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REGULATING MENTAL ILLNESS IN THE SOUTH AFRICAN WORKPLACE — LESSONS FROM CANADA

by

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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

Date: 20 December 2022

DECLARATION

I, **AIDAN MYLCHREEST**, 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

In post-Covid-19 South Africa, an already stressed population has returned to work. A mental health crisis is emerging and this is evident amongst employees who are struggling with mental illnesses such as depression. In these circumstances, both employers and employees will need guidance when faced with mental illness in the workplace.

The recent matter of *Jansen v Legal Aid South Africa* (2018) 39 *ILJ* 2024 (LC) ('*Jansen'*) is an example of a dispute that arose out of allegations of unfair discrimination and unfair dismissal, due to an employee's depressive condition. This paper will examine the decisions of the Labour Court and the Labour Appeal Court in *Jansen* with a view to analyse the approach of the respective courts, in the context of disability and unfair discrimination. This paper identifies the shortcomings of the *Jansen* judgements and argues that both courts missed an opportunity to provide certainty to both employers and employees.

This paper goes on to consider Canada's progressive approach to mental health and the legal mechanisms developed to provide protection to employees. Canadian jurisprudence will serve as a source of comparison, with a view to extract lessons in managing mental illness in the workplace. Finally, this paper recommends that legislators consider Canada's legal approach to mental illness with a view to develop a Code of Good Practice focused on mental illness in the workplace.

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REGULATING MENTAL ILLNESS IN THE SOUTH AFRICAN WORKPLACE — LESSONS FROM CANADA

AIDAN MYLCHREEST †

I. INTRODUCTION

'Mental illness is one of the least understood and least accepted of all illnesses. It creates fear and stereotypical responses in people .... For a great many people, such illnesses are shameful and embarrassing and as a result they are reticent to stand up for their rights or to protest when injustice has been done to them.'[1]

In the early 17th century, Robert Burton (writing under his alias Democritus Junior) published one of the earliest texts on the subject of depression, *The Anatomy of Melancholy*,[2] in which the writer attempted to identify and understand an illness which had plagued humankind.[3] Our understanding of mental illness has evolved since then, and developments in medicine have allowed for the management of conditions such as depression.[4] However, persons suffering with mental illness still face misunderstanding and prejudice in many spheres of life, including in their places of employment.[5] In 2018, it was estimated that '9.8 per cent of adult South Africans will experience major (clinical) depression at some point in their life'[6] and that depression costs the South African economy R218 billion in lost productivity and absenteeism.[7] During the Covid-19 pandemic, the threat of illness, death, and the risk to

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[1] Patrick Boyer *Equality for all* Parliamentary Committee Report (1985) 89 available at *https://parl.canadiana.ca/view/oop.com_HOC_3301_24_4/1*, accessed on 8 May 2022.

[2] Democritus Junior 'The Anatomy of Melancholy' Project Gutenberg ed (2021) available at *https://www.gutenberg.org/files/10800/10800-h/10800-h.htm*, accessed on 28 May 2021.

[3] Ibid.

[4] Allan V. Horwitz, Jerome C. Wakefield, & Lorenzo Lorenzo-Luaces 'History of depression' in RJ De Rubeis & DR Strunk (eds) *The Oxford Handbook of Mood Disorders* (2015) at 1–2.

[5] Stavroula Leka & Aditya Jain & World Health Organization 'Health impact of psychosocial hazards at work: an overview' (2010) available at *https://apps.who.int/iris/handle/10665/44428*, accessed on 3 December 2022.

[6] Diego F Cuadros et al 'Spatial structure of depression in South Africa: A longitudinal panel survey of a nationally representative sample of households' Scientific Reports 9, 979 (2019) at 1 available at *https://doi.org/10.1038/s41598-018-37791-1*, accessed on 19 December 2022.

[7] South African Depression and Anxiety Group 'Depression has a serious impact on the South African economy' available at

livelihoods impacted on employees, which experienced 'deep worry, anxiety and rumination'.[8] As people begin to return to work, there is a concern that South Africa may yet face 'a second pandemic of mental illness'.[9]

Mental illness in the workplace was the subject of the recent matter of *Jansen v Legal Aid South Africa*.[10] In this matter, an employee claimed he was subjected to unfair discrimination and was dismissed due to his depression.[11] The employer argued in response that the dismissal was due to misconduct[12] and the dispute was heard in the Labour Court (LC) and the Labour Appeal Court (LAC).[13] The *Jansen* matter is an example of some of the issues arising out mental illness in the workplace and in this paper I analyse both judgements as a case note. In general, I focus on depression having regard to the fact that *Jansen* deals with the depression of an employee and the prevalence of the condition. As part of my analysis, I discuss some of the issues that were debated in both judgements such as:

- Depression as a disability.
- Depression as a listed ground of unfair discrimination.
- Developing a Code of Good Practice.

I critically evaluate how both the LC and LAC addressed these issues in comparison to Canadian law.[14] I have chosen Canadian law having regard to the innovative legal approach to mental illness as found in Canada.[15] In conclusion, this paper will extract relevant lessons applicable to mental illness in the workplace

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https://www.sadag.org/index.php?option=com_content&view=article&id=3091&Itemid=483#depression-in-the-workplace-research-2015, accessed on 28 May 2021.

[8] Kim AW, Nyengerai T & Mendenhall E 'Evaluating the mental health impacts of the Covid-19 pandemic: Perceived risk of Covid-19 infection and childhood trauma predict adult depressive symptoms in urban South Africa' (2020) *Psychological Medicine* 9.

[9] Creamer Media's Engineering News 'Covid-19 lockdown two years on — a second pandemic of mental illness looms in the workplace' available at *https://www.engineeringnews.co.za/article/covid-19-lockdown-two-years-on-a-second-pandemic-of-mental-illness-looms-in-the-workplace-2022-03-25*, accessed on 27 April 2022.

[10] (2018) 39 *ILJ* 2024 (LC).

[11] Ibid para 39.

[12] Ibid paras 3–4.

[13] *Legal Aid South Africa v Jansen* (2020) 41 *ILJ* 2580 (LAC).

[14] Canada has long recognised that 'there can be no health without mental health'. See World Health Organization 'Comprehensive mental health action plan 2013–2030' (2021) 1 available at https://www.who.int/publications/i/item/9789240031029, accessed on 8 May 2022.

[15] Canadian Civil Liberties Association 'The state of mental health in Canada' available at *https://ccla.org/current-state-mental-health-canada/*, accessed on 28 May 2021.

II. OVERVIEW OF THE FACTS

Mr Jansen's legal journey began at the satellite branch of the Legal Aid Board in the small town of Riversdale in the Western Cape.[16] Mr Jansen ('the Employee') was employed by the Legal Aid Board ('the Employer') as a paralegal from 2007, until his dismissal in February 2014.[17] The Employee was known as an 'excellent worker', had received numerous awards, and was once appointed as a brand ambassador.[18] On 7 April 2010, the Employee visited his doctor (for an unrelated ailment) and was diagnosed with depression.[19] He was prescribed antidepressants and referred to hospital for counselling and treatment.[20] The Employer was duly informed of the Employee's diagnosis of 'major depression', and was provided with a medical certificate indicating same.[21]

The Employee's depression worsened as he experienced difficulties in his personal and professional life.[22] He engaged with the Employer about his depression on multiple occasions, but this did not prevent conflict with his superiors from emerging.[23] This conflict led to an increase in the Employee's absenteeism and complaints about his general attitude.[24] There was a general deterioration of the employment relationship that ultimately resulted in the Employee being charged with misconduct, and on 7 November 2013 he appeared before a disciplinary hearing.[25] The Employee did not contest the factual basis of the charges but attempted to adduce medical evidence of his depressive condition[26] as part of his defence.[27] The chairperson of the hearing rejected the medical evidence and ruled that the hearing was

