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Legal redress for mental health impairments arising in the workplace

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prominence – could be interpreted inconsistently by the courts and other bodies that adjudicate consumer disputes. But, as that is true of all common-law principles and legislative provisions interpreted by the courts, this is not a unique impediment. A second disadvantage could be that consumers do not read and understand contractual terms even though these terms are transparent and prominent. But this is, of course, also true of all terms and conditions in consumer agreements, especially those in standard-term contracts. Overall, the advantages of introducing the core exemption outweigh the potential disadvantages.

I accordingly recommend that the legislature consider tempering the strict limitation on freedom of contract in the CPA to include the core exemption. There is a readily available body of publications and case law in the United Kingdom and the European Union where courts have considered and addressed the exemption on numerous occasions. This is further supported by paragraphs (*a*) and (*b*) of section 2(2) which already allow adjudicators, courts, tribunals, and the Commission to consider appropriate foreign and international law, international conventions, declarations, or protocols when interpreting and applying the CPA.

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LEGAL REDRESS FOR MENTAL HEALTH IMPAIRMENTS ARISING IN THE WORKPLACE

OPSOMMING

Die remedie van konstruktiewe ontslag as regsvergoeding vir geestelike gesondheidsinstredelinge in die werkplek

Daar bestaan 'n komplekse wisselwerking tussen geestesgesondheid en arbeidsreg, wat die aandag op die regsuitdagings en remedies wat met werkplekteistering en afknouery geassosieer word vestig. Negatiewe werkplekdinamika dra by tot geestesgesondheidskwessies soos angs en depressie onder werknemers, en dit is derhalwe belangrik om die vraag af te vra hoe arbeidswetgewing, spesifiek binne die Suid-Afrikaanse konteks, sulke kwessies aanspreek deur die Wet op Arbeidsverhoudinge 66 van 1995 en die Wet op Gelyke Indiensneming 55 van 1998. Die regsdefinisies van teistering soos uiteengesit in die Kode vir Goeie Praktyk oor die Voorkoming en Uitskakeling van Teistering in die Werkplek word uiteengesit. Die erkenning van sielkundige mishandeling en die implikasies daarvan onder arbeidswetgewing word bespreek met klem op die kriteria vir konstruktiewe ontslag wanneer 'n werknemer se geestesgesondheid in gedrang kom as gevolg van werkplektoestande. Deur 'n oorsig van toepaslike regspraak, ondersoek hierdie aantekening die toepassing van regsbeginsels in werklike gevallestudies, wat die uitdagings illustreer om konstruktiewe ontslag te bewys in gevalle van geestesgesondheid as gevolg van werkplekteistering. Daar bestaan 'n behoefte aan 'n genuanseerde begrip van die onderlinge verband tussen 'n werknemer se geestesgesondheid en werkgewersverantwoordelikhede. Die bevindinge onderstreep die noodsaaklikheid vir werkgewers om werkplekomgewings proaktief te bestuur om teistering te voorkom en geestesgesondheid te beskerm en vir verbeterde regsraamwerke en werkgewersbeleide wat ingestel is op die kompleksiteite van geestesgesondheid in die werkplek. Hierdie aantekening dra by tot die gesprek oor billike arbeidspraktyke en het ten doel om beleidsontwikkeling na meer inklusiewe en ondersteunende werksomgewings te beïnvloed.

1 Introduction

In the contemporary workplace, the convergence of mental health issues and labour law has become a focal point for both legal scholars and practitioners. This growing interest is precipitated by the alarming rise in reports of workplace harassment and bullying, phenomena that not only degrade the dignity and well-being of employees but also engage complex legal considerations under labour law. As the workplace continues to evolve, driven by changing social norms and technological advancements, so too does the nature of interpersonal interaction within these environments which often leads to new challenges in managing workplace conduct.

This note explores the critical intersection of mental health and labour law. It focuses particularly on how legal frameworks address and mitigate instances of workplace harassment and bullying. It discusses the legal definitions and implications of harassment as set out in the Code of Good Practice on the Prevention and Elimination of Harassment in the Workplace, which encompasses a wide range of behaviour, from overt discrimination to subtle psychological abuse. The note further examines the constructs of constructive dismissal within this context, emphasising how employees suffering from mental health issues such as depression and anxiety can seek redress under the Labour Relations Act 66 of 1995 (LRA) and the Employment Equity Act 55 of 1998 (EEA).

