other medical appointments as well as amending the employees' role or parts thereof.⁸²⁰

4.3.1.1.1. Marie Claire McLaughlin v Charles Hurst Limited

In the case of Marie Claire McLaughlin v Charles Hurst Limited⁸²¹, the Fair Employment Tribunal (hereafter "Tribunal") held that Charles Hurst Limited (hereafter "employer") violated its duty to make reasonable adjustments for Marie-Claire McLaughlin (hereafter "employee"), an employee who worked an average of 47.8 hours per week as a customer service advisor.⁸²²

The employee had previously suffered from ill mental health which resulted in her being absent from work due to bouts of depression and panic attacks.⁸²³ The employee then filed for a reduction in her working hours to 40 hours per week, and in doing so she specifically referred to her disability and the serious impact it was having on both her and her co-workers.⁸²⁴ The employer subsequently denied her request.⁸²⁵

The Tribunal held that the employee's request for reduced working hours was not considered in an appropriate manner, with all emphasis being placed on the needs of the business, and little or

⁸¹⁷ Introduction, Equality Act 2010 Code of Practice.

⁸¹⁸ Introduction, Equality Act 2010 Code of Practice.

⁸¹⁹ Equality Act 2010 Code of Practice.

⁸²⁰ Section 6(33), Equality Act 2010 Code of Practice.

⁸²¹ McLaughlin v Charles Hurst Limited [2016] NIIT 00083 15IT.

⁸²² McLaughlin v Charles Hurst Limited [2016] NIIT 00083 15IT.

⁸²³ McLaughlin v Charles Hurst Limited [2016] NIIT 00083 15IT, para 9(i) – (iii).

⁸²⁴ McLaughlin v Charles Hurst Limited [2016] NIIT 00083 15IT, para 10(i).

⁸²⁵ McLaughlin v Charles Hurst Limited [2016] NIIT 00083 15IT, para 10(i).

no emphasis placed on the needs of the employee.⁸²⁶ It was further held that had the employer correctly focused on the concept of reasonable adjustments, the employee would have benefitted from her request for reduced working hours.⁸²⁷ The employer's failure to grant the employee a reasonable adjustment was held to have inevitably compounded and exacerbated any pre-existing condition to a serious degree.⁸²⁸

The Industrial Tribunal found that the employer had failed to appropriately consider her request and consequently awarded her £11 840 in respect of injury to feelings and psychiatric injury sustained by her as a result of the employer's breach of duty to make a reasonable adjustment.⁸²⁹

This case showcases the importance of taking the needs of the employee requesting the reasonable adjustment into account, when considering whether or not to grant a reasonable adjustment.

4.3.1.1.2. *Environment Agency v Rowan*

In this case, Ms Rowan (hereafter "employee") was employed as a clerk at the Environment Agency (hereafter "employer").⁸³⁰ The employee suffered a back injury which eventually resulted in surgery and was followed by a long-term sickness absence.⁸³¹ Following the surgery, the employee relocated resulting in her commute to work increasing by 50 miles.⁸³² She thus requested to work from home but her request was denied and deemed inappropriate.⁸³³

The employer subsequently commenced a capability procedure relating to the employee's performance.⁸³⁴ Shortly thereafter, the employee resigned and brought claims of unfair dismissal and disability discrimination.⁸³⁵ Her claims were based on the Disability Discrimination Act 1995, which at the time had not yet been repealed by the UK's Equality Act. According to the

⁸²⁶ *McLaughlin v Charles Hurst Limited* [2016] NIIT 00083 15IT, para 28(ii).

⁸²⁷ *McLaughlin v Charles Hurst Limited* [2016] NIIT 00083 15IT, para 28(ii).

⁸²⁸ *McLaughlin v Charles Hurst Limited* [2016] NIIT 00083 15IT, para 10(i).

⁸²⁹ *McLaughlin v Charles Hurst Limited* [2016] NIIT 00083 15IT, para 10(i).

⁸³⁰ *Environment Agency v Rowan* [2008] IRLR 20, para 3.

⁸³¹ *Environment Agency v Rowan* [2008] IRLR 20, para 3.

⁸³² *Environment Agency v Rowan* [2008] IRLR 20, para 4.

⁸³³ *Environment Agency v Rowan* [2008] IRLR 20, para 5.

⁸³⁴ *Environment Agency v Rowan* [2008] IRLR 20, para 9.

⁸³⁵ *Environment Agency v Rowan* [2008] IRLR 20, para 13.

DDA, where a disabled employee is placed at a substantial disadvantage by a PCP, an employer has a duty to take reasonable steps to rectify the disadvantage.⁸³⁶

Where it is found that the duty has arisen, tribunals are further required to determine whether the adjustment is reasonable to prevent the PCP from placing the claimant at that substantial disadvantage.⁸³⁷ To do this, the claimant is required to prove on the facts that a duty to make reasonable adjustments had arisen and was subsequently breached.⁸³⁸ Where there have done so, the onus is then on the employer to show that such duty was not breached.⁸³⁹ The ET upheld the employee's claim for constructive dismissal and held that the employer had discriminated against her on the grounds of disability in refusing to grant the employee a trial – period of working from home.⁸⁴⁰

The employer consequently appealed the ET's decision, one of the grounds being that a trial period itself cannot be a reasonable adjustment.⁸⁴¹ The Employment Appeal Tribunal (hereafter "EAT") provided that it had considerable difficulty in seeing how a trial – period could in itself be considered a reasonable adjustment.⁸⁴² It went further to provide that a trial period ought to be used as a manner of assessing whether a future adjustment was viable.⁸⁴³

The EAT provided further guidance as to the approach to be adopted in determining whether an employer has discriminated against an employee by failing to comply with the duty to make reasonable adjustments. According to the EAT, tribunals must identify:

- a. the PCP applied by or on behalf of the employer;⁸⁴⁴
- b. the physical feature of the premises occupied by the employer;⁸⁴⁵
- c. the identity of the non – disabled comparator (where appropriate);⁸⁴⁶ and

⁸³⁶ Environment Agency v Rowan [2008] IRLR 20, para 13.

⁸³⁷ Environment Agency v Rowan [2008] IRLR 20, para 13.

⁸³⁸ Rowan v The Environment Agency [2008] IRLR 20 (4/17 FET)(1408/16).

⁸³⁹ Environment Agency v Rowan [2008] IRLR 20, para 13.

⁸⁴⁰ Environment Agency v Rowan [2008] IRLR 20, para 20.

⁸⁴¹ Environment Agency v Rowan [2008] IRLR 20, para 4.

⁸⁴² Environment Agency v Rowan [2008] IRLR 20, para 37.

⁸⁴³ Environment Agency v Rowan [2008] IRLR 20, para 47.

⁸⁴⁴ Environment Agency v Rowan [2008] IRLR 20, para 27(a).

⁸⁴⁵ Environment Agency v Rowan [2008] IRLR 20, para 27(a).

⁸⁴⁶ Environment Agency v Rowan [2008] IRLR 20, para 27(c).

- d. the nature and extent of the substantial disadvantage suffered by the claimant.⁸⁴⁷

As such, the ET had failed to clearly identify the nature and extent of the substantial disadvantage suffered by the claimant and it was thus not in a position to determine what adjustments were reasonable to prevent the PCP that allegedly placed the employee at a substantial disadvantage.⁸⁴⁸ The EAT therefore allowed the employer's appeal against the finding of disability discrimination.⁸⁴⁹

4.3.2. Health and Safety at Work Act of 1974⁸⁵⁰

Despite being drafted more than 40 years ago, the Health and Safety at Work Act 1974⁸⁵¹ (hereafter "HSWA") remains relevant in the workplace, insofar as an employer's general obligation to look after their employees' welfare.⁸⁵² The HSWA sets out general duties which employers have towards employees and duties which employees have towards themselves.

Prior to the implementation of the HSWA, the United Kingdom lacked comprehensive workplace health and safety legislation.⁸⁵³ There were however numerous fragmented and incoherent pieces of sector-specific legislation, with distinct rules governing factories, offices, stores, mines, construction, and railways.⁸⁵⁴ The HSWA sets out general duties which employers have towards employees and duties which employees have towards themselves.⁸⁵⁵

⁸⁴⁷ Environment Agency v Rowan [2008] IRLR 20, para 27(d).

⁸⁴⁸ Environment Agency v Rowan [2008] IRLR 20, para 62.

⁸⁴⁹ Environment Agency v Rowan [2008] IRLR 20, para 74.

⁸⁵⁰ Health and Safety at Work Act 1974, accessible at <https://www.legislation.gov.uk/ukpga/1974/37/contents>.

⁸⁵¹ Chapter 2, Health and Safety at Work Act 1974 (HSWA).

⁸⁵² Section 2, Health and Safety at Work Act.

⁸⁵³ Worknest 'Health and Safety at Work Act 1974: A guide for employers' available at <https://worknest.com/blog/health-safety-work-etc-act-1974/> (accessed 2 October 2021).

⁸⁵⁴ Worknest 'Health and Safety at Work Act 1974: A guide for employers' available at <https://worknest.com/blog/health-safety-work-etc-act-1974/> (accessed 2 October 2021).

⁸⁵⁵ Sections 2 and 3, Health and Safety at Work Act.

Section 2 of the HSWA places a further duty on employers to ensure, so far as is reasonably practicable, the health, safety and wellbeing of all employees at work.⁸⁵⁶ Most recently, in May 2020 the Advisory, conciliation and Arbitration Service (ACAS) published a new guideline based on the covid-19 pandemic and mental health in which it emphasised the employers' duty of care to safeguard employees' health, safety and well-being.⁸⁵⁷

4.3.2.1. Management of Health and Safety at Work Regulations

The Management of Health and Safety at Work Regulations 1999⁸⁵⁸ (MHSW Regulations) was introduced to reinforce the HSWA by explicitly providing what employers are required to do to manage health and safety. This was done by placing duties on both employers and employees, thus clearly defining what was required of both parties to maintain a safe and healthy workplace.⁸⁵⁹

Regulation 3 of the MHSW Regulations provides that employers have a duty to assess and manage risk to their employees.⁸⁶⁰ Laws are widely accepted to be reflective of the bone mores of society and at the time of the introduction of the HSWA and MHSW Regulations, mental health was seen to be less significant than that of physical health.⁸⁶¹ This was due to the stigmatisation thereof and the interpretation of employment legislation thus failed to consider mental health.⁸⁶² The current interpretation however acknowledges mental health and the duty of employers to assess and manage risk to their employees now includes assessing and minimising the risk of stress-related illness.⁸⁶³

Under the MHSW Regulations, a primary duty of employers is to conduct risk assessments to identify potential hazards to employee health and safety, as well as to the health and safety of

⁸⁵⁶ Section 2, Health and Safety at Work Act.

