EMPLOYERS' RESPONSES TO ALCOHOL ADDICTION IN SOUTH AFRICA: THE ROLE OF THE LEGISLATIVE FRAMEWORK

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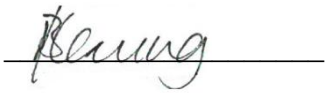
PLAGIARISM DECLARATION

I, **Betina Nathalie Fleming**, declare that this Research Report is my own unaided work. It is submitted in partial fulfilment of the requirements for the degree of Master of Laws (by Coursework and Research Report) at the University of the Witwatersrand, Johannesburg. It has not been submitted before for any degree of examination in this or any other university.



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ABSTRACT

Alcohol addiction in South Africa is a growing concern affecting many individuals in their personal and professional lives. The impact of substance abuse on the workplace is immense and as such there is a need for employers to understand their roles, rights, and obligations in dealing with employees suffering with alcohol addiction.

This paper considers the definition of substance abuse, how it manifests itself in the workplace, and how employers can establish whether an employee is an alcohol dependent user. The paper also discusses the obligations of employers in respect of managing cases of alcohol dependence, with reference to relevant case law and legislative provisions.

The paper addresses the differences between misconduct in respect of social drinkers and incapacity in respect of employees suffering with alcohol addiction. The paper discusses the views of the International Labour Organisation and provides an overview of the South African legislative framework under the Labour Relations Act, the Employment Equity Act, and the Prevention of and Treatment for Substance Abuse Act. The paper goes on to identify the gaps between the ILO's recommendations and South African law and suggests mechanisms to close these gaps.

If South Africa is to take effective steps to guard against alcohol abuse and to ensure that the rights of employees are adequately protected, the introduction of a framework to assist employers in managing issues of alcohol addiction is paramount. Ensuring greater synergy between the recommendations of the ILO and the South African legislative framework is an important, and achievable, first step.

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I INTRODUCTION

> 'Alcohol is the most commonly misused drug in South Africa with a complicated history of racial inequities in access to liquor and in the regulation of the conditions in which liquor is consumed .... Alcohol remains the substance with the greatest burden of harm.'[1]

A report provided to the Mine Health and Safety Council indicated that 'alcohol misuse is one of the most significant public health concerns facing South Africa today'.[2] In 2009 statistics indicated that the consumption of substances in South Africa was twice the global norm,[3] with a study in twenty African countries indicating that 'in terms of the proportion of heavy drinkers as a percentage of current drinkers, South Africa ranked fourth highest'.[4]

There is little doubt of the threat that a slow burning epidemic[5] such as alcoholism poses to employees, employers, and the nation when one considers that the 'harmful use of alcohol is a causal factor in more than 200 disease and injury conditions'.[6]

There are a number of factors that contribute to continued use of and dependence on alcohol, including poverty and low levels of education.[7] As Setlalentoa et al posit, the multi-faceted nature of the problem impacts the ability to effectively address it.[8] As alcohol abuse and dependence have 'far-reaching negative effects that affect the drinker as well as those who are part

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[1] South African National Drug Master Plan (drafted in accordance with the stipulations of the Prevention of and Treatment for Substance Abuse Act [No 70 of 2008]) 4 ed, 2019–2024 (hereinafter 'the SANDMP') at 29.
[2] M Grove *Judging Alcohol Use in the Workplace: Should Labour Arbitrators and Judges Reconcile the Employer's Duties Differently in the Agricultural Sector?* (Research Report, University of Cape Town, 2013) 2.
[3] B Smook, M Ubbink, E Ryke & H Strydom 'Substance abuse, dependence and the workplace: A literature overview' (2014) 50(1) *Social Work/Maatskaplike Werk* at 60.
[4] M McCann, N Harker Burnhams, C Albertyn & U Bhoola *Alcohol, Drugs & Employment* 2 ed (2001) at 23.
[5] Alcohol dependence in South Africa was termed an 'epidemic' by Siegfried & Parry — see N Siegfried & C Parry 'Alcohol abuse and Covid-19: Two colliding epidemics — government must act now to reduce the momentum' *Maverick Citizen*, 27 December 2020, available at *https://www.dailymaverick.co.za/article/2020-12-27-alcohol-abuse-and-covid-19-two-colliding-epidemics-government-must-act-now-to-reduce-the-momentum/*, accessed on 12 January 2021.
[6] SANDMP op cit note 1 at 27.
[7] M Setlalentoa, E Ryke & H Strydom 'Intervention strategies used to address alcohol abuse in the North West Province, South Africa' (2015) 51(1) *Social Work/Maatskaplike Werk* at 88.
[8] Ibid.

of his immediate environment'[9] these issues inevitably seep into the workplace.

While the majority of employees that consume alcohol do so in a recreational setting and in a controlled manner, it is becoming ever more apparent that occasional use is becoming dependent use for many employees,[10] leading to an increase in substance abuse in the workplace.[11] This results in a greater risk to employers and employees alike and as such clear direction is needed to address the issue effectively.

This research report will consider the definition of substance abuse, how this manifests itself in the workplace and how employers can establish whether an employee is an alcohol dependent user. This paper will also discuss the obligations of employers in respect of managing cases of alcohol dependence, with reference to relevant case law and legislative provisions. Finally, this paper will consider the views of the International Labour Organisation ('the ILO') in respect of substance abuse, will establish whether any gaps exist between what the ILO considers effective mechanisms to deal with substance abuse and what the South African legal framework prescribes, and will discuss potential solutions to fill any gaps.

The discussion contained in this paper is based on desktop research, focusing on a review of legislation, judgments, arbitration awards, academic commentaries and other research publications. Numerous sources considered for this paper make reference to 'substance' abuse; this includes alcohol unless stated otherwise. As I am an attorney specialising in employment relations, some knowledge gained through years of work experience has been used to contribute to the discussion in this paper. The proper ethical considerations in respect of using personal knowledge are observed in that specific examples from practice have not been used.

II ALCOHOL ADDICTION IN THE WORKPLACE: IDENTIFICATION AND MANIFESTATION

(a) What is alcohol addiction?

[9] Setlalentoa, Ryke & Strydom op cit note 7 at 82.

[10] A report compiled by the World Health Organisation determined that 'South Africa is ranked as second-highest in the category of harmful patterns of drinking'; see Grove op cit note 2 at 8.

[11] Agencies that provide Employee Assistance Programme services reported a 'rise in substance abuse in the workplace'; see N Harker Burnhams citing Rose-Innes, 2008, Food and Retail Sector in SA in McCann et al *Substance Abuse Workplace Prevention in South Africa* (2011), in a presentation given under the auspices of the Alcohol & Drug Abuse Research Unit, Medical Research Council.

