

Mental Health as a Human Right – Legal aspects

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Mental health as a human right

Legal aspects in Labour Law



LEGAL FRAMEWORK

- Mental Health Care Act
- Labour Relations Act and Employment Equity Act
- Occupational Health and Safety Act and Mine Health and Safety Act with
- Compensation for Occupational Injuries and Diseases Act



INTERPLAY OF LEGAL PRINCIPLES

- The disability-centred framework in the LRA and EEA
- Discrimination claims
- Reasonable accommodation, unjustified hardship, and inherent requirements
- Assessing psychosocial risks in the workplace and addressing these risks



Legal aspects

Mental Health Care Act

- The Mental Health Care Act defines mental illness as a **positive diagnosis** of a mental health-related illness in terms of **accepted diagnostic criteria** made **by an authorised mental health care practitioner**
- Mental illnesses have been defined by a variety of terms, such as distress, disadvantage, disability, inflexibility, irrationality, and statistical deviation.

Navigating legal aspects of mental health in the workplace





Understanding mental health in a disability framework

- The Disability Code defines "Mental impairment" as

a clinically recognised condition or illness that affects a person's thought processes, judgment or emotions.

- Focus on the effect of a disability on the person in relation to the working environment, and not on the diagnosis of the impairment.
- An impairment constitutes a disability to the EEA if it substantially limits the person's career prospects.



Reasonable Accommodation and unjustified hardship

- Item 6 of the Disability Code, like section 15(2) of the EEA, requires employers to make **reasonable accommodation** for people with disabilities.
 - Obstacles should be eliminated in the workplace, and that measures should be taken to adapt policies, practices and the working environment to make the workplace accessible unless such accommodation does would result in unjustifiable hardship for the employer.
 - *Standard Bank of South Africa v CCMA & others* [2008] 4 BLLR 356 (LC)
“the ... duty to accommodate stems from its overriding obligation not to discriminate.”
- *Standard Bank of South Africa v CCMA & others*
 - **Unjustifiable hardship** is the threshold at which employers are relieved of their obligation to accommodate disabled employees

Discrimination claims

- Whether a mental health disorder is classifiable as a disability or not, an employer's treatment of an employee, without demonstrating an understanding of the employee's unique disability-related needs, may amount to discrimination in terms of the EEA
- *In Marsland v New Way Motor & Diesel Engineering (2009) 30 ILJ 169 (LC)*
 - discrimination based on the fact that a person suffers from a mental health issue, has the potential to impair the fundamental dignity of that person as a human being, or to affect them in a comparably serious manner
 - discrimination based on mental illness should be treated as a prohibited ground of discrimination.
- *Smith v The Kit Kat Group (Pty) Ltd (JS787/14) [2016] ZALCJHB 362*