⁸⁵⁷ Kurnatowska M 'United Kingdom: Employee Mental Health in a COVID-19 world' available at <https://www.acas.org.uk/about-us> (accessed 29 September 2021).

⁸⁵⁸ Management of Health and Safety at Work Regulations 1999.

⁸⁵⁹ Management of Health and Safety at Work Regulations 1999.

⁸⁶⁰ Regulation 3, Management of Health and Safety at Work Regulations 1999.

⁸⁶¹ Swanepoel M 'Human Rights that influence the mentally ill patient in south african medical law' (2011) 14 *PELJ* 1.

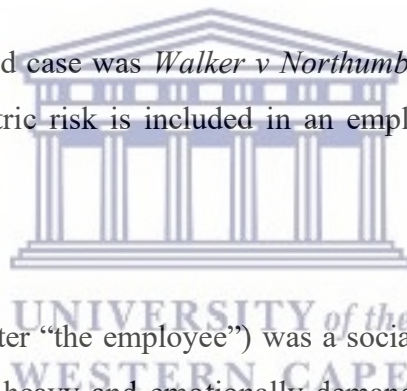
⁸⁶² Swanepoel M 'Human Rights that influence the mentally ill patient in south african medical law' (2011) 14 *PELJ* 1.

⁸⁶³ Regulation 3, Management of Health and Safety at Work Regulations 1999.

anybody who may be harmed by their work activity.⁸⁶⁴ Employers must subsequently make arrangements to implement health and safety measures to control the hazards identified during risk assessment.⁸⁶⁵ Employers are also tasked with informing employees of the risks to their health and safety. Furthermore, the MHSW Regulations furthermore impose an implied duty on employers to provide a suitable work environment and failure to comply may amount to claims for constructive dismissal, claims arising out of a breach of duty of care as well as criminal offences.⁸⁶⁶ This effectively places a positive duty on employers to prevent harm and to protect the well – being of their employees. The case of *Cross v Highlands and Island Enterprises* emphasised the importance of working conditions to both physical and mental health.⁸⁶⁷ In this case, the Court explicitly held that employers have a duty to exercise reasonable care to avoid subjecting employees to working conditions that are reasonably likely to result in psychiatric harm or illness.⁸⁶⁸

4.3.2.1.1. Walker v Northumberland City Council

The first landmark stress related case was *Walker v Northumberland City Council* which held that the prevention of psychiatric risk is included in an employer’s duty of care towards its employees.⁸⁶⁹



In this case Mr Walker (hereafter “the employee”) was a social worker who suffered a mental breakdown, largely due to the heavy and emotionally demanding workload.⁸⁷⁰ Following his return to work, despite the employee repeatedly requesting assistance from his employer, no additional support was provided.⁸⁷¹ This resulted in the employee suffering a second mental breakdown the following year.⁸⁷² The employee was thereafter dismissed due to ill - health and he brought an action against his employer.⁸⁷³

⁸⁶⁴ Regulation 5, Management of Health and Safety at Work Regulations 1999.

⁸⁶⁵ Regulation 5, Management of Health and Safety at Work Regulations 1999.

⁸⁶⁶ Kurnatowska M ‘United Kingdom: Employee Mental Health in a COVID-19 world’ available at <https://www.acas.org.uk/about-us> (accessed 29 September 2021).

⁸⁶⁷ *Cross v Highlands and Island Enterprises* [2001] I.R.L.R. 336.

⁸⁶⁸ *Cross v Highlands and Island Enterprises* [2001] I.R.L.R. 336.

⁸⁶⁹ *Walker v Northumberland County Council* [1995] 1 All ER 737.

⁸⁷⁰ *Walker v Northumberland County Council* [1995] 1 All ER 737.

⁸⁷¹ *Walker v Northumberland County Council* [1995] 1 All ER 737.

⁸⁷² *Walker v Northumberland County Council* [1995] 1 All ER 737.

⁸⁷³ *Walker v Northumberland County Council* [1995] 1 All ER 737.

The action was based on the employer's alleged breach of duty of care to take reasonable steps to ensure he had a manageable workload.⁸⁷⁴ The employee argued that the duty of care extended to taking reasonable steps to prevent the risk of exposing employees to a workload which was detrimental to their health.⁸⁷⁵ The employer however argued that it was inappropriate for the court to evaluate the reasonableness of their operational allocation of resources.⁸⁷⁶

The court held that there was no logical reason to justify the exclusion of the risk of psychiatric injury from an employer's duty of care.⁸⁷⁷ In relation to the employee's first mental breakdown, the court held that the employer had not breached their duty of care in failing to prevent it as the employer could not have reasonably foreseen it occurring.⁸⁷⁸ The court however held that the second mental breakdown was foreseeable in circumstances where the employee was not offered additional support.⁸⁷⁹

4.3.2.1.2. Barber v Somerset County Council

The case of *Barber v Somerset County Council* also dealt with the mental health of an employee being affected by the decisions of an employer. In this case, the employee was a teacher who was demoted during a restructuring exercise.⁸⁸⁰ Following the demotion, he found himself performing the same duties as before but with less support and remuneration.⁸⁸¹ To maintain what he had previously earned, he worked overtime and was effectively working 70 hours per week.⁸⁸² As a result of his workload, the employee was eventually diagnosed with depression and was subsequently booked off from work.⁸⁸³ Following his return to work, the employee informed his employer that he was experiencing difficulty coping.⁸⁸⁴ He further informed his direct superior of his inability to cope and expressed concern for the detrimental effects of the

⁸⁷⁴ Walker v Northumberland County Council [1995] 1 All ER 737.

⁸⁷⁵ Walker v Northumberland County Council [1995] 1 All ER 737.

⁸⁷⁶ Walker v Northumberland County Council [1995] 1 All ER 737.

⁸⁷⁷ Walker v Northumberland County Council [1995] 1 All ER 737.

⁸⁷⁸ Walker v Northumberland County Council [1995] 1 All ER 737.

⁸⁷⁹ Walker v Northumberland County Council [1995] 1 All ER 737.

⁸⁸⁰ Barber v Somerset County Council [2004] All ER (D) 07 (Apr) HL, para 5.

⁸⁸¹ Barber v Somerset County Council [2004] All ER (D) 07 (Apr) HL, para 4.

⁸⁸² Barber v Somerset County Council [2004] All ER (D) 07 (Apr) HL, para 6.

⁸⁸³ Barber v Somerset County Council [2004] All ER (D) 07 (Apr) HL, para 8.

⁸⁸⁴ Barber v Somerset County Council [2004] All ER (D) 07 (Apr) HL, para 6.

workload to his health.⁸⁸⁵ Following an incident at work, the employee was advised to immediately stop working and went on ill – health retirement.⁸⁸⁶ The employee subsequently claimed damages for psychiatric illness.

The County Court held that given the employer’s awareness of the applicant’s history, it should have investigated the employee’s situation to see how his difficulties could possibly be alleviated.⁸⁸⁷ The court held further that the employer’s failure to investigate or provide temporary assistance to the employee led to the employee attempting to cope and failing to do so and as such had breached its duty to protect its employees’ health and safety.⁸⁸⁸ The court awarded the employee over £100 000 in damages.⁸⁸⁹

The employer appealed the decision to the Court of Appeal (hereafter “COA”), who in response formulated guidelines for determining an employer’s liability for psychiatric injury caused by workplace stress. The COA held that an employer is entitled to assume that an employee can withstand the normal pressures of the job unless it is aware of a particular problem or vulnerability.⁸⁹⁰ Furthermore, where an employee returns to work following an absence due to sickness and fails to make any further disclosure to the employer, it is implied that the employee believes they are fit to resume their previous work.⁸⁹¹ Finally, the COA held that an employers’ duty to take steps to safeguard an employee from harm to health arising from stress at work is only applicable where the harm is reasonably foreseeable.⁸⁹² Surprisingly however, the COA reasoned that it is unlikely for an employer to be found to have breached their duty of care where they offer confidential advice services with referrals to appropriate treatment or counselling services, unless completely unreasonable demands are placed on employees where the risk of harm was clear. The employers’ appeal was therefore upheld.

⁸⁸⁵ Barber v Somerset County Council [2004] All ER (D) 07 (Apr) HL, para 6.

⁸⁸⁶ Barber v Somerset County Council [2004] All ER (D) 07 (Apr) HL, para 8.

⁸⁸⁷ Barber v Somerset County Council [2004] All ER (D) 07 (Apr) HL, para 8.

⁸⁸⁸ Barber v Somerset County Council [2004] All ER (D) 07 (Apr) HL, para 6.

⁸⁸⁹ Barber v Somerset County Council [2004] All ER (D) 07 (Apr) HL, para 7.

⁸⁹⁰ Barber v Somerset County Council [2004] All ER (D) 07 (Apr) HL, para 9.

⁸⁹¹ Barber v Somerset County Council [2004] All ER (D) 07 (Apr) HL, para 6.

⁸⁹² Barber v Somerset County Council [2004] All ER (D) 07 (Apr) HL, para 18

This matter was taken to the House of Lords who approved the COA's guidelines. The House of Lords however reversed the COA's decision on the facts and the decision of the County Court was restored.⁸⁹³ It was further held that the overall test for determining whether an employer was in breach of the duty of care was whether the conduct taken by an employer was reasonable for the safety of its workers in light of what it is aware of or ought to be aware of.⁸⁹⁴ With regard to the specific circumstances of the case, it held that even the slightest reduction in workload had the potential to make a difference to the employee's condition which should have continuously been monitored.⁸⁹⁵

The obligations placed on employers where they are aware or ought to be aware of employees' mental health conditions, are thus clear. Consideration for the individual circumstances of employees' is of the utmost importance and each matter is required to be assessed on its own merits.