According to the SANDMP, 'alcohol is the most widely used psychoactive substance in the country'.[12] Alcohol addiction or dependence is characterised by symptoms such as cravings, loss of control, physical dependence, and tolerance.[13] Mogorosi characterises alcohol addiction as 'an overpowering desire and a compulsive need … as well as a psychological and sometimes physical dependence ...'.[14] The SANDMP defines addiction as 'a chronic, relapsing disease that affects both the brain and behaviour',[15] and distinguishes between substance use, misuse, and abuse.[16]

McCann et al also provide a distinction between consumers of alcohol as falling along a spectrum ranging from 'social drinker' which is unproblematic to 'dependent drinker' which is categorised by having 'no control over alcohol use', remaining 'intoxicated throughout the day for two or more days', and exhibiting aggressive, defiant, or risk-taking behaviour.[17]

As the ILO rightly states, a lack of well-understood distinctions between social drinking and problematic or abusive consumption creates a myriad of problems for many countries, ranging from societal concerns to health and safety issues.[18] With this is mind it is unsurprising that alcohol addiction spills into the individual's employment life.[19] The ILO recognises this in stating that alcoholism results in an individual's failure to fulfil work commitments, and a propensity to drink in situations that are hazardous and that have a negative impact on relationships.[20] All of these affect the individual at work and thus affect the workplace itself. As the arbitrator in *SACCAWU obo Johnson / Clover SA (Pty) Ltd*[21] stated, '[a]n employer clearly has an interest in an employee's conduct outside the workplace to the extent that it affects his capacity to perform during working

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[12] SANDMP op cit note 1 at 9 and 10.

[13] The International Labour Organisation defines each of these symptoms in its report titled *Alcohol and Drug Problems at Work: A Shift to Prevention* 2003 ('ILO Report') at 62, available at https://www.ilo.org/safework/info/publications/WCMS_127369/lang--en/index.htm, accessed on 12 January 2021.

[14] L Mogorosi 'Substance abuse at the work place: The problem and possible solutions' (2009) 45(4) *Social Work/Maatskaplike Werk* at 496, available at *http://dx.doi.org/10.15270/45-4-197*, accessed on 12 January 2021.

[15] SANDMP op cit note 1 at 5.

[16] SANDMP op cit note 1 at 9 and 10.

[17] McCann et al op cit note 4 at 3.

[18] International Labour Organisation *Prevention of alcohol and drug use in the workplace — A consensual approach to workplace substance abuse: from rehabilitation to prevention,* available at https://www.ilo.org/safework/areasofwork/workplace-health-promotion-and-well-being/WCMS_108398/lang--en/index.htm, accessed on 22 May 2021.

[19] According to the SANDMP 'it is estimated that at least 70% of employees engaged in risky alcohol … use are in the active workforce'; see the SANDMP op cit note 1 at 36.

[20] International Labour Organisation *Management of alcohol- and drug-related issues in the workplace. An ILO code of practice*, Geneva, International Labour Office, 1996 at 63, available at *https://www.ilo.org/global/publications/ilo-bookstore/order-online/books/WCMS_PUBL_9221094553_EN/lang--en/index.htm*, accessed on 22 May 2021.

[21] [2000] 4 BALR 397 (CCMA).

hours'.[22] How alcohol addiction manifests itself in the workplace and how employers can and do identify problems of alcohol addiction with be discussed in the next section.

(b) How does alcohol addiction manifest in the workplace?

Alcohol addiction manifests in the workplace in a number of ways. It is noteworthy that some sufferers of this affliction may take a number of years to begin showing concerning behaviour in the workplace.[23] This is one of the reasons that alcohol addiction can be difficult to detect and treat before becoming an insurmountable problem.

Mogorosi lists some of the manifestations of alcohol addiction in the workplace as absenteeism,[24] workplace injury, and damage to property and equipment.[25] Smook et al list late-coming, decreased productivity, increased (human) error, and the waste of materials as indicators.[26] A rise in misconduct matters such as violence[27] and theft may also signal an alcohol addiction problem.[28] Relationship problems between colleagues may also be indicative of alcohol addiction, as morale lowers for workers covering for colleagues that are frequently absent or unable to do their jobs effectively (or at all) due to alcohol addiction.[29]

According to Smook et al, 'alcoholic employees are on average absent two to four times more frequently than non-alcoholic employees, and they cause two to four times more on-the-job accidents'.[30] This results in increased costs for employers, who may be required to bring in additional labour to cover absent workers. One may also observe an increase in costs around disciplinary action and internal and external dispute resolution.[31]

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[22] Ibid at 401.
[23] McCann et al posit that some individuals with an alcohol addiction problem can conceal this fact for up to five years; see McCann et al op cit note 4 at 136.
[24] According to the SANDMP, employers lose 86 working days annually due to substance abuse-related absenteeism. See the SANDMP op cit note 1 at 36.
[25] Mogorosi op cit note 14 at 496.
[26] Smook et al op cit note 3 at 61.
[27] K Odeku & O Odeku 'Impact of alcoholism in the workplace and the role of the employers' (2015) 6(4) *Journal of Sociology and Social Anthropology* 475 at 477, available at https://www.semanticscholar.org/paper/Impact-of-Alcoholism-in-the-Workplace-and-the-Role-Odeku/cb1cb6737737d000a67e574d9cdbb21d80ed5c45, accessed on 12 January 2021.
[28] Smook et al op cit note 3 at 61.
[29] These and other issues are discussed in Grove op cit note 2 at 57–8.
[30] Smook et al op cit note 3 at 61.
[31] Grove op cit note 2 at 58.

(c) What are some of the workplace-based factors that contribute to alcohol addiction?

There are a number of factors that may lead an individual to develop an alcohol addiction. These factors may be social, economic, or based on circumstances prevailing in the workplace such as

> 'uncomfortable work settings, lack of safety, inadequate physical or financial resources, poor supervision and problems with co-workers, low pay, poor training and job preparation, job insecurity and lack of opportunities for career advancement'.[32]

In addition,

> '[t]he demand … to maintain the required levels of productivity and constant deadlines, working nightshifts, long shifts, constant long-distance driving, job complexities and role conflicts'[33]

may increase the likelihood of an individual developing an alcohol addiction or continuing to use alcohol as a coping mechanism.

According to the 2006 SANDMP some occupations are considered 'at risk' of workers developing substance addiction problems.[34] These occupations include 'artists, musicians, medical personnel, farm workers and transport industry workers'.[35] Frone[36] discusses various workplace triggers or stressors which include settings where workers are 'not integrated into or regulated by the work organisation … where alcohol is physically or socially available … [and where] alcohol use may be a response to the physical and psychosocial qualities of the work environment'.[37] Recognising work-based triggers for employees struggling with alcohol addiction can go some way towards assisting those employees through adapting the workplace where possible and appropriate.

Often employers are unaware of alcohol addiction trends in the workplace, or choose to ignore them, until frequent or serious workplace incidents prompt management to look more

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[32] Mogorosi op cit note 14 at 499.
[33] Ibid.
[34] Mogorosi op cit note 14 at 500.
[35] Ibid.
[36] Michael R Frone 'Work stress and alcohol use' (1999) 23(4) *Alcohol Research and Health* 284, available at *https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&ved=2ahUKEwiEp7zltaDvAhWoShUIHYRxCfYQFjAOegQIeBAD&url=https%3A%2F%2Fpubs.niaaa.nih.gov%2Fpublications%2Farh23-4%2F284-291.pdf&usg=AOvVaw18vLH_iK5VDm3FRX5k-0uy*, accessed on 8 March 2021.
[37] Ibid at 285.

deeply into the problem.[38] With the consumption of alcohol being socially acceptable in most circles, employers may feel reluctant to confront workers that imbibe frequently or to excess[39] and, as such, problems lie undiscovered until there is some real incentive to seek them out.[40]

(d) How does an employer identify an addiction issue?

While observations of an employee's physical state (for example, slurred speech, staggering and the like) and testing using a breathalyser or more invasive medical testing can indicate that an employee is intoxicated, there are specific mechanisms that can assist an employer in identifying whether an employee is merely a social or casual drinker or whether the employee is alcohol dependent.

