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ASPECTS OF SOUTH AFRICAN LABOUR LAW WITH SPECIFIC REFERENCE TO MENTAL HEALTH[1]

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Introduction

The South African Constitution[2] protects, amongst others, rights to human dignity[3], equality[4] and fair labour practices[5]. The right to human dignity is a central value in the system created by the South African Constitution and forms the foundation of many of the other protected basic human rights. The right to human dignity is not, however, directly mentioned in South African labour law legislation.[6] The right to equality is of specific importance to the present enquiry, since it includes the prohibition that no person may unfairly discriminate directly or indirectly against any person who suffers from a disability[7]. As in the case of the right to fair labour practices[8], the right to equality finds application in all three of the primary pieces of national labour legislation mentioned hereunder.

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[1] This chapter is aimed at highlighting the most crucial aspects of South African labour law pertaining to the mental health of employees. It is not meant to be an exhaustive enquiry into this topic and it does not deal in any detail with most of the more general South African labour law aspects. In this regard, the reader is encouraged to consult the extensive body of legal writing available on the subject of South African labour law.

[2] Constitution of the Republic of South Africa, Act 108 of 1996, hereafter referred to as "**the South African Constitution**"

[3] S10

[4] S9

[5] S23

[6] The South African Constitution is founded on the values of human dignity, the achievement of equality and the advancement of human rights and freedoms. Recognising a right to dignity is an acknowledgement of the intrinsic worth of human beings. Human beings are entitled to be treated as worthy of respect and concern. The right to human dignity is the foundation of many of the other basic human rights protected by the South African Constitution. See in general on this basic human right: *The core meaning of human dignity,* R Steinmann, The Potchefstroom Electronic Law Journal, 2016 vol.19 n.1 and the authorities referred to therein

[7] S9(4) as read with S9(3)

[8] The Labour Relations Act, Act 66 of 1995, (hereafter referred to as the "**LRA**") is the pivotal piece of legislation giving effect to this constitutional right. It provides, amongst others, that every employee has the right not to be unfairly dismissed and not to be subjected to unfair labour practices. It sets out a comprehensive mechanism through which an alleged unfair dismissal or unfair labour practice may be remedied.

The aforesaid basic human rights form the basis of the statutory labour protection afforded to employees in South Africa and all South African Labour law should be interpreted with these core values in mind. The main sources of South African labour law are: The Labour Relations Act, the Basic Conditions of Employment Act[9] and the Employment Equity Act[10]. The BCEA entitles incapacitated employees to paid sick leave amongst other benefits.[11] The EEA protects employees and job applicants from unfair discrimination on the grounds of illness or disability and the LRA prohibits employers from dismissing employees because they are disabled, unless the employer can prove that the employee's disability has rendered the employee unable to fulfil his or her work function and the employer has first followed the statutory incapacity procedure and has been unable to find an alternative to dismissal. So-called "codes of good practice" are also published from time to time under the authority of the LRA. When interpreting the LRA, account must be taken of these codes.[12]

In what follows, the aforesaid protections will be discussed with the view to form a practical guide line, from a legal perspective, on how to deal with cases of mental disability in the work place.

Mental Disability defined

A mental illness is defined in the Mental Health Care Act[13] to mean *a positive diagnosis of a mental health related illness in terms of accepted diagnostic criteria made by a mental health care practitioner authorised to make such diagnosis.[14]* A "health care practitioner" is in turn defined as *a psychiatrist or registered medical practitioner or nurse, occupational therapist, psychologist or social worker who has been trained to provide prescribed medical health care, treatment or rehabilitation services.*[15] The BCEA determines that a medical certificate

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[9] Act 75 of 1997, hereafter referred to as the "**BCEA**"

[10] Act 55 of 1998, hereafter referred to as the "**EEA**"

[11] S22 of the BCEA: during every cycle of three years (as from the date of commencement of employment), an employee is entitled to paid sick leave equal to the number of normal working days during every period of 36 days in this cycle. This roughly translates to one day's paid leave for every 26 days worked during each three-year cycle. S23 of the BCEA: Employees do not, in order to be paid, have to bring a medical certificate if they are off ill for less than for three days unless such absence is repeated three times within an eight-week period.