4.3.3. Analysing the regulative framework of UK

Similar to the UK, South African employers too have a duty to provide and maintain as far as reasonably practical, a working environment which is safe and without risk to the health of its employees.⁸⁹⁶ Furthermore, section 8(2)(d) places a positive obligation on employers to make arrangements to ensure the safety and absence of risk to health of employees.⁸⁹⁷ However, this obligation is subject to the reasonable practicability of the arrangements. To determine whether an adjustment is reasonably practicable, employers must have regard to:

- i. the severity and scope of the hazard or risk concerned;⁸⁹⁸
 - ii. the state of knowledge reasonably available concerning that hazard or risk and the means of removing or mitigating that hazard or risk;⁸⁹⁹
 - iii. the availability and suitability of means to remove or mitigate that hazard or risk;⁹⁰⁰
- and

⁸⁹³ Barber v Somerset County Council [2004] All ER (D) 07 (Apr) HL, para 25.

⁸⁹⁴ Barber v Somerset County Council [2004] All ER (D) 07 (Apr) HL, para 20.

⁸⁹⁵ Barber v Somerset County Council [2004] All ER (D) 07 (Apr) HL, para 23.

⁸⁹⁶ Section 8(1), Occupational Health and Safety Act 85 of 1993.

⁸⁹⁷ Section 8(2)(d), Occupational Health and Safety Act 85 of 1993.

⁸⁹⁸ Section 8(2)(b) – (d), Occupational Health and Safety Act 85 of 1993.

⁸⁹⁹ Section 8(2)(b) – (d), Occupational Health and Safety Act 85 of 1993.

⁹⁰⁰ Section 8(2)(b) – (d), Occupational Health and Safety Act 85 of 1993.

- iv. the cost of removing or mitigating that hazard or risk in relation to the benefits deriving therefrom.⁹⁰¹

The obligations placed upon British and South African employers are thus similar in nature.

4.4. NORTHERN IRELAND

4.4.1. Disability Discrimination Act of 1995⁹⁰²

The Disability Discrimination Act of 1995 (hereafter “DDA”) introduced measures to safeguard against the discrimination of disabled persons.⁹⁰³ The DDA has continued to find application even after Brexit and Northern Ireland remains bound by the minimum standards of EU discrimination law.⁹⁰⁴ Northern Ireland’s definition of ‘disability’ is contained in Part I and Schedule I of the DDA.⁹⁰⁵ The definition is largely the same as that of the UK and provides that an individual has a disability if he / she has a physical or mental impairment which has a substantial and long-term adverse effect on his / her ability to carry out normal day-to-day activities.⁹⁰⁶ For the effect of the disability to be substantial, it is required to be more than minor or trivial but need not be severe.⁹⁰⁷ Similarly, for a disability to have a long-term adverse effect, it ought to have lasted or be likely to last for a period of twelve months and the effect which it has need be detrimental.⁹⁰⁸

Employers may be required under the DDA to take specific actions to ensure that their arrangements or premises do not discriminate against individuals with disabilities.⁹⁰⁹ These

⁹⁰¹ Section 8(2)(b) – (d), Occupational Health and Safety Act 85 of 1993.

⁹⁰² Disability Discrimination Act 1995, accessible at <https://www.legislation.gov.uk/ukpga/1995/50/contents>.

⁹⁰³ Disability Discrimination Act 1995 (DDA).

⁹⁰⁴ Article 2(1) of the Withdrawal Agreement between the UK and EU. Available at <https://www.gov.uk/government/publications/new-withdrawal-agreement-and-political-declaration>.

⁹⁰⁵ Part 1 and Schedule 1, Disability Discrimination Act.

⁹⁰⁶ Section 1, Disability Discrimination Act.

⁹⁰⁷ Northern Ireland Tourism ‘The Disability Discrimination Act 1995’ available at <https://www.tourismni.com/build-your-business/sector/accommodation/accommodation-getting-started/legal-considerations/the-disability-discrimination-act-1995/> (accessed 10 October 2021).

⁹⁰⁸ Northern Ireland Tourism ‘The Disability Discrimination Act 1995’ available at <https://www.tourismni.com/build-your-business/sector/accommodation/accommodation-getting-started/legal-considerations/the-disability-discrimination-act-1995/> (accessed 10 October 2021).

⁹⁰⁹ Section 6, Disability Discrimination Act.

actions are referred to as reasonable adjustments and the purpose thereof is to ensure that persons with disabilities either have equal access to services or to compensate for the disadvantage they face as a result of their disability.⁹¹⁰ Employers should consider a variety of factors when assessing what constitutes a reasonable adjustment.⁹¹¹ Such factors to be considered include but are not limited to the following:

- a. the steps effectiveness in mitigating the disadvantage;⁹¹²
- b. the financial practicality and other costs required;⁹¹³
- c. the extent to which the step may cause disruption;⁹¹⁴
- d. the extent to which the employer's financial and other resources are available for financial or other assistance;⁹¹⁵
- e. the nature of the employer's activities;⁹¹⁶
- f. the size of its undertaking and the effect on other employees;
- g. the adjustments made for other disabled staff; and
- h. the extent to which the disabled person is willing to co-operate.⁹¹⁷

Employers are not liable if they are unaware of the disability and substantial disadvantage and could not have reasonably been expected to be aware.⁹¹⁸

4.4.1.1. *British Telecommunications v Meier*

The case of *British Telecommunications v Meier*⁹¹⁹ dealt reasonable adjustments during the recruitment process and held that the duty of providing reasonable adjustments is not subject to the applicant or employee suggesting such an adjustment.⁹²⁰

⁹¹⁰ Section 6, Disability Discrimination Act.

⁹¹¹ Section 6(4), Disability Discrimination Act.

⁹¹² Section 6(4)(a), Disability Discrimination Act.

⁹¹³ Section 6(4)(b) – (c), Disability Discrimination Act.

⁹¹⁴ Section 6(4)(b) – (c), Disability Discrimination Act.

⁹¹⁵ Section 6(4)(d), Disability Discrimination Act.

⁹¹⁶ Northern Ireland Tourism 'The Disability Discrimination Act 1995' available at

<https://www.tourismni.com/build-your-business/sector/accommodation/accommodation-getting-started/legal-considerations/the-disability-discrimination-act-1995/> (accessed 10 October 2021).

⁹¹⁷ Northern Ireland Tourism 'The Disability Discrimination Act 1995' available at

<https://www.tourismni.com/build-your-business/sector/accommodation/accommodation-getting-started/legal-considerations/the-disability-discrimination-act-1995/> (accessed 10 October 2021).

⁹¹⁸ Section 4A(3), Disability Discrimination Act.

⁹¹⁹ *British Telecommunications PLC v Meier* [2019] NICA 43

⁹²⁰ *British Telecommunications PLC v Meier* [2019] NICA 43, para 1.

The claimant, who suffered from Asperger's Syndrome (ASD), dyslexia and dyspraxia, applied for a position at the company.⁹²¹ The claimant informed the employer of his conditions and requested the avail of the employers' disability scheme.⁹²² The employer was also a member of the Disability Confident Scheme (DCS) which intends assisting employers to employ and retain disabled people.⁹²³ Members of the DCS are expected to actively attract and recruit persons with disabilities and to provide a fully inclusive and accessible recruitment process. Under this, the employer guaranteed to interview anyone with a disability whose application met the minimum criteria for the position.⁹²⁴ However, the employer utilised a Situational Strength Test (hereafter "SST") to determine whether an applicant displayed desirable attributes and behaviours for the position.⁹²⁵

Although concerned by the use of the SST given the nature of his disability, the claimant proceeded to take the SST due to his belief that he would be guaranteed an interview.⁹²⁶ The employer however treated the SST as a necessary criterion to be met to be considered for recruitment; and all applications sent to recruitment were anonymised and thus did not contain information relating to the claimant's disability.⁹²⁷

As expected, the claimant did not perform well in the SST and was informed that based on the outcome of the SST that the employer would not be taking his application further.⁹²⁸ After the claimant raised concerns with the employer, the employer responded by providing that the claimant could have contacted them in relation to his disability.⁹²⁹ In addition, the owner of the SST in a letter to the employer, stated that where a candidate discloses that they have autism at the commencement of the recruitment process, a recruiter should engage with the candidate regarding what the test involves and whether any reasonable adjustments are required.⁹³⁰ Where

⁹²¹ British Telecommunications PLC v Meier [2019] NICA 43, para 4.

⁹²² British Telecommunications PLC v Meier [2019] NICA 43, para 5.

⁹²³ British Telecommunications PLC v Meier [2019] NICA 43, para 6.

⁹²⁴ British Telecommunications PLC v Meier [2019] NICA 43, para 6.

⁹²⁵ British Telecommunications PLC v Meier [2019] NICA 43, para 8.

⁹²⁶ British Telecommunications PLC v Meier [2019] NICA 43, para 10.

⁹²⁷ British Telecommunications PLC v Meier [2019] NICA 43, para 11.

⁹²⁸ British Telecommunications PLC v Meier [2019] NICA 43, para 10.

⁹²⁹ British Telecommunications PLC v Meier [2019] NICA 43, para 12.

⁹³⁰ British Telecommunications PLC v Meier [2019] NICA 43, para 12.

the adjustments are unable to be implemented due to the nature of the test, candidates are to be permitted to bypass the test.⁹³¹ The employer further acknowledged that the process did not allow for the involvement of a recruiter until the SST stage had been completed.⁹³² Furthermore, the employer reasoned that no other applicant had been allowed to bypass the SST that year and that although they “worked hard to be as inclusive as possible, it was important to ensure that the employer took forward candidates who are most likely to have a successful and enjoyable time on the programme”.⁹³³

In the premise, the Tribunal concluded that the employer was aware that the claimant suffered from ASD and dyslexia but failed to proactively offer or make reasonable adjustments.⁹³⁴ It was further held that the employer ought reasonably to have known that his disability placed him at a substantial disadvantage.⁹³⁵

On appeal, the employer argued that it did not possess the requisite knowledge to trigger a reasonable adjustment duty and was not aware that the claimant was likely to be placed at a substantial disadvantage as a result of his disability.⁹³⁶ The Court of Appeal confirmed that the Tribunal was correct in concluding that the employer was aware of the claimant’s disability and failed to take further steps to plan for and make reasonable adjustments.⁹³⁷ Furthermore, the Court of Appeal noted that the duty to make reasonable adjustments rests on the employer and was applicable to all stages of the recruitment process which included prior to proceeding to the interview.⁹³⁸ It was concluded that the employer erred in expecting the claimant to propose a reasonable adjustment where the employer itself had a legal duty to consider what reasonable adjustments would be appropriate.⁹³⁹ The appeal was therefore dismissed.⁹⁴⁰

⁹³¹ British Telecommunications PLC v Meier [2019] NICA 43, para 12.