One such mechanism is the Alcohol Use Disorders Identification Test ('AUDIT') which was developed by the World Health Organization in 1982 as a means to identify those who are alcohol dependent or who are at risk of developing an alcohol addiction.[41] AUDIT is a question-based assessment focusing on the frequency and quantity of consumption and scoring the participant accordingly. Participants scoring higher than eight are either in the beginning stages of alcohol dependence or are at risk of developing a dependence problem.[42] Employers seeking to establish whether an employee has an alcohol addiction can make use of AUDIT to determine what steps, if any, need to be taken to assist an employee, provided that this is done within the prescripts of the law.[43]

Distinguishing between employees that fall within the definition of 'social drinker' and those that fall within the category of 'dependent drinker' is imperative and the obligations on employers differ somewhat depending on the circumstances. On the one hand, the behaviour of a social drinker who presents at the workplace under the influence of alcohol may fall into the category of misconduct, whereas an employee dealing with alcohol addiction that attends the

[38] McCann et al op cit note 4 at 27.
[39] McCann et al op cit note 4 at 68.
[40] McCann et al op cit note 4 at 26.
[41] T Buddy 'AUDIT or Alcohol Use Disorders Identification Test' *Verywell Mind*, 27 November 2020, available at *https://www.verywellmind.com/alcohol-use-disorders-identification-test-69492*, accessed on 12 January 2021.
[42] Ibid.
[43] There are privacy considerations when subjecting employees to this form of testing. It is important that employees are fully acquainted with the purpose of the test and that, with this understanding, they voluntarily submit. Section 7 of the Employment Equity Act 55 of 1998 prohibits medical testing except in certain circumstances. While AUDIT is not an invasive medical test, employers could come under fire should the need to test employees not be considered as 'justifiable in the light of medical facts, employment conditions … or the inherent requirements of a job' as required by s 7(1)*(b)*. Employers should thus proceed with caution.

workplace under the influence could be determined to suffer from incapacity.[44]

The distinction between the two dictates how employers can and should respond to the issues at play. As the arbitrator in *Naik v Telkom SA*[45] stated, it is 'instructive to see where, either a lack of clarity on the distinction between misconduct and incapacity, or an inability to follow the definition of alcoholism as incapacity to its logical conclusion, can lead'.[46] The distinction between misconduct and incapacity and the employer's responses in respect of each will be dealt with more fully in Part III below.

III EMPLOYER RESPONSES TO ALCOHOL ADDICTION

(a) Obligations of employers with regard to employees: Occupational health and safety

Section 8 of the Occupational Health and Safety Act ('the OHS Act')[47] requires that every employer 'provide and maintain, as far as is reasonably practicable, a working environment that is safe and without risk to the health of his employees'. It is eminently conceivable that an employee who is at work in an intoxicated state poses a greater risk to the health and safety of their fellow employees that one who is not inebriated. This risk must be guarded against by employers by removing any person that is, or appears to be, intoxicated from the workplace or by restricting access to the workplace to such persons from the outset.[48] This is to protect other employees and, often, to protect the intoxicated employee themselves as the risk of workplace injury is eliminated.

The obligation on an employer in terms of occupational health and safety is relatively wide. As articulated by Yeates, the relatively new 'SANS 45001 standard dealing with Occupational Health and Safety management in South Africa … specifically acknowledges that an organisation's duty on workplace safety includes the promotion and protection of both its workers' physical and *mental* health'.[49] Employees suffering with alcohol addiction and the consequences that flow from it, be they social, economic, or psychological, may require assistance from

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[44] This is supported by McCann et al who state: 'Problem drinking in the workplace can be divided into two categories: drinking which results in incapacity and that which results in misconduct.' See McCann et al op cit note 4 at 18.
[45] (2000) 21 *ILJ* 1266 (CCMA).
[46] Ibid at 1270.
[47] Act 85 of 1993.
[48] Section 2A of the OHS General Safety Regulations prohibits an employer from permitting any person that is or appears to be intoxicated to enter or remain in the workplace.
[49] Michael Yeates 'OHSA — yes, this includes mental health — what does the law say?' available at *https://www.cliffedekkerhofmeyr.com/en/results.html?query=employment+alert+2+march+2020*, accessed on 1 March 2021.

employers in the workplace to safeguard their mental health and well-being. This may require on-site counselling and job adaptation which brings employees with alcohol addiction back into the workplace and alongside their colleagues to whom they could conceivably pose a risk.

There is thus a very real tension between the obligation that an employer owes to all employees in maintaining a safe working environment versus the obligation that an employer bears in protecting employees' mental health, and providing ongoing assistance to an employee suffering with alcohol addiction as provided for in the Labour Relations Act[50] ('LRA'). This tension is even more difficult for employers to navigate in a context where certain industries and jobs that are high risk have a zero tolerance approach to intoxication in the workplace, making the possibility of ongoing counselling and treatment less likely.[51]

(b) Obligations of employers with regard to employees: Non-discrimination

As outlined by s 1 of the Constitution of the Republic of South Africa, 1996 ('the Constitution'), South Africa's constitutional democracy is founded on the values of 'human dignity, the achievement of equality and the advancement of rights and freedoms'. Section 9 of the Constitution in turn provides that 'everyone is equal before the law and has the right to equal protection and benefit of the law'[52] and that '[e]quality includes the full and equal enjoyment of all rights and freedoms'.[53]

The Employment Equity Act[54] ('the EEA') was promulgated to give effect to these rights. Chapter Two of the EEA establishes statutory protections against discrimination, with ss 5 and 6 containing 'generally expressed obligations to promote equality by eliminating unfair discrimination in the workplace and a prohibition of unfair discrimination on a series of specified and other grounds'.[55] The EEA prohibits both direct and indirect discrimination. Van Niekerk and Smit outline direct discrimination as instances where 'the criteria on which differentiation is based

[50] Act 66 of 1995.
[51] Certain jobs require employees to function free of any form on intoxication and employers in industries such as mining often have zero tolerance policies in place for intoxication on duty. These employers also test employees regularly to ensure that they do not transgress the rules around intoxication in the workplace and in some instances, a negative inference can be drawn from an employee's refusal to be tested. See *Mphaphuli v Ramotshela* (2020) 41 *ILJ* 242 (LC) in this regard.
[52] Section 9(1).
[53] Section 9(2).
[54] Act 55 of 1998.
[55] A Van Niekerk & N Smit *Law@Work* 3 ed (2014) at 120.

are themselves unfair — for example, when an employer treats a woman less favourably than it does or would treat a man'. [56] Indirect discrimination, on the other hand, occurs when criteria that appear fair on the face of it create inequitable outcomes.[57]

The court in *Leonard Dingler Employee Representative Council v Leonard Dingler (Pty) Ltd*[58] stated that '[d]iscrimination occurs when people are not treated as individuals' and that 'to discriminate is to assign to [someone] characteristics which are generalised assumptions about groups of people'.[59] This was certainly the contention in *Independent Municipal & Allied Workers Union & another v City of Cape Town*[60] ('*IMATU*') where the candidate for appointment as a firefighter alleged that he had not been appointed due to generalised stereotypes of persons suffering with diabetes.