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[16] *Jansen* (LC) supra note 10 para 2.
[17] Ibid paras 2–5.
[18] Ibid para 7.
[19] Ibid para 9.
[20] Ibid.
[21] Ibid para 10.
[22] Ibid para 26.
[23] Ibid paras 42–43.
[24] Ibid para 15. A notable incident that resulted in the breakdown of trust between the Employee and the Employer occurred when his direct line manager represented the Employee's wife in a case of domestic violence at the Oudtshoorn Divorce Court (para 14). The Employee saw this act as a betrayal, and his colleague's continued representation of his ex-wife became a trigger for his depression (para 15.).
[25] *Jansen* (LC) supra note 10 para 3. The employee was charged with misconduct and was required to answer several charges relating to his absenteeism, insubordination, and a failure to obey a lawful instruction (para 3).
[26] *Jansen* (LC) supra note 10 para 29. The Employee submitted a report by Dr Farre that noted: 'Mr Jansen shows intense symptoms of a reactive depression. He shows signs of burnout …. His ability to cope and function is poor and limited. This state of mind paralyses his whole day to day functioning …. I must stress that Mr Jansen is close to an emotional breakdown …. I am concerned for his rational thought processing that seems to be stuck in his depressive state of mind.' (para 29).
[27] *Jansen* (LC) supra note 10 para 26.

convened to assess the charges of misconduct, and not to determine the Employee's incapacity.[28] The Employee was subsequently found guilty of misconduct and on 24 February 2014 was dismissed by the Employer.[29]

The Employee sought to challenge this dismissal and first approached the Commission for Conciliation, Mediation and Arbitration ('CCMA') to institute a claim of unfair dismissal in terms of the Labour Relations Act[30] ('LRA') and a claim for unfair discrimination in terms of the Employment Equity Act[31] ('EEA'). The CCMA determined that it did not have the jurisdiction to hear the matter and it was referred to the LC.[32] The Employee's claim for unfair dismissal and unfair discrimination was successful in the LC.[33] However, the findings of the court a quo were later overturned by the LAC.[34]

III. STATEMENT OF THE CASES

To extract the legal principles applicable to matters concerning employees suffering with mental illness, I will examine the findings of both the LC and the LAC.

1. The Labour Court

The Honourable Mthombeni AJ stated the issues to be determined in the first two paragraphs of his judgment. The first claim to be determined was whether the Employee's dismissal was automatically unfair as provided for in s 187(1)*(f)* of the LRA.[35] The Employee's claim was based on the assertion that he was a victim of unfair discrimination and that his dismissal was based on his disability (mental illness/depression) or an analogous arbitrary ground.[36] The Employee's second claim was that he had been unfairly discriminated against on the ground of disability and/or an analogous ground in terms of the EEA.[37]

The court accepted that the Employee suffered from 'reactive depression' that arose due to stress.[38] The LC stated that 'it is highly probable that [the Employee] had a recurring mental

[28] Ibid para 30.
[29] Ibid para 5.
[30] Act 66 of 1995.
[31] Act 55 of 1998.
[32] *Jansen* (LAC) supra note 13 para 25.
[33] *Jansen* (LC) supra note 10 para 68.
[34] *Jansen* (LAC) supra note 13 para 53.
[35] *Jansen* (LC) supra note 10 para 29.
[36] Ibid para 1.1.
[37] Ibid para 1.2.
[38] Ibid para 40.

illness from which he was suffering …'.[39] Without much reference to legislation, it was accepted that the Employee's depressive condition was a disability and it was accepted that the Employer was aware of same.[40] The LC held that the Employer 'did not have any regard to the circumstances under which the infractions happened and the effect of the applicant's depression upon his conduct when deciding to dismiss the Employee'.[41] This determination led the court to conclude that the Employer had a duty to accommodate the Employee and that an incapacity enquiry was the appropriate mechanism to address the Employee's shortcomings.[42]

Citing the EEA, the court noted that persons with a disability are defined as 'people who have a long-term or recurring physical or mental impairment which substantially limits their prospects of entry into, or advancement in employment'.[43] The court concluded that the Employee's depression could not be classified as a disability.[44] With reference to the findings of the earlier case of *New Way Motor and Diesel Engineering (Pty) Ltd v Marsland*,[45] the LC adopted the view that a court need not determine whether the mental illness satisfies the definition of disability as defined in terms of labour legislation.[46] It held that discrimination based on an employee's depression infringed that employee's right to human dignity, and this infringement constituted unfair discrimination based on an analogous ground.[47]

The focus on the concept of human dignity, as envisioned in the Constitution[48], when assessing the Employee's claim of unfair discrimination led the LC to a more detailed examination of s 187(1)*(f)* of the LRA.[49] Section 187(1)*(f)* provides that a dismissal will be considered automatically unfair if it was based on unfair discrimination on one of the listed

[39] Ibid para 54.
[40] Ibid para 43.
[41] Ibid.
[42] Ibid.
[43] Ibid para 44.
[44] Ibid. This finding is contradicted in the preceding paragraph: 'In my view, it follows that the respondent had knowledge that the applicant was a person with a disability.'(para 43).
[45] (2009) 30 *ILJ* 2875 (LAC).
[46] *Marsland* only referenced s 187(1)*(f)* of the LRA. I have noted that the LC in *Jansen* court did not make a substantive distinction between s 187(1)(*f*) and s 1 of the EEA.
[47] *Jansen* (LC) supra note 10 para 45.
[48] Constitution of the Republic of South Africa, 1996.
[49] Jansen (LC) supra note 10 paras 45–48.

grounds.[50] The court referred to the requirement of factual and legal causation as part of the enquiry as to whether the Employee's depression was, most likely, the cause of his dismissal.[51] The LC accepted that the Employee suffered from depression and that the Employer was aware of his mental illness.[52] The LC accepted that the Employee's dismissal was due to his condition.[53] The LC stated that:

> 'Considering that the applicant's dismissal was automatically unfair in terms of s 187(1)*(f)* of the LRA, the test for determining such a dismissal should be applicable to prove unfair discrimination within the meaning of s 6 of the EEA.'[54]

Accordingly, it was held that the Employee's dismissal was automatically unfair due to discrimination on one of the listed grounds.[55] The judge ordered retrospective reinstatement, and compensation equivalent to six months' salary, together with payment of the Employee's legal costs.[56]

2. The Labour Appeal Court

Nearly two years after the LC handed down its judgment, the matter was argued before the LAC. The judgment of the LAC differed substantially from that of the LC. The LAC accepted that the Employee suffered from depression, however, the LAC noted that Dr Farre (the clinical psychologist) did not testify that the Employee suffered from 'chronic, major or ongoing depression'.[57] The LAC was not convinced by the evidence that the Employee's mental illness was the proximate reason for his dismissal.[58] In determining whether 'the reason for [the Employee's] dismissal was discrimination on prohibited grounds …'[59] the LAC noted the fact that the Employee did not dispute that he had engaged in the conduct that formed the basis of the disciplinary action instituted against him.[60] The court viewed these

[50] Section 187(1)*(f)* of the LRA records the listed grounds as 'any arbitrary ground, including, but not limited to race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, political opinion, culture, language, marital status or family responsibility'.
[51] *Jansen* (LC) supra note 10 para 47.
[52] Ibid para 51.
[53] Ibid para 50.
[54] Ibid para 59.
[55] Ibid.
[56] Ibid para 68.
[57] *Jansen* (LAC) supra note 13 para 7.
[58] Ibid paras 45–7.
[59] Ibid para 37.
[60] Ibid para 38.

admissions as 'cogent evidence' that the cause of the dismissal was the Employee's conduct.[61] Further, the court's assessment of the Employee's evidence left it unconvinced that the misconduct was due to his depression[62] and that he could not appreciate the wrongfulness of his actions or had no self-control.[63] Having regard to these findings, the LAC rejected the LC's conclusion that the Employee had discharged the evidentiary burden which was required in order to succeed in his claim under s 187(1)*(f)* of the LRA.[64]

The LAC held that the Employee did not adduce credible evidence that he was treated differently to other employees or that his depression resulted in such treatment.[65] The LAC concluded that the Employer had a legitimate reason to discipline the Employee and the Employee's claim of unfair discrimination was rejected.[66] The LAC set aside the findings of the LC and dismissed the case.