⁹³² British Telecommunications PLC v Meier [2019] NICA 43, para 12.

⁹³³ British Telecommunications PLC v Meier [2019] NICA 43, para 12.

⁹³⁴ British Telecommunications PLC v Meier [2019] NICA 43, para 14.

⁹³⁵ British Telecommunications PLC v Meier [2019] NICA 43, para 13.

⁹³⁶ British Telecommunications PLC v Meier [2019] NICA 43, para 16.

⁹³⁷ British Telecommunications PLC v Meier [2019] NICA 43, para 19.

⁹³⁸ British Telecommunications PLC v Meier [2019] NICA 43, para 18.

⁹³⁹ British Telecommunications PLC v Meier [2019] NICA 43, para 20.

⁹⁴⁰ British Telecommunications PLC v Meier [2019] NICA 43, para 22.

This case illustrates the positive duty placed on employers in relation to the provision of reasonable adjustments to persons with disabilities and has the effect of cautioning employers from “taking the back set” during the recruitment process.

4.4.1.2. *Holly Lane v Aware Defeat Depression*

The case of *Holly Lane v Aware Defeat Depression*⁹⁴¹ also addressed reasonable adjustments in the recruitment process. In this case, the claimant, who was profoundly deaf, applied for a position which she was both qualified for and had the relevant experience in. Despite having informed the respondent of her deafness, the respondent failed to arrange a sign language interpreter during the interview process.⁹⁴² The claimant then attempted arranging an interpreter of her own but was unsuccessful on account of short notice.⁹⁴³ She subsequently requested that her interview be rescheduled so as to allow for the arrangement of an interpreter, however her request was denied.⁹⁴⁴ This denial was based on the fact that another candidate had requested their interview be rescheduled and was denied. The respondent alleged that they had to treat all candidates the same.⁹⁴⁵

The matter was settled out of court and, in doing so, the respondent agreed to pay the claimant £4000.⁹⁴⁶ Furthermore, the respondent affirmed its commitment to the principle of equal opportunity in the workplace and agreed to consult with the Equality Commission regarding the development of its policies, practices and training to address disability discrimination.⁹⁴⁷ The respondent also undertook to implement any reasonable recommendations made by the Commission.⁹⁴⁸

This case highlighted employers’ duty to make reasonable adjustments during the recruitment process and confirmed that penalties will be imposed on employers who fail in their duty.

⁹⁴¹ *Holly Lane v Aware Defeat Depression* [2015].

⁹⁴² *Holly Lane v Aware Defeat Depression* [2015].

⁹⁴³ *Holly Lane v Aware Defeat Depression* [2015].

⁹⁴⁴ *Holly Lane v Aware Defeat Depression* [2015].

⁹⁴⁵ *Holly Lane v Aware Defeat Depression* [2015].

⁹⁴⁶ *Holly Lane v Aware Defeat Depression* [2015].

⁹⁴⁷ *Holly Lane v Aware Defeat Depression* [2015].

⁹⁴⁸ *Holly Lane v Aware Defeat Depression* [2015].

According to Section 5(1) of the DDA, discrimination in employment occurs in the form of direct discrimination where a disabled person is treated less favourably than someone else, as a result of their disability.⁹⁴⁹ Discrimination in employment also occurs in instances where there is a failure to make reasonable adjustments for a disabled person and where a disabled person is harassed for a reason relating to their disability.⁹⁵⁰ The scope of protection against discrimination is slightly less than that of the UK in that Northern Ireland's scope is not extended to include discrimination arising from a disability. This is as a result of the case of *London Borough of Lewisham v Malcolm*⁹⁵¹ where the House of Lords interpreted disability-related discrimination in a restricted manner, effectively rendering it the same as direct discrimination.⁹⁵² Although at the time of this case, both the UK and Northern Ireland were bound by this decision, the introduction of the UK's Equality Act redressed this imbalance by specifically providing for discrimination arising from disability whereas to date, Northern Ireland has not introduced similar measures.⁹⁵³

4.4.2. Health and Safety at Work Order of 1987⁹⁵⁴

Northern Ireland's health and safety at work is primarily regulated by the Health and Safety at Work (Northern Ireland) Order 1978 (HSW Order).⁹⁵⁵ The primary objective of the HSW Order is to secure the health, safety and welfare of persons at work. The HSW Order places a 'duty of care' on employers to ensure the health, safety and welfare of employees.⁹⁵⁶ These duties include but are not limited to:

- a. ensuring the workplace is safe;⁹⁵⁷
- b. preventing risks to health;⁹⁵⁸

⁹⁴⁹ Section 5(1), Disability Discrimination Act.

⁹⁵⁰ Section 55, Disability Discrimination Act.

⁹⁵¹ *London Borough of Lewisham (Lewisham LBC) v Malcolm* [2008] UKHL 43.

⁹⁵² *London Borough of Lewisham (Lewisham LBC) v Malcolm* [2008] UKHL 43.

⁹⁵³ Stammering law 'Types of discrimination are more limited in Northern Ireland' available at <https://www.stammeringlaw.org.uk/disability-equality-law/scotland-wales-and-northern-ireland/northern-ireland/discrimination/#drd> (accessed 3 October 2021).

⁹⁵⁴ Health and Safety at Work (Northern Ireland) Order 1978 (Health and Safety at Work Order), accessible at <https://www.legislation.gov.uk/nisi/1978/1039>.

⁹⁵⁵ Health and Safety at Work Order.

⁹⁵⁶ Section 4(1), Health and Safety at Work Order.

⁹⁵⁷ Section 4(1)(d), Health and Safety at Work Order.

⁹⁵⁸ Section 4(1)(e), Health and Safety at Work Order.

- c. ensuring the implementation of safe working practices;⁹⁵⁹
- d. informing employees of any potential hazards;⁹⁶⁰
- e. assessing the risk of stress-related ill-health arising from work activities; and
- f. taking measures to control that risk.⁹⁶¹

Non – compliance with duties and obligations may result in matters being referred to either the Fair Employment Tribunal (hereafter “FET”) or the Industrial Tribunal.⁹⁶² The FET primarily deals with matters concerning discrimination on the grounds of religion and politics whilst the Industrial Tribunal hears other discrimination and employment claims.⁹⁶³ It is however worth noting no Employment Appeals Tribunal exists and as such, any appeal from a Tribunal is heard by the Northern Ireland Court of Appeal.⁹⁶⁴

4.4.2.1. *Sullivan v The Southern Health Board*

An employer’s duty to identify and manage workplace stress was highlighted in the matter of *Sullivan v The Southern Health Board*.⁹⁶⁵ In this matter the employee informed his employer that he felt as though he was being overworked due to the absence of another permanent consultant like himself, who had been present at the time he commenced employment.⁹⁶⁶ The Supreme Court held that the employee was entitled to compensation for the stress and anxiety he has endured in both his professional and personal life as a result of the employers’ consistent unwillingness to address his legitimate complaints.⁹⁶⁷

⁹⁵⁹ Section 2, Health and Safety at Work Order.

⁹⁶⁰ HSENI ‘Mental Wellbeing’ available at <https://www.hseni.gov.uk/sites/hseni.gov.uk/files/publications/%5Bcurrent-domain%3Amachine-name%5D/mental-wellbeing-guide-for-employers> (accessed 7 October 2021).

⁹⁶¹ Section 6, Health and Safety at Work Order.

⁹⁶² Regulation 3, The Industrial Tribunals and Fair Employment Tribunal (Early Conciliation: Exemptions and Rules of Procedure) Regulations (Northern Ireland) 2020.

⁹⁶³ Regulation 3, The Industrial Tribunals and Fair Employment Tribunal (Early Conciliation: Exemptions and Rules of Procedure) Regulations (Northern Ireland) 2020.

⁹⁶⁴ Regulation 3, The Industrial Tribunals and Fair Employment Tribunal (Early Conciliation: Exemptions and Rules of Procedure) Regulations (Northern Ireland) 2020.

⁹⁶⁵ *Sullivan v The Southern Health Board* [1997] 3 IR 123.

⁹⁶⁶ *Sullivan v The Southern Health Board* [1997] 3 IR 123.

⁹⁶⁷ *Sullivan v The Southern Health Board* [1997] 3 IR 123.

Employers may also be subjected to claims for constructive dismissal where they have breached the implied duties of taking reasonable care to protect workers' health and the duty to refrain from acting in such a manner which destroys mutual trust and confidence.⁹⁶⁸

4.4.2.2. *Liz Allen v Independent Newspapers (Ireland) Limited*

*Liz Allen v Independent Newspapers (Ireland) Limited*⁹⁶⁹ highlighted the consequence of employers failing to comply with their duties. In this case, the employee resigned and claimed that she had been constructively dismissed by providing that the treatment which she had suffered 'undermined her confidence and health to such a degree that she could not tolerate her working environment and was left with no other option but to resign'.⁹⁷⁰ The employers main point of contention was that the employee had not utilised all grievance procedures before resigning.⁹⁷¹ The tribunal was however satisfied that the employee had addressed her complaints to senior level management at various stages of her employment. It was further held it reasonable for the employee to have considered the manner in which her complaints had previously been dealt with.⁹⁷² In doing so, the tribunal held that the employee's conclusion that she could have no confidence in her employer to either properly or effectively address her grievances was reasonable in all circumstances.⁹⁷³ Lastly, the tribunal held that the employee acted reasonably in considering the likely effect on her health and well – being had she remained in the employer of her employer.⁹⁷⁴ As such, the employee's decision to resign was reasonable and her constructive dismissal claim was subsequently upheld. The employee was awarded compensation of £70 500.00 which included future loss of earnings.⁹⁷⁵

⁹⁶⁸ Morgan, B 'Stress in the Workplace – Employers should be alert to the claims which can arise' (2004).

Available at: <https://www.morganmcmamus.com/wp-content/uploads/2015/09/Stress-in-the-workplace-June-2004>.

⁹⁶⁹ *Liz Allen v Independent Newspapers (Ireland) Limited* [2nd August 2001 UD 641/2000].