The discussion highlights how the legal system navigates the delicate balance between protecting employee rights and ensuring fair treatment by employers. The objective is to provide an understanding of how the labour law remedy of constructive dismissal serves as a protective framework for employees affected by mental health issues arising from negative workplace dynamics and to propose legal strategies that can be employed to foster a healthier, more supportive workplace environment. This exploration is not only crucial for legal professionals but also for employers, policymakers, and mental health advocates aiming to enhance the quality of work life and ensure compliance with legal standards. It should, however, be noted that although the focus of this note is on the constructive dismissal remedy, other remedies, such as those related to unfair labour practices and unfair discrimination, are also available.

In this note, we consider three cases which considered the constructive dismissal remedy in cases where workplace bullying or harassment led to mental health deterioration in employees. The discussion is anchored in the understanding that the workplace should be a safe and supportive environment, free from behaviour that undermines individual dignity and mental health. By examining one of the significant legal recourses that are available – the constructive dismissal remedy – this note seeks to provide insights into how labour law can be leveraged to address and redress the adverse effects of workplace harassment on mental health. As we navigate through the intricacies of labour law, it becomes evident that the success of constructive dismissal claims hinges on a delicate balance of legal strategy, evidence, and a deep understanding of the interplay between workplace dynamics and mental health.

2 Mental health and labour laws

In the contemporary workplace, the intersection of mental health and labour law has garnered increasing attention, particularly in the context of workplace bullying and harassment. These issues not only challenge the well-being of employees but also raise complex legal considerations under labour law. Workplace bullying and harassment can result in mental health conditions such as anxiety and

depression (*Centre for Autism Research and Education CC v CCMA* [2020] 11 BLLR 1123 (LC) para 39; Rycroft "Workplace bullying: Unfair discrimination, dignity violation or unfair labour practice' 2009 *ILJ* 1431). Item 4.1 of the Code of Good Practice on the Prevention and Elimination of Harassment in the Workplace defines the term "harassment" as follows:

> "4.1.1 unwanted conduct, which impairs dignity;
>
> 4.1.2 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; and
>
> 4.1.3 is related to one or more grounds in respect of which discrimination is prohibited in terms of section 6(1) of the EEA".

The Code recognises both overt (direct) and covert (indirect) forms of harassment, which may originate from physical, verbal, or psychological conduct (item 4.7.1). The Code also clarifies that harassment is an abuse of power (item 4.3), and that

> "[h]arassment includes violence, physical abuse, psychological abuse, emotional abuse, sexual abuse, gender-based abuse and racial abuse. It includes the use of physical force or power, whether threatened or actual, against another person or against a group or community" (item 4.2).

Harassment may also take the form of mobbing (item 4.7.10), online harassment (item 4.7.11), physical harassment (item 4.7.2), and psychological harassment (item 4.7.4).

Several remedies are available to deal with employees who are subjected to harassment and who develop mental health complications, such as depression, as a result. In particular, the LRA and EEA aim to protect employees against unfair discrimination in the workplace. In terms of the LRA, certain acts by employers are regarded as automatically unfair (automatically unfair dismissals) (s 187 of the LRA), which usually results in punitive consequences for the employer. The LRA, in giving effect to section 23 of the Constitution of the Republic of South Africa, 1996 (the right to fair labour practices), amongst others, provides that an employee has the right not to be unfairly dismissed or subjected to unfair labour practices (s 185). The LRA provides that where an employer fails to prove that they dismissed the employee based on misconduct, incapacity, or the employer's operational requirements, such a dismissal will be considered unfair (substantive fairness) (s 188(*a*)(i) and (ii) of the LRA). Such a dismissal will furthermore be considered fair only where the employer followed the correct procedure in dismissing the employee (procedural fairness). Where an employee is, however, dismissed on any of the grounds listed in section 187(1)(*f*) of the LRA, which grounds include disability, such a dismissal will be considered automatically unfair. The only two exceptions, or defences, against a claim for automatic unfair dismissal are where the employee reached the agreed or normal retirement age (s 187(2)(*b*) of the LRA), or where the dismissal was based on an inherent requirement of the specific job (s 187(2)(*a*) of the LRA). As far as disability is concerned, it means that disability as the reason for dismissal can be justified only where the disability prevents the individual from fulfilling an inherent requirement of the job. Employers can also possibly justify the dismissal of an employee because of reasons related to a mental health condition on the ground of capacity.