As part of its judgment the LAC recognised that depression was a disturbingly common occurrence in the South African workplace.[67] The LAC noted that depression is a form of ill health and that many of the legal mechanisms dealing with the incapacity of an employee will be applicable to the dismissal of a person suffering from mental illness.[68] The court went on to caution employers that a failure to engage in an assessment of a depressed employee's capacity prior to dismissal could result in a substantively or procedurally unfair dismissal.[69] Employers were also cautioned to pay attention to the capacity of employees suffering from depression when instituting disciplinary proceedings.[70] It was noted that an employee's depressive state, if sufficiently severe, could reduce their blameworthiness for misconduct or eliminate their appreciation of wrongfulness.[71] A dismissal without following the procedures applicable to incapacity or an employer's operational requirements could also be substantively and/or procedurally unfair.[72] Conversely, the court reflected on the role of an

[61] Ibid.
[62] Ibid para 45.
[63] Ibid para 39. The LAC noted that the psychologist who testified in support of the Employee's case could not say whether the Employee's depression had, in fact, caused the misconduct (para 45).
[64] Ibid para 49.
[65] *Jansen* (LAC) supra note 13 para 49.
[66] Ibid paras 47–9.
[67] Ibid para 40.
[68] Ibid para 41. The court made specific reference to the Code of Good Practice: Dismissal (para 41).
[69] *Jansen* (LAC) supra note 13 para 41.
[70] Ibid.
[71] Ibid para 42.
[72] Ibid.

employee in such matters, and it noted that for an employee to succeed in a claim for an automatically unfair dismissal based on mental illness, the employee would need to provide sufficient evidence, and engage in the 'narrower determination of whether the reason for his dismissal was his depression and if he was subjected to differential treatment on that basis'.[73]

IV. COMMENT

Although the LAC in *Jansen* dismissed the Employee's claims, it undertook a discussion of depression in the workplace.[74] Mental illness is particularly relevant in the aftermath of the Covid-19 pandemic where illness, economic stress and hard lockdowns have had a severe impact on mental health.[75] In this context, I believe that the *Jansen* matter is an example of the issues our labour courts will grapple with in future cases. Some of these issues will be discussed below.

1. Depression as a disability

Depression is a psychiatric disorder that affects both individuals and society.[76] The World Health Organization defines depression as a mood disorder that is 'characterized by depressive mood (for example, sad, irritable, empty) or a loss of pleasure that is accompanied by other cognitive, behavioural, or neurovegetative symptoms that significantly affect the individual's ability to function'.[77] In the workplace, depression can result in decreased productivity, increased absenteeism, increased presenteeism,[78] damaged professional relationships, medical boarding, and disability claims.[79]

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[73] Ibid para 43.
[74] Ibid paras 41–50.
[75] Kim et al op cit note 8 at 1.
[76] Stander MP et al 'Depression in the South African workplace' (2016) 22(1) *South African Journal of Psychiatry* 814.
[77] World Health Organization 'ICD-11 international classification of diseases 11th revision' available at *https://icd.who.int/browse11/l-m/en#/http://id.who.int/icd/entity/1563440232*, accessed on 26 February 2022.
[78] Presenteeism occurs when employees are present at the workplace but do not function adequately. See Marika Smuts & Denine 'Excessive stress and eliminating barriers to decent work' (2020) 41 *ILJ* 782.
[79] S Evans-Lacko & M Knapp 'Global patterns of workplace productivity for people with depression: absenteeism and presenteeism costs across eight diverse countries' (2016) 51 *Social Psychiatry and Psychiatric Epidemiology* 1525.

Lynk states that '[d]isability is notoriously difficult to define with precision, whether in medicine, social science or the law …'[80] and that 'different definitions of disability are employed in statutes that have different social objectives ...'.[81] Such difficulty was evident in both judgements in *Jansen*, and I submit that the way that a court understands and defines mental illness will have an impact on the rights of employees.[82] In *Jansen*, the Employee's claim was founded on the submission that his depression could be classified as a disability for the purpose of anti-discrimination legislation. Neither the LC nor the LAC accepted this argument. In the following section, I analyse the courts' reasoning in the context of South African legislation and case law. Thereafter, I consider relevant Canadian law with a view to critique the findings in *Jansen*.

a) South Africa

The starting point of an examination into mental illness and disability is the Mental Health Care Act ('MHCA').[83] The MHCA was enacted to 'provide for the care, treatment and rehabilitation'[84] of those suffering with mental illness. It acts as a mechanism that brings 'the law and medicine into a close relationship'.[85] While the MHCA does not explicitly define mental illness (and depression) as a disability, the attitude of the legislature is evident in the Preamble.[86] The MHCA recognises that 'the Constitution … prohibits against unfair discrimination of people with mental or other disabilities'[87] and that the public may need protection from persons suffering from mental illness.[88] These provisions support the argument that mental illness may constitute a disability, particularly for the purpose of an enquiry into unfair discrimination.[89] Both courts in *Jansen* neglected to refer to the MHCA

[80] Michael Lynk *Disability and the Implementation of the Accommodation Duty in the Canadian Workplace by Labour Arbitrators* Paper presented at the Conference on Reasonable Accommodation and the Role of the State: A Democratic Challenge, Quebec City (2008) at 23.
[81] Ibid.
[82] L van Niekerk et al 'Conceptualising disability: Health and legal perspectives related to psychosocial disability and work' (2020) 13(1) *S Afr J Bioethics Law* 43.
[83] Act 17 of 2002.
[84] Ibid.
[85] Adolph A Landman & Willem J Landman *A Practitioner's Guide to the Mental Health Care Act* (2014) at 14.
[86] Preamble of MHCA.
[87] Ibid.
[88] Ibid.
[89] Landman op cit note 85 at 11.

and, having regard to its provisions on unfair discrimination, I submit that the MHCA should not be ignored when deciding labour disputes arising out of mental illness.

The LRA does not include definitions of 'disability', 'persons with disabilities' or 'mental illness'.[90] Issues of disability and unfair discrimination in the workplace are mostly confined to the EEA. Interestingly, the term 'disability' is not defined in the EEA.[91] Section 1 of the EEA includes a definition of 'people with disabilities' that refers to persons 'who have a long-term or recurring physical or mental impairment which substantially limits their prospects of entry into, or advancement in, employment'.[92] Some authors have noted, with concern, that the purpose of the definition of 'person with disabilities' was to define those persons that would benefit from affirmative action.[93] and that this definition should not be conflated with any definition of 'disability'.[94] Others argue that the term 'people with disabilities' is interchangeable with 'disability'.[95] I have noted that the courts in *Jansen* did not engage with s 1 of the EEA and that there was no significant interrogation of the meaning of 'persons with disabilities'. I submit that the EEA does not adequately define disability when it comes to mental illness, but some clarity can be obtained with the application of the Code of Good Practice on Employment of Persons with Disabilities ('the Code').[96]

The Code was enacted to protect people with disabilities from prejudice in the workplace.[97] The role of the Code is captured in s 3*(c)* of the EEA, which provides that the EEA should be interpreted 'taking into account any relevant code of good practice issued in terms of this Act or any other employment law …'. Section 3.1 of the Code provides that the Code should act 'as a guide for any Court or tribunal to consider when interpreting or applying the Act'.[98] The Code was neither referred to nor applied in the *Jansen* matter, but I argue that these provisions are instructive when determining the application of the Code to such disputes.

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[90] L Nxumalo 'Does South African labour legislation provide adequate protection for mental illness in the workplace?' (2018) 39 *ILJ* 1446.
[91] JL Pretorius et al *Employment Equity Law* (2021) 7–46.
[92] Section 1 of the EEA.
[93] Pretorius op cit note 91 at 7–41.
[94] Pretorius op cit note 91 at 7–42.
[95] Nxumalo op cit note 90 at 1442.
[96] GN 1085 in *GG* 39383 of 9 November 2015.
[97] Section 1 of the Code.
[98] Section 3.1 of the Code.

