Case Study

Who is crazy now? Re judgment of Ockert Jansen v Legal Aid South Africa C678/14

Unlike physical illnesses, psychological disorders are (somewhat) intangible and their physical manifestations are often limited to the manner in which the sufferer acts. This notion carries with it the inherent risk for employers and employees alike that a psychological ailment suffered by an employee may not be immediately recognized by both parties. Once this fact does come to the attention of an employer, however, it is prudent that it appreciates the (potential severity of the) condition and responds appropriately. The case of *Ockert Jansen v Legal Aid South Africa* delivered on 16 May 2018 was no exception and illustrates the prospective harm which may result for an employer, in this particular case the respondent, who fails to do so.

The applicant ("**Mr Jansen**") occupied the office of Paralegal from the time he commenced his employment with the respondent in 2007 until 2014 when he was summarily dismissed. Mr Jansen had, from the year 2010, received several medical certificates certifying that he had been diagnosed with, amongst other things, depression. Indeed, Mr Jansen routinely submitted these certificates to the respondent and he informed the respondent on numerous occasions that his depression related to problems he was experiencing at both a personal and professional level.

During this period, Mr Jansen was simultaneously going through a divorce. His depression was no doubt exacerbated when, much to his surprise, his line manager represented his wife in those divorce proceedings. Mr Jansen only became aware of this fact when his manager appeared on his wife's behalf in the Oudtshoorn Divorce Court.

Mr Jansen repeatedly informed his employer of his poor emotional and mental condition which was worsening as a result of the deleterious environment which he was in. Furthermore, there were various ancillary disputes which had arisen during this period between Mr Jansen and the respondent which aggravated his mental condition. Compounding his situation, Mr Jansen's children were impacted financially and deprived of necessities including food and clothing; this materially affected their academic performance.

In 2013, the respondent alleged that there were various acts of misconduct perpetrated by Mr Jansen and he was served personally by his line manager with a notice to attend a disciplinary enquiry together with a charge sheet. Notably, this was an enquiry into misconduct and not incapacity.

At the disciplinary proceedings, upon Mr Jansen raising the defence that he suffered from a mental condition, the respondent declined to consider, and the presiding chairperson failed to acknowledge,

the copious reports and medical certificates submitted by medical practitioners in support of this contention. Mr Jansen was found guilty of the charges levelled against him and ultimately dismissed.

Mr Jansen's depression and personal circumstances continued to deteriorate commensurately with his impecuniosity, which naturally further impacted his children severely. Mr Jansen then proceeded to institute a claim against his erstwhile employer for, amongst other things, an automatically unfair dismissal in the Labour Court, Cape Town.

The Labour Court held that the true reason for Mr Jansen's dismissal by the respondent was, in fact, his mental condition and not his alleged misconduct and that the two were inextricably linked. The court found that the respondent was required to take steps to reasonably accommodate Mr Jansen who clearly brought to its attention his mental ailment. It was held that what the respondent was actually required to do was to institute an incapacity enquiry in place of conducting a disciplinary enquiry for misconduct. Mr Jansen was successful in these legal proceedings before the Labour Court.

The net effect of all this was that Mr Jansen's plight was remedied with an order of reinstatement with retrospective effect, which resulted in him receiving five years of back pay. Furthermore, he also received six months remuneration as a form of compensation for the distress suffered by him at the hands of the respondent.

This award serves as a reminder for employers that they should view submissions by its employees that they suffer from a mental illness as proverbial red flags – this is especially so when their submissions are supported by medical certificates. At this juncture, legal advice should be obtained in order to respond appropriately to such submissions and hedge against any prospective legal risk which may arise, because it may be that the employer is required to conduct an incapacity enquiry as opposed to a misconduct enquiry. Making the distinction between which of these two enquiries should be conducted can be difficult in practice because the lines dividing them are not always clear, but patently a failure to make this distinction can be harmful to the employer's pocket and its reputation too.

Authors:

Sandro Milo
Partner,
Head of Employment Law

T: +27 87 358 9884

sandromilo@
eversheds-sutherland.co.za

Kyle-Terry Lamb
Candidate Attorney,
Employment law

T: +27 87 359 1554

Kyle-terrylamb@
eversheds-sutherland.co.za

eversheds-sutherland.com

© Eversheds Sutherland 2018. All rights reserved.
Eversheds Sutherland (International) LLP and Eversheds Sutherland (US) LLP are part of a global legal practice, operating through various separate and distinct legal entities, under Eversheds Sutherland. For a full description of the structure and a list of offices, please visit www.eversheds-sutherland.com.