“H” Stands for health, and yes, this includes mental health – what does the law say?

Health and wellbeing are complex issues as it relates to a company’s greatest asset – it’s people – and people are undeniably complex. There are various factors may that weigh-in on a person’s state of wellbeing and mental health, and some of these factors originate from within the workplace. However, often employees suffering from mental issues choose to remain silent for fear of victimisation, stigmatisation or even ridicule, leaving them to ‘suffer in silence’ and struggle for survival in the workplace.

Our Occupational Health and Safety (OHS) legislation places a duty on every employer to maintain, as far as is reasonably practicable, a working environment that is safe and without risk to the health of its employees. Indeed, the recently introduced SANS 45001 standard dealing with Occupational Health and Safety management in South Africa, which was introduced in August 2018, specifically acknowledges that an organisation’s duty on workplace safety includes the promotion and protection of both its workers’ physical and mental health. However, often the concept of workplace ‘safety’ overshadows that of ‘health’, which is overlooked and rather dealt with under the pretext of workplace discipline. What cannot be denied however, is that an employer has a role to play in the mental health of its employees, in some form or another.

The topic of mental health in the workplace permeates the current state of affairs of the world and has become increasingly important to address. It directly or indirectly affects the workplace in the form of low morale, workplace inefficiencies or even lost time or workplace accidents. For instance, the World

Health Organisation (WHO) conducted a study in 2014 illustrating that by 2020, depression will be a primary contributor to the global health burden.

It has therefore become crucial that employers know how to respond to this sensitive topic, as our courts have become more responsive to the issue of mental illness in the workplace. This holds particularly true where employers adopt a nonchalant and dismissive attitude towards mental health and have failed to properly identify and/ or address mental health issues.

Mental health issues often (but not always) make their debut in the workplace in the form of poor or lacklustre performance on the part of the employee. Employers have been taught to respond to poor performance in the manner prescribed in the Schedule 8 of the Code of Good Practice – Dismissal, by embarking on a performance improvement programme (PIP), whereby reasonable standards of performance are clearly communicated and the employee's progression towards these standards are mentored and monitored.

The lines, however, become obscured where mental health issues manifest in other forms of misconduct such as acts of gross insolence, emotional or even violent outbursts, gross insubordination or irrational behaviour. These issues are much harder to identify especially in the face of pending misconduct disciplinary action, where emotions are running high and the trust relationship has been impacted.

Mental health issues have predominantly been addressed as an 'ill health' (incapacity) issue and not as a disability. The problem with this approach lies in the fact that where mental health in the workplace is treated as an incapacity issue, employees suffering from debilitating mental health issues, are not afforded the necessary protections prescribed under the Labour Relations Act, 1995 (LRA) and the Employment Equity Act, 1998 (EEA).

Section 185 of the LRA states that an employee has the right to not be unfairly dismissed or subjected to unfair labour practices. The Code of Good Practice – Dismissal provides employers with a guideline when they seek to dismiss an employee for incapacity but is vague on dealing with employees diagnosed with debilitating mental health issues. The EEA on the other hand prohibits discrimination because of a person's 'disability'.

Neither the LRA, nor the EEA define what is regarded as a 'disability' within the employment law context. The question then begs, what passes for a 'disability' under our currently legislation and can this be (fairly) treated in the same manner as 'ill health/ incapacity'? Our Labour Court has been divergent on this issue.

While the Labour Appeal Court in *Independent Municipal & Allied Trade Unions v Witzenberg Municipality* (2012) 33 ILJ 1081 (LAC) categorised the mental illness suffered by the employee as an issue of incapacity due to ill health, the same court in *New Way Motors & Diesel Engineering (Pty) Ltd v Marsland* (2009) 30 ILJ (LAC) considered it as a disability.

Needless to say, this can be confusing and each case is therefore to be dealt with on its own merits, but

this is cold comfort for the Human Resources Manager that needs to advise his or her employer on the correct procedures to follow. In terms of the Mental Health Care Act 17 of 2002, mental illness is defined as –

"*A positive diagnosis of mental health related illness in terms of accepted diagnostic criteria made by a mental health practitioner authorised to make such a diagnosis*."