The interpretation of mental illness as a disability is clarified in the Code.[99] The Code defines 'persons with disabilities' as persons 'who have long-term physical, mental, intellectual or sensory impairments which… may hinder their full and effective participation in society... .'[100] The Code provides a set of criteria and enquiries that need to be satisfied when assessing an employee's disability.[101] An employee will be considered to have a disability when they:

' a) have a physical or mental impairment;
b) which is long term or recurring; and
c) which substantially limits their prospects of entry into, or advancement in employment'.[102]

A mental impairment means 'a clinically recognized condition or illness that affects a person's thought processes, judgment or emotions'.[103] Mental impairment is considered to be long-term if the condition lasts for at least 12 months and an impairment is recurring when it is 'likely to happen again' and is 'substantially limiting'.[104] The Code clarifies that a mental impairment will be 'substantially limiting' if in its 'nature, duration or effects' the condition 'limits the person's ability to perform the essential functions of the job …'.[105] It follows that the definition of a 'person with disabilities' will not only refer to medically diagnosed conditions but must have regard to the effect of a disability on the employee in the context of their work.[106] Accordingly, symptoms of mental illness, and its effect on an employee's performance,[107] could satisfy the provisions of the Code and that the correct application of the Code is imperative. It follows that depression may constitute a 'disability' for the purposes of the EEA.[108] I submit that our understanding of mental illness and disability would have benefited if either of the courts in *Jansen* had applied the Code as it was intended.

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[99] Pretorius op cit note 91 at 7–45.
[100] Footnote 4 of the Code.
[101] Section 5.3 of the Code.
[102] Ibid.
[103] Section 5.3.1 of the Code.
[104] Ibid.
[105] Section 5.3.3 of the Code
[106] Pretorius op cit note 91 at 7–47.
[107] Section 5.3.1 of the Code.
[108] In 2003, the Department of Labour published the Technical Assistance Guidelines on the Employment of Persons with Disabilities ('the Guidelines'), available at *https://tinyurl.com/2ehskepx*. The foreword to the Guidelines summarises its purpose to 'complement the Code' and to assist employers to implement the EEA. It is noteworthy that the Guidelines define disability as 'a condition caused by an accident, trauma, genetics or a disease which may limit a person's mobility, hearing, vision, speech, intellectual or emotional functioning.'

I submit that the lack of a clear definition of mental illness as a 'disability' in legislation can cause confusion. This is apparent in the South African Human Rights Commission's ('SAHRC's') Disability Toolkit that was published in 2015.[109] This toolkit included the term 'persons with disabilities', that was defined as:

> 'persons with physical or mental impairment that substantially limits one or more of that person's major life activities, [who] have a record of such impairment, or who have been regarded as having such impairment'.[110]

In 2017, the Disability Toolkit[111] was revised to assist employers with the inclusion of disabled persons in the workplace.[112] This later toolkit states that:

> '[m]ental illness is a general term for a group of illnesses that affect the mind or brain … which include bipolar disorder, depression, schizophrenia, anxiety and personality disorders, affect the way a person thinks, feels and acts.'[113]

I submit that this revision, whilst detailed, deviates from the general approach to mental illness as detailed in the EEA and the Code. It is my view that there must be alignment between the legislation, codes and guidelines in order to provide clarity when assessing whether mental illness such as depression constitutes a disability in the context of our labour law. I submit that, in such circumstances, we should reasonably expect our courts to address such discrepancies and provide guidance to both employers and employees.

In *PSA obo J.S. Du Plessis v The Department of Correctional Services*[114] a dispute arose when an employer refused to grant an employee temporary incapacity leave.[115] The application for incapacity was based on the employee's diagnosed chronic anxiety and depression.[116] The arbitrator determined that 'the Applicant's condition amounts to a

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[109] South African Human Rights Commission *Disability Toolkit promoting the right to work of persons with disabilities: toolkit for the private sector* (2015) available at *https://www.sahrc.org.za/home/21/files/SAHRC%20Disability%20toolkit%20FOR%20CD.pdf*, accessed on 16 December 2022.
[110] Ibid at 4.
[111] South African Human Rights Commission *Disability Toolkit a quick reference guide & monitoring framework (*2017) available at *https://www.sahrc.org.za/home/21/files/20170524%20SAHRC%20Disability%20Monitoring%20Framework%20and%20guidelines%20Draft%205.pdf*, accessed on 16 December 2022.
[112] Ibid at 3.
[113] Ibid at 15.
[114] 2008 JOL 22441 (PSCBC).
[115] Ibid at 1.
[116] Ibid at 7.

disability within the meaning of the Employment Equity Act'.[117] While this matter is not persuasive in terms of the doctrine of precedent, I submit that it is an example of a forum that readily accepted that depression and its effects can be classified as a disability in terms of the EEA.

In 2017, the LAC heard the matter of *Pharmaco Distribution (Pty) Ltd v Weideman*[118] in which the employer sought to set aside the LC finding that discrimination based on an employee's bipolar disorder constituted unfair discrimination in terms of s 187(1)*(f)* of the LRA and s 6 of the EEA.[119] The LAC confirmed the earlier decision that but for the employee's mental illness the employee would not have been 'singled out', and that her condition constituted a disability in terms of our labour legislation.[120]

A few months after the *Jansen* judgment, the LAC in *Rapoo v Rustenburg Local Municipality*[121] was asked to set aside an earlier judgment of the LC that held that the employee had suffered unfair discrimination due to his depressive mood disorder and that the employer had subjected him to unfair discrimination on the basis of his disability.[122] The LAC approved the analysis of the court a quo, and held that 'the municipality has failed to comply with Code of Good Practices on the Employment of People with Disabilities under the EEA, the Constitution of the Republic of South Africa, International and foreign law as well as best practices'.[123] I argue that *Rapoo* continued the trend established by the court in *Pharmaco,* and determined that depression constitutes a disability in terms of the EEA, read with the Code.[124]

b) Canada

The starting point of any discussion of the Canadian approach to issues of disability and depression is the Canadian Human Rights Act[125] ('CHRA'). The CHRA defines disability as 'any previous or existing mental or physical disability …'.[126] This definition provides a

[117] Ibid at 17.
[118] (2017) 38 *ILJ* 2496 (LAC).
[119] Ibid para 1.
[120] Ibid para 34.
[121] (2020) 6 BLLR 533 (LAC).
[122] Ibid at 533–4.
[123] Ibid para 13.
[124] Ibid.
[125] R.S.C. 1985 c. H-6.
[126] Ibid s 25.

foundation for Canada's Employment Equity Act[127] ('EEA (Canada)') that was enacted to 'achieve equality in the workplace' and to 'correct the conditions of disadvantage in employment experienced by … persons with disabilities …'.[128] I note that the purpose of the EEA (Canada) and the EEA are similar, but that differences becomes apparent when one examines s 3 of the EEA (Canada). Section 3 defines 'persons with disabilities' as:

> 'persons who have a long-term or recurring physical, mental, sensory, psychiatric or learning impairment and who
>
> (a) consider themselves to be disadvantaged in employment by reason of that impairment, or
> (b) believe that a[n] employer or potential employer is likely to consider them to be disadvantaged in employment by reason of that impairment,
>
> and includes persons whose functional limitations owing to their impairment have been accommodated in their current job or workplace'.[129]

The EEA (Canada) expands the scope and meaning of the term 'persons with disabilities' to include impairments that are 'mental, sensory, *psychiatric* or learning' (my Emphasis) in nature.[130] In contrast to this definition, the corresponding section in the EEA refers to 'long-term mental impairment'[131] and we are required to refer to the Code to determine whether mental illness falls under the ambit of 'persons with disabilities'. I am of the view that legislation focused on unfair discrimination or the protection of the rights of disabled persons must include a definition of disability that clearly and unequivocally incorporates mental illness. I submit that the EEA (Canada) is an example of how mental illness can be clearly expressed and included in employment equity legislation.