Inherent requirements of the job

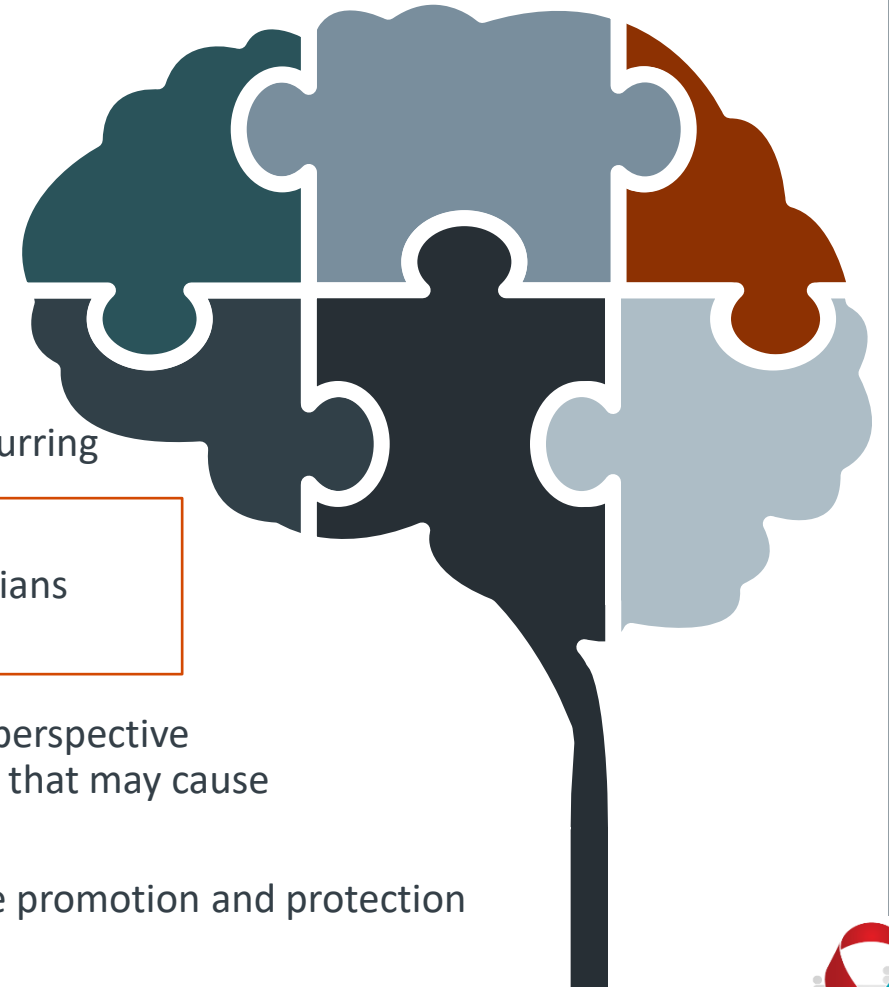
- Section 6(2)(b) of the EEA
 - even though there is a need to eradicate discrimination from the workplace, there may be situations in which possession or lack thereof of one or more of the listed grounds may be relevant to certain work
- What constitutes an inherent requirement of the job?
 - It must be a permanent feature of the job
 - It must be integral to the job - it cannot be changed without materially altering the job itself
 - It must be essential to the performance of the work in question

Invisible conditions | OHSA and MHSA

- Recent guidelines for mandatory COPs for the management of medical incapacity due to ill health and injury in the mining industry cover:
 - **rehabilitation, re-skilling** and **re-training**
 - evaluation for **replacement** and **reasonable accommodation** of people with medical incapacity or disabilities
- Reasonable accommodation can only arise if the employer is aware of the mental health condition or the risk of mental health conditions occurring

Strategies for early detection of invisible conditions may include:

- analysis of sick leave or absenteeism
 - reports from treating physicians
 - medical surveillance reports
 - poor work performance
- Assessing psychosocial risks in the workplace from a health and safety perspective enables employers to identify and address any aspect of the workplace that may cause or exacerbate mental health issues – *which is a legal requirement*
 - Employer have a duty in respect of workplace safety which includes the promotion and protection of its workers' **physical** and **mental** health





COIDA

MENTAL HEALTH

- PTSD was recently added to the definition of an "*occupational disease*" in the COIDA Amendment Act signed into law in April this year
- The effective date has not yet been promulgated

Compensation Commissioner v Georgia Badenhorst

- eg
- Employee with pre-existing phobia of snakes grabbed a snake in the storeroom when reaching for a docket positioned above her head
 - After the incident, the employee became incoherent, shocked, confused and acted irrationally to the extent that she was admitted to a psychiatric institution. Thereafter she developed a stutter and was moderately impaired in basic activities
 - Diagnosed with PTSD and awarded 20% permanent disablement which she challenged
 - Severity of PTSD and other disorders suffered justified the 75% disablement ruling

COID Amendment Act

Clinical rehabilitation

Clinical rehabilitation and provision of assistive devices for the purpose of physical and psychological recovery of the employee and to reduce any disability resulting from an occupational injury or disease

Vocational rehabilitation

Vocational rehabilitation to assist an employee to maintain employment, obtain employment, regain or acquire vocational independence

Social rehabilitation

Social rehabilitation to assist in restoring an employee's independence and social integration to the maximum extent practicable

THANK YOU



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