IN THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

Not Reportable

Case no: C678/14

In the matter between:

OCKERT JANSEN **Applicant**

and

LEGAL AID SOUTH AFRICA **Respondent**

Heard: **26 June 2017**

Delivered: **16 May 2018**

Summary: A dismissal of an employee who suffers from a mental condition, of which the employer is aware, for misconduct in circumstances where the acts of misconduct are inextricably intertwined with the employee's conduct constitutes an automatically unfair dismissal and unfair discrimination.

JUDGMENT

MTHOMBENI, AJ:

Introduction

[1] This application concerns the following two claims:

1.1. An automatically unfair dismissal claim in terms of Section 187(1) (f) of the Labour Relations Act[1] ("the LRA"). The applicant claims that the reason for his dismissal is that the respondent unfairly discriminated against the applicant on the ground of a disability and/or an analogous arbitrary ground; and/or

1.2. An unfair discrimination claim under Section 6 of the Employment Equity Act [2]("the EEA"), the applicant claiming that the respondent unfairly discriminated against the applicant on the ground of disability or an analogous ground.

Factual Background

[2] The applicant was employed at the respondent as a paralegal, with effect from 2 March 2007. He held this position throughout his employment at the respondent and was based at the Riversdale satellite office.

[3] On or about 14 November 2013, the respondent issued a notice to attend a disciplinary enquiry, dated 7 November 2013, to the applicant calling him to answer to the following charges of misconduct:

> "**Charge 1**
> Absence from duty without permission in that you failed to report for duty on the following days without the necessary authorisation from management:30 August 2013; 2,9,10,20,30 September 2013; 1,4,7,11,14,15,21,22,23 October 2013; and 5 November 2013 (a total of 17 working days);
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> **Charge 2**
> Transgression of Legal Aid South Africa's rules, regulations, policies and procedures in that you failed to inform your manager of your absence before 07h30 on the following 30 August 2013;2,9,10,20,30 September 2013;1,4,7,11,1521,22 and 23 October 2013;and 4 and 5 October 2013;
> **Charge 3**

[1] 66 of 1995
[2] 55 of 1998

1 Gross insolence in that on 1 October 2013, and in the presence of Mr Tebogo Choane, the Labour Relations Manager, you turned your back in a disrespectful manner and walked away while Mr Pieter Terblanche, your manager and the JCE of George JC, was engaging with you about your absence from work on 30 September 2013 and on 1 October 2013. You further uttered words to the effect that he should fire you in the presence of Mr Tebogo Choane, the Labour Relations Manager.

2 On 2 and 3 October 2013, you were contacted by Mr Mark Nicholls, the SPA, and Mr Walied Sait, the Admin Manager of George JC, enquiring why you failed to report for duty and you told both of them that you were waiting for your dismissal letter from Legal Aid South Africa and unemployment insurance fund forms as you no longer wished to work for Legal Aid South Africa anymore; and

Charge 4

Refusal to obey a lawful and reasonable instruction in that on 10 October 2013 you refused to conduct a prison visit at Mossel Bay Youth Correctional Centre after being specifically instructed to do so by your manager, Mark Nicholls.

[4] The disciplinary enquiry was held on 20 and 21 November 2013. The chairperson found the applicant guilty on all the charges and recommended that that the applicant be summarily dismissed.

[5] On 7 February 2014, the respondent requested the applicant to make representations as to why the recommendation should not be implemented. On 13 February 2014, the applicant submitted written representations to the respondent. On 24 February 2014, the respondent confirmed the applicant's summary dismissal.

The evidence

[6] I had ruled that the respondent had a duty to begin and the applicant had an evidential burden in respect of his claims. The respondent closed its case without leading any evidence. The applicant and Ms Rolene Farre ("Farre")

testified and the respondent did not call any witnesses. The following constitutes the uncontested testimony of the applicant and Farre.

[7] The applicant was an excellent worker, always made an extra effort to help the respondent's clients and received performance awards for most of his employment at the respondent. He was appointed a brand ambassador for the respondent.

