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EMPLOYMENT ALERT

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IT'S ALL IN THE HEAD

There is a steady increase in the diagnosis of mental illness in the workplace. Mental illness still carries a social stigma which may make sufferers reluctant to seek help. Unlike other illnesses mental illness may not manifest physically and is harder to detect. This often leads to the suspicion that employees are malingering when diagnosed with a mental illness.

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Where an employer is aware that an employee suffers with mental health issues, it must consider the potential impact of the illness on the employee and on the workplace and apply the appropriate incapacity process.

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Mental illness may have a profoundly negative effect on workplace relationships. Where an employer is aware that an employee suffers with mental health issues, it must consider the potential impact of the illness on the employee and on the workplace and apply the appropriate incapacity process. The employer failed to do this in *Jansen v Legal Aid South Africa* (C678/14) [2018] ZALCCT 17 (16 May 2018).

In 2010 Jansen was diagnosed with major depression. From there his downward spiral continued. In 2011 he was diagnosed with depression and high anxiety. In 2012 Jansen separated from his wife. His direct manager, a Mr Terblanche, represented his wife in the divorce proceedings. Unsurprisingly, Jansen felt betrayed by this. It further aggravated his poor mental state. In late 2012 Jansen's clinical psychologist advised his employer of his issues at work and warned that these issues required resolution as soon as possible. Jansen himself had appraised his employer of his condition. Jansen was regularly absent from work. He also began acting erratically. His behaviour was seen as insolent and insubordinate. In this period, he was diagnosed with manic depression.

In November 2013, Jansen's employer had had enough. It "charged" him with misconduct. The chairperson rejected Jansen's explanation that his behaviour

was due to his mental illness on the basis that there was no medical evidence corroborating this, and that the enquiry related to misconduct and not incapacity. She refused to consider medical reports showing that Jansen was on the verge of an emotional breakdown.

On 24 February 2014 Jansen was dismissed. This worsened his mental state. Jansen was eventually evicted from his rental accommodation. When the matter was finally heard in 2018 he was homeless.

Jansen approached the Labour Court contending that his dismissal was automatically unfair as it related to his disability, and that it was an act of unfair discrimination on a listed ground. In court, the employer chose not to lead any evidence. It contended that Jansen had not made out a prima facie case and applied for absolution from the instance. This proved to be a fatal decision.

The Labour Court held that where the onus rests on a defendant that, as a rule, absolution from the instance would not be granted. The court found that it would not be in accordance with the objectives of the Labour Relations Act to place undue technical hurdles before a lay applicant. Although Jansen may not have pleaded that he was dismissed because of his mental condition, he had throughout referred to his condition. His employer knew what case it was expected to meet.

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CONTINUED

Jansen's employer knew that he had a disability. It was under a duty to reasonably accommodate him. Instead of dismissing Jansen for misconduct, it had a duty to institute an incapacity enquiry.



The court found that Jansen's depression was the actual cause of his dismissal. He had provided his employer with proof of his illness. It had declined to accept this proof without challenging it. Jansen's employer knew that he had a disability. It was under a duty to reasonably accommodate him. Instead of dismissing Jansen for misconduct, it had a duty to institute an incapacity enquiry.

The court enunciated the principles for determining an automatically unfair dismissal. Firstly, would the dismissal have occurred if Jansen did not suffer from a mental illness? If the answer was yes, then the dismissal was not automatically unfair. If not, the question was whether Jansen's mental illness was the most likely cause of the dismissal? If this inference could be drawn then the dismissal was automatically

unfair. The court found Jansen's dismissal to be automatically unfair and constituted unfair discrimination. The court ordered retrospective reinstatement (just less than five years' back-pay).

Employers should exercise caution when dealing with disciplinary issues that may be related to mental illness. They should take care to identify whether an employee's conduct is due to his or her mental illness. If so, the matter should be dealt with as one of incapacity rather than misconduct.

Gillian Lumb, from Cliffe Dekker Hofmeyr's Employment Practice, acted for Ockert Jansen in this matter.

Jose Jorge and Steven Adams

*Jansen's employer has appealed the judgment.



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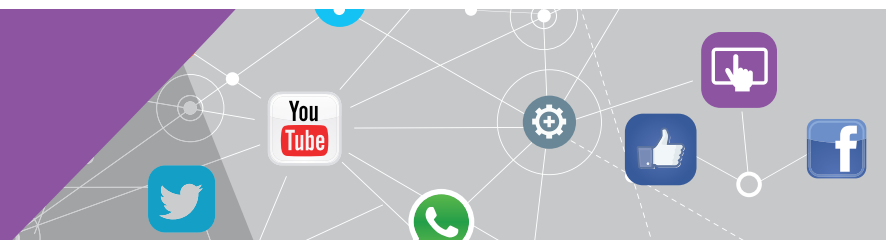
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For more information about our Employment practice and services, please contact:



Aadil Patel
National Practice Head
Director
T +27 (0)11 562 1107
E aadil.patel@cdhlegal.com



Gillian Lumb
Regional Practice Head
Director
T +27 (0)21 481 6315
E gillian.lumb@cdhlegal.com



Kirsten Caddy
Director
T +27 (0)11 562 1412
E kirsten.caddy@cdhlegal.com



Jose Jorge
Director
T +27 (0)21 481 6319
E jose.jorge@cdhlegal.com



Fiona Leppan
Director
T +27 (0)11 562 1152
E fiona.leppan@cdhlegal.com



Hugo Pienaar
Director
T +27 (0)11 562 1350
E hugo.pienaar@cdhlegal.com



Nicholas Preston
Director
T +27 (0)11 562 1788
E nicholas.preston@cdhlegal.com



Thabang Rapuleng
Director
T +27 (0)11 562 1759
E thabang.rapuleng@cdhlegal.com



Samiksha Singh
Director
T +27 (0)21 481 6314
E samiksha.singh@cdhlegal.com



Gavin Stansfield
Director
T +27 (0)21 481 6313
E gavin.stansfield@cdhlegal.com



Michael Yeates
Director
T +27 (0)11 562 1184
E michael.yeates@cdhlegal.com



Ndumiso Zwane
Director
T +27 (0)11 562 1231
E ndumiso.zwane@cdhlegal.com



Steven Adams
Senior Associate
T +27 (0)21 481 6341
E steven.adams@cdhlegal.com



Anli Bezuidenhout
Senior Associate
T +27 (0)21 481 6351
E anli.bezuidenhout@cdhlegal.com



Anelisa Mkeme
Senior Associate
T +27 (0)11 562 1039
E anelisa.mkeme@cdhlegal.com



Sean Jamieson
Associate
T +27 (0)11 562 1296
E sean.jamieson@cdhlegal.com



Devon Jenkins
Associate
T +27 (0)11 562 1326
E devon.jenkins@cdhlegal.com



Precness Mohlahlo
Associate
T +27 (0)11 562 1875
E precness.mohlahlo@cdhlegal.com



Zola Mcaciso
Associate
T +27 (0)21 481 6316
E zola.mcaciso@cdhlegal.com



Prinoleen Naidoo
Associate
T +27 (0)11 562 1829
E prinoleen.naidoo@cdhlegal.com



Bheki Nhlapho
Associate
T +27 (0)11 562 1568
E bheki.nhlapho@cdhlegal.com



Nonkululeko Sunduza
Associate
T +27 (0)11 562 1479
E nonkululeko.sunduza@cdhlegal.com



Siyabonga Tembe
Associate
T +27 (0)21 481 6323
E siyabonga.tembe@cdhlegal.com

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JOHANNESBURG

1 Protea Place, Sandton, Johannesburg, 2196. Private Bag X40, Benmore, 2010, South Africa. Dx 154 Randburg and Dx 42 Johannesburg.
T +27 (0)11 562 1000 F +27 (0)11 562 1111 E jhb@cdhlegal.com

CAPE TOWN

11 Buitengracht Street, Cape Town, 8001. PO Box 695, Cape Town, 8000, South Africa. Dx 5 Cape Town.
T +27 (0)21 481 6300 F +27 (0)21 481 6388 E ctn@cdhlegal.com

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