[12] LRA S203(3)

[13] Act 17 of 2002, S1 (xxi), hereafter referred to as the "**MHCA**"

[14] S1(xxi)

[15] S1(xvii)

(commonly referred to in employment parlance as a "sick note") must be signed by a medical practitioner or other person who is certified to diagnose and treat patients and who is registered with a professional council established by an Act of Parliament.[16]

Presently, a generally accepted diagnostic criteria in South Africa for the diagnosis of mental disorders is the Diagnostic and Statistical Manual of Mental Disorders, 5th Edition, or DSM-5 as it is commonly referred to.[17] The DSM-5 defines a mental disorder as *a syndrome characterised by clinically significant disturbance in an individual's cognition, emotion regulation, or behaviour that reflects a dysfunction in the psychological, biological, or developmental processes underlying mental functioning*.[18]

Can a mental disorder be classified as a disability for purposes of the LRA, EEA and BCEA? S1 of the EEA defines "people with disabilities" as *people who have long term or recurring physical or mental impairment which substantially limits their prospects of entry into, or advancement in, employment*. This definition has some obvious limitations, but South African labour legislation is otherwise silent on what constitutes a "disability". It is submitted that, for purposes of the LRA, the common meaning of the word should be ascribed to it.[19] Commonly, the word "disability" means *a physical or mental condition that limits a person's movements, senses or activities.*[20] Thus, it requires little argument that a mental disorder can be referred to as a "disability". It follows that a mental disorder should qualify as a "disability" for purposes of the LRA and this has indeed been recognised in South African case law.[21]

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[16] S23(2)

[17] Diagnostic and Statistical Manual of Mental Disorders, 5th Edition, American Psychiatric Publishing, 2013 (hereafter referred to as the "**DSM-5**")

[18] p.20. Metal disorders are usually associated with significant distress or disability in social, occupational, or other important activities. An expectable or culturally approved response to a common stressor or loss, such as the death of a loved one, is not a mental disorder. Socially deviant behaviour (e.g. political, religious or sexual) and conflicts that are primarily between the individual and society are not mental disorders unless the deviance or conflict results from a dysfunction in the individual, as described.

[19] See for instance: Union Government v Mack 1917 AD 731 at 739; Sigcau v Sigcau 1941 CPD 344; Beedle & Co v Bowley 12 SC 401 at 402

[20] https://en.oxforddictionaries.com/definition/disability

[21] Also see: Jansen v Legal Aid South Africa (JA121/2014) [2018] ZALCCT 17; (2018) 39 ILJ 2024 (LC) (16 May 2018) at par.43 - 44 where the Court held that a "mental impairment" (in this case, depression) qualifies as a "disability" for purposes of the EEA. Also, in New Way Motor and Diesel Engineering (Pty) Ltd v Marsland, (2009) 30 ILJ 2875 (LAC) at par. 24 is was held that depression can be classified as a "disability" for purposes of the LRA

Disability, unfair discrimination and mental disorders

In terms of the MHCA, a mental health care user[22] may not be unfairly discriminated against on the grounds of his or her mental health status.[23] To do so constitutes an offence punishable with a fine, imprisonment or both.[24]

The EEA[25] determines that no person may unfairly discriminate, directly or indirectly, against an employee in any employment policy or practice, on various grounds including disability.[26]

In addition to the aforesaid, the LRA[27] dictates that the dismissal of an employee is automatically unfair if the reason for such dismissal is that the employer unfairly discriminated against an employee, directly or indirectly, on any arbitrary ground, including, but not limited to disability.[28] A dismissal would also be deemed to be unfair if the employer fails to prove that the reason for such dismissal is a fair reason related to the employee's conduct or capacity or is based on the employer's operational requirements and that the dismissal was conducted in accordance with a fair procedure.[29] The onus of proving a fair reason for a dismissal accordingly falls on the employer. Since mental disorders qualifies as disabilities, a dismissal based purely on a mental disorder would constitute unfair discrimination and thus be an automatically unfair dismissal.

The reasons advanced for a person's dismissal can be numerous, suffering from a mental disorder being but one of these reasons. For this reason, it has been held that, for purposes

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[22] Means, amongst others, a person receiving care, treatment and rehabilitation services – S1(xix) of the MHCA

[23] S10(1)

[24] S70

[25] S6(1). However, note that in terms of S6(2) it is not unfair discrimination to promote affirmative action consistent with the Act or to prefer or exclude any person on the basis of an inherent job requirement

[26] The other grounds are: race, gender, pregnancy, marital status, family responsibility, ethnic or social origin, colour, sexual orientation, age, religion, HIV status, conscience, belief, political opinion, culture, language, and birth

[27] S187(1)(f)

[28] Other grounds for unfair discrimination that would constitute an automatic unfair dismissal includes race, gender, sex, ethnic or social origin, colour, sexual orientation, age, religion, conscience, belief, political opinion, culture, language, marital status or family responsibility. However, note that S187(2) states that, in spite of the provisions of S187(1)(f), a dismissal may be fair if the reason for dismissal is based on an inherent requirement of the particular job and that a dismissal based on age is fair if the employee has reached the normal or agreed retirement age for persons employed in that capacity.

