

**NEW CHALLENGES:
SHIFTING POWER IN
UNCERTAIN TIMES**
12-14 August 2009



22nd ANNUAL LABOUR LAW CONFERENCE

Depression: Mental health discrimination in the workplace

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Context

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- Societal perceptions of mental health problems - stigma
- Close link between mental abilities and production in modern economy
- Mental illness not treated similar to “physical” illness in occupational health and safety or workers’ compensation
- People with mental health problems have high rate of unemployment



- Mental health problems one of leading causes of disability
- Consistency of approach in integrated disability framework imperative
- What model of disability?
 - Social model vs medical model
 - Not just normative issue, NB consequences for productivity

Discrimination

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- PEPUDA 4 of 2000
“any act or omission, including a policy, law, rule, practice, condition or situation which directly or indirectly— (a) imposes burdens, obligations or disadvantage on; or (b) withholds benefits, opportunities or advantages from, any person on one or more of the prohibited grounds”.

Scenarios for discrimination

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- Pre-employment testing
- Unfair labour practices
- Harassment: sexual, racial, corporate bullying
- Dismissal

Legal framework

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- Constitution, 1996
- Employment Equity Act, 1998 (EEA)
- Labour Relations Act, 1995 (LRA)
- Code of Good Practice: Dismissal
- Code of Good Practice: Key Aspects of Disability in the Workplace (Disability Code)
- Technical Assistance Guidelines on Employment of People with Disabilities (TAG)

What/who is protected?

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- Employees will have to prove disability or that discrimination based on analogous ground
- EEA defines 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”



- “Long-term or recurring”
- “Substantially limiting”
 - Duty to mitigate effect
 - Exclusions based on public policy
- Disability Code para 5.1: EFFECT of disability, not DIAGNOSIS or IMPAIRMENT
- In fact, emphasis is on ‘impairment’
- Clinically recognised mental disorder

Unfair discrimination

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- EEA s 5: employer to take positive steps to eliminate unfair discrimination
 - Formal equality only or substantive equality?
- EEA s 6: prohibition on unfair discrimination, direct or indirect, in any policy or practice, on one or more grounds, including...disability
- Prohibited grounds not exhaustive – important for mental health discrimination



- Unfair? LC: purposeless, purpose not important enough to outweigh employee's rights, morally offensive
- Has to be located within s 9 of the Constitution
- CC jurisprudence on what makes discrimination unfair
 - Impact on employee
 - Does it fundamentally impact on human dignity?

Psychological testing

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- Prohibited, along with ‘similar assessments’ unless:
 - Scientifically valid and reliable
 - Applied fairly to all employees
 - Not biased against any employee or group
- Recognition that it creates scope for discrimination

Dismissal

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- Person with mental health difficulties could be dismissed because of incapacity, misconduct or operational requirements
- Reason given for dismissal important
- Automatically unfair: s 187(1) of LRA
 - Defence if employer can show that person cannot perform essential functions because of disability

Reasonable accommodation

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- Importance of substantive equality
- Para 6 of Disability Code and Item 6 of TAG
- *Lucas*:
 - *What is reasonable depends on the circumstances of the workplace and the employee.*
 - *Collaborative approach by employer and employee*
 - *Modify employment practices to give employee with disability opportunity to perform*



- *Ultimate goal to retain employment for people with disabilities*
- *One would consider the extent, purpose, arrangement of accommodations and employer's resources*



- Accommodating mental health different from accommodating physical disabilities – it's an ongoing process that is more individualised
- Shifts in attitudes imperative
- Essential functions of the job – service economy may make it difficult to accommodate mental health problems

Conclusions

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- Balance between requirements of the workplace and protecting vulnerable employees
- Overhaul of policies relating to HRM, OHS, compensation of employees, reintegration of disabled employees back into the workplace
- Not just normative, but pragmatic necessity