The Labour Court found that the City of Cape Town's refusal to appoint the candidate as a firefighter amounted to an arbitrary, irrational, and unfair exclusion 'predicated upon anachronistic generalized assumptions' which impaired the candidate's dignity and negatively affected the full enjoyment of certain of his constitutional rights.[61] The *IMATU* judgment made it clear that a medical condition which had the effect of limiting an individual's entry to or advancement in employment[62] could, in appropriate circumstances, constitute a ground for discrimination in terms of the EEA. As McGregor notes, dignity and the impact on one's dignity of the conduct complained of, is the underlying principle that distinguishes mere differentiation from discrimination.[63]

Section 5 of the EEA states that 'every employer must take steps to promote equal opportunity in the workplace by eliminating unfair discrimination in any employment policy or practice'. Employment policy or practice in turn is defined as including, inter alia, recruitment and appointment procedures, job classification and grading, job assignments, working environment and facilities, training and development, and disciplinary measures both short of, and including, dismissal.[64]

Employees suffering with or recovering from alcohol addiction may be faced with some

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[56] Ibid at 125–6.
[57] Van Niekerk & Smit cite 'height, weight, educational requirements, full or part-time status, and length of experience' as examples of indirect discrimination; op cit note 54 at 126.
[58] (1998) 19 *ILJ* 285 (LC).
[59] Ibid at 1442(H).
[60] (2005) 26 *ILJ* 1404 (LC).
[61] Ibid para 90.
[62] Ibid para 90.
[63] Marie McGregor 'Elements of an employment discrimination case' (2002) 10 *JBL* 98 at 102.
[64] Section 1 of the EEA.

form of discrimination in the workplace such as discrimination on the grounds of disability[65] or on an arbitrary ground such as a health condition. As Vilsaint et al state, 'such discrimination can take the form of perceived personal slights, [where] … an individual is perceived as untrustworthy, dishonest, or always about to relapse …'.[66] Employees may be denied training opportunities or assignment and promotion opportunities based on the fact that they have a history of alcohol addiction. Discriminatory practices like these affect recovered and recovering employees' long term well-being as the stigma of alcohol addiction continues to plague them in the workplace.[67]

Employers thus have a duty to do away with any business practices that limit employees suffering with alcohol addiction from enjoying any of the benefits of employment including, without limitation, advancement opportunities. Employers must also be alive to the fact that the dismissal of an employee suffering with an alcohol addiction could be alleged to constitute an automatically unfair dismissal in terms of s 187(1)*(f)* of the LRA to the extent that the reason for the dismissal was the employee's disability or health condition.

(c) The responsibilities of and onus on an employer in dealing with alcohol addiction

One of the primary obligations on any employer is to treat its employees fairly. This obligation stems from s 23(1) of the Constitution which states that '[e]veryone has the right to fair labour practices'. Legislation such as the LRA was enacted to give effect to this right by providing a framework for the rights and obligations of employers and employees in respect of inter alia collective bargaining matters, industrial action, unfair labour practices, and dismissal.

Employers that are dealing with the various manifestations of alcohol use in the workplace often have to deal with misconduct and incapacity which, in many cases, lead to dismissal. Dismissal is dealt with in terms of s 185 of the LRA, which provides employees with the right not to be unfairly dismissed, as well as in s 188 of the LRA, which identifies what constitutes dismissal. Failure to follow procedure in effecting a dismissal will render it unfair and as such adherence to the law and to the employer's own rules, regulations, policies, procedures, and standing orders as

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[65] In light of the approach by the courts, as in *Smith v The Kit Kat Group (Pty) Ltd* [2016] 12 BLLR 1239 (LC), an employee alleging that they suffer from a disability born of an alcohol addiction would have to satisfy the requirements of the definitions of 'people with disabilities' contained in s 1 of the EEA read together with the definition of 'disability' set out in item 5.3 of the Code of Good Practice: Employment of Persons with Disabilities enacted under the EEA.

[66] Corrie L Vilsaint, Lauren A Hoffman & John F Kelly 'Perceived discrimination in addiction recovery: Assessing the prevalence, nature, and correlates using a novel measure in a U.S. national sample' (2020) 206, 107667 *Drug and Alcohol Dependence* at 2, available at www.elsevier.com/locate/drugalcdep, accessed on 1 March 2021.

[67] Vilsaint et al note that 'affected individuals suffer continued discrimination even after they have resolved a significant AOD problem and achieved long-term remission and recovery, which may undermine ongoing recovery efforts and quality of life; see Vilsaint et al ibid at 1.

may be amended from time to time is of paramount importance.[68]

In addition to procedural fairness, employers must ensure that any dismissal effected is for a substantively fair reason. As such employers must ensure that the distinction between misconduct and incapacity is appropriately drawn. As indicated above, the distinction between an employee that falls within the definition of a 'social drinker' and one that falls within the definition of a 'dependent drinker' will determine how an employer responds and whether any dismissal that is effected is fair. The Labour Court in the matter of *ADT Security (Pty) Limited v Commission for Conciliation, Mediation and Arbitration & others*[69] found that the failure to properly categorise the employee's condition had a material bearing on the outcome of the matter at the CCMA and rendered the award reviewable.[70] In this matter the arbitrator focused on incapacity brought about by alcoholism whereas in fact there was no evidence in support of this finding. The arbitrator's incorrect categorising of the matter as one involving incapacity invoked the employer's obligation to investigate the nature of the employee's illness and to provide assistance to him. The arbitrator held that the employer's failure to conduct this investigation and to afford the employee the assistance needed, rendered his dismissal procedurally and substantively unfair. In the circumstances, the Labour Court held that the arbitrator had reached a conclusion that no other reasonable decision maker could have reached.[71] In the matter of *Zililo v Maletswai Municipality*[72] it was held that dismissal for misconduct in the face of evidence that demonstrated incapacity would be unfair.[73]

It is therefore crucial that employers understand the distinction between matters requiring disciplinary action and those requiring a different approach. As Grove points out, echoing the sentiments in *ADT Security*, '[t]he onus is on employers to establish whether they are dealing with a case of misconduct or incapacity where alcohol is a factor. Failure to do so properly may result in the dismissal being ruled as unfair.'[74] Odeku and Odeku share this view in stating that employers need to be cautious in ensuring that a proper investigation of the circumstances be carried out and that the appropriate case is put to the employee concerned should it be necessary.[75]

This approach is supported by the Labour Court, with Molahleli J stating in *Mahlangu v*

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[68] In the matter of *Black Mountain v CCMA & others* [2005] 1 BLLR 1 (LC) the court determined that an employer is constrained to comply with its own policy in matters involving alcohol addiction. In this matter the employer's policy stipulated that employees that tested positive for alcohol would be referred for treatment and that any disciplinary action pending at that time would be suspended. This was not done and the employee was dismissed. The court found that this was fatal to the employer's case and the dismissal was determined to be unfair.

[69] [2014] JOL 31942 (LC).

[70] Ibid para 28. Rycroft shares this view in stating that the 'deliberate misuse or confusion of categories will be unfair'. See A Rycroft 'Blurring the lines between incapacity, misconduct and operational requirements*: Zililo v Maletswai Municipality*' (2009) 21 *SA Merc LJ* 426 at 430.

[71] *ADT Security* supra note 69 at 31942.

[72] [2009] JOL 23238 (LC).

[73] Rycroft op cit note 70 at 429.

[74] Grove op cit note 2 at 18.

[75] Odeku & Odeku op cit note 27 at 476.