⁹⁷⁰ *Liz Allen v Independent Newspapers (Ireland) Limited* [2nd August 2001 UD 641/2000].

⁹⁷¹ *Liz Allen v Independent Newspapers (Ireland) Limited* [2nd August 2001 UD 641/2000].

⁹⁷² *Liz Allen v Independent Newspapers (Ireland) Limited* [2nd August 2001 UD 641/2000].

⁹⁷³ *Liz Allen v Independent Newspapers (Ireland) Limited* [2nd August 2001 UD 641/2000].

⁹⁷⁴ *Liz Allen v Independent Newspapers (Ireland) Limited* [2nd August 2001 UD 641/2000].

⁹⁷⁵ *Liz Allen v Independent Newspapers (Ireland) Limited* [2nd August 2001 UD 641/2000].

4.4.2.3. *Marshall Specialist Vehicles Ltd v Osborne*

In the case of *Marshall Specialist Vehicles Ltd v Osborne*⁹⁷⁶ the employee had voluntarily worked longer hours as the company was experiencing difficulties.⁹⁷⁷ The employee was informed by her doctor that her health had begun suffering as a result thereof and she subsequently raised a complaint with her employer informing them of her difficulty to cope with her workload.⁹⁷⁸ The Employment Tribunal implied a term into her employment contract that an employer must not impose on an employee or acquiesce in their assumption of, a workload which it is reasonably foreseeable may cause physical or mental injury and held that the employer breached this term.⁹⁷⁹ Consequently, the Employment Tribunal held that the employee was constructively unfairly dismissed by the employer and awarded her a total of £52 140.00.⁹⁸⁰

On appeal however, the Employment Appeal Tribunal (hereafter “EAT”) held that the previous tribunal had manufactured an implied term which it then found the employer had breached.⁹⁸¹ It did however provide that a general term that an employer should take reasonable care for their employees, is implied in all employment contracts.⁹⁸² Furthermore, to proceed in a claim for constructive dismissal based on this term an employee must establish:

- i. That the risk of injury was foreseeable;⁹⁸³
- ii. That the employer was in breach of its duty;⁹⁸⁴ and
- iii. That the breach amounted to a fundamental breach of the employment contract.⁹⁸⁵

The EAT held that there was insufficient evidence placed before the Employment Tribunal and that not all relevant questions had been considered.⁹⁸⁶ The appeal was thus upheld.⁹⁸⁷ This case illustrates the importance of due consideration of evidence placed before a tribunal.

⁹⁷⁶ *Marshall Specialist Vehicles Ltd v Osborne* [2003] IRLR 672 EAT.

⁹⁷⁷ *Marshall Specialist Vehicles Ltd v Osborne* [2003] IRLR 672 EAT, para 5.

⁹⁷⁸ *Marshall Specialist Vehicles Ltd v Osborne* [2003] IRLR 672 EAT, para 2.

⁹⁷⁹ *Marshall Specialist Vehicles Ltd v Osborne* [2003] IRLR 672 EAT, para 37.

⁹⁸⁰ *Marshall Specialist Vehicles Ltd v Osborne* [2003] IRLR 672 EAT, para 2.

⁹⁸¹ *Marshall Specialist Vehicles Ltd v Osborne* [2003] IRLR 672 EAT, para 40.

⁹⁸² *Marshall Specialist Vehicles Ltd v Osborne* [2003] IRLR 672 EAT, para 41.

⁹⁸³ *Marshall Specialist Vehicles Ltd v Osborne* [2003] IRLR 672 EAT, para 43.

⁹⁸⁴ *Marshall Specialist Vehicles Ltd v Osborne* [2003] IRLR 672 EAT, para 43.

⁹⁸⁵ *Marshall Specialist Vehicles Ltd v Osborne* [2003] IRLR 672 EAT, para 43.

⁹⁸⁶ *Marshall Specialist Vehicles Ltd v Osborne* [2003] IRLR 672 EAT, para 85.

⁹⁸⁷ *Marshall Specialist Vehicles Ltd v Osborne* [2003] IRLR 672 EAT, para 92.

4.4.3. Analysing the regulative framework of Northern Ireland

As is the case with the UK, employers in Northern Ireland and South Africa have similar duties in relation to the safety and wellbeing of their employees. Although the obligations placed upon them are similar in nature, the stigmatisation of mental health in these jurisdictions becomes apparent when considering the frequency of disability related disputes and the enforcement of legislation.

4.5. CONCLUSION

The legal frameworks of the abovementioned countries are valuable to consider in an attempt to develop and clarify the South African legal position on the regulation of mental health in the workplace. Analysing the frameworks of these countries affords the opportunity of learning from more developed legal frameworks in the protection of persons with mental health conditions. The lessons and recommendations which South Africa ought to take from the discussed countries will be discussed in the final chapter.



CHAPTER 5:

CONCLUSION AND RECOMMENDATIONS

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5.1. AN OVERVIEW

By 2030 mental health conditions are predicted to be the leading illness globally.⁹⁸⁸ The effects of this are widespread and will affect many role players, with employers, governments as well as community and business organisations no longer being immune thereto. The blatant misconceptions and stigma attached to mental health conditions result in fear of disclosure and consequently prevent employees from seeking assistance.

Chapter 2 provided an analysis of the international obligations which are binding on South Africa in respect of recognising mental health and acknowledging the significance thereof. Following the heinous human rights violations committed during the Second World War, the enactment of the International Bill of Rights enhanced the fundamental freedoms of humans around the world. The International Bill of Rights consists of both the UDHR and the ICESCR. The UDHR acknowledges that human rights are inherent and further prohibits the exclusion of such rights.⁹⁸⁹ The protection afforded to persons with disabilities is extensive, with articles 5 and 7 providing that such persons are entitled to equal protection of the law and may not be subjected to cruel or inhumane treatment or punishment.⁹⁹⁰ Furthermore, article 23 specifically acknowledges the right to just and favourable working conditions.⁹⁹¹ The ICESCR guarantees the enjoyment of economic, social and cultural rights. Article 6 acknowledges the right to work, with article 7 confirming the right to just and favourable working conditions.⁹⁹² Furthermore, article 12(1)

⁹⁸⁸ Hock, Or & Kolappa et al 'A new resolution for global mental health' (2012) 379 *National Library of Medicine* 1367.

⁹⁸⁹ Preface, UDHR.

⁹⁹⁰ Article 5 and 7, UDHR.

⁹⁹¹ Article 23, UDHR.

⁹⁹² Article 6 and 7, ICESCR.

recognises the right to the highest attainable physical and mental health.⁹⁹³ Finally, article 23 explores the improvement of industrial hygiene.⁹⁹⁴

The CRPD was created with the purpose of promoting, protecting and ensuring that individuals with mental and physical disabilities have full access to all human rights and freedoms.⁹⁹⁵ Its fundamental purpose was to empower persons with disabilities.⁹⁹⁶ To achieve this, the social model approach to disability was endorsed. Discrimination based on disability in all aspects of employment was prohibited by article 27(1)(a), whilst article 27(1)(b) reaffirms the right to just and favourable working conditions.⁹⁹⁷ Lastly, article 27(1)(i) addressed the provision of reasonable accommodation in the workplace.⁹⁹⁸

The ILO, a UN specialised agency, was founded to promote and realise workplace norms and fundamental principles and rights. Various conventions have since been introduced with the Discrimination (Employment and Occupation) Convention elaborating on the duty of states to promote equal opportunity and treatment. The Occupational Health and Safety Convention recognised mental health in articles 5(b) and 11(d) and (e) when referring to health.⁹⁹⁹ Through the creation of the Convention on Vocational Rehabilitation and Employment of Disabled Persons, the ILO advocated for equal treatment of disabled persons in the workplace.¹⁰⁰⁰ The definition of a disabled person herein, is inclusive of mental impairments.¹⁰⁰¹ Lastly, the ILO Disability Code promotes and safeguards both employment opportunities and safe and healthy working environments for persons with disabilities.¹⁰⁰²

The African Charter was adopted to promote and protect human rights and fundamental freedoms. The African Charter outlines rights and responsibilities which ought to be upheld at all times. Not only are states prohibited from discriminating against persons based on a list of

⁹⁹³ Article 12(1), ICESCR.

⁹⁹⁴ Article 23, ICESCR.

⁹⁹⁵ Article 1, CRPD.

⁹⁹⁶ Article 1, CRPD.

⁹⁹⁷ Article 27(1)(a) and (b), CRPD.

⁹⁹⁸ Article 27(1)(i), CRPD.

⁹⁹⁹ Articles 5(b), 11(d) and (e), Occupational Health and Safety Convention 1958.

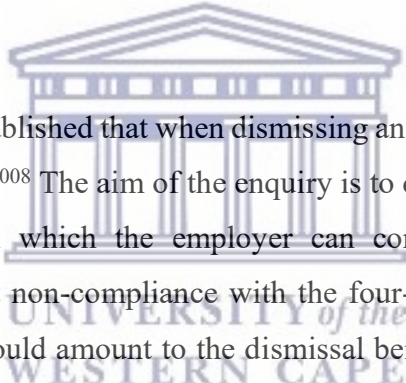
¹⁰⁰⁰ Vocational Rehabilitation and Employment (Disabled Persons) Convention 1983.

¹⁰⁰¹ Article 1(1) Vocational Rehabilitation and Employment (Disabled Persons) Convention 1983.

¹⁰⁰² Code of Good Practice for Managing Disability in the Workplace, preface.

grounds, but they are also obliged to provide the same level of protection to all individuals. Article 15 references the right to work, specifically the right to work under equitable and satisfactory conditions.¹⁰⁰³ The right to reach the best possible state of physical and mental health is also provided for in article 16.¹⁰⁰⁴

Chapter three considered the South African legislative framework regulating mental health in the workplace. The enactment of the Constitution resulted in the safeguarding of the fundamental rights and freedoms of its citizens. The right to equality, as contained in section 9, is notably important as it prohibits discrimination on listed grounds, of which disability is included.¹⁰⁰⁵ Furthermore, section 23 of provides for the protection of labour rights. To realise section 23(5), three fundamental pieces of legislation were enacted. The LRA regulates employment relationships but more importantly provides for protection against unfair dismissals. Accompanying the LRA is the Code of Good practice on Dismissal (Dismissal Code, Schedule 8 to the LRA) which regulates aspects of dismissal related to conduct and incapacity.¹⁰⁰⁶


Standard Bank v CCMA¹⁰⁰⁷ established that when dismissing an employee for incapacity a four-stage enquiry must be adopted.¹⁰⁰⁸ The aim of the enquiry is to determine whether there are any alternatives short of dismissal which the employer can consider. IMATU v Witzenburg Municipality¹⁰⁰⁹ confirmed that non-compliance with the four-stage enquiry reflected in item 11(b) of the Dismissal Code would amount to the dismissal being unfair.¹⁰¹⁰ Furthermore, this case confirmed that incapacity may include mental illness, thus acknowledging the prevalence thereof.¹⁰¹¹ Hendricks v Mercantile & General Reinsurance¹⁰¹² dealt with reasonable accommodation and confirmed that where an employee unreasonably refuses accommodations offered by the employer, their dismissal would be fair.¹⁰¹³ In the case of New Way Motors v

¹⁰⁰³ Article 15, African Charter on Human and Peoples' Rights.