In addition, employees who are subjected to harassment can institute a claim of unfair discrimination based on section 6(1) of the EEA. The definition of

disability contained in the Code of Good Practice on Disability lays down certain criteria that an individual will have to satisfy in order to be protected under the Code (cl 5.1 of the Code). The Code provides that a person will be considered disabled provided that the impairment must be long-standing or recurring, and be a mental or physical impairment, and must substantially limit the individual's capabilities. The Code further defines what mental and physical impairments are. The aim of limiting disability to either of these two forms of impairment allows for legal certainty (Ngwena & Pretorius "Code of Good Practice on the Employment of People with Disabilities: An appraisal" 2003 *ILJ* 1816 1821). Physical impairment is the "partial or total loss of bodily function or part of the body, including sensory impairment" (cl 5.1.1.i). Mental impairment is a "clinically recognised condition or illness that affects a person's thought processes, judgement or emotions" (cl 5.1.1.ii).

While the definitions of mental impairment in the EEA, the Code, and the Code of Good Practice on the Employment of People with Disabilities capture the essence of mental impairment, its understanding of its effects on employees within the workplace requires further elaboration. Unlike a physical impairment, mental impairment is an invisible disability (Nxumalo "Does South African labour legislation provide adequate protection for mental illness in the workplace?" 2018 *ILJ* 1436 1437). The invisible nature of this disability, along with the variation in the "frequency and severity of their occurrence" (Talatalai, Ramanoii & Chilizaiii "Reducing psychosocial disability for persons with severe mental illness in South Africa" 2020 *South African Health Review* 12 13), makes it harder for employers to apply a one-size-fits-all approach in dealing with employees who suffer from a mental impairment, and requires a deeper understanding of what mental impairment is.

The most common forms of mental impairments in the workplace are "depression, anxiety and post-traumatic stress disorder" (Mokoka & Rataemane "Disability claims on psychiatric grounds in the South African context: A review" 2012 *S Afr J Psych* 6). Adler explains that depression often stems from the relations that the individual has with others ("Depression in the light of individual psychology" 1961 *J of Individual Psychology* 56). The individual's feeling of inferiority will evoke one of two responses: the first is to solve these problems that the individual is faced with, or the second is to evade dealing with them altogether (*ibid*). If the individual chooses to evade these frustrations presented by the "outside" world, those within this world are viewed as enemies who threaten the individual's achievement of their goals (*ibid*). Adler further explains that depression is brought about by factors such as exploitation and depreciation of an individual's contribution to society (*idem* 57–58). While Adler explains how depression often occurs within an individual, it still needs to be established what depression is.

Depression is a mood disorder (Welgemoed & Huysamen "Workplace protection of employees suffering from depression: A South African perspective" 2019 *ILJ* 41), which reduces a person's ability to respond to positive emotional stimuli. This means that these persons often tend to stay in a state of negativity (Rottenberg "Emotions in depression: What do we really know?" 2017 *The Annual Review of Clinical Psychology* 241 245), resulting in people who suffer from depression experiencing constant feelings of "overwhelming sadness, emptiness and anxiety" (*idem* 242). These negative emotions affect both their mind and body (Welgemoed & Huysamen 41), often disrupting the individual's ability to continue with daily life activities (Nxumalo 1437). Regardless of the severity of these emotions, they ultimately have a negative impact on an employee's ability

to work and often result in extensive periods of absenteeism (Welgemoed & Huysamen 41). Employees who suffer from depression are reluctant to share their illness with their employer and/or colleagues, for fear that they may be subjected to unfair discrimination or ridicule (*ibid*). Where depression has been caused by the lack of sensitivity on the part of the employer, labour law dictates that such employee cannot be expected to continue with the existing working relationship where it affects an employee's ability to perform properly in the workplace (*idem* 42).

A possible effective remedy that is at the disposal of employees who have been subjected to workplace bullying and harassment which has impacted on their mental health is the constructive dismissal remedy. "Constructive dismissal" means that an employee has terminated a contract of employment (with or without notice) because the employer made continued employment intolerable for the employee (s 186(1)(*e*) of the LRA). Constructive dismissal claims are notoriously hard to prove (see Van Eck & Van Staden "Workplace bullying in the legal profession" 2023 *SALJ* 647 659–664). In *Watt v Honeydew Dairies (Pty) Ltd* 2003 ILJ 466 (CCMA), the Commissioner explained the difficulties faced by an employee in order to succeed with the remedy of constructive dismissal:

> "It is submitted that an employee bears a considerable risk in the case of constructive dismissal…. In the first place one of the requirements of a constructive dismissal is that the employee must resign. This in turn means that if such employee is unable to show the requisite conditions that render continual employment intolerable, then the resignation remains valid. Secondly, it is necessary for the employee to establish this. In other words, the applicant bears the *onus* which in itself constitutes a risk. In the third place, the test is objective and therefore the subjective perceptions of the employee are not relevant in this regard. Finally, the circumstances surrounding constructive dismissal are so varied that it is very difficult to lay down any concise guidelines. This means that cases of constructive dismissal can only be decided on case by case basis" (475C).