Minister of Sport & Recreation[76] that

> 'a distinction should be drawn between a case of a person abusing alcohol and the one who is an alcoholic …. Different considerations applied in terminating employment due to misconduct and incapacity due to ill-health. Termination for misconduct has to do with the fault of the employee whilst termination for incapacity is based on the principle of no fault on the part of the employee.'[77]

The above principles are borne out by the Code of Good Practice: Dismissal[78] ('the LRA Code') which classifies alcoholism as a form of incapacity.[79] There are a number of cases dealing with alcohol abuse and alcohol dependence in the workplace and which are of assistance to employers in drawing the line between the two categories.[80] In the seminal judgment in *Transnet Freight Rail v Transnet Bargaining Council & others*[81] ('*Transnet*') the court had to consider the appropriateness of the dismissal of an employee who was intoxicated whilst on duty. Steenkamp J made a number of remarks regarding misconduct and incapacity which are instructive to employers and which can be briefly summarised as follows:

a) Alcoholism is specified in item 10(3) of the LRA Code as a form of incapacity, this being accepted in scientific and medical circles.[82]
b) The LRA Code suggests that some form of counselling and rehabilitation may be appropriate as a means to assist employees suffering with alcoholism.[83] Steenkamp J goes further to assert that 'the employer is *enjoined* to consider counselling and rehabilitation' (emphasis added).[84]
c) 'The dividing line between addiction and mere drunkenness is sometimes blurred.' [85] With regard to the latter, the employee may be charged with misconduct whilst in respect of the former, counselling and rehabilitation ought to be considered.[86]

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[76] (2010) 31 *ILJ* 1907 (LC).
[77] Ibid para 30.
[78] Schedule 8 to the LRA.
[79] See item 10(3) of the LRA Code specifically.
[80] Examples include *ADT Security (Pty) Limited v Commission for Conciliation, Mediation and Arbitration & others* [2014] JOL 31942 (LC), *Builders Trade Depot v CCMA & others* (2012) 33 *ILJ* 1154 (LC), *Mohlopi / Amalgamated Beverage Industries* [2010] JOL 26609 (CCMA), *SACCAWU obo Johnson / Clover SA* (Pty) Ltd [2000] 4 BALR 397 (CCMA), *Taxi-Trucks Parcel Express (Pty) Ltd v National Bargaining Council for the Road Freight Industry & others* (2012) 33 *ILJ* 2985 (LC), and *Transnet Freight Rail v Transnet Bargaining Council & others* [2011] JOL 26922 (LC).
[81] [2011] JOL 26922 (LC).
[82] Ibid para 18.
[83] Ibid.
[84] Ibid para 19.
[85] Ibid.
[86] Ibid.

d) Counselling and rehabilitation would be unnecessary in circumstances where the employee denies the existence of an alcohol addiction.[87]

e) The distinguishing feature between misconduct and incapacity matters is fault on the part of the employee; more specifically, 'the employee cannot be blamed for their disease and its impact on their behaviour and discipline would be inappropriate in the circumstances'.[88]

(d) Incapacity on the basis of ill-health

An employee may fall under the category of incapacity on the basis of ill-health in circumstances where she suffers from a medical condition that renders him either unfit or incapable of performing the role that he was employed to fulfil. As has been established above, alcohol addiction is considered a medical condition falling within the definition of incapacity. As stated in *Naik v Telkom SA*,[89] '[t]he upshot of viewing alcoholism as a disease in the employment context is that an employee's displaying the symptoms of alcoholism must, logically, be treated similarly to displays of other medical conditions'.[90] The LRA provides assistance in this regard and establishes criteria for determining whether an employee is incapacitated and if so, to what extent. The criteria outlined by the LRA are contained in item 11 of the LRA Code.

These criteria place certain obligations on an employer. The first is to investigate the nature of the employee's incapacity. As Molemela AJA stated in *IMATU obo Strydom v Witzenburg Municipality & others*,[91] any 'conclusion as to the employee's capability can only be reached once a proper assessment of the employee's condition has been made'. This stage of the enquiry requires that the employer determine whether the illness is of a temporary or a permanent nature. Once this is established, an employer is obliged to consider all alternatives short of dismissal to assist the employee in adapting to the work environment where possible.[92] For an employee suffering with an alcohol addiction, employers may be required to ensure that appropriate in-patient treatment and/or counselling is sought. Employers ought to provide necessary support in terms of sick leave and/or vacation leave for this. Time away from the workplace for employees suffering with withdrawal symptoms so that they may seek medical attention and recover may be required. Each case ought to be judged on its own merits and circumstances and as such it is crucial that the

[87] Ibid.
[88] Ibid para 21.
[89] Supra note 45.
[90] Ibid at 1269.
[91] (2012) 33 *ILJ* 1081 (LAC) para 6.
[92] A Lechwano 'Incapacity through a new lens: Samancor and beyond' (2013) 34 *ILJ* 38 at 43, available at *http://jutastat.juta.co.za/nxt/gateway.dll/iljn/inlj/18780/18781/18936/18940?f=templates$fn=default.htm*, accessed on 12 January 2021. For a comprehensive discussion on the assessment of and determination of reasonable accommodation for ill-heath incapacity, see Van Niekerk & Smit op cit note 55 at 319.

nuanced nature of reasonable accommodation is appreciated. Establishing whether there are any work-based triggers and taking steps to mitigate against those is also an important component of assessing reasonable accommodation measures.

Establishing what reasonable accommodation measures would be appropriate requires consultation with the employee and, where necessary, with medical experts to determine what medical interventions, if any, are needed. The failure by an employer to adequately consult and to secure relevant expertise before making any decisions around reasonable accommodation can be hugely problematic and may be fatal to any employer's claim that it has treated an employee fairly.[93]

The concomitant responsibility on an employee suffering with alcohol addiction is that they take the hand of assistance that is extended by the employer or face the alternative of dismissal.[94] This principle was demonstrated in the matter of *SATAWU / PORTNET*[95] where an employee was dismissed for repeated absenteeism and sought to rely on a drinking problem to excuse his conduct. In this matter the arbitrator found that 'the employee's actions, decisions and omissions point to an employee who is not responding to the corrective action that the employer has tried to take over a number of years'[96] and that, in the circumstances, the dismissal was fair.

While it has been stated that employers with 'deep financial pockets' may be required to take a more generous approach to issues of incapacity,[97] these obligations are not without their limits and will not endure indefinitely.[98] Employers may ultimately be justified in dismissing an employee suffering with alcohol addiction in appropriate circumstances. This sentiment was expressed by the arbitrator in *PPWAWU v Nampak Corrugated Containers*[99] where it was stated that 'at some stage in this process the respondent would be entitled to decide that enough is enough and consequently terminate the employment relationship'.[100] Whether an employer is justified in taking this stance would depend entirely on the circumstances of the matter.

The legal obligations on the employer to properly categorise and deal with alcohol addiction in the workplace are clear. The ILO has offered insight into alcohol addiction and has

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[93] In the matter of *Standard Bank of SA v CCMA & others* (2008) 29 *ILJ* 1239 (LC) the court criticised Standard Bank for failing in its duties towards an employee to properly investigate the extent of her condition by consulting an occupational health practitioner and, as a result, to reasonably accommodate her. This judgment emphasised the principle that an employer must demonstrate bona fides in the investigation of the extent of an employee's incapacity and in the assessment of possible reasonable accommodation.