[29] S188

of S187 of the LRA, the most probable or plausible inference to be drawn from the circumstantial evidence presented in a case would indicate the root or dominant cause for a dismissal.[30] This root- or dominant cause is normally taken to be the reason for a dismissal. When alleging dismissal on the basis of a prohibited ground (such as disability), the onus for proving the reason for such dismissal does not fall squarely on the employee: the employee only needs to produce evidence that is sufficient to raise a credible possibility that an automatic unfair dismissal has taken place. Once the employee has established such evidence, the onus of proof falls on the employer to prove that the reason for the dismissal did not fall within a circumstance envisaged in S187 for constituting an automatic unfair dismissal.[31]

It should be noted that an employer cannot be said to have dismissed an employee on the ground of disability if the employer does not know about such disability. It is thus vitally important that employees suffering from some form of mental illness inform their employers of their condition as soon as it becomes apparent that the employee's work performance suffers as a result thereof.

Dismissal for ill health (including mental disorders)

Since a dismissal based on unfair discrimination resulting from a disability would constitute an automatic unfair dismissal, an employer cannot dismiss an employee purely on the grounds of a disability.[32] This does not, however, mean that the employer cannot terminate such employee's employment if certain requirements are present. The LRA recognises three grounds on which a termination of employment might be legitimate. These are: the conduct of the employee; the capacity of the employee, and the operational requirements of the employer's business.[33]

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[30] SACWU v Afrox Ltd (1999) 20 ILJ 1718 (LAC) par. 32; Jansen v Legal Aid Board *supra* at par. 47 -48

[31] Kroukam v SA Airlink (Pty) Ltd [2005] 12 BLLR 1172 (LAC) at par. 27 -28; Jansen v Legal Aid Board *supra* at par. 49 -53; LRA S192

[32] *Supra*; LRA S187(f);

[33] LRA Schedule 8 – Code of Good Practice: Dismissal, S2(2)

Practically, an employee suffering from a disability should only be dismissed on grounds that he or she are unable to perform the requisite work (the so- called incapacity of the employee) or because of the employer's operational requirements.[34]

In establishing whether a dismissal because of incapacity based on ill health was fair under the prevailing circumstances, the following should be considered: Firstly, whether the employee was, objectively measured, capable of performing the work required of him or her (poor work performance is not a directly relevant criteria). If so, the dismissal was clearly unfair and thus subject to sanction. If not, the enquiry should continue to consider the extent to which the employee was in fact able to perform his or her duties, the extent to which the employee's work circumstances and/or employment duties might be adapted to accommodate his or her disability and, lastly, the availability of suitable alternative work.[35] Thus, a dismissal based on the incapacity of an employee can only be justified if the employee is unable to fulfil his or her designated work function and the employee's work circumstances and or employment duties cannot be suitably adapted and the employer is unable to provide any suitable alternative employment.

The case of the Standard Bank of South Africa Ltd v the CCMA & others[36] is one of the leading judgments in South Africa on the topic of dismissals on the basis of ill health[37]. In this judgment, the Labour Court expounded a four-pronged enquiry that an employer must observe before dismissal for ill health may be considered. These four focus points may be summarised as follows[38]:

- As a first step, the employer must enquire into whether or not an employee with a disability is able to perform his work. If so, that is the end of the enquiry and the employee cannot be dismissed on the ground of alleged incapacity;

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[34] The termination of employment because of an employer's operational requirements has nothing to do with an employee's disability and therefore does not fall within the ambit of this enquiry. Termination of employment because of Operational requirements are regulated by S189 and S189A of the LRA.

[35] LRA Schedule 8 – Code of Good Practice: Dismissal S11

[36] Standard Bank of South Africa v CCMA & Others [2008] 4 BLLR 356 (LC)

[37] Another leading judgment on the same subject is IMATU obo Strydom v Witzenburg Municipality & Others (2012) JOL 28586 (LAC)

[38] At par.70 and further

- However, if the employee concerned is in fact unable to perform his or her duties and the employee's incapacity is of a permanent or long-term nature[39], the enquiry proceeds as follows:
  - Firstly, the employer must ascertain the extent to which the employee is unable to perform his or her employment duties. This is a factual enquiry and will more than likely require medical or other expert advice[40];
  - Secondly, the enquiry proceeds to determine the extent to which it the employer can adapt the employee's work circumstances to accommodate his or her disability;
  - Thirdly, and only if no adaptation of the employee's position is not possible, the employer must enquire if any suitable and alternative positions are available.

If the outcome of the complete enquiry as set out above leaves the situation unresolved, and only in this instance, can the employer consider dismissing the incapacitated employee.