If a constructive dismissal is established, it establishes only the existence of a dismissal under the LRA. This dismissal must then be shown to be either fair or unfair. Consequently, the employer then shoulders an evidentiary burden to show that the dismissal was fair (s 192(2) of the LRA; *Jordaan v CCMA* [2010] 12 BLLR 1235 (LAC) 1238). Put differently, a constructive dismissal is not inherently unfair. However, a constructive dismissal is, generally, likely to be procedurally unfair, since, by its nature, there would have been no procedure by which such a dismissal can be fair (*Riverview Manor (Pty) Ltd v CCMA* [2004] 2 BLLR 177 (LC) para 20).

3 *Sanlam Life Insurance Limited v Mogomatsi* 2023 ILJ 2516 (LAC)

The employee was employed as an ethical hacker to test the employer's information technology systems for security vulnerabilities. However, a series of events led to a strained employment relationship. Initially, the employee had no issues with his colleagues, but tension arose when he took a vacation without proper approval after a late request, leading to disciplinary action, which was later dismissed by reason of inconsistencies in his colleagues' testimonies (paras 4–5).

Additionally, the employee faced personal challenges, including his mother's illness, of which his manager was aware. The manager had requested medical proof of the illness, which the employee did not provide. He cited e-mail as an insecure platform. The employee's absence because of gout met with scepticism.

He faced further challenges when denied funding for a course and reimbursement for a certification renewal. Moreover, he wasn't chosen for a conference which his colleagues attended and faced disciplinary actions for project delays and perceived unprofessional behaviour (paras 6–10, 14–17).

A significant event occurred when the employee remotely addressed a security breach in Kenya. While he believed he found a solution, his colleagues challenged his claim, asserting that they had already found the solution. This led to confrontations and accusations of dishonesty, culminating in his manager offering the employee a choice between an apology or resignation. The employee chose neither (paras 11–12, 22–24).

In the wake of these events, the employee resigned and filed a constructive dismissal dispute. At the arbitration, the manager confirmed the unauthorised leave and detailed the employee's performance issues. Another colleague focused on the Kenya incident, highlighting the team's efforts and the employee's lack of collaboration. The arbitration concluded with these testimonies, painting a picture of deteriorating trust and collaboration between the employee and his colleagues. The arbitrator found that the employee failed to prove that he was constructively dismissed and found that he had resigned (paras 25–26).

The employee, dissatisfied with the outcome of the arbitration, launched a review application in the Labour Court. He argued that the arbitrator overlooked crucial evidence, including the ultimatum he received and the state of his mental health at the time of his resignation. The court found that the employee's mental health, particularly his anxiety and depression, was not given due consideration during the arbitration. It criticised the employer for neglecting the employee's mental well-being and emphasised that understanding an employee's mental health is essential. The court concluded that the employee's resignation was indeed a constructive dismissal, and ordered the employer to compensate the employee with four months' salary (paras 28–29, 35–37). Aggrieved by the outcome, the employer referred the matter to the Labour Appeal Court (para 29).

The Labour Appeal Court held that constructive dismissal arises when employment ends as a result of an employer making it intolerable for the employee. However, the court qualified this with the additional statement that mere intolerability does not guarantee constructive dismissal; the intolerable conditions must be primarily the employer's fault. It was, therefore, held that the employer's conduct must lack "reasonable and proper cause" (para 31). It was held that although an employer should be sensitive to an employee's mental health vulnerabilities (paras 33–34), for constructive dismissal claims based on mental health to succeed, evidence must show the employer knew, or should have known, about the employee's condition (paras 12, 35).

In this case, the employee's mental health was not a focal point in the arbitration and was introduced only later. The employee did not lead evidence during arbitration proceedings relating to his mental ill health. Evidence related to the employee's mental health was led for the first time in the review proceedings. The Labour Court accordingly misdirected itself by taking into consideration evidence that was not before the arbitrator (paras 1–2, 36–37, 44). The employer was not shown to be aware of the employee's mental health issues at the time (paras 43–44).

The Labour Appeal Court found that the Labour Court conflated dismissal for incapacity with constructive dismissal, a misdirection evident in its handling of the case. Constructive dismissal occurs when an employee resigns as a result of

their employer making their working conditions intolerable, essentially leaving them no choice but to resign (para 31). This is fundamentally different from dismissal for incapacity, which pertains to an employee being dismissed as a result of their inability to perform work duties, often because of health or physical incapacity. The misdirection by the Labour Court stemmed from its treatment of the employee's mental health condition as a basis for constructive dismissal, without adequately considering whether the employer had rendered the employment relationship intolerable through indifference or insensitivity towards the employee's mental health (paras 43–44). For a constructive dismissal claim based on mental health to succeed, it must be shown that the employer was, or should have been, aware of the employee's psychiatric ill health and acted in a manner that made continued employment intolerable due to this awareness.