[94] See the decision in *Portnet (Cape Town) and SA Transport & Allied Workers Union on behalf of Lesch* (2002) 23 *ILJ* 1675 (ARB) as summarised by Grove op cit note 2 at 24.

[95] [2001] 12 BALR 1348 (AMSSA).

[96] Ibid at 1358 para G.

[97] Lechwano op cit note 92 at 49.

[98] Ibid at 48.

[99] [1998] 1 BALR 34 (CCMA).

[100] Ibid at 40.

provided additional guidelines to governments and employers on managing alcohol addiction in the workplace. The views of the ILO will be discussed in the next section.

(e) What is the view of the ILO in respect of alcohol addiction in the workplace?

In terms of s 39(1)*(b)* and *(c)* of the Constitution, South Africa is expressly obliged to consider international law when interpreting the Bill of Rights. With this in mind one must consider the views of the ILO whose mandate is 'to promote rights at work, encourage decent employment opportunities, enhance social protection and strengthen dialogue on work-related issues'.[101] In line with its Decent Work Agenda the work of the ILO is aimed at ensuring, inter alia, rights at work, coupled with 'concern for the welfare of people at work'.[102] This includes recognition of the negative impact of alcohol addiction on the workplace and the importance of the workplace as a means of preventing and reducing drug and alcohol abuse.[103] To this end, the ILO developed a Code of Practice on the Management of Alcohol and Drug Related Issues in the Workplace (hereafter 'the ILO Code').[104] The ILO Code provides guidelines for the categorisation, assessment and management of substance abuse problems in the workplace.

The main objectives of the ILO Code are to 'promote the prevention, reduction and management of alcohol- and drug-related problems in the workplace …'[105] and it recognises education and training as being vital to the proper management of substance abuse in the workplace. Education and training initiatives increase and improve awareness and ensure that employees buy into programmes established to manage substance abuse in the workplace. As indicated in the ILO Report, '[s]ubstance abuse programmes ... not only result in a healthier workforce, they also contribute to improved worker morale, a positive enterprise image ... and increased ... productivity'.[106]

The ILO Code sets out a number of mechanisms to reduce alcohol-related issues through what it terms 'good employment practices'.[107] These mechanisms include identifying problems within the working environment in terms of 'job situations' that could contribute to alcohol-related problems,[108] avoiding corporate practices that 'formally or informally support behaviour which

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[101] The International Labour Organisation *Mission and Impact of the ILO*, available at *https://www.ilo.org/global/about-the-ilo/mission-and-objectives/lang--en/index.htm*, accessed on 22 May 2021.
[102] ILO Report op cit note 13 at 2.
[103] Ibid.
[104] ILO Code op cit note 20.
[105] Ibid at 1.
[106] ILO Report op cit note 13 at 5.
[107] ILO Code op cit note 20 at 11.
[108] Ibid at 11.

incites, encourages or otherwise facilitates the harmful use of alcohol or the abuse of drugs on the premises',[109] and not placing an employee with a known alcohol addiction in an environment which could expose them to the risk of relapse.[110] Further to this, the ILO Code provides a number of recommendations to guide the relevant stakeholders in the proper management of alcohol-related issues in the workplace. Many of the recommendations centre around policies and programmes directed at the prevention, reduction and management of alcohol-related problems in the workplace.

In emphasising prevention of alcohol-related issues in the workplace through information, education and training,[111] the ILO recommends training programmes that emphasise the negative effects of alcohol, and that provide the legal framework around alcohol consumption at a general and workplace-specific level. Information regarding alcohol-related issues in the workplace and measures to limit or prevent these, and services available to employees to assist them with alcohol-related issues, are also mentioned. [112]

In respect of assistance, treatment and rehabilitation programmes for employees the ILO stresses that employees suffering with alcohol addiction should be treated in the same way as other employees with health concerns.[113] The ILO recognises an employer's 'authority to discipline workers for employment-related misconduct associated with alcohol and drugs', but advocates for counselling, treatment and rehabilitation in the first instance.

Further, the ILO emphasises principles of non-discrimination, of job security for those suffering with addiction,[114] and of allowing for job re-integration for employees recovering from or in treatment for alcohol addiction.[115] Employee Assistance Programmes (EAPs) are viewed as being an important tool at the disposal of employees as a means of 'providing confidential assistance to workers … in a neutral setting'.[116]

The ILO Code outlines medical testing as being appropriate in some circumstances with the need for testing to be 'evaluated with regard to the nature of the jobs involved'.[117] The ILO Code suggests that testing procedures be developed in line with the legislative framework

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[109] Ibid.
[110] Ibid.
[111] This extends to training for managers to assist in identifying potential problems, responding appropriately, providing appropriate support to employees, and effecting changes to the work environment to 'prevent, reduce or otherwise better manage alcohol- and drug-related problems' the ILO Code op cit note 20 at 14 and 15.
[112] Ibid.
[113] Ibid at 17.
[114] Ibid at 17.
[115] Ibid at 19.
[116] Ibid at 18.
[117] Ibid at 34.

prevailing in the country concerned[118] and with individuals' right to privacy being considered.

At a higher level, the ILO Code places certain obligations on governments and law makers in requiring that legislation and national policy be put in place to deal with the prevention, reduction, and management of alcohol-related issues in the workplace[119] and that mechanisms for the reporting on accidents where alcohol was a contributing factor be enabled.[120] The latter in turn empowers competent authorities to suggest changes to the relevant country's legislative framework, to assist in an advisory capacity where needed, and to publish educative material on alcohol-related issues in the workplace with particular emphasis on vocations considered to be at risk.[121]

While the ILO makes it clear that the ILO Code contains mere guidelines, it is encouraging that the South African legislature has taken a number of the recommendations forward into policy and legislative reform. This will be discussed in the next section.

(f) How closely aligned is the South African legal framework to ILO views and/or recommendations?

The sentiments of the ILO that alcohol addiction ought to be treated in the same way as any illness[122] and that employers should offer some form of counselling, treatment and rehabilitation before imposing disciplinary action[123] has been adopted as part of the LRA Code[124] and has been expressed in a number of judgments, most notably the seminal *Transnet* judgment[125].

As stated above, the ILO Code sets out a number of mechanisms to reduce alcohol-related issues through 'good employment practices'.[126] The SANDMP recognises what the ILO Code terms 'job situations' that could contribute to alcohol-related problems[127] in identifying job categories that are at risk of developing substance dependence issues. While this does not directly translate into good employment practices, it is encouraging that there is a recognition of the fact that certain sectors are at greater risk of developing alcohol addiction. It is hoped that this will in some way enjoin government and employers to pay closer attention to trends in alcohol use, abuse, and dependence in these areas.

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[118] Ibid.
[119] Ibid at 6.
[120] Ibid.
[121] Ibid.
[122] Ibid at 17.
[123] Ibid at 16.
[124] See Item 10(3) of the LRA Code.
[125] Supra note 81.
[126] ILO Code op cit note 20 at 11.
[127] Ibid.

Perhaps one of the largest steps forward is the enactment of the Prevention of and Treatment for Substance Abuse Act[128] ('the PTSA') which is somewhat in line with the recommendation of the ILO that legislation in the field of substance abuse issues be determined.[129] There are however some gaps in the wording of the PTSA which will be discussed below. For the purposes of this section, a brief outline of the PTSA will be provided.