Some Canadian provincial legislators have taken a nuanced approach when dealing with mental illness. For example, Ontario's Human Rights Code ('OHRC') includes a definition of disability that incorporates clear terminology in respect of mental illness.[132] The OHRC defines 'disability' as including 'condition[s] of mental impairment or a developmental

[127] S.C. 1995 c. 44.
[128] Section 2 of the EEA (Canada).
[129] Section 3 of the EEA (Canada).
[130] Ibid.
[131] Section 1 of the EEA.
[132] R.S.O. 1990 Chapter H.19.

disability' and 'mental disorder[s]'.[133] Alberta's Human Rights Act[134] ('AHRA') recognises that a 'mental disability' constitutes 'any mental disorder, developmental disorder or learning disorder, regardless of the cause or duration of the disorder'.[135] It has been argued that such definitions of disability, which explicitly refer to mental disorders, have enabled Canadian jurists to recognise that a wide array of mental illness (including depression) constitutes a disability.[136] However, this terminology is not uniform across the provinces[137] and Canadian courts have sought to interpret a definition of disability that is both 'context-specific and flexible'.[138]

The recognition of depression as a disability, and therefore as a ground of unfair discrimination, is evident in several judgments handed down by Canadian courts. In *University of Western Ontario v University of Western Ontario Staff Association*,[139] an arbitrator was required to determine whether an employee's anxiety disorder constituted a mental impairment or mental disorder in terms of the OHRC.[140] The judgment referred to an earlier decision of the Supreme Court of Canada[141] that dealt with the interpretation of the term 'handicap' as contained in the Quebec Charter of Human Rights and Freedoms.[142] The arbitrator in *University of Western Ontario* took the same approach that was adopted in interpreting 'handicap', and held that the concept of disability 'must not be confined within

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[133] OHRC Chapter H.19. Section 10(1) defines 'disability' as:

'*(a)* any degree of physical disability, infirmity, malformation or disfigurement that is caused by bodily injury, birth defect or illness and, without limiting the generality of the foregoing, includes diabetes mellitus, epilepsy, a brain injury, any degree of paralysis, amputation, lack of physical co-ordination, blindness or visual impediment, deafness or hearing impediment, muteness or speech impediment, or physical reliance on a guide dog or other animal or on a wheelchair or other remedial appliance or device,

(b) a condition of mental impairment or a developmental disability,

(c) a learning disability, or a dysfunction in one or more of the processes involved in understanding or using symbols or spoken language,

(d) a mental disorder, or

(e) an injury or disability for which benefits were claimed or received under the insurance plan established under the Workplace Safety and Insurance Act, 1997; ("handicap")'.

[134] RSA 2000 c A-25.5.

[135] AHRA s 44(1)(*h*).

[136] Lynk op cit note 80 at 25.

[137] See Table 1. at 26 below.

[138] Link op cit note 80 at 24. See also *Lane v ADGA Group Consultants Inc.* 2007 HRTO 34 (CanLII).

[139] 2008 CanLII 16058 (ON LA).

[140] Ibid at 2.

[141] *Quebec (Commission des droits de la personne et des droits de la jeunesse) v Montréal (City); Quebec (Commission des droits de la personne et des droits de la jeunesse) v Boisbriand (City)* 2000 SCC 27 (CanLII), [2000] 1 SCR 665.

[142] CQLR c C-12.

a narrow definition that leaves no room for flexibility' and that a narrow definition does not fulfil the Charter's objectives or purpose.[143] The arbitrator held that a court should not limit itself to medical opinion but rather view same in context and with due regard to the purpose of the Charter.[144] This matter is a useful example of the application of the 'context-specific and flexible' approach adopted in Canadian courts in matters dealing with mental illness.[145]

In *Simcoe Condominium Corporation No. 89 v Dominelli*[146] the Ontario Supreme Court of Justice accepted that depression constitutes a mental impairment or a mental disorder for the purpose of the OHCR.[147] The court relied upon the judgment of *Crowley v LCBO et al*,[148] which established the test for disability. The test requires a person alleging unfair discrimination on the basis of a mental disorder to produce evidence of a medically recognized 'mental disability', or a 'working diagnosis' with clinically accepted symptoms.[149] The claimant in *Simcoe* was not able to adduce sufficient medical evidence to support the argument that their mental disorder constituted a disability in terms of the OHRC. I submit that this judgment is at odds with the earlier approach adopted in *University of Western Ontario* having regard to the focus in *Simcoe* on the employee's medical history.

In *Morris v BC Rail*,[150] an employee of the British Columbia Railway Company claimed that he was dismissed due to his 'major depression'.[151] The employee lodged a claim with the British Columbia Human Rights Tribunal on the basis that the employer discriminated against him due to his depression in contravention of British Columbia's Human Rights Code.[152] The Tribunal accepted that the employee suffered from symptoms of depression such as 'severe concentration problems, memory loss, motivation problems, suicidal thoughts, tearfulness, anxiety, and sleep problems'.[153] The Tribunal recognised that '[m]ajor

[143] *University of Western Ontario* supra note 139 at 6 with reference to *City of Montreal* supra note 141 para 76.
[144] *University of Western Ontario* supra note 139 at 7–8 with reference to *City of Montreal* supra note 141 para 80.
[145] Lynk op cit note 80 at 24.
[146] 2015 ONSC 3661 (CanLII).
[147] Ibid para 39.
[148] 2011 HRTO 1429 (CanLII).
[149] *Simcoe* supra note 146 para 43.
[150] 2003 BCHRT 14.
[151] Ibid para 2.
[152] R.S.B.C. 1996, c. 210 para 1.
[153] *Morris* supra note 150 para 190.

depression is a bio-medical condition'[154] that was poorly understood. The Tribunal went on to analyse how the employee's mental illness resulted in functional limitations at work.[155] Further, the social construction of mental illness was considered and the Tribunal interrogated the employer's perception of the employee's condition.[156] In this context, it was held that the employer had subjected the employee to unfair discrimination on the basis of his mental illness.[157] I argue that this decision is a well-considered attempt to understand the effects of mental illness in the workplace. It serves as a good example of the type of enquiries that should be undertaken when assessing matters of unfair discrimination on the basis of an employee's depression.

c) Analysis

Jansen is an example of a matter where the definition of mental illness and disability was misunderstood. The reluctance of the LC to interpret mental illness as a disability became evident when the court referred to s 1 of the EEA[158] but failed to determine whether the employee in his depressive condition satisfied the definition of 'persons with disabilities'.[159] The LC refrained from any further analysis and dismissed the argument that the Employee's condition was consistent with the definition of a person with a disability.[160] The LAC did not take this issue further and it made no substantive comment on s 1 of the EEA.[161] Further, there was no reference to the MHCA and neither court deemed it necessary to apply the Code to the facts of the case. I submit that both the LC and the LAC should have undertaken a more thorough review of the legislation applicable to mental illness, disability, and unfair discrimination. Similarly, I submit that both courts were limited in their examination of the existing case law and important decisions, such as *Pharmaco*, were not assessed as part of either courts' reasoning.

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[154] Ibid paras 215–6.
[155] Ibid para 216.
[156] Ibid para 218.
[157] Ibid paras 240–1.
[158] *Jansen* (LC) supra note 10 para 44. Section 1 of the EEA defines people with disabilities as 'people who have a long-term or recurring physical or mental impairment which substantially limits their prospects of entry into, or advancement in employment'.
[159] *Jansen* (LC) supra note 10 para 44.
[160] Ibid.
[161] *Jansen* (LAC) supra note 13 para 41. Confusingly, the LAC undertakes an unrelated discussion of whether a depressed employee may be dismissed on the basis of incapacity and notes that such employees may need to be accommodated due to their 'disability' (para 41).

The judgments of both courts in *Jansen* are insufficient when compared to Canadian jurisprudence. The approach to mental illness in the Canadian workplace is supported by a clear vision of disability as described in legislation, such as the EEA (Canada), together with the case law. I have noted that some Canadian federal and provincial legislation makes explicit mention of mental disorders as part of the definition of disability, and I am of the view that such clarity can form part of a unified legal effort to assist employees. It is apparent that Canadian courts have used the legislative platform to adopt a flexible and purposive approach to the interpretation of mental illness and disability. The decisions of *University of Western Ontario* and *Morris* have shown that a court need not confine itself to medical opinion only and that a court can consider the functional limitations associated with an employee's mental illness together with the stigma faced by mentally ill employees.