[8] On 3 February 2010, Mr AC Nel, the Deputy Minister of Justice and Constitutional Development at the time, appointed the applicant as the vice-chairperson of the Small Claims Court Board.

[9] Around 7 April 2010, the applicant consulted Dr Conradie to attend to an open wound on top of his eye following a fall. During the consultation, the applicant mentioned medical problems that he could not understand. Dr Conradie's diagnosis was that he probably suffered from a major depression, referred him to hospital and prescribed anti-depressants.

[10] Dr Conradie issued a medical certificate, which the applicant submitted to the respondent, stating that the applicant displayed symptoms that relate to a major depression and he had referred him to hospital for counselling and treatment.

[11] Afterwards, the applicant approached Walied Sait ("Sait"), the administration manager at the time, and requested to be put on the respondent's wellness programme. Sait agreed and the applicant went to FAMSA at Mossel Bay where she consulted one Ms Du Preez, a social worker.

[12] On 17 November 2011, the applicant consulted Dr Small whose diagnosis indicated that the applicant had a depression with high anxiety. Dr Small gave the applicant a medical certificate which the applicant submitted to the respondent.

[13] On 29 August 2012, the applicant addressed an email to Sait and informed him about his personal and work problems which resulted in him being treated for depression.

[14] On 3 September 2012, the applicant attended at the Oudtsthoorn Divorce Court as at that time he had separated from his wife. Mr Pieter Terblanche ("Terblanche"), the applicant's manager and Justice Centre Executive at the respondent, appeared on behalf of the applicant's wife without informing the applicant beforehand as required by the respondent's policy.

[15] This incident exacerbated the applicant's condition, for he considered Terblanche's action as constituting a conflict of interest. The applicant viewed Terblanche's conduct as amounting to a betrayal, thus aggravating his mental condition.

[16] Eventually, Sait arranged for the applicant to consult Farre, a clinical psychologist, whom the applicant consulted for four sessions. Farre submitted a report, dated 18 October 2012, to the employer advising that the applicant carried a lot of frustration and displayed symptoms of a burnout; the incident involving Terblanche resulted in a lack of trust and the applicant felt betrayed; and this issue needed resolution as soon as possible to enable the applicant to continue working within a positive environment. The applicant made attempts at meeting with the respondent to discuss the matter, but to no avail.

[17] On 18 October 2012, the applicant addressed an email to Amanda Clark, the National Human Resources Executive, advising her that management at the respondent had triggered his condition resulting in him consulting a psychologist.

[18] On 23 October 2012, the applicant addressed a letter to Ms V Vedalankar, the Chief Executive Officer, and informed her about differential treatment by the management and the resultant depression. However, there was no response.

[19] At this juncture, the applicant's emotional and mental condition had deteriorated to such an extent that he would, as his coping mechanism, disengage from everything and lock himself up in his room for days.

[20] After the applicant's divorce was finalised, a maintenance order required that the respondent deduct an amount from his salary on the 15th day of every month and to be paid over to the Maintenance Court in Oudtsthoorn. However, while the applicant's payslip indicated that the money had been deducted, it never reached his former wife timeously. Consequently, the applicant's children were deprived of necessities such as food and clothing. The applicant had to send money out of his own pocket while they were waiting for the respondent to make a transfer to court.

[21] Considering that the applicant had always taken good care of his children, to see his children suffering affected him badly and worsened his mental condition. As a result, he was put on anti-depressants and his dosage was increased.

[22] Around August 2013, the respondent did not give the applicant a performance bonus and notch increase because he had been issued with a final written warning in the previous year.

[23] This, coupled with the applicant's grievances relating to overtime payment and maintenance order payment delays, aggravated the applicant's mental condition. Consequently, the applicant absented himself from work for seventeen days for it was difficult for him to go to work and properly perform his duties. Upon his return to work, he would inform Mr Mark Nicholls ("Nicholls"), his immediate supervisor that he was could no longer cope with the circumstances he had found himself in on account of his mental condition. In response, Nicholls would just advise him to that the seventeen days absence from work would be considered as unpaid leave.