The Labour Appeal Court emphasised that the burden on an employee to prove constructive dismissal is significant. This statement underscores the principle that, for a constructive dismissal claim to succeed, the employee must clearly demonstrate that their resignation was a direct consequence of the employer's conduct making the employment relationship intolerable (para 31). It is not merely enough for an employee to resign because they find their work conditions difficult or unpleasant. They must prove that these conditions were so intolerable that they had no reasonable option but to resign, and importantly, that this intolerability was primarily the fault of the employer, without reasonable and proper cause (paras 31–32). This burden of proof involves a two-stage approach: in the first instance, it must be established that the employer's actions led to a dismissal, effectively by making the employment intolerable, which is assessed objectively; and, secondly, it must be shown that this dismissal was unfair (para 32). The emphasis on the significant *onus* reflects the complexity of such claims, particularly in cases where mental health is a factor. The employee must demonstrate not just that their working conditions were intolerable but also that the employer was aware, or should have been aware, of their mental health condition and acted in a manner that disregarded this knowledge, which contributed to the intolerability of the employment situation (paras 34–35). The Labour Appeal Court, therefore, found that the Commissioner's conclusion that the employee was not constructively dismissed but resigned, was valid (paras 25, 45).

The decision thus highlights that, for a constructive dismissal claim based on mental health to be valid, the employer needed to have been aware, or should reasonably have been aware, of the employee's mental health condition. The Labour Appeal Court noted that there was no evidence that the employer was aware of the employee's mental health issues (para 43). If the employer had been aware of these issues and acted indifferently, it could have established a solid case for constructive dismissal. However, the court found no evidence of the employer being made aware of the employee's mental health condition, and hence no action could be expected from the employer in this regard (*ibid*).

The employee's actions or reactions, potentially influenced by his mental health, were not contextualised within his mental health state during the arbitration, which could have offered a different perspective on the events. The medical certificate indicating that the employee resigned because of stress was presented only after his resignation, not during the arbitration. It could potentially have supported his claim had it been presented earlier (para 44).

The ruling of the Labour Appeal Court suggests that while mental ill-health can be a valid reason for employment termination, it must be approached fairly.

This underscores the legal importance of considering mental health in employment decisions. Had the employee made his employer explicitly aware of his mental health issues during his employment and raised it during the arbitration, it is plausible that it could have influenced the outcome of the case or, at least, the perception of the events (paras 43–44). The acknowledgment by the Labour Court of the employee's mental health as a "common cause" contrasts with the lack of evidence presented during the arbitration that the employer was aware of the employee's mental health condition. This discrepancy suggests that the Labour Court may have inappropriately applied the issue of incapacity as a result of mental ill-health to the case, which was primarily about constructive dismissal.

4 *New Way Motor & Diesel Engineering (Pty) Ltd v Marsland* **2009 ILJ 2875 (LAC)**

Here, the employee fell into a state of depression after his wife of 24 years suddenly left him (para 5). On returning to work, after being hospitalised for four days, the employee was treated with great hostility by his employer. The employee returned to work in a vulnerable condition but was nevertheless subjected to a brutal regime of insult, psychological assault, and egregious treatment for a significant period. He was isolated and branded for having a "contagious disease" (paras 6, 11). Prior to his hospitalisation, the employee was actively involved in many of the employer's core operations (para 4). After his return to work, the employee found that he was excluded from performing the essential requirements of his job. He alleged that the employer's managing director began threatening and verbally abusing him (paras 8, 9). As a result, the employee relapsed into a state of severe depression (para 9). The employee was booked off from work for a week, and upon his return, he was handed a notice to attend a disciplinary enquiry. The grounds for the disciplinary enquiry were indicated as poor work performance, the breach of company rules, and the misuse of company benefits (para 10). The chairperson of the enquiry found the employee guilty of poor work performance and required the employer to provide the employee with counselling (para 11). Subsequent to the hearing, the employee was prevented from performing any of his duties and was subjected to continuous threats and verbal abuse (paras 12, 14 and 15). The employee eventually resigned. The mistreatment of the employee did not cease at the time of his dismissal but included vindictiveness towards the employee after his dismissal with regard to his UIF card, his pension fund pay-out and return of personal belongings, which were only returned to him on the day of the trial (par 34). He lodged a claim of unfair dismissal against the employer based on constructive dismissal.