I submit that the *Jansen* matter was an opportunity to align our legislation and case law with a common understanding of mental illness and its effect in the workplace. Both courts missed this opportunity in that they did not refer to the Code and earlier precedent. Further, no regard was given to foreign law which dealt with similar issues. Regrettably, the LC and the LAC did not undertake the legal analysis that one would expect and the question whether mental illness constitutes a disability for the purpose of our labour legislation remains unclear.

2. Depression as unfair discrimination

The inclusion of persons suffering from mental illness in the economy is important to their overall wellbeing and recovery.[162] Unfair discrimination based on mental illness, including depression, remains a prevalent issue in the South African workplace notwithstanding the purpose of the EEA, the LRA and the Code.[163] The Employee in *Jansen* argued that he had faced unfair discrimination on the part of his employer due to his depression. I submit that the LC and the LAC, in their assessment of the Employee's case, did not give effect to the purpose of our anti-discrimination legislation. In support thereof, I will examine applicable law and case law, and review how Canadian courts have tackled the same issues. In

[162] World Health Organization 'WHO guidelines on mental health at work. Geneva: World Health Organization; 2022' at 2, available at *https://www.who.int/publications/i/item/9789240053052*, accessed on 2 December 2022.
[163] Nxumalo op cit note 90 at 1449.

conclusion, I will show that there is good reason to include mental illness as its own, defined, listed ground of unfair discrimination.[164]

a) South Africa

South Africa's first significant attempt[165] to tackle unfair discrimination can be traced back to the Constitution and the Bill of Rights. Section 9(3) of the Constitution prohibits unfair discrimination on a number of listed grounds, including 'race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth'.[166] This clause was expanded upon with the enactment of the EEA.[167] The EEA seeks to achieve equity in the workplace[168] and provides that an employer may not discriminate against an employee on the basis of any of the listed grounds,[169] namely:

> 'race, gender, sex, pregnancy, marital status, family responsibility, ethnic or social origin, colour, sexual orientation, age, disability, religion, HIV status, conscience, belief, political opinion, culture, language, birth or on any other arbitrary ground'.[170]

In the event that an employee is subjected to unfair discrimination on the basis of a listed ground, the onus will shift to the employer to provide justification for their discriminatory action.[171] Issues of unfair discrimination are broadly dealt with by the LRA, as part of the provisions dealing with automatically unfair dismissals.[172] Section 187(1)*(f)* provides that a dismissal is automatically unfair if the reason for the dismissal was unfair discrimination on:

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[164] J Grogan *Employment Rights* 2 ed (2014) 211.
[165] It is beyond the scope of this paper to review the international instruments that inspired the drafting of our anti-discrimination provisions. For a concise review of South Africa's international obligations to protect the rights of disabled persons, see SAHRC op cit note 110 at 5–7.
[166] Ibid.
[167] Grogan op cit note 164 at 205.
[168] The Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 ('PEPUDA') forms part of the legislature's efforts to give effect to the Constitution's unfair discrimination provisions. PEPUDA does not apply to whom the EEA applies, and is therefore not applicable to unfair discrimination in the workplace (Section 5.3).
[169] Grogan op cit note 164 at 206.
[170] Section 6(1) of the EEA.
[171] Section 11(1) of the EEA.
[172] A Van Niekerk et al *Law@work* 5 ed (2019) at 284.

'any arbitrary ground, including, but not limited to race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, political opinion, culture, language, marital status or family responsibility'.[173]

None of the sections listed above include mental illness as a listed ground of unfair discrimination. The omission of mental illness as a listed ground is in contrast to the MHCA, which states that '[a] mental health care user may not be unfairly discriminated against on the grounds of his or her mental health status'.[174] I submit that this section is clear in its intention and purpose and lays a basis for mental illness to be considered as a unique ground of unfair discrimination. I argue that the LC and LAC should have taken note of the MHCA, as this may have informed their interpretation and application of the anti-discrimination provisions mentioned above.

The need to include mental illness as a listed ground is evident in *Marsland.*[175] In this matter, the employee submitted that after he was diagnosed with anxiety and depression his employer subjected him to unfair discrimination and abuse, which ultimately led to his constructive dismissal.[176] In terms of s 187(1)*(f)* of the LRA, the court a quo found that the employer's conduct constituted unfair discrimination based on the employee's mental health and was therefore automatically unfair.[177] However, the LC also held that the unfair discrimination was based on an analogous arbitrary ground (the impairment of the employee's dignity) and not on the listed ground of disability.[178] The LAC readily accepted that the employee suffered from depression[179] but then held that '[i]t is not strictly necessary to decide whether the concept of "disability" as set out as a ground in s 187(1)*(f)* describes the condition suffered by respondent'.[180] The effect of this finding had a direct bearing on the matter. A finding of discrimination on a listed ground means that the onus to justify the unfair discrimination automatically shifts to the employer. The finding that the employee faced unfair discrimination on an 'arbitrary ground' does not trigger this shift in onus.[181]

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[173] Ibid at 263.
[174] Section 10(1) of the MHCA.
[175] *Marsland* supra note 45 at 1181.
[176] Ibid para 17.
[177] Ibid para 18.
[178] Ibid paras 18–20.
[179] Ibid paras 24–6.
[180] Ibid para 24.
[181] Section 11(2) of the EEA.

Consequently, the employee was required to prove that the employer's conduct was irrational, discriminatory, and unfair.[182] I argue that the LAC's was incorrect in its determination that the unfair discrimination was on the basis of an analogous ground. It was evident that the LAC was not prepared to interrogate the effects of mental illness and debate any idea that mental illness could be interpreted as its own listed ground.

b) Canada

The provisions of the CHRA are comparable to s 9(3) of our Constitution, in that the Act seeks to prevent unfair discrimination based on:

> 'race, national or ethnic origin, colour, religion, age, sex, sexual orientation, gender identity or expression, marital status, family status, genetic characteristics, disability or conviction for an offence for which a pardon has been granted or in respect of which a record suspension has been ordered'.[183]

As discussed above, the CHRA includes 'disability' as a prohibited ground of unfair discrimination, and this includes 'mental disabilities.'[184] However, this definition is not uniform across the Canadian provincial and territorial Acts and codes. On review, various jurisdictions have either adopted the term 'disability' as a listed ground of unfair discrimination, which includes mental illness/disability, or 'mental disability' is included as its own listed ground. This distinction between the regions is summarised below:

Table 1. Canadian Legislation: Terminology

Province/territory	*Act*	*Section(s)*	*Prohibited ground*
Alberta	Alberta Human Rights Act, RSA 2000, c A-25.5	7(1)*(b)*	Mental disability
British Columbia	Human Rights Code, RSBC 1996, c 210	13(1)*(b)*	Mental disability
Manitoba	Human Rights Code, CCSM c H175	9(2)(l)	Mental disability

[182] Ibid.
[183] Section 3(1) of the CHRA.
[184] Ibid at s 3(1)–25.