The objectives of the PTSA include, inter alia, the combating of substance abuse in a coordinated manner, the provision of 'mechanisms for … prevention, early intervention, treatment, reintegration and after care services to deter the onset of and mitigate the impact of substance abuse', and the establishment of a Central Drug Authority.[130] The objectives are clearly aligned to the recommendations outlined by the ILO Code. The SANDMP issued in terms of the PTSA reflects South Africa's response to substance abuse issues and outlines the roles of the various government departments in addressing substance abuse.[131] The SANDMP outlines statistics, provides information, indicates engagements with stakeholders and provides for strategic goals to combat substance abuse on a wide scale.

The central focus of the PTSA remains the reduction of demand for and supply of illicit substances and the enhancement of structures designed to assist persons affected by alcohol addiction. While the implementation of the PTSA is certainly commendable and goes some way to dealing with the scourge of substance abuse in South Africa, there are certainly gaps in the South African legislative framework as regards alcohol abuse in the workplace specifically. This will be discussed in the following section.

(g) What gaps are there and what can be done to close those gaps?

One of the most startling gaps, in my view, is a lack of intervention from a legislative perspective in workplaces.[132] The PTSA certainly provides direction for dealing with alcohol addiction at a national and community level but does not distil these principles into directives for employers. The Department of Employment and Labour is noticeably absent from the list of stakeholders that are to be consulted in respect of mechanisms to reduce demand for and harm created by substance abuse,[133] in respect of early intervention and prevention mechanisms,[134] and in respect of

[128] Act 70 of 2008.
[129] ILO Code op cit note 20 at vi.
[130] Section 2 of the PTSA.
[131] SANDMP op cit note 1 at 13.
[132] Harker Burnhams op cit note 11 at 12.
[133] Section 5 of the PTSA.
[134] Section 8 of the PTSA.

community-based services established in response to substance abuse issues.[135] This fails to recognise the growing recognition that alcoholism arises, at least in some instances, from the work environment itself[136] and that, in my view, solutions can be found in the same place.

It is only at s 57 of the PTSA that the 'business community' is mentioned. This is in relation to the establishment of a Provincial Substance Abuse Forum. The goal of such a forum is, inter alia, 'to carry out functions related directly or indirectly to addressing the problem of substance abuse',[137] to enable the flow of information, to provide annual reports, and to assist the Central Drug Authority in carrying out its functions.[138] In my view, this is a token inclusion in plans to combat alcohol addiction and does not provide sufficient power or direction in respect of what can and should be done in respect of workplaces.

The failure to include employers as an interested party in the provisions of the PTSA is an opportunity missed, as direction on early intervention and prevention in respect of alcohol addiction as well as on effective treatment is needed. It is clear that the law is supportive of the notion that alcohol addiction is an illness requiring specific intervention but what remains unclear is what specifically is required on the part of employers. It is my view that recommendations mirroring the ILO Code could, to a large extent, be introduced into the LRA by way of a code of good practice. While codes of good practice are merely guides, these documents are important tools to help employers properly interpret and comply with their legal obligations. The courts have often given deference to the provisions of the LRA codes and as such employers are constrained to take cognisance of these codes when dealing with employment matters.

Harker Burnhams notes that there is limited literature and a lack of national survey data on substance abuse in the South African workforce.[139] Imposing directives on employers regarding mandatory reporting on the number of employees shown to have:-

a) reported for duty under the influence of alcohol;
b) been involved in a workplace incident where alcohol was a contributing factor;
c) been dismissed on the basis of alcohol-related misconduct; and
d) been dismissed on the basis of incapacity related to alcohol addiction

would ensure that reliable data is collected directly from employers on a regular basis. This in turn would enable the Department of Employment and Labour to understand the extent of alcohol-addiction issues in the workplace and, together with employers and organised labour as interested groups, develop mechanisms to effectively deal with the issues, with the ILO's emphasis on early

[135] Section 12 of the PTSA.
[136] Frone op cit note 36 at 284.
[137] Section 58 of the PTSA.
[138] Section 58 of the PTSA.
[139] Harker Burnhams op cit note 11 at 6.

intervention in mind.

The ILO Code makes reference to EAPs as being of value to organisations, but the creation of EAPs is not a requirement in terms of the South African legal framework. Whilst many employers have EAPs in place, this is done on a voluntary basis and the efficacy of these programmes is rarely tested. It is my view that a code of good practice dealing with substance addiction in the workplace ought to outline the need for and the role and function of an EAP in the workplace so as to give certainty to employers as to what is needed in this regard. It is emphasised again that while codes of good practice are merely guides to employers, they are 'intended to be a product of tripartite consensus as to norms'[140] and as such deviation from well-established and widely supported codes may prove increasingly difficult for employers.

The ILO emphasises early detection and prevention of alcohol addiction in the workplace. The South African legal framework in employment law takes a reactive stance to the issue in that it provides some tools to employers on how to deal with the issue once it has arisen, rather than providing employers with the tools to limit or reduce the prevalence of the problem. In this regard, it would be desirable for employers to be required to compile documents similar to the SANDMP, albeit adapted to fit the workplace, and to provide this to the Department of Employment and Labour at frequencies similar to the SANDMP. Such an obligation ought to be built in to existing legislation such as the PTSA; however, this can only be achieved if the scope of the PTSA is broadened to include workplaces as critical areas of the community where solutions and support can be found.

From the above it is clear that the recommendations of the ILO Code have been adopted in some forms in the South African legal framework but unfortunately not in respect of the workplace, which was the intention of the ILO Code. There are certainly gaps that can and should be filled by the legislature and/or the Department of Employment and Labour in order to give effect to the recommendations contained in the ILO Code and to give effect to the Constitutional imperative to consider international law.

[140] Rycroft op cit note 70 at 427.

IV ANALYSIS AND DISCUSSION

As discussed in Part II above, 'alcohol misuse is one of the most significant public health concerns facing South Africa today'[141] and is filtering into workplaces across the country. As discussed, there is an onus on employers to assist employees suffering with alcohol addiction, as they would assist any employee suffering with an illness. This is detailed in the LRA Code[142] and in judgments such as *Transnet.* What is problematic is that alcohol addiction is not, in reality, viewed by employers as being the same as any illness and, in fact, there is a large degree of stigmatisation of the issue. Employers are quick to dismiss employees that exhibit symptoms of alcohol addiction and do not often look deeper to establish whether the employee suffers with addiction.

Employers often grapple with the need for operational continuity, the need to ensure a safe working environment for all staff, and the obligation to treat all employees fairly. In respect of the former, and as discussed above,[143] employees that suffer with alcohol addiction cost employers a large amount of money in terms of absenteeism, reduced productivity, late-coming and the like but must be treated with dignity at all times. On the other hand, employees working alongside those suffering with alcohol addiction are potentially at risk from a safety perspective and must be afforded some protections by employers. This is particularly so in work environments where safety is an extremely high priority; for example, in mines, chemical plants and the like.[144] Employers are thus often in an inimical position and take a reactive and aggressive stance towards alcohol addiction which fails to understand the nature of the illness and the need for a compassionate, dignified and effective response.

Many employers do not fully appreciate their obligations around health and safety as it applies to employees suffering with alcohol addiction and the requirement to ensure emotional well-being as well as a physically safe workplace. The physical safety of all employees is considered paramount and as a result, employees with alcohol addiction problems are often given short shrift and dismissed before any meaningful intervention is undertaken. The lack of guidance within the current legislative framework on how to balance the rights and interests of all employees when it comes to issues of health and safety whilst assisting in the rehabilitation of an employee suffering with alcohol addiction is thus problematic.