The Labour Court held that the conduct of the employer towards the employee amounted to unfair discrimination based on a mental impairment. The court held that the employee's mental health was the factual basis for his dismissal, which accordingly constituted an automatically unfair dismissal. Such discrimination was seen as causing a significant detriment to his work conditions, evidenced by the reallocation of his duties without justification, verbal abuse from senior management, and being ostracised, which affected his mental health even further (paras 17, 18).

On appeal to the Labour Appeal Court, the court found that the dismissal of the employee was automatically unfair under section 187(1)(*f*) of the LRA, as it was based on discrimination against him as a result of his mental health condition (para 35). The appeal court held that discrimination on the grounds of

mental health problems constituted an arbitrary ground, and such discrimination played a significant role in the employee's dismissal, which rendered the dismissal automatically unfair (para 18). The appeal court agreed with the lower court's assessment that the employer's conduct had the potential to impair the fundamental dignity of the employee as a human being, thus falling within the grounds set out in section 187(1)(*f*) of the LRA (para 26). The court accordingly upheld the award of 24 months' compensation to the employee, considering the egregious treatment he endured and its impact on his mental and emotional well-being.

The court emphasised the necessity of setting itself against the cruel, inhuman, and arbitrary treatment of employees, as exemplified by the employer's behaviour towards the employee (para 35). This stance underscores the principle that fair treatment in the workplace is fundamental to upholding the dignity of employees and is a core aspect of fair labour practices (*ibid*).

The case illustrates that discrimination based on mental health conditions violates the constitutional right to fair labour practices (s 23 of the Constitution of the Republic of South Africa, 1996). By ruling that the dismissal was automatically unfair as a result of discrimination against the employee on the basis of his mental health condition, the court reaffirmed the importance of treating mental health issues with the same seriousness and fairness as any other health condition in the employment context (para 18). The court found the employer's conduct towards the employee, including its vindictiveness and egregious treatment even after his dismissal, to be particularly appalling. This highlighted the broader principle that fair treatment extends beyond the termination of employment and is integral to respecting the rights and dignity of individuals (para 26).

5 *National Health Laboratory Service v Yona* [2015] 10 BLLR 1002 (LAC)

This case concerns the constructive dismissal of an employee of the National Health Laboratory Service (the employer). At the time of the dismissal, the employee was employed by the employer for a cumulative period of 21 years. The conflict began when a subordinate was appointed as the acting business manager, a role the employee had previously acted in during the absence of the then manager. This led to the employee feeling humiliated and unfairly treated, which prompted her to lodge an internal grievance against the decision (paras 6–7).

Following the unresolved grievance and its impact on her mental health, the employee developed severe depression and generalised anxiety disorder, which led to her continuous absence from work. Despite her submission of medical certificates for her absences, her employer accused her of failing to communicate her absence appropriately, and proceeded to process her absence as unpaid leave (paras 10–11).

The employee's application for temporary incapacity leave was not approved by her employer's insurer, Alexander Forbes. Additionally, the employee was informed that extended sick leave was not an option for her, because there was no record of her applying for an extension of sick leave apart from the information submitted in her application for temporary disability (para 12). This situation led to her absences being processed as unpaid leave, contributing to her decision to resign and claim constructive dismissal as a result of the intolerable circumstances created by her employer's actions. Eventually, after her application for temporary incapacity leave was declined and her sick leave was exhausted (and considered as unpaid leave), the employee resigned, citing constructive dismissal.

The Commissioner found that the conduct of the employer towards the employee was such that it rendered her continued employment intolerable. Consequently, her resignation constituted a dismissal as envisaged in section 186(1)(*e*) of the LRA, which was unfair. The Commissioner awarded the employee compensation equivalent to three months' salary. This decision was based on the assessment that the employer had caused the employment relationship between the employee and the employer to become intolerable, primarily because of its unfair and insensitive handling of her medical condition and absence from work (para 17).

The Labour Court found that the Commissioner's decision was within the bounds of reasonableness. The court had no basis to interfere with it and thus dismissed the review application with costs. The court highlighted the strong language used by the Commissioner to describe the unacceptable way in which the employer failed to assist the employee when her health condition required its assistance. This conduct was seen as violating the employee's right to fair treatment at the workplace, contributing to an employment relationship that was rendered intolerable, and forcing her to resign in order to access funds from her provident fund. The court's decision affirmed the Commissioner's findings, upholding the judgment that the employee was constructively dismissed as a result of the unfair conduct of the employer (para 20).