Newfoundland & Labrador	Human Rights Act, 2010, SNL 2010, c H-13.1	2(c) and 9(1)	Disability
New Brunswick	Human Rights Act, RSNB 2011, c 171	2.1(i)	Mental disability
Northwest Territories	Consolidation Of Human Rights Act S.Nu. 2003, c.12	7(1)	Disability
Nova Scotia	Human Rights Act, RSNS 1989, c 214	5(1)*(o)*	Mental disability
Ontario	Human Rights Code, R.S.O. 1990, CHAPTER H.19	5(1) and 10(1)	Disability
Prince Edward Island	Human Rights Act, RSPEI 1988, c H-12	1(c.1) and *(d)*	Disability
Saskatchewan	Saskatchewan Human Rights Code, 2018, SS 2018, c S-24.2	16(1) and 2(1)*(b)*	Disability
Quebec	Charter of Human Rights and Freedoms, CQLR c C-12	ChI.1(10) and (16)	Handicap
Yukon	Human Rights Act, RSY 2002, c 116	7*(h)*	Mental disability

The recent case of *Hoefman v LMT Enterprises Ltd*[185] illustrates how a court may assess a claim for unfair discrimination in circumstances where the applicable legislation provides that 'mental disability' is recognised as a listed ground of unfair discrimination. The Human Rights Tribunal of Alberta ('the Tribunal') was required to interpret s 7 of the Alberta Human Rights Act ('ABHRA') which prohibits the discrimination of an employee on the basis of a 'mental disability'.[186]The Tribunal was required to determine whether the employee's condition could be classified as a 'mental disability' or whether he suffered from mere

[185] 2022 AHRC 43.
[186] Ibid paras 1–7.

stress.[187] The Tribunal readily accepted the employee's claim of mental disability on the basis of the medical documentation at hand and the testimony of the employee and his wife.[188] This finding was reached notwithstanding the fact that the medical documentation constituted hearsay and no medical professional was called to testify at the hearing.[189] I submit that this is a notably simpler enquiry as provided by the inclusion of mental illness as its own listed ground of unfair discrimination.

c) Analysis

The LC and the LAC in *Jansen* did not meaningfully engage with local or foreign precedent and both courts limited their review of case law to *Marsland*. From this judgment, the LC in *Jansen* held that the discrimination experienced by the Employee, on the account of his depression, could severely impact his 'fundamental human dignity'[190] and that this constituted unfair discrimination on an arbitrary ground. Some authors have noted that the overall finding of the court in *Marsland* is correct, but that the court missed an opportunity to clarify our understanding of depression and disability for the purpose of employment law.[191] I agree with this statement, considering the failure of the courts to pay heed to the provisions of the MHCA. I also submit that the *Marsland* judgment was a clumsy exercise in interpretation, which was unfortunately adopted by both courts in *Jansen*, to the detriment of the Employee's case. Ndou takes the argument further and states that the seriousness of the infringement of the depressed employee's right to dignity is, in fact, justification for mental illness to be recognised as a listed ground of unfair discrimination.[192] I agree with this argument, and I submit that defining mental illness as its own distinct listed ground would achieve the purpose of South Africa's unfair discrimination legislation. I note that in comparison to Canadian law, we can see that the recognition of mental illness as its own

[187] Ibid para 50. The court reviewed several letters and reports, prepared by medical professionals, which indicated the employee suffered from, inter alia, 'stress', 'anxiety related/mood disorder', 'brain anxiety/neurotic disorder', 'severe panic disorder', 'symptoms of anxiety and panic including significant social anxiety' and/or 'adjustment disorder' (para 51).
[188] Ibid paras 51–2.
[189] Ibid paras 11–46.
[190] *Jansen* (LC) supra note 10 paras 45–6.
[191] Bernice Welgemoed & Elsabe Huysamen 'Workplace protection of employees suffering from depression: A South African perspective' (2019) 40 *ILJ* 52.
[192] Moffat Maitele Ndou 'Mental illness, harassment and labour laws: Some thoughts on harassment by employees suffering from mental illness' (2020) 41(3) *Obiter* 541.

distinct ground of unfair discrimination can result in a simpler application of the legislative protection of mentally ill employees.

In South Africa's history, there is an example where a medical condition, not originally included in s 9(3) of the Constitution, was later recognised as a listed ground of unfair discrimination.[193] In the early 1990s, South Africa faced the HIV/AIDS crises, and the workforce was substantially impacted.[194] Legislators recognised that employees infected with HIV faced severe discrimination[195] and, in 1998, 'specific HIV provisions and protections'[196] separate from those addressing disability were included in the EEA.[197] The inclusion of HIV status as a listed ground of unfair discrimination signalled to employers that discrimination on the basis of an employee's HIV status will be unfair unless justified in accordance with the EEA.[198] I submit that the issue of mental illness requires a similar attitude and approach by our legislators. There is a notable stigma attached to employees suffering with mental illness, such as depression and I am of the view that the unfair discrimination provisions of the EEA should be amended to include an additional listed ground of mental illness.[199]

3. Developing a Code of Good Practice

Despite the enactment of legislation to protect the rights of people with disabilities, a lack of understanding about mental illness and its effect on employees can result in prejudice, unfair labour practices and loss of employment.[200] Having regard to the nature of mental illness, and the purpose of our employment equity legislation, employers need to recognise the role of disability and anti-discrimination laws when dealing with mental illness in the workplace.[201]Some commentators have noted that our current disability legal framework consists of 'fragmented employee support structures and policies' when it comes to mental

[193] Edwin Cameron 'Legal and human rights responses to the HIV/AIDS epidemic' (2006) *Stell LR* 47.
[194] Mark Heywood & Fatima Hassan 'The Employment Equity Act and HIV/AIDS: A step in the right direction' (1999) 20 *ILJ* 845.
[195] Cameron op cit note 193 at 52–65.
[196] Heywood & Hassan op cit note 194 at 849.
[197] Ibid.
[198] Ibid at 854.
[199] Nxumalo op cit note 90 and Welgemoed & Huysamen op cit note 191.
[200] South African Society of Psychiatrists 'Mental illness disability in the workplace - The stigma is real' available at *https://www.sasop.co.za/mental-disabilities*, accessed on 13 November 2022.
[201] Welgemoed & Huysamen op cit note 191 at 58.

illness, such as depression.[202] With these shortfalls in mind, I will look into the potential mechanisms that can be implemented to provide legal support for mentally ill employees. I will review options that have emerged in both South Africa and Canada with a view to recommending a way forward that is to the benefit of both employers and employees.

a) South Africa

Some legal commentators have praised South Africa's disability legislation and have noted that the EEA, the Code and other instruments have laid the groundwork for a 'specialised legislative regime' that can address mental illness such as depression.[203] Other writers argue that such legislation does not provide sufficient protection for employees with mental illness[204] and that specific legal interventions are required to address issues such as depression in the workplace.[205] It has been argued that employers should develop policies that address mental illness and depression.[206] However, such employers may not have the knowledge or tools to undertake such interventions.[207] As argued in this paper, our legal understanding of mental illness, such as depression, requires clarity and I agree that this may only be achieved through the development of legal instruments focusing on mental illness in the workplace. However, it is unreasonable to leave employers to their own devices and I submit that the legislature must provide guidance on issues of mental illness. Fortunately, we do not need to look far for an example of a legislative intervention and South Africa's approach to the HIV/AIDS crisis is pertinent to our discussion.

In 2000, following the passing of the EEA, the Code of Good Practice on Key Aspects of HIV/AIDS and Employment ('the HIV/AIDS Code') was developed.[208] The purpose of the HIV/AIDS Code was to expand upon the anti-discrimination provisions of the EEA and to provide:

> 'practical workplace related measures to inhibit unfair discrimination against employees with HIV and AIDS. These include the development of HIV/AIDS policies and programmes; the introduction

[202] Ibid.
[203] Welgemoed & Huysamen op cit note 191 at 59.
[204] Nxumalo op cit note 90 at 1442.
[205] Ibid at 1446.
[206] Ibid at 1450.
[207] Ibid at 1449.
[208] Cameron op cit note 193 at 68.

of mechanisms to promote acceptance and openness in relation to HIV/AIDS; promoting support for all employees with or affected by HIV and AIDS; and establishing grievance procedures and disciplinary measures to deal with HIV related complaints.'[209]

I argue that both employers and employees facing issues such as depression would benefit from a similar intervention. A Code of Good Practice focused on mental illness would be an opportunity to provide clarity and guidance to employers. This Code of Good Practice could assist our courts as they grapple with issues such as those raised in *Jansen.* However, I am not of the view that we should simply replicate other codes and assume that previous efforts will be transferable to issues of mental illness. I submit that any attempt to draft a code dealing with mental illness should include a study of other jurisdictions.

b) Canada

During the early 2000s, Shain eloquently noted that '[a] perfect legal storm is brewing in the area of mental health protection at work', and '[t]his storm brings with it a rising tide of liability for employers'.[210] This warning was heeded by Canadian legislators who were proactive in the development of a vision of 'a psychologically healthy and safe workplace'.[211] It was recognised that disorders such depression, anxiety and burnout were all too common in the workplace and that any psychological harm at work could no longer be regarded as trivial.[212]

In 2006, the Canadian parliament released a report titled 'Out of the shadows at last'.[213] The report revealed the economic costs of mental illness and also shone a light on the stigma,

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[209] Ibid.