¹⁰⁰⁴ Article 16, African Charter on Human and Peoples' Rights.

¹⁰⁰⁵ Section 9(3), Constitution of the Republic of South Africa 1996.

¹⁰⁰⁶ Schedule 8, Labour Relations Act 66 of 1995.

¹⁰⁰⁷ Standard Bank of South Africa (SA) v Commission for Conciliation, Mediation and Arbitration (CCMA) [2008] 4 BLLR 356 (LC).

¹⁰⁰⁸ Standard Bank of SA v CCMA [2008] 4 BLLR 356 (LC), para 72 – 76.

¹⁰⁰⁹ IMATU v Witzenburg Municipality [2012] 7 BLLR 660 (LAC).

¹⁰¹⁰ IMATU v Witzenburg Municipality [2012] 7 BLLR 660 (LAC), para 7.

¹⁰¹¹ IMATU v Witzenburg Municipality [2012] 7 BLLR 660 (LAC), para 7.

¹⁰¹² Hendricks v Mercantile & General Reinsurance Co of SA Ltd (1994) 15 ILJ 304 (LAC).

¹⁰¹³ Hendricks v Mercantile & General Reinsurance Co of SA Ltd (1994) 15 ILJ 304 (LAC) 317.

Marsland,¹⁰¹⁴ the employee resigned and claimed constructive dismissal after falling into a severe state of depression. The court held that the dismissal was unfair.¹⁰¹⁵ The court further noted that the treatment received by the employer diminished the employee's dignity which was described as appalling.¹⁰¹⁶ The landmark ruling of *Legal Aid SA*¹⁰¹⁷ set the precedent for courts to deal with matters involving depression, as a disability issue.¹⁰¹⁸

The EEA serves as a primary piece of legislation, protecting the rights of persons with disabilities. The EEA lists disability as one of the grounds for which an employee may not be subjected to unfair discrimination.¹⁰¹⁹ Additionally, the EEA established the Code of Good Practice on Key Aspects of Employment of People with Disabilities (Employment Code).¹⁰²⁰ The Employment Code aims to raise awareness about employment opportunities for people with disabilities and the protections that should be provided to them.¹⁰²¹ Additionally, the Employment Code works to eliminate societal barriers that restrict employees from participating fully in society. The OHSA expands on the duties of employers towards their employees in relation to a safe and risk-free working environment.¹⁰²² The recent introduction explicitly acknowledged the responsibility of organisations to protect and promote the physical and mental health and safety of workers.¹⁰²³

Chapter four examined how the Netherlands, Northern Ireland (NI) and the United Kingdom (UK) regulate mental health in the workplace. The Netherlands is party to many international conventions and, as such, the development of their national legislative framework has been in line with international obligations. The Act on Equal Treatment on the grounds of Disability and Chronic Illness (DDA) established an anti-discrimination prohibition on the grounds of disability.¹⁰²⁴ Although no clear definition of disability was provided by the DDA, the courts

¹⁰¹⁴ *New Way Motor & Diesel Engineering (Pty) Ltd v Marsland* (2009) 30 ILJ (LAC).

¹⁰¹⁵ *New Way Motor & Diesel Engineering (Pty) Ltd v Marsland* (2009) 30 ILJ (LAC) 2886.

¹⁰¹⁶ *New Way Motor & Diesel Engineering (Pty) Ltd v Marsland* (2009) 30 ILJ (LAC) 2886.

¹⁰¹⁷ *Legal Aid South Africa v Jansen* [2020] JOL 47984 (LAC).

¹⁰¹⁸ *Legal Aid South Africa v Jansen* [2020] JOL 47984 (LAC).

¹⁰¹⁹ Section 6, EEA.

¹⁰²⁰ Code of Good Practice on the Employment of People with Disabilities.

¹⁰²¹ Code of Good Practice on the Employment of People with Disabilities.

¹⁰²² Section 8(2), OHSA.

¹⁰²³ International Organisation for Standardisation (ISO) International Standard 45001(2018), introduction.

¹⁰²⁴ Open Society Institute 'Rights of People with Intellectual Disabilities: Access to Education and Employment' (2005) Netherlands Monitoring Report, 23.

have emphasised the absolute importance of interpreting legislation in a manner which is consistent with the UN Conventions and thus confirmed that the definition of a disability is ‘a limitation which results in particular from physical, mental or psychological impairments which in interaction with various barriers may hinder the full and effective participation of the person concerned in professional life on an equal basis with other workers’.¹⁰²⁵ The DDA also regulates reasonable accommodation and provides that disabled persons are entitled to adaptations which are necessary to enable them to participate fully in society.¹⁰²⁶ The Working Conditions Act places a duty on employers to protect employees’ health and safety in all aspects of employment and are also obligated to implement a policy aimed at attaining the best possible working conditions.¹⁰²⁷

Following Brexit, the Disability Discrimination Act of 1995 continues to find application in NI. The definition of a disability in NI is inclusive of mental health conditions.¹⁰²⁸ Employers are also required to make reasonable adjustments for disabled persons, with what constitutes a reasonable adjustment being explored in section 6 of the Disability Discrimination Act.¹⁰²⁹ Employers are however not liable to make reasonable adjustments where they were not aware of the disability or substantial disadvantage caused by it. In *British Telecommunications v Meier* it was confirmed that the provision of an adjustment is not subject to an employee suggesting it.¹⁰³⁰ The Health and Safety at Work (Northern Ireland) Order 1978 (HSW Order) places a duty on employers to ensure the health, safety and welfare of employees.¹⁰³¹ This duty includes assessing the risk of stress-related ill- health arising from work activities.¹⁰³² The court in *Sullivan v The Southern Health Board* held that the employer was liable to compensate the employee as they had not addressed his legitimate complaints.¹⁰³³ The UK’s Equality Act acknowledges mental health conditions in its definition of a disability.¹⁰³⁴ Chapter 2 of the Equality Act prohibits

¹⁰²⁵ Open Society Institute ‘Rights of People with Intellectual Disabilities: Access to Education and Employment’ (2005) Netherlands Monitoring Report, 24.

¹⁰²⁶ Open Society Institute ‘Rights of People with Intellectual Disabilities: Access to Education and Employment’ (2005) Netherlands Monitoring Report, 24.

¹⁰²⁷ Article 3(1), Working Conditions Act 1999.

¹⁰²⁸ Part 1 and Schedule 1, Disability Discrimination Act.

¹⁰²⁹ Section 6(4)-(d), Disability Discrimination Act.

¹⁰³⁰ *British Telecommunications PLC v Meier* [2019] NICA 43.

¹⁰³¹ Health and Safety at Work (Northern Ireland) Order 1978.

¹⁰³² HSENI ‘Mental Wellbeing’ available at

<https://www.hseni.gov.uk/sites/hseni.gov.uk/files/publications/%5Bcurrent-domain%3Amachine-name%5D/mental-wellbeing-guide-for-employers> (accessed 7 October 2021).

¹⁰³³ *Sullivan v The Southern Health Board* [1997] 3 IR 123.

¹⁰³⁴ Section 6 (1)(a) – (b), Equality Act 2010 c.15.

discrimination based on disability, with section 15 exploring what constitutes discrimination.¹⁰³⁵ Employers are also obligated to provide reasonable accommodation where possible.¹⁰³⁶ This was illustrated in *Marie Claire McLaughlin v Charles Hurst Limited* where the court found in favour of the employee, having held that the employer had failed to properly consider her request for accommodation.¹⁰³⁷ The Health and Safety at Work Act 1974 (HSWA) provides that all employers have general duty to look after their employees' welfare.¹⁰³⁸ The Management of Health and Safety at Work Regulations 1999¹⁰³⁹ (MHSW Regulations) provides that employers must assess and manage risk to their employees.¹⁰⁴⁰

5.2. RECOMMENDATIONS

A multi-sectoral approach is necessary to improve the regulation of mental health in the South African workplace. All parties including, but not limited to, government departments, the public and the private sector have roles to play. The South African government ratified the CRPD on 30 November 2007 and committed itself to fulfilling the obligations thereof.¹⁰⁴¹ A government that ratifies the CRPD ultimately pledges to, without any discrimination, promote and ensure the full realisation of all human rights and fundamental freedoms for persons with disabilities.¹⁰⁴² To monitor the effective implementation of the provisions of the CRPD is to ensure accountability of state parties in fulfilling their obligations. Under the CRPD all state parties are required to submit regular reports on the actions taken to give effect to the CRPD's obligations.¹⁰⁴³ The initial report is required to be submitted within the first two years of the CRPD being in force.¹⁰⁴⁴ Thereafter, a minimum of one report every four years is required.¹⁰⁴⁵

¹⁰³⁵ Section 15, Equality Act 2010 c.15.

¹⁰³⁶ Government Equalities Office 'Equality Act 2010' 3.

¹⁰³⁷ *McLaughlin v Charles Hurst Limited* [2016] NIIT 00083 15IT.

¹⁰³⁸ Health and Safety at Work Act.

¹⁰³⁹ Management of Health and Safety at Work Regulations 1999 No. 3242.

¹⁰⁴⁰ Regulation 3, Management of Health and Safety at Work Regulations 1999 No. 3242.

¹⁰⁴¹ Ramodibe D 'South Africa's compliance with UN Conventions on Rights of Persons with Disabilities and Rights of the Child: input by Civil Society' available at <https://pmg.org.za/committee-meeting/12656/>.

¹⁰⁴² Article 4, CRPD.