The Labour Appeal Court upheld the decision of the Labour Court and the Commissioner's findings, and dismissed the appeal with costs. The court confirmed that the employee's resignation constituted a constructive dismissal, as her continued employment had been rendered intolerable as a result of the conduct of the employer (para 1). The court restated the principle that the burden of proving that the employer made the employment relationship intolerable rested on the employee (para 2). It was noted that while the employee's medical condition originated from her being bypassed for an acting managerial position, this was not the direct cause of her resignation. Instead, her resignation was prompted by the denial of extended sick leave benefits, to which she was either entitled, or, at least, entitled to apply for (para 34). The court criticised the employer for arguing that the employee, as a senior managerial employee, had knowledge of the appellant's sick leave policy and should have made an application for extended sick leave benefits without the employer's intervention. This argument was seen as overlooking the fact that the employee was suffering from a severe mental illness at the time, which necessitated assistance (para 35). The court highlighted that the employer failed to treat the employee fairly and compassionately at a time when she was in desperate need, suffering from a severe work-related mental illness. This failure was compounded by the employer's inaccurate accusations regarding the employee's communication about her absence, which was always covered by valid medical certificates (para 41). The Labour Appeal Court emphasised that an employer's conduct towards an employee, and its cumulative impact, must be such that viewed objectively; the employee could not reasonably be expected to endure it (para 45).

The decision exemplifies how unfair treatment by an employer can lead to constructive dismissal. The employee felt compelled to resign as a result of intolerable work conditions created by the employer's failure to provide fair and compassionate treatment during her time of need. Fair treatment is critical to prevent such outcomes, in order to ensure that employees do not feel forced out of their jobs by the employer's conduct (para 41). The court's findings also emphasise that fair treatment is integral to maintaining the dignity of employees. In this case, the lack of fair treatment not only affected the employee's mental

health but diminished her sense of dignity in the workplace. Fair treatment ensures that employees are valued and respected, which is a fundamental aspect of their constitutional rights (*ibid*).

The decision further demonstrates how unfair treatment can erode trust between employees and management, in so doing damaging workplace morale. By failing to assist the employee adequately and accusing her of not communicating her absence despite her submission of valid medical certificates, the employer damaged the relationship of trust and confidence. Fair treatment fosters a positive work environment, encouraging trust between the parties (*ibid*).

The decision also reiterates that fair treatment in the workplace is not just a matter of ethical employment practices but a constitutional right. The judgment of the Labour Appeal Court reflects the constitutional standard that employment relationships should be conducted fairly and without rendering the employee's continued employment intolerable. This judgment serves as a reminder of the legal obligation on employers to uphold the constitutional rights of their employees to fair labour practices (para 20).

6 Common lessons

These decisions illustrate that the courts recognise the crucial role that mental health, specifically conditions like depression and mental illness, plays in cases of constructive dismissal. It is, however, essential for the claims to demonstrate that the employer was, or should reasonably have been, aware of the employee's mental health issues and acted in a way that exacerbated these conditions, making continued employment intolerable.

It is tempting for purposes of the *Sanlam* decision to argue that the employer should have known about the employee's mental health condition, having (at least partially) contributed to it. Indeed, the sequence of events leading to the employee's resignation, including disciplinary actions for unauthorised leave, scepticism about his absences because of gout, denial of funding for a course, non-reimbursement for certification renewal, and exclusion from a conference, collectively could have exacerbated his stress or mental health conditions. These actions might suggest the employer's indirect contribution to the intolerable working conditions that affected the employee's mental health. Nevertheless, despite the known stress factors, the employee did not discuss his condition with his employer, nor did he attribute his resignation during the arbitration to his mental health condition. This was only raised on review (*Sanlam* para 36).

The *National Health Laboratory Service* and *Marsland* decisions demonstrate that the constructive dismissal remedy may be effective when employers were aware, or should reasonably have been aware, of the employee's mental health condition but failed to step in to resolve the factors within its control to prevent intolerability. Employers are expected to show a heightened level of sensitivity and care for employees suffering from depression or other mental illnesses. This includes not only being aware of their condition but also taking proactive steps to accommodate their needs and avoiding actions that could worsen their mental health. As a necessary precondition, however, fairness dictates that employers should be made aware of these conditions.