[210] Martin Shain 'Tracking the perfect legal storm', Discussion paper submitted to the Mental Health Commission of Canada (2010) 24 available at *https://wsmh-cms.mediresource.com/wsmh/assets/q8cfyt48m6sow4ws*, accessed on 8 May 2022.

[211] The National Standard of Canada (CAN/CSA-Z1003-13/BNQ 9700-803/2013) *Psychological health and safety in the workplace — Prevention, promotion, and guidance to staged implementation* (2002) available at *https://www.csagroup.org/article/cancsa-z1003-13-bnq-9700-803-2013-r2018/*, accessed 8 May 2022 at 1.

[212] Martin Shain & Carla Nassar 'Stress at work, mental injury and the law in Canada', Discussion paper submitted to the Mental Health Commission of Canada (2008) 6 available at *https://www.mentalhealthcommission.ca/wp-content/uploads/drupal/Workforce_Stress_at_Work_Mental_Injury_and_the_Law_in_Canada_ENG_0_1.pdf*, accessed on 8 May 2022.

[213] Michael J.L. Kirby & Wilbert Joseph Keon 'Out of the shadows at last: Highlights and recommendations' Canada Senate, Standing Committee on Social Affairs, Science and Technology final report (2006) available at *aahttps://mdsc.ca/documents/Publications/Out%20of%20the%20Shadows_Highlights_EN.pdf*, accessed on 8 May 2022.

fear and reluctance experienced by both employees and employers when dealing with mental illness.[214] In 2007, the federal Commission on Mental Health for Canada ('the CMHC') was established and in 2013 the National Standard of Canada for Psychological Health and Safety in the Workplace[215] ('the Standard') was published.[216] The Standard was the first of its kind in the field of mental health law and has served as an example to other states grappling with similar issues.[217]

The adoption of the Standard is voluntary.[218] However, the Standard notes that it is in the employer's best interests to work towards the implementation of the Standard since:

> '[w]orkplaces with a positive approach to psychological health and safety are better able to recruit and retain talent, have improved employee engagement, enhanced productivity, are more creative and innovative, and have higher profit levels.'[219]

It is the intention of the Standard to provide guidance and establish a framework for Employers to implement.[220] The Standard recognises that the workplace can pose a 'risk of psychological harm' to an employee and these risks should be assessed, managed and prevented by the timeous intervention of the employer.[221] Through such action it is hoped that employers will lead a change in culture that will result in a safer work environment for employees struggling with mental illness. [222] The implementation of the Standard is monitored by the Mental Health Commission of Canada, a government body that is mandated to improve the mental health system, engage with various stakeholders (including the justice system) and improve the lives of Canadians living with mental illness.[223] It is my view that

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[214] Anne M. MacAulay *An Examination of Mental Illness in Canadian Workplaces: A Content Analysis of Trends and Directions in Canadian Arbitration Case Decisions* (unpublished MBA thesis, University of Prince Edward Island, 2010) 9.
[215] The Standard op cit note 211.
[216] Joti Samra 'The evolution of workplace mental health in Canada: Research Report (2007-2017)' Research report (2017) 13 available at *https://www.yorku.ca/well-being/wp-content/uploads/sites/549/2021/11/The-Evolution-of-Workplace-Mental-Health-in-Canada.pdf*, accessed on 8 May 2022.
[217] Ibid at 24.
[218] Ibid.
[219] The Standard at 1.
[220] The Standard at 2.
[221] Ibid.
[222] The Standard at ix.
[223] Preamble of the Standard.

the Canadian legal approach to issues of mental illness in employment is innovative and recognises the needs of employees and employers.

c) Analysis

It has been argued South Africa's labour legislation 'fails to provide adequate protection for employees with mental illness, given the uniqueness of the disability' and that without legislative intervention issues of mental illness in the workplace will remain unaddressed.[224] In contrast, Canada's progressive approach to mental illness in the workplace is internationally recognized and admired.[225] The International Labour Organization has recognised the value of the Standard and it has been proposed that an international standard for psychological health and safety in the workplace be developed using the Standard as its foundation.[226] It my submission that our legislators should be guided by the efforts of our Canadian contemporaries and that the Standard should be examined with reference to the South African workplace. Accordingly, with a view to give effect to the provisions of the Constitution, the EEA and the LRA, I recommend that the development of a Code of Good Practice focused on mental illness could, inter alia, guide employers to create psychologically safe workspaces and proactively address issues of mental illness with employees. I submit that such guidance would assist our courts to achieve uniformity in interpretation and application of the law in matters arising out of the mental illness of an employee.

4. An opportunity lost

In 2019, the South African Depression and Anxiety Group ('SADAG') received a total of 179 090 calls from members of the public seeking advice and assistance with issues of mental illness (including suicide interventions).[227] In 2021, for the period of January to September, SADAG reported that their helplines had received a total of 466 407 calls.[228] In this context, it is inevitable that both employers and employees will need to grapple with disputes arising

[224] Nxumalo op cit note 90 at 1437.
[225] Samra op cit note 216 at 20.
[226] Ibid at 25.
[227] South African Anxiety and Depression Group 'World Mental Health Day 2021: Calls to SADAG from January–September 2021' infographic available at *https://www.sadag.org/index.php?option=com_content&view=article&id=3197:world-mental-health-day-10-october-2021&catid=149&Itemid=132*, accessed on 8 May 2022.
[228] Ibid.

out of mental illness such as depression. The complexity and magnitude of such matters will require our legal decision makers to understand the nuances related to mental illness, with a view to protecting the rights of workers.

As seen in this paper, our courts have the opportunity to draw upon a variety of legal instruments and case law, sourced from both local and foreign jurisdictions. Regrettably, both the LC and the LAC in *Jansen* declined to grasp the judicial nettle and avoided any meaningful interrogation of relevant and applicable legislation or precedent. It is submitted that the failure of both courts to engage with this legal topic and expand our understanding of disability is at odds with the purpose of the MHCA, LRA, and the EEA read with the Code. In my view, both the LC and the LAC in *Jansen* failed to utilise the EEA and the LRA in the manner for which they were intended. I submit further that the failure to consider the Code was an error in law and that this had a significant impact on the outcome of the Employee's claim. Further, it is submitted that if both courts in *Jansen* had given due regard to cases other than *Marsland*, they may have been more accepting of the contention that the Employee's dismissal was based on his depression rather than his conduct. It is my view that the acceptance that the Employee's depressive condition constituted unfair discrimination arising out of an infringement of human dignity resulted in an unnecessary obfuscation of the nature of mental illness and disability. Accordingly, an opportunity to provide clarity to both employers and employees who face similar issues arising out of depression in their workplace was missed. The misstep of the LC and the LAC in *Jansen* is apparent when one considers the later decision of *Rapoo,* which correctly applied the provisions of the Code and determined that an employee suffering with depression satisfies the definition of a 'person with disabilities' in terms of the EEA.[229] It is noteworthy that the employee in *Rapoo* duly succeeded with their claim.

V. CONCLUSION

In a post-pandemic world, it is essential that future legal decision makers recognise mental illness that may arise in the workplace and that proactive steps are taken to ensure that the rights of employees suffering with conditions such as depression are protected. As we have seen from our Canadian counterparts, a flexible and purposive approach should be adopted

[229] *Rapoo* supra note 121 para 13.

to cast the net of legal protection over such employees. South Africa is no stranger to this approach, and in response to a public health crisis, it has shown that it can take innovative legal steps to combat prejudice and protect the rights of the vulnerable. Once again, South Africa will have to draw upon this experience, and the experience of foreign contemporaries, to navigate the coming 'second pandemic of mental illness' in the workplace.[230]

[230] Creamer Media's Engineering News op cit note 9.

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