This definition is not necessarily helpful, as it requires a diagnosis in order to establish the existence of a mental illness condition. In many cases, persons suffering from mental health issues may either be unaware, or even in denial of their condition, and employers are certainly not qualified to make such a diagnosis on its own.

In *L S v Commission for Conciliation, Mediation and Arbitration & others* (2014) 35 ILJ 2205 (LC), the court held that the employer failed to conduct a proper investigation as to why the employee was underperforming. The court held, when someone suffers from a mental illness there might not be a wilful denial in performing, but rather the inability of the employee to perform. Where the employer opted to categorise the issue as that of misconduct instead of incapacity for poor work performance, the court found that this was unfair.

This judgment illustrates the onerous duty placed on employers to conduct proper investigations where they seek to dismiss poor performing employees who may suffer from, *inter alia* depression. It further highlights the importance of appointing skilled disciplinary chairpersons that are mindful of the finer intricacies of labour law and categorising the issues properly, so as to follow the correct procedures and applying the correct tests, when chairing disciplinary hearings.

More recently, the court in *Jansen v Legal Aid South Africa* [2019] JOL 42192 (LC) dealt with the dismissal of an employee who suffers from a mental condition of which the employer was aware. In this case, the employee was dismissed for misconduct in circumstances where his acts of misconduct were inextricably linked to his mental condition.

The labour court found that the employer in this case was under a duty to reasonably accommodate the employee. The court also found that the employer failed to comply with its duty and that as opposed to dismissing the applicant for misconduct, the employer had a duty to institute an incapacity enquiry.

The court found that the dismissal of the employee was automatically unfair in terms of section 187 (1)(f) of the LRA and that the employer unfairly discriminated against the employee in terms of section 6 of the EEA.

The Labour Court in Standard Bank of SA v Commission for Conciliation, Mediation and Arbitration & Others (2008) 29 ILJ 1239 (LC) provided some guidance for employers to follow when dealing with employees who suffer from 'disabilities'. The employer must consider –

Whether the employee is able to do his work;
To what extent the employee is able to perform his duties;
Whether they can adapt the employee's current working conditions to accommodate the employee's disabilities; and

If adaptation is not possible, the employer will have to find other suitable employment within its organisation if possible.

To this extent, employers may be under a statutory duty to render assistance to employees suspected of suffering from mental health issues. This places an additional burden on the employer and further begs the question ‘to what extent must an employer go in order to satisfy its OHS obligations?” This question however, deserves a proper legal analysis under the circumstances.

From the case law and the various legislative provisions, the following is clear:

When an employer is faced with an employee who is suffering from mental health issues, the employee should be provided with as much support as reasonable possible and practicable. This may include an investigation by the employer to establish measures that may assist the affected employee or to adapt the working environment if this is practicable. It may even include an independent assessment by a qualified medical health practitioner. Needless to say, employers’ will be well advised to firstly obtain the necessary consent from the relevant employee/s.

Throughout the discussions with the employee, the employer should establish whether the illness is temporary or permanent.

The employer should also investigate any alternatives possible to avoid dismissal. These alternatives may include evaluating the nature of the job and possibly the work environment.

In doing so, the employer may also consider alternative positions for the employee that could assist the employee with dealing with his/her condition or alternatively consider decreasing the employee’s working hours. However, the employee should agree to such alternatives.

Furthermore, and irrespective of the duration of the employment, the employer should always provide the employee with an opportunity to state a case and provide alternatives short of dismissal. However, if the employee provides no viable alternatives, refuses to cooperate or it is not possible for the employer to reasonably accommodate the employee any further than it already took steps to, dismissal may be considered.

Should there be no alternative available short of dismissal, the employee may be dismissed for incapacity. However, in order to ensure that the employee is not successful in an unfair dismissal and / or unfair discrimination matter, the employer should be able to provide solid evidence that all viable alternatives were considered.

Despite case law providing some clarity on this issue, South Africa can benefit greatly from specialised legislation dealing specifically with mental illness in the workplace, especially if certain mental illnesses can be recognised as disabilities in the workplace. Adopting such disability laws, within the South African context, would ensure that people who suffer from mental illness are afforded specific rights and recourse where they are unfairly discriminated against in the workplace. There appears to be a trend developing that our labour court recognises that certain conditions could be construed as a disability, and is thus worthy of the protections afforded to disabled persons under the EEA.