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[141] Grove op cit note 2 at 2.
[142] Item 10(3) of the LRA Code.
[143] Part I.
[144] Van Niekerk & Smit op cit note 55 at 276.

As discussed in Part III above, once an alcohol addiction has been identified, the employer is obliged to explore rehabilitation and counselling at further expense. [145] As Smook et al state, 'some substance-dependent persons … have difficulty in recovering [and] experience repeated relapses, numerous rehabilitation admissions, numerous treatment episodes, exposure to different specialists, huge financial expenditure and little success'.[146] This makes the prospect of genuinely investigating alcohol addiction in the workplace less attractive to employers and, as such, these issues often remain wilfully undetected. For this reason, the benefits of early detection, prevention, and treatment must be expounded so that there is adequate buy-in from employers.

The employment law system in South Africa does not provide employers with sufficient guidance on how to deal effectively with alcohol addiction in the workplace. As discussed in Part III above, the recommendations of the ILO Code have been adopted in some way in the South African legal framework but more needs to be done. While the LRA Code goes some way to assisting in employer responses to alcohol addiction, it is my view that it does not go far enough. The LRA Code states that 'in the case of certain kinds of incapacity, for example alcoholism or drug abuse, counselling and rehabilitation may be appropriate steps for an employer to consider',[147] but does not provide any guidance to employers on what counselling and rehabilitation is appropriate. The LRA Code also does not recognise that counselling and rehabilitation are not always effective solutions and are not always the only solution. As a result, employers often take the view that these are the only options one need consider and that, failing these, they have dispensed with their obligations.

A lack of proper understanding of alcohol addiction in the workplace creates stigma and this, together with ignorance of the nature of the illness and appropriate treatment, can undermine efforts to deal with alcohol addiction issues.[148] Providing proper guidelines to employers would also provide employees with some certainty as to what assistance is available to them and in that way, the process is demystified. As Harker Burnhams states, employees can be resistant to participation in EAPs out of fear.[149]

Legislating a requirement on employers to devise and implement appropriate EAPs would also go some way towards ensuring long-lasting and effective interventions on the part of employers. It could be argued that EAPs would be more helpful to employers than a code of good practice as an EAP considers the specific nuances of particular workplaces. An EAP for a mine

[145] Smook et al op cit note 3 at 79.
[146] Ibid.
[147] Item 10(3) of the LRA Code.
[148] According to McCann et al, '[a]lcohol dependency should be destigmatised and alcohol abuse should be stigmatized'. See McCann et al op cit note 4 at 9.
[149] Harker Burnhams op cit note 11 at 13.

where mine safety is paramount would be different to a corporate office where health and safety considerations are different. If the creation of an EAP is required of employers this would be a mechanism through which standards of care are created and where workplace stressors and triggers such as non-inclusion or regulation of stress could be properly identified and mitigated against.

Issues of human dignity, non-discrimination, effective management of workplace incidents, the management of health and safety issues, and appropriate internal policy development as it relates to substance abuse in the workplace are also absent from the LRA Code. While it is accepted that legislation cannot and should not cater for every eventuality, a code of good practice on the management of substance abuse in the workplace would be appropriate to manage these issues. As has been discussed above, the ILO Code offers an enormous amount of information about, and recommendations regarding, the identification, understanding, prevention, treatment, and handling of alcohol addiction in the workplace. A code of good practice could be adapted from the ILO Code taking into account the realities of the South African context.

It is imperative that the South African legal framework adopt a more proactive stance to substance abuse in the workplace. As it currently stands, employers take a reactive approach to alcohol addiction and often treat the symptom of the problem rather than the core illness. This results in a system that allows alcohol addiction and discrimination to perpetuate and to continue to affect employers and employees alike. Workplace policies and practices that perpetuate discrimination against employees suffering with alcohol addiction must be eliminated. Legislative reform in the way of a code of good practice which recognises and deals with the intersection between fair labour practices, occupational health and safety considerations, and discrimination issues would go some way to ensuring that alcohol addiction is properly dealt with, which ultimately is in the best interests of employers, employees, and the communities that surround them.

V CONCLUSION

The Constitutional right to fair labour practices[150] is the cornerstone of the South African employment law system. The LRA on the one hand gives effect to that right in providing rights and remedies to employers and employees alike. The EEA prohibits discrimination and prohibits discriminatory employment practices. The OHSA provides guidance to employers on ensuring the health and safety of workers, which in turn creates a conundrum for employers who must protect the rights and interests of all affected employees. In my view, the rights of workers would be afforded even greater protection by recognising the interplay between the LRA, the EEA and the OHSA, by understanding how policy reform can be brought about through this recognition and by recognising how, through this, the obligations of employers in dealing with employees suffering with alcohol addiction can be better understood and applied.

That the LRA Code does not provide greater stewardship to employers is, in my view, a shortcoming of the current legislative framework that requires attention. The obligations contained in the OHSA in respect of both physical and mental health and safety in the workplace as well as the requirements contained in the EEA as it relates to non-discrimination can and should be considered together with the LRA's aim of furthering the Constitutional imperative of fair labour practices. The current legislative framework, if synergised, together with the recommendations contained in the ILO Code, provide an excellent basis on which to forge guidelines for employers and will address the shortcomings in employer responses to alcohol addiction in the workplace.

Employers and employees alike would benefit from greater regulation in respect of how employers deal with alcohol addiction in the workplace, from early intervention measures, to identification of alcohol addiction, to proper treatment of the illness and ultimately to appropriate treatment. While the PTSA certainly goes a long way to dealing with substance abuse on a national and community level, the failure to acknowledge and solidify the role of the workplace in the problem-solving mechanisms identified by the PTSA is a major shortcoming of the legislation, in my view.

That alcohol addiction poses a major risk to employers and employees cannot be understated. South Africa has a high rate of episodic drinking[151] and a large percentage of South

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[150] Section 23.

[151] C Parry, G Gray, A Maker & M Smithers 'Charting a healthier way forward for alcohol in SA, now and into the future' *Daily Maverick* 27 July 2020, available at https://www.dailymaverick.co.za/article/2020-07-27-charting-a-healthier-way-forward-for-alcohol-in-sa-now-and-into-the-future/, accessed on 12 January 2021.

Africans having a drinking problem[152] which results in a high incidence of death,[153] creates innumerable social problems,[154] and impacts heavily on the workplace.[155] The workplace creates a unique opportunity for workers to be educated about alcohol addiction, for early intervention mechanisms to be implemented, for alcohol addiction to be identified and for it to be treated.[156] This is a tool that can be used to grapple with alcohol addiction effectively for a fair portion of the population.

The employment law system in South Africa is not yet fully aligned to the recommendations contained in the ILO Code and as such there is some work to be done to ensure the fuller realization of workers' rights to fair employment practices.

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[152] Mogorosi op cit note 14 at 498.
[153] Parry et al op cit note 151.
[154] SANDMP op cit note 1 at 36.
[155] 'Alcohol abuse impacts on industry and exacts an enormous toll in terms of manpower, production and finance.' See McCann et al op cit note 4 at 1.
[156] '[S]ubstance abuse has serious consequences for the workplace, and … work-place initiatives are an effective means of preventing and reducing drug and alcohol abuse' — see ILO Report op cit note 13 at 2.

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