[24] The applicant's condition deteriorated further, resulting in him staying away from work from 11 October to 18 October 2013. On 16 October 2013, the

applicant consulted Dr Van Wyk. This time the diagnosis indicated that the applicant had "*gemoedsteuring*". The dictionary meaning for this word is manic depression.

[25] On 7 November 2013, Terblanche presented the applicant at his home with a notice to attend a disciplinary enquiry and a "charge sheet". The applicant told Terblanche that he was aware of his condition, went to his bedroom and fetched a document which explained symptoms of repressive depression and handed it over to Terblanche. Terblanche read the document, handed it back to the applicant and asked him to sign the notice.

[26] At this stage, the applicant's mental condition had worsened to such an extent that he had effectively lost control over himself, was acting erratically and out of character. This could be attributed to his behaviour for which he was charged respecting gross insolence and insubordination as stated in charges 3 and 4, respectively, above. At the disciplinary enquiry, the applicant admitted the allegations levelled against him and raised his mental condition as his defence.

[27] Prior to receiving the notice, the applicant had contacted Sibulelo Qhungwana ("Qhungwana"), a resident clinical psychologist at the respondent's national office, explained to her what he had been going through and asked to be put on the respondent's wellness programme. Following Qhungwana's intervention, arrangements were made for the applicant to consult Farre again. This time around, the applicant attended four sessions with Farre.

[28] On 28 November 2013, the applicant addressed an email to Nicholls and copied Sait and Terblanche on it, advising Nicholls that he had been absent from work because he had been attending sessions with Farre.

[29] As per the respondent's policy, on 4 December 2013 Farre forwarded a report concerning the applicant's psychological status, including her recommendations, to Nicholls. The salient aspects of the report are as follows:

> "In November of this year Mr Jansen came to see me again. He was in a worse state than the previous year. He was clearly not coping with his circumstances, specifically at work.
>
> Mr Jansen shows intense symptoms of a reactive depression. He shows signs of burnout. He tries to avoid any negative connotation that enhances his state of mind. He is on related prescribed medication to help relieve the symptoms. He shows diminished interest in almost all activities, he has no tolerance re (sic) frustration, his mood is greatly affected, his emotional control is limited, and he has diminished appetite and diminished sleep. 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. The behaviour he shows reflects his state of mind. He seems to avoid all possible stressors there for (sic) the absence from work. I am concerned for his rational thought processing that seems to be stuck in his depressive state of mind.
>
> I would recommend that Mr Jansen be granted sick leave for a considered amount of time. He needs to divorce himself from work and try to refocus and prioritise his life. Therapy alone is not enough. His resources for impulse control seems (sic) limited therefore he needs timeout. This is of great importance. Please take note."

[30] Ms Ronel Arendse ("Arendse"), the Justice Executive at the Bellville Justice Centre, chaired the disciplinary enquiry. Arendse rejected the applicant's defence on the basis that there was no medical evidence corroborating his version that he had suffered from reactive depression and that at that stage she was involved in a disciplinary enquiry for misconduct and not incapacity.

[31] On 9 December 2013, following an adjournment on 21 November 2013 the applicant submitted Farre's report to Arendse but she refused to consider the report stating that it would be prejudicial to the respondent to re-open the matter.

[32] Prior to the confirmation of his dismissal, the applicant submitted to Patrick Hundemark, the Chief Legal Executive, Farre's report and other medical certificates in addition to his representations. Hundemark concluded that:

> "Having regard to the evidence that was led before your disciplinary hearing in totality, there is no concrete evidence before me to conclude that your alleged ill-health has the effect you presented. Accordingly, this defence is dismissed."

[33] Afterwards, on the strength of Farre's report the applicant applied for sick leave as per the respondent's policy on temporary incapacity, but the respondent refused to grant him such leave notwithstanding that the applicant still had eighteen days from his leave cycle to his credit. During January 2014, the applicant consulted Dr Van Wyk as he was no longer coping at work. Dr Van Wyk diagnosed him with major depression and booked him off work from 15 to 31 January 2014.