¹⁰⁴³ Article 35, CRPD.

¹⁰⁴⁴ United Nations (UN) 'Chapter 5: National legislation and the Convention – Incorporating the Convention into domestic law' available at <https://www.un.org/development/desa/disabilities> (accessed 24 October 2021).

¹⁰⁴⁵ United Nations (UN) 'Chapter 5: National legislation and the Convention – Incorporating the Convention into domestic law' available at <https://www.un.org/development/desa/disabilities> (accessed 24 October 2021).

Legislation plays a vital role in overcoming segregation and discrimination in the workplace, which is precisely what persons with mental health conditions require protection from. Despite ratifying the CRPD, South Africa is yet to promulgate disability specific legislation. Instead, protection is provided for, on a piecemeal basis, in existing legislation.¹⁰⁴⁶ A foundational concept of international law is that a state party to an international treaty must ensure that its national legislation and practice adhere the treaty's requirements, which South Africa does through the promulgation of our labour law dispensation.¹⁰⁴⁷ Furthermore, section 9 of the Constitution provides that legislative and other measures designed to protect and advance persons and categories of persons who have been disadvantaged by unfair discrimination may be taken to promote the achievement of equality.¹⁰⁴⁸ The obligation to prohibit all discrimination based on disability and to provide equal and effective protection to persons with disabilities as contained in Article 5 of the CRPD necessitates the following:

- i. the inclusion of both the prohibition in national laws and, preferably, national constitutions; and
- ii. the adoption of detailed legislative provisions covering discrimination in all areas of public and private life.¹⁰⁴⁹

There is no mandated manner in which to comply with such obligation and state parties have discretion in doing so. One approach is to enact a disability discrimination law that prohibits discrimination on the basis of disability in general while also providing clear laws for certain areas of public and private life.¹⁰⁵⁰ Another possibility is to implement a disability-equality law, similar to the gender-equality legislation that has been enacted in various states, which would be solely premised on the protection and promotion of persons with disabilities in the workplace.¹⁰⁵¹ In other words, an over-arching piece of legislation regulating the treatment of persons with

¹⁰⁴⁶ United Nations (UN) 'Chapter 5: National legislation and the Convention – Incorporating the Convention into domestic law' available at <https://www.un.org/development/desa/disabilities> (accessed 24 October 2021).

¹⁰⁴⁷ United Nations (UN) 'Chapter 5: National legislation and the Convention – Incorporating the Convention into domestic law' available at <https://www.un.org/development/desa/disabilities> (accessed 24 October 2021).

¹⁰⁴⁸ Section 9, Constitution.

¹⁰⁴⁹ Article 5, CRPD.

¹⁰⁵⁰ United Nations (UN) 'Chapter 5: National legislation and the Convention – Incorporating the Convention into domestic law' available at <https://www.un.org/development/desa/disabilities> (accessed 24 October 2021).

¹⁰⁵¹ United Nations (UN) 'Chapter 5: National legislation and the Convention – Incorporating the Convention into domestic law' available at <https://www.un.org/development/desa/disabilities> (accessed 24 October 2021).

disabilities in the workplace.¹⁰⁵² This type of legislation does not just prevent discrimination; it also addresses a wide range of concerns affecting people with disabilities.¹⁰⁵³ Additional implementing legislation should be enacted by South Africa.

Summarily, South Africa ought to consider the following:

- i. Adopting either a comprehensive, general discrimination law which ultimately prohibits the use of disability as a ground of discrimination in public and private life;¹⁰⁵⁴ and/or
- ii. Adopting non-discrimination laws in various sectors such as employment, education, and access to justice which would include disability as a prohibited ground of discrimination;¹⁰⁵⁵ and/or
- iii. Adopting disability-equality law by prohibiting discrimination based on disability.¹⁰⁵⁶

In this premise, there is a selection of reasonably viable options available to South Africa.¹⁰⁵⁷ The advantages of the promulgation of legislation dealing specifically with disability include legal certainty. The current climate of mental health in the workplace is uncertain with courts contributing thereto by handling matters dealing with mental health in an inconsistent manner. The decisions of *New Way Motors v Marsland*¹⁰⁵⁸ and *Independent Municipal & Allied Trade Unions (IMATU) obo Strydom v Witzenberg Municipality*¹⁰⁵⁹ demonstrate the inconsistency with which courts have dealt with mental health in the workplace. In *New Way Motors v Marsland*, the court recognised depression as a disability, effectively offering hope for the

¹⁰⁵² United Nations (UN) ‘Chapter 5: National legislation and the Convention – Incorporating the Convention into domestic law’ available at <https://www.un.org/development/desa/disabilities> (accessed 24 October 2021).

¹⁰⁵³ United Nations (UN) ‘Chapter 5: National legislation and the Convention – Incorporating the Convention into domestic law’ available at <https://www.un.org/development/desa/disabilities> (accessed 24 October 2021).

¹⁰⁵⁴ United Nations (UN) ‘Chapter 5: National legislation and the Convention – Incorporating the Convention into domestic law’ available at <https://www.un.org/development/desa/disabilities> (accessed 24 October 2021).

¹⁰⁵⁵ United Nations (UN) ‘Chapter 5: National legislation and the Convention – Incorporating the Convention into domestic law’ available at <https://www.un.org/development/desa/disabilities> (accessed 24 October 2021).

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¹⁰⁵⁸ *Marsland v New Way Motor & Diesel Engineering (J4175/02)* [2008] ZALC 157.

¹⁰⁵⁹ *IMATU obo Anton Strydom vs Witzenburg Municipality* [2012] BLLR 660 (LAC).

adequate regulation of mental health in the workplace.¹⁰⁶⁰ However, in *IMATU v Witzenberg Municipality* depression was dealt with as an incapacity issue, effectively minimising the severity of the matter. For laws to achieve their purpose there ought to be legal certainty which South Africa is currently lacking. To effectively combat this uncertainty, at the very least, the definition of a disability should be abundantly clear. Although the CRPD fails to provide a definition of a disability, its description of persons with disabilities, is based on the social model, and explicitly includes mental health conditions by providing that persons with disabilities include ‘those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others’.¹⁰⁶¹ South Africa’s EEA reflects this by defining persons with disabilities as people ‘who have a long-term or recurring physical, including sensory, or mental impairment which substantially limits their prospect of entry into or advancement in employment’.¹⁰⁶² Yet despite this mirrored definition, courts remain inconsistent with the manner in which they approach matters concerning mental health.

Disability specific legislation does not guarantee better protection and promotion of the rights of persons with disabilities and by extension, mental health conditions, if the legislation itself is not implemented and enforced effectively. It is only through the effective implementation of the law that societal attitudes can be positively influenced to enhance the promotion and protection of the rights and welfare of persons with mental health conditions. Despite the rights guaranteed by international conventions and the Bill of Rights, South Africa still has a significant human rights implementation gap.¹⁰⁶³ This is due in part to a lack of effective and efficient mechanisms for monitoring the application of these rights, as well as what determines resource allocation decisions for their realisation.¹⁰⁶⁴

The UN made provision for this in Article 33(2) of the CRPD which highlights the importance of ensuring that state and private parties are held responsible for the implementation of these

¹⁰⁶⁰ *Marsland v New Way Motor & Diesel Engineering* (J4175/02) [2008] ZALC 157.

¹⁰⁶¹ Article 1, CRPD.

¹⁰⁶² Section 5, EEA.

¹⁰⁶³ Malatji, B ‘SA needs an independent monitoring framework to implement rights of persons with disabilities’ available at <https://www.sahrc.org.za/index.php/sahrc-media/opinion-pieces/item/2320-sa-needs-an-independent-monitoring-framework-to-implement-rights-of-persons-with-disabilities> (accessed 1 November 2021).

¹⁰⁶⁴ Malatji, B ‘SA needs an independent monitoring framework to implement rights of persons with disabilities’ available at <https://www.sahrc.org.za/index.php/sahrc-media/opinion-pieces> (accessed 1 November 2021).

rights by providing that parties to the convention should establish an independent monitoring framework (IMM).¹⁰⁶⁵ In addition, state parties are obliged to adequately fund the established IMM to ensure its effective functioning.¹⁰⁶⁶ The functions of the IMM include reporting to the UN Committee on the CRPD every four years on South Africa's implementation of the rights contained in the CRPD and those expressed in our Constitution and domestic legislation.¹⁰⁶⁷ The role of the IMM is crucial in that the UN Committee relies extensively on the provision of accurate information, reflecting the true circumstances of state parties.¹⁰⁶⁸ Along with monitoring, the IMM aims to provide guidance, raise awareness, and advocate for the rights and freedoms of persons with disabilities in the country.¹⁰⁶⁹ This will in addition, aid in addressing the stigma associated with disabilities. Thus, establishing a monitoring system is critical to mainstreaming disability concerns in South Africa. To expedite the process of designating an IMM, the South African Human Rights Commission (SAHRC) has been proposed as the most suitable institution.¹⁰⁷⁰ This is largely due to the SAHRC's powers to monitor, protect and promote human rights, which stems from it being an "A" status independent National Human Rights Institution (NHRI).¹⁰⁷¹

South African employers have a duty to reasonably accommodate employees in instances where it does not cause undue hardship.¹⁰⁷² Initially, accommodations for persons with disabilities were primarily funded by organisations. The funding received from these organisations made early developments relating to accommodations for persons with disabilities, possible.¹⁰⁷³ Funding awarded to government institutions and NGO's, in most instances, was used to subsidise

¹⁰⁶⁵ Malatji, B 'SA needs an independent monitoring framework to implement rights of persons with disabilities' available at <https://www.sahrc.org.za/index.php/sahrc-media/opinion-pieces> (accessed 1 November 2021).

¹⁰⁶⁶ Malatji, B 'SA needs an independent monitoring framework to implement rights of persons with disabilities' available at <https://www.sahrc.org.za/index.php/sahrc-media/opinion-pieces> (accessed 1 November 2021).

¹⁰⁶⁷ Malatji, B 'SA needs an independent monitoring framework to implement rights of persons with disabilities' available at <https://www.sahrc.org.za/index.php/sahrc-media/opinion-pieces> (accessed 1 November 2021).

¹⁰⁶⁸ Malatji, B 'SA needs an independent monitoring framework to implement rights of persons with disabilities' available at <https://www.sahrc.org.za/index.php/sahrc-media/opinion-pieces> (accessed 1 November 2021).