While the test for constructive dismissal remains objective, there is a growing acknowledgment that this assessment must consider the unique challenges posed by mental health conditions. The subjective experience of an employee with depression or mental illness is relevant to understanding the intolerability of their

working conditions, although the ultimate test remains objective. The question is not whether the employee's working conditions were made intolerable by the underlying mental health condition of the employee. Rather, the question is whether the employer caused the mental health condition or failed to intervene to remedy the causes of intolerability. The challenge lies in balancing the objective standard with a consideration of individual circumstances related to mental health. The law must ensure that the employee's condition is genuinely factored into the assessment without departing from the objective standard that protects both employee and employer rights. This balance ensures that employees with depression or mental illnesses are given a fair evaluation of their claims of constructive dismissal, recognising the unique challenges they face. In practical terms, this means that evidence of an employee's mental health condition and how it affects their perception of the work environment can be crucial. Documentation from mental health professionals, details of the employer's awareness of the condition, and specific instances where the condition may have influenced the employee's experience of intolerable conditions can all be relevant. This approach ensures that the law remains fair and just while adapting to the complexities of mental health in the workplace.

These decisions highlight the need for an inclusive and supportive work environment that accommodates employees with mental health issues, including depression. Creating conditions that are intolerable for these employees, either through direct action or neglect, violates the principle of fair labour practices and can lead to findings of constructive dismissal. Discrimination against employees on the grounds of mental health conditions like depression constitutes a breach of their rights to fair labour practices. Employers' actions or neglect that leads to an employee's resignation because of such discrimination can be grounds for constructive dismissal. This emphasises the legal protections against mental health discrimination in the workplace. Fair treatment in the workplace extends to how employers handle employees with depression or mental illnesses. This principle underscores the necessity for employers to act compassionately and supportively, and to recognise the impact of their actions on the mental health and dignity of their employees.

7 Conclusion

The decisions considered in this note illustrate the complexities involved in proving constructive dismissal, especially when mental health deterioration is a central factor. The courts' decisions in these cases highlight the necessity for employers to be acutely aware of and responsive to the mental health needs of their employees. It is clear that for a constructive dismissal claim based on mental health to succeed, there must be evidence that the employer was, or should have been, aware of the employee's mental health condition and acted in a manner that made continued employment intolerable. This requirement places a significant burden on employees not only to demonstrate the intolerability of their working conditions but also to establish a direct link between their employer's actions (or inactions) and their mental health deterioration.

The constructive dismissal remedy can be used effectively in cases related to workplace harassment and mental illness by carefully navigating the legal and evidentiary requirements, as well as by leveraging the protective frameworks established by labour laws. The cases discussed provide valuable insights into how employees and legal practitioners can approach such situations. For a constructive dismissal claim to succeed, particularly in the context of mental illness exacerbated by workplace harassment, it is crucial to demonstrate that the

employer was, or reasonably should have been, aware of both the harassment and its impact on the employee's mental health. Establishing a clear link between workplace harassment and the deterioration of the employee's mental health is essential. Evidence that the employer did not take adequate steps to address the harassment or its impact on the employee's mental health can strengthen a constructive dismissal claim. This might include showing that reported incidents were ignored, inadequately investigated, or not followed up with effective corrective measures. Resignation should be considered a last resort after all reasonable steps to resolve the situation internally have been exhausted. This includes using internal grievance procedures, seeking accommodations, and attempting mediation.

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CAN A PREDECESSOR COMPARATOR BE USED IN AN EQUAL PAY CLAIM UNDER SECTION 6(4) OF THE EMPLOYMENT EQUITY ACT 55 OF 1998?*

OPSOMMING

Kan 'n voorganger as 'n vergelykbare persoon benut word in 'n gelyke betalingseis kragtens artikel 6(4) van die Wet op Gelyke Indiensneming 55 van 1998?

Die verkiesing van 'n vergelykbare persoon is die eerste vereiste wat gelys is deur die Arbeidshof in 'n eis vir gelyke betalings in *Mangena v Fila South Africa (Pty) Ltd* [2009] 12 BLLR 1224 (LC). Artikel 6(4) van die Wet op Gelyke Indiensneming 55 van 1998 (WGI) bevestig eweneens dat 'n vergelyking getref moet word tussen die diensbepalings en voorwaardes van die eiser en 'n vergelykbare persoon. Die WGI, die Gelyke Indiensnemingsregulasies, en die Gelyke Betalingskode voorsien egter nie voorskriftelike bepalings rakende die keuse en die geskiktheid van 'n vergelykbare persoon, en meer spesifiek, of 'n voorganger kan kwalifiseer as 'n vergelykbare persoon soos beoog nie. Derhalwe analiseer ek in hierdie aantekening die vraag of 'n eiser in 'n gelyke betalingseis gebruik kan maak van 'n voorganger vir doeleindes van die vergelyking wat vereis word in 'n gelyke betalingseis ingevolge artikel 6(4) van die WGI. Die gevolgtrekking word bereik, met verwysing na internasionale arbeidsreg en die Verenigde Koninkryk se gelyke betalingswetgewing, dat dit wel moontlik is.

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