[34] At the time of these proceedings, the applicant was still receiving continuous treatment for depression and using anti-depressants and sleeping medication. The dismissal has worsened the applicant's emotional and mental status. He has not been employed since then and on two occasions received, upon certification that he suffers from mental illness, social grants on the basis of his disability. The applicant had, at the time of these proceedings, to reapply for a disability grant which would come to an end.

[35] Moreover, the applicant's personal circumstances have deteriorated in that he had been evicted from his rental accommodation and was at the time of this hearing homeless and living in a friend's office in town. His children have been affected psychologically and academically, for he could no longer attend to their financial needs. In particular, the applicant's son could not continue with his studies because the applicant could not afford accommodation for him, owing to his impecuniosity. The applicant's daughter had to undergo counselling and was not performing well at school as she used to prior.

Evaluation

[36] At the outset, it is apposite to address the application for absolution from the instance, which was launched at the conclusion of the applicant's case, by Mr Du Preez for the respondent. However, Mr Du Preez did not request that a ruling be made at that stage and suggested that the issue could be addressed at the argument stage.

[37] Mr Du Preez, contended that the applicant had failed to make out a *prima facie* case and, therefore, the respondent could not be required to rebut anything.[3] It is my considered view that, as it shall be illustrated below, there is no merit in the application for absolution from the instance.

[38] This issue was dealt by this court in *Janda v First National Bank*[4] where Van Zyl AJ, faced with an absolution from the instance application in a matter concerning an automatically unfair dismissal claim, stated that:

> "Accordingly, and by reason of the fact that the overall onus lies with the respondent, it would be incorrect to accede to the application from the instance, either at this stage of the proceedings, or later. As a rule, absolution from the instance will not be granted where the onus rests on the defendant (the respondent in the instant matter) on one or more of the issues."

[39] I now turn to the merits of the dispute. It is common cause that the applicant did not dispute that he had acted as alleged by the respondent. He, however, maintained that his depression was the actual reason for his dismissal. During the course of his disciplinary enquiry the applicant submitted proof of his mental condition which the respondent declined to consider, without challenging its authenticity.

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[3] *Bandat v De Kock and Another* (JS832/2013 [2014] ZALCJHB 342 ;(2015) 36 ILJ 979 (LC),
[4] [2006] 12 BLLR 1156(LC)

[40] The applicant at all material times suffered from reactive depression, a mental condition, which was triggered by stress in the workplace, particularly the incident concerning Terblanche when he represented the applicant's estranged wife at court.

[41] The applicant's condition could be very destructive if left unchecked and untreated. The applicant was treated for his condition as evidenced by the medical certificates that he had submitted to the respondent. While the respondent purported to question their authenticity in these proceedings, the respondent had accepted them without question at the time.

[42] At the time the applicant committed the acts of misconduct for which he had been dismissed, he was suffering from his condition and was using medication. The respondent, despite denial, was aware of the fact that the applicant undergoing medical treatment for his mental condition as illustrated by the testimony of the applicant and Farre.

[43] In my view, it follows that the respondent had knowledge that the applicant was a person with a disability. For this reason, the respondent was under a duty to reasonably accommodate him. The respondent failed to comply with its duty in this regard. Instead of dismissing the applicant for misconduct, the respondent had a duty to institute an incapacity enquiry. [5] Considering that the respondent had been made aware of the applicant's condition, the respondent in deciding to dismiss the applicant did not have any regard to the circumstances under which the infractions happened and the effect of the applicant's condition upon his conduct.

[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." It follows that the condition suffered by the applicant is not consistent with this definition.

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[5] *Standard Bank of South Africa v CCMA* [2008] 4 BLLR 356 (LC).

[45] This notwithstanding, in my view it instructive to refer to *New Way Motor and Diesel Engineering (Pty) Ltd v Marsland*[6] where this court stated that:

> "It 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 the respondent. The uncontested evidence of the respondent supported by a letter from his psychiatrist does support such a conclusion in that he had suffered from depression. The description of depression is also set out in his statement of case. Depression is a form of mental illness; see Diagnostic and Statistical Manual of Disorders IV. But, even were his condition not to be considered a form of disability as set out in s 187 (1) (f), unquestionably the discrimination suffered by respondent as a result of his 'mental health problem' had, in the words of Stein AJ,'the potential to impair the fundamental dignity of that person as a human being or affect him in a comparably seriousness manner."