Section 10 of Schedule 8 to the LRA (Code of Good Practice: Dismissal) deals with dismissals based on ill health. For further clarity, this section is quoted:

10. ***Incapacity: Ill health or injury***

(1) Incapacity on the grounds of ill health or injury may be temporary or permanent. If an employee is temporarily unable to work in these circumstances, the employer should investigate the extent of the incapacity or the injury. If the employee is likely to be absent for a time that is unreasonably long in the circumstances, the employer should investigate all the possible alternatives short of dismissal. When alternatives are considered, relevant factors might include the nature of the job, the period of absence, the seriousness of the illness or injury and the possibility of securing a temporary replacement for

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[39] Std Bank v CCMA *supra* par.68

[40] An Employer cannot assess on its own whether an employee is incapacitated because of ill health. This determination must be made by a medical practitioner, psychiatrist or psychologist, usually in conjunction with an occupational therapist. It is the employer who is responsible for ensuring that the employee undergoes an assessment and it is also the employer's responsibility to bear the costs of the assessment. Having said this, an employee cannot be forced to undergo a medical assessment or examination. Without a medical report prepared by a medical practitioner and/or occupational therapist, an employer cannot undertake investigations to determine whether it should accommodate an employee who is suffering from ill health and how it should do so.

the ill or injured employee. In cases of permanent incapacity, the employer should ascertain the possibility of securing alternative employment, or adapting the duties or work circumstances of the employee to accommodate the employee's disability.

(2) In the process of the investigation referred to in subsection (1) the employee should be allowed the opportunity to state a case in response and to be assisted by a trade union representative or fellow employee.

(3) The degree of incapacity is relevant to the fairness of any dismissal. The cause of the incapacity may also be relevant. In the case of certain kinds of incapacity, for example alcoholism or drug abuse, counselling and rehabilitation may be appropriate steps for an employer to consider.

(4) Particular consideration should be given to employees who are injured at work or who are incapacitated by work-related illness. The courts have indicated that the duty on the employer to accommodate the incapacity of the employee is more onerous in these circumstances.

In Standard Bank of South Africa Ltd v the CCMA & others[41], the facts can be summarised as follows: Whilst in the employ of the bank, an employee sustained injury to her back in a motor vehicle accident. That necessitated the bank creating an alternative position for her as she could no longer perform her previous duties. However, some 2 years later, the bank dismissed the employee for incapacity which resulted from high absenteeism and low productivity. This was, however, only done after a long period during which the bank made continued efforts to accommodate the employee. These efforts included:

- The bank requested advice from a medical practitioner on how to help the employee;
- The bank looked for and found a series of alternative positions for the employee;
- Even though the alternative posts were more junior than her original job, the bank did not reduce the employee's pay; and

[41] Supra – footnote 36

- When the employee was in pain, she would be sent home for the day. The bank went so far as to, on occasion, gave the employee four months' paid leave in order to allow her to get well.

The employee did not accept her dismissal and referred the dispute to the CCMA, where her dismissal was found to be unfair, and 6 months' salary was awarded. The bank then took the matter on review to the Labour Court. The Labour Court held, at the outset, that the employee was to be regarded as a person with a disability. The Labour Court then proceed to examine the steps which the bank took to accommodate the employee and found, in the main, that:

- The bank failed to act on the medical practitioner's recommendation to get advice from an occupational therapist on how to accommodate the employee;
- The bank failed to give the employee a telephone headset and a comfortable chair in order to assist her to work with less pain;
- The bank failed to allow the employee to do the job of entering computer data out of fear that her medication might interfere with her concentration;
- The bank failed to consider the employee's request to work half-day;
- The bank failed to allow the employee to state a case for herself on her own behalf, before dismissing her; and
- The bank failed to consult technical experts before taking the dismissal decision.

The court concluded from the above that the employer had not really wanted to keep the employee but did acknowledge that the employer had genuine problems in keeping the employee on in its employ as the employee had been absent for 74 days in one year and 116 days in the following year. In addition, the employee admitted that she struggled to cope with the alternative jobs given to her and she often needed to go home early due to pain. In spite of this acknowledgement, the Labour Court held that the bank would have been able to accommodate the employee because the cost of doing so would have been affordable for the bank and that the employee's inability to cope with the new work was partly due to the employer's reluctance to give her headphones and a comfortable chair. The Labour Court accordingly found that the bank unfairly discriminated against the employee.

Whilst the employee in the Standard Bank matter above did not suffer from a mental illness, the judgment nevertheless serves as an example of how careful an employer must evaluate a situation prior to taking the decision to dismiss a disabled employee on grounds of

incapacity. The judgment confirms that an employer, dealing with the incapacity of a disabled employee, should[42]:

- Do everything it reasonably can to change the physical work station of an injured employee if such injury interferes with the employee's ability to work;
- Endeavour to change the employee's tasks;
- Consult with the employee on these matters before dismissing him/her;
- Obtain and carry out the recommendations of medical experts, unless it can prove that this is truly not viable; and
- Before deciding that nothing more can be done to save the employee's job, get advice from a reputable labour law expert.

Another example of an unfair dismissal of a disabled employee (this time the impairment was clinical depression), is the case of Jansen v the Legal Aid