¹⁰⁶⁹ Malatji, B 'SA needs an independent monitoring framework to implement rights of persons with disabilities' available at <https://www.sahrc.org.za/index.php/sahrc-media/opinion-pieces> (accessed 1 November 2021).

¹⁰⁷⁰ Malatji, B 'SA needs an independent monitoring framework to implement rights of persons with disabilities' available at <https://www.sahrc.org.za/index.php/sahrc-media/opinion-pieces> (accessed 1 November 2021).

¹⁰⁷¹ Malatji, B 'SA needs an independent monitoring framework to implement rights of persons with disabilities' available at <https://www.sahrc.org.za/index.php/sahrc-media/opinion-pieces> (accessed 1 November 2021).

¹⁰⁷² Gresse E 'An analysis of the duty to reasonably accommodate employees: a comment on Jansen v Legal Aid South Africa' 24 *AJOL* 121.

¹⁰⁷³ Van Niekerk L 'Supported employment: Recommendations for successful implementation in South Africa' (2011) 41 *South African Journal of Occupational Health* 87.

transport costs, initial startup costs and other services including advice regarding work clothing and preparation.¹⁰⁷⁴

However, to ensure the effective realisation of accommodations, stable and sufficient funding is required.¹⁰⁷⁵ Funding will also allow for consultations with relevant health professionals to best ensure that working environments are medically suitable for persons with mental health conditions.¹⁰⁷⁶ The fragmentation and inconsistent funding sources which are currently relied upon in South Africa are presenting a serious barrier which is ultimately hindering the supply of reasonable accommodation.¹⁰⁷⁷ The success of the IMM will therefore be determined by the adequacy of funding received.¹⁰⁷⁸ The appointment of a body of inspectors responsible for conducting in person assessments of the workplace and the accommodations required to be made for employees with disabilities, will ensure that employers have provided accommodations which benefit their employees and have not just theoretically complied with their duties.

The success of the appointment of such a body is evidenced in the Netherlands where the Labour Inspectorate promotes compliance with labour protection laws.¹⁰⁷⁹ The Labour Inspectorate is responsible for overseeing the compliance of both public and private establishments.¹⁰⁸⁰ Enforcement of employment legislation is also performed by the Labour Inspectorate and is done in conjunction with other supervisory institutions.¹⁰⁸¹ The Labour Inspectorate is not only mandated to perform programmed visits, but is also tasked with investigating employee complaints regarding working conditions, working hours and remuneration.¹⁰⁸² The provision of

¹⁰⁷⁴ Van Niekerk L 'Supported employment: Recommendations for successful implementation in South Africa' (2011) 41 *South African Journal of Occupational Health* 87.

¹⁰⁷⁵ Van Niekerk L 'Supported employment: Recommendations for successful implementation in South Africa' (2011) 41 *South African Journal of Occupational Health* 87.

¹⁰⁷⁶ Van Niekerk L 'Supported employment: Recommendations for successful implementation in South Africa' (2011) 41 *South African Journal of Occupational Health* 87.

¹⁰⁷⁷ Van Niekerk L 'Supported employment: Recommendations for successful implementation in South Africa' (2011) 41 *South African Journal of Occupational Health* 87.

¹⁰⁷⁸ Malatji, B 'SA needs an independent monitoring framework to implement rights of persons with disabilities' available at <https://www.sahrc.org.za/index.php/sahrc-media/opinion-pieces> (accessed 1 November 2021).

¹⁰⁷⁹ UN 'Labour Inspection Structure and Organization' available at https://www.ilo.org/labadmin/info/WCMS_156052/lang--en/index.htm (accessed 6 November 2021).

¹⁰⁸⁰ UN 'Labour Inspection Structure and Organization' available at https://www.ilo.org/labadmin/info/WCMS_156052/lang--en/index.htm (accessed 6 November 2021).

¹⁰⁸¹ UN 'Labour Inspection Structure and Organization' available at https://www.ilo.org/labadmin/info/WCMS_156052/lang--en/index.htm (accessed 6 November 2021).

¹⁰⁸² UN 'Labour Inspection Structure and Organization' available at https://www.ilo.org/labadmin/info/WCMS_156052/lang--en/index.htm (accessed 6 November 2021).

preventative information commences the inspection campaign during which the Labour Inspectorate distributes information packages to employers, containing all relevant information pertaining to their legal duties and the course of an inspection.¹⁰⁸³ Where violations are discovered during an investigation or an inspection, the Labour Inspectorate then intervenes and issues sanctions.¹⁰⁸⁴ The Health and Safety Executive (HSE) in the UK is responsible for securing the health, safety and welfare of employees and the general public in respect of the manner in which business is conducted.¹⁰⁸⁵ In certain instances local governments are tasked with performing alongside the HSE in occupational safety and health investigations.¹⁰⁸⁶ Similarly, Northern Ireland's inspectorate body is the Health and Safety Executive for Northern Ireland (HSENI) whose duties and functions are identical to that of the HSE.¹⁰⁸⁷

Through the promulgation of disability specific legislation in SA employers will be required to comply with the duties placed upon them. As mentioned before, legislation by itself is futile if not properly implemented and enforced. The need for actionable consequences is thus necessary to ensure the effectiveness and ultimate success of legislation. In the Netherlands the severity of the sanctions imposed by the Labour Inspectorate is dependent on the legislation which has been breached and the seriousness of the violation.¹⁰⁸⁸ The sanctions imposed in the Netherlands include verbal comments, official warnings, immediate suspension of employment activities, administrative fines, criminal proceedings and penalty orders.¹⁰⁸⁹ Monetary sanctions have proven to be effective with Dutch employers noting that one of the primary reasons for their compliance with their legislative duties, is the monetary sanctions imposed on them in the event of their failure.¹⁰⁹⁰ The HSE in the UK have various types of enforcement action, including but not limited to providing information to relevant parties, serving notices, withdrawing approvals

¹⁰⁸³ UN 'Labour Inspection Structure and Organization' available at https://www.ilo.org/labadmin/info/WCMS_156052/lang--en/index.htm (accessed 6 November 2021).

¹⁰⁸⁴ UN 'Labour Inspection Structure and Organization' available at https://www.ilo.org/labadmin/info/WCMS_156052/lang--en/index.htm (accessed 6 November 2021).

¹⁰⁸⁵ ILO 'United Kingdom – 2013' available at <https://www.ilo.org/dyn/legosh/en/f?p=14100> (accessed 5 November 2021).

¹⁰⁸⁶ ILO 'United Kingdom – 2013' available at <https://www.ilo.org/dyn/legosh/en/f?p=14100> (accessed 5 November 2021).

¹⁰⁸⁷ ILO 'Labour Inspection country profiles: United Kingdom' available at https://www.ilo.org/labadmin/info/WCMS_112602/lang--en/index.htm (accessed 5 November 2021).

¹⁰⁸⁸ UN 'Labour Inspection Structure and Organization' available at https://www.ilo.org/labadmin/info/WCMS_156052/lang--en/index.htm (accessed 6 November 2021).

¹⁰⁸⁹ UN 'Labour Inspection Structure and Organization' available at https://www.ilo.org/labadmin/info/WCMS_156052/lang--en/index.htm (accessed 6 November 2021).

¹⁰⁹⁰ Croner – I 'Netherlands: In Depth' available at <https://app.croneri.co.uk/topics/netherlands/indepth?product=133> (accessed 4 November 2021).

and licenses, and prosecution.¹⁰⁹¹ In addition, when failing to comply with legislative obligations, employers further expose themselves to constructive dismissal claims by employees who claim that the refusal to reasonably accommodate them ultimately resulted in having no alternative other than resignation.¹⁰⁹²

The inclusion of persons with mental health conditions will be drastically improved by facilitating an environment which reasonably accommodates their abilities. Governments should empower organisations which best represent persons with mental health conditions. These organisations should be mandated to monitor the implementation of policy and law in accordance with international standards. This will effectively ensure that the government is held accountable for their internationally imposed obligations.

According to the ILO, discrimination in the workplace is likely to occur if negative attitudes are present. This is largely due to the ignorance of mental health. Restricted exposure limits awareness and understanding and anecdotally, mental disabilities are far less understood than their physical counterpart. Although employers are not immune to the effects of restricted exposure, they perform an increasingly important function as the approach and acceptance by employers play a vital role in successfully integrating persons with disabilities into the workplace. Employers thus have the potential to steer the attitude towards mental health in a positive manner, which is precisely why their role is crucial.

In considering the effectiveness and practicability of the legislative frameworks, the comparison had between South Africa and the likes of the Netherlands, Northern Ireland and the United Kingdom allow for the identification of lacunae. Such lacunae as acknowledged and discussed in the aforementioned chapters, are able to be addressed through the various mechanisms currently being implemented in the respective international jurisdictions. By doing so, not only is South Africa's legislative framework strengthened but its comprehensiveness will be improved.

¹⁰⁹¹ ILO 'Labour Inspection country profiles: United Kingdom' available at https://www.ilo.org/labadmin/info/WCMS_112602/lang--en/index.htm (accessed 5 November 2021).

¹⁰⁹² Ivan Israelstam 'Discipline and Dismissal' available at <https://www.labourguide.co.za/discipline-dismissal/740-what-factors-constitute-constructive-dismissal> (accessed 3 November 2021).



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6.6. LEGISLATION

6.6.1. South Africa

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2. Code of Good Practice on the Employment of People with Disabilities.
3. Code of Good Practice on the Prevention and Elimination of Harassment in the Workplace.
4. Employment Equity Act 55 of 1998.
5. Labour Relations Act 66 of 1995.
6. Occupational Health and Safety Act 85 of 1993.

6.6.2. Netherlands

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4. *Constitution of the Kingdom of the Netherlands* 2018.
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6. Eligibility for Permanent Invalidity Benefit (Restrictions) Act of 2002
7. Gatekeeper Improvement Act 1999.
8. General Equal Treatment Act 1994.
9. Wet op de Ondernemingsraden (Work Councils Act).
10. Working Conditions Act 1999.

6.6.3. Northern Ireland

1. Disability Discrimination Act 1995.
2. Health and Safety at Work (Northern Ireland) Order 1978.

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6.6.4. United Kingdom

1. Equality Act 2010.
2. Disability Discrimination Act 1995.
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6.9. THESES

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