[46] In my view, the conduct of the respondent in ignoring the applicant's condition and deciding to dismiss him in the circumstances, when viewed objectively against the applicant's depression, had potential to impair the applicant's fundamental human dignity and, accordingly, falls within the grounds envisaged by Section 187 (1) (f) of the LRA.

[47] In *SACWU v Afrox Ltd*[7], in dealing with an automatically unfair dismissal in terms of Section 187(1)(a), this court enunciated the basic principles applicable for determining whether or not a dismissal is automatically unfair. This court stated:

> "The enquiry into the reason for the dismissal is an objective one, where the employer's motive for the dismissal will be merely one of a number of factors to be considered. This issue (the reason for the dismissal) is essentially one of causation and I can see no reason why the usual twofold approach to causation, applied in other fields of law, should not be utilised here (compare *S v Mokgethi & Others* 1990 (1) SA (A) at 39D-41A; *Minister of Police v Skosana* 1977 (1) SA (A) at 34).

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[6] (2009) 30 ILJ 2875 (LAC) at para 24.
[7] (1999) 20 ILJ 1718 (LAC) para 32.

> The first step is to determine *factual* causation; was participation or support, or intended participation or support, of the protected strike a sine qua non (or prerequisite) for the dismissal? Put another way, would the dismissal have occurred if there was no participation or support of the strike? If the answer is yes, then the dismissal was not automatically unfair. If the answer is no, that does not render the dismissal automatically unfair; the next issue is one of *legal* causation, namely whether such participation or conduct was the 'main' or 'dominant', or 'proximate' or 'most likely' cause of the dismissal. There are no hard and fast rules to determine the question of legal causation (compare *S v Mokgethi* at 40).
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> I would specifically venture to suggest that the most practical way of approaching the issue would be to determine what the most probable inference is that may be drawn from the established facts as a cause of the dismissal, in much the same way as the most probable or plausible inference is drawn from circumstantial evidence in civil cases. It is important to remember that at this stage the fairness of the dismissal is not yet an issue…Only if this test of legal causation also shows that the most probable cause for the dismissal was only participation or support of the protected strike, can it be said that the dismissal was automatically unfair in terms of s 187 (1) (a). If that probable inference cannot be drawn at this stage, the enquiry proceeds a step further".

[48] I am of the view that the test in *Afrox* would apply in determining whether or not a dismissal is automatically unfair as envisaged by Section 187(1) (f) of the LRA.

[49] In *Kroukam v SA Airlink (Pty) Ltd*[8] this court, while alluding to **Afrox** test, stated:

> "The question in the present dispute concerned the application of this test. The starting point of any enquiry is to be found in Chapter VIII of the Act (66 of 1995). Thus, if an employee simply alleges an unfair dismissal, the employer must show that it was fair for a reason permitted by section 188. If the employee alleges that she was dismissed for a prohibited reason, for

[8] [2005] 12 BLLR 1172 (LAC) at para 27.

> example pregnancy, then it would seem that the employee must, in addition to making the allegation, at least prove that the employer was aware that the employee was pregnant and that the dismissal was possibly based on this condition. Some guidance as to the nature of the evidence required is to be found in *Maund v Penwith* District Council [1984] ICR 143,where Lord Justice Griffiths of the Court of Appeal held at 149 that:
>
> "[I]t is not for the employee to prove the reason for his dismissal, but merely to produce evidence sufficient to raise the issue or, to put it another way, that raises some doubt about the reason for dismissal. Once this evidential burden is discharged, the onus remains upon the employer to prove the reason for dismissal".

[50] From this perspective, in my view, the respondent would not have dismissed the applicant had the latter not suffered from his condition. His conduct, as alleged by the employer and for which he was dismissed was inextricably linked to his mental condition. Differently put, the applicant acted in the manner he did because of his mental condition. The most probable inference to be drawn from the uncontested evidence led by the applicant and Farre is that the probable cause for the applicant's dismissal was his mental condition.

[51] I am convinced that the applicant has led adequate evidence to indicate that he had suffered from depression and the respondent was, throughout, aware of his mental condition. I am, therefore, satisfied that the applicant has made out a *prima facie* case and, thus, discharged the evidential burden to show that the reason for his dismissal was on account of his mental condition. On the contrary, the respondent, in electing not to produce any evidence, has failed to discharge the onus to prove the reason for dismissal was permissible, as contemplated in Section 191(2) of the LRA. Hence, an application for absolution from the instance would not succeed as it held in *Janda* (supra)

[52] This court in *Kroukam*[9] (supra) went further and stated:

[9] See para 28.

> "In my view, section 187 imposes an evidential burden upon the employee to produce evidence which sufficient to raise a credible possibility that an automatically unfair dismissal has taken place. It then behoves the employer to prove to the contrary, that is to produce evidence to show that the reason for the dismissal did not fall within the circumstance envisaged in section 187 for constituting an automatically unfair dismissal".

[53] I am, therefore, satisfied that the applicant has raised a credible possibility that the dominant reason for the dismissal was his mental condition. If my conclusion in this respect is incorrect, in my view at least the applicant's condition played a significant role or influenced the decision to dismiss the applicant to a significant extent.

[54] Mr Du Preez contended that the applicant has failed to show, *prima facie*, that he, at the time of committing the acts of misconduct for which he was dismissed, suffered from a disability. In my opinion, there is uncontested evidence that the applicant had suffered from a mental condition when he consulted with Farre for the first time. He stayed away from work for a period of seventeen days because of his mental condition and was subsequently charged with absenteeism. Farre diagnosed the applicant with reactive depression when he consulted with her for the second time. For these reasons, it is highly probable that the applicant had a recurring mental illness from which he was suffering at the time he committed the acts of misconduct for which he was dismissed.

[55] The applicant, a layperson who was unemployed at the time, drafted his own statement of claim. Mr Du Preez contended that the applicant did not plead in his statement of claim that that he was discriminated against or dismissed because of his alleged mental condition. While the applicant's drafting is inelegant and not a model of clarity, this notwithstanding, in my view the applicant has, throughout the statement of claim, mentioned his disability.

[56] In this regard, I share this court's sentiment in *Maleka v National Sorghum Breweries*[10] where it was stated that:

> "While I am aware that this Court must generally treat pleadings as they are treated in other superior courts, I am of the view that in the present circumstances it would not be in accordance with the objectives of the Act to place undue technical hurdles before the applicant. I accordingly deal with the matter on the basis of the factual contentions contained in all the pleadings before me, but applying the usual principles to determine which averments I should accept".

[57] I agree with Mr Leslie for the applicant that the respondent knew what case it was expected to meet in that the parties had complied with the Judge President's Guidelines in respect of discrimination in the pre-trial minute, which was signed by both parties, and at which Mr Du Preez was present. Paragraph 6 of the pre-trial minute states:

> "**LEGAL ISSUES TO BE DECIDED**
>
> 6. The parties agree that, in addition to the factual disputes referred to above, the following are the legal issues to be decided by the court in this matter:
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> 6.1 Whether the applicant suffers from a disability within the meaning of section 187(10(f) of the LRA and/or section 6, read with section 1, of the EEA;
>
> 6.2 Alternatively, whether the applicant's alleged mental health condition is an analogous ground to one or more of the grounds listed in section 187(1)(f) of the LRA and/or section 6 of the EEA; …
>
> 6.4 Whether the respondent unfairly discriminated against the applicant on the ground of disability or an analogous ground within the meaning of section 6 of the EEA;
>
> 6.5 Whether the reason for the applicant's dismissal was that the respondent unfairly discriminated against the applicant on the ground of a disability and/or analogous arbitrary ground and, as

[10] [1999] 5 BLLR 495 (LC) at para [9]

> such, whether the applicant's dismissal was automatically unfair within the meaning of section 187(1)(f) of the LRA…".

[58] In this respect, in *NUMSA v Driveline Technologies (Pty) Ltd & Another*[11] this court stated that where a litigant is a party to a pre-trial minute reflecting agreement on certain issues, our courts will generally hold the parties to that agreement or to those issues.

[59] I now turn to the unfair discrimination claim. Considering that the applicant's dismissal was automatically unfair in terms of Section 187(1) (f) of the LRA, the test for determining such a dismissal should be applicable to prove unfair discrimination within the meaning of Section 6 of the EEA. It follows that the respondent also unfairly discriminated against the applicant on the basis of its policy or practice which is defined in the EEA as including, *inter alia*, dismissal.

Relief

[60] The applicant seeks reinstatement with retrospective effect. Considering that the respondent has not produced any evidence to show why reinstatement should not be ordered, this court is bound to order reinstatement as a primary remedy in terms of Section 193 (1) (a) of the LRA.

[61] This court, in exercising its discretion with regard to the retrospectivity of a reinstatement order should ensure that the respondent is not unfairly financially burdened. There is no evidence to show that there are factors that would persuade this court not to order reinstatement with full retrospectivity.

[62] Concerning the unfair discrimination claim, in terms of Section 50(2) of the EEA this court has the following powers:

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[11] [2000]1 BLLR 20 (LAC) at para 83.

> "If the Labour Court decides that an employee has been unfairly discriminated against, the Court may make any appropriate order that is just and equitable in the circumstances, including-
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> (a) payment of compensation by the employer to that employee;
>
> (b) payment of damages by the employer to that employee".

[63] In *South African Airways (Pty) Ltd v Jansen Van Vuuren & Another*[12] this court held:

> "The purpose of an award of damages for patrimonial loss by means of a monetary award, is to place the claimant in the financial position he or she would have been in had he, or she, not been unfairly discriminated against. This is the common purpose of an award of damages for patrimonial loss in terms of South African law in both the fields of delict and contract. In the case of compensation for non-patrimonial loss, the purpose is not to place the person in a position he or she would have otherwise been in, but for the unfair discrimination, since that is impossible, but to assuage by means of monetary compensation, as far as money can do so, the insult, humiliation and indignity or hurt that was suffered by the claimant as a result of the unfair discrimination".

[64] Considering that this court has concluded that reinstatement with full retrospective effect would be the most appropriate remedy for the automatically unfair dismissal, it would not be just and equitable to order damages for patrimonial loss. Such reinstatement would place the applicant in a position he would have been in, but for discrimination. Put differently, it would put an onerous financial burden on the respondent to award damages twice.

[65] There is uncontested evidence that the respondent had ignored reports on the applicant's mental condition, failed to conduct a capacity enquiry and to accommodate him. Moreover, the applicant had been evicted from his rental homes following his dismissal and his children suffered because of his impecuniosity. In my view, it would be just and equitable to order compensation as a *solatium* for the distress the applicant endured on account

[12] (2014) 29 ILJ 2774 (LAC) at para 80.

of the unfair discrimination by the respondent. The compensation award must, therefore, serve as a deterrent.

[66] There is no evidence of how a compensation award would impact the financial position of the respondent. This could be ascribed to the respondent's decision to not call any witnesses at all.

[67] With regard to costs, the applicant was successful in establishing the existence of an automatically unfair dismissal and unfair discrimination. For this reason, it is apposite that a costs order be made against the respondent on a party and party scale, including the costs of counsel.

Order

[68] In the result, I make the following order:

1. The application for absolution from the instance is dismissed;
2. It is declared that the dismissal of the applicant was automatically unfair in terms of Section 187(1) (f) of the LRA;
3. It is declared that the respondent unfairly discriminated against the applicant in terms of Section 6 of the EEA;
4. The respondent is ordered to reinstate the applicant with full retrospective effect;
5. The respondent is ordered to pay the applicant compensation equivalent to six month's salary, calculated at the applicant's rate of remuneration on the date of dismissal;
6. The respondent is ordered to pay the applicant's costs, including that of counsel.

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Mthombeni AJ

Acting Judge of the Labour Court of South Africa

Appearances:

For Applicant : Mr GA Leslie
Instructed : Cliffe Dekker Hofmeyr.

For respondent : Mr T Du Preez,
Instructed by : Everinghmas Attorneys.