

# The “invisible” illness challenge

"Managing an employee who suffers from a "visible" illness or injury (for example a damaged or lost limb or back injury) is difficult enough. Managing a situation involving an invisible illness, such as depression, can be even more challenging, as the employer in discovered in *New Way Motor & Diesel Engineering (Pty) Ltd v Marsland ILJ (2009) BLLR 1181 LAC.*" (Maserumule Consulting "Dealing with Invisible Illness")



Rangata

This case highlighted the fact that an employee may not be dismissed purely on the grounds that he or she suffers from depression. The court found that Marsland had been constructively dismissed because of his depression. Section 188 of the Labour Relations Act (66 of 1995) (LRA) provides that a dismissal which is not automatically unfair, is unfair when the employer fails to prove that the reason for dismissal was fair in relation to the employee's conduct or capacity. The question is whether the court *a quo* in *New Way Motor & Diesel Engineering (Pty) Ltd v Marsland* ("New Way Motor") was correct in deciding that the employer's decision to dismiss the employee was automatically unfair.

The respondent suffered a nervous breakdown in December 2001 when his wife of 24 years left him. The respondent was hospitalised and returned to work in February 2002. Ostracized and verbally abused by the appellant and its senior management, Marsland was issued a final warning on various charges, including poor work performance, after a disciplinary hearing. He appealed which led to, among others, projects on which he had been working being cancelled.

He was later told his work had been outsourced, his position as marketing manager had fallen away and he was declared redundant. After being verbally abused and physically threatened by the appellant, Marsland terminated his contract of employment without notice. The matter was referred to the Metal Engineering Industry Bargaining Council on the ground of automatically unfair constructive dismissal, alternatively unfair constructive dismissal. The conciliating commissioner issued a certificate stating that the dispute was unresolved.

The legal question was whether mental health can be accepted as a ground for unfair discrimination and whether the appellant's conduct towards the respondent constitutes an automatically unfair dismissal. The court was called to rule whether the appellant differentiated against the respondent directly or indirectly and the respondent was treated less favourably. Further, whether the differentiation was made on one of the specified or analogous grounds of discrimination and it was unfair towards the respondent.

In the court *a quo*, Marsland went to the Labour Court citing his dismissal in terms of s186(e) read with s817(1)(d) and/or (f). Judge Stein AJ ruled that the respondent had been constructively dismissed. However, she went on to say:

*"Was the applicant's mental health problems and later the exercising of his rights in terms of the Act the dominant or principle reason that caused the respondent to discriminate against him, such discrimination causing an intolerable working environment such that the applicant was forced to terminate the employment contract?"*

And, apart from concluding that the evidence suggested a deliberate strategy on the part of the respondent to exclude Marsland from work in which he had previously been involved, she said:

*"In my view, the conduct of the respondent towards the applicant as set out above amounted to unfair discrimination against applicant on the grounds of his mental health."*

Stein AJ ruled that mental health had played a considerable role in Marsland 's dismissal and that the dismissal had been shown to be automatically unfair.

The employer appealed this finding, arguing that the conduct of the respondent was likely to destroy or seriously damage the relationship of trust and confidence between the parties. It went further, arguing that the reason relied upon for dismissal did not constitute a prohibited ground. The appellant stated that it offered to restore the employment relationship between it and the respondent, the respondent declined the offer and, therefore, the 24 months compensation awarded was unfair.

The appeal court dismissed the appeal but set aside the decision of the court *a quo* and replaced the order of the previous court with a new order. The court decided that the dismissal of the respondent by the appellant was automatically unfair in terms of s188 (1)(f) of the LRA as amended. The court found that the conduct of the appellant impacted on the human dignity of the respondent and the appellant had no justifiable reasons for differentiating the respondent, in terms of s187(2). The appeal court agreed with the decision of *Standard Bank of South Africa v CCMA* [2008] 4 BLLR 356 (LC), in which the court ruled that the dismissal of a bank official that developed incapacitating backaches was automatically unfair dismissal.

In conclusion, dismissal of employees suffering from depression should be an act of last resort and should be considered only if the employee is unable to function effectively as a result of the illness. Even if this is the case, it would be necessary first to consider alternatives in consultation with the employee, (for example hiring a temporary replacement, or temporarily adjusting the employee's functions), before resorting to dismissal.

***Rangata is CE of Maponya and Lehutjo is a labour consultant.***

Article by BAITSENG RANGATA AND MELLO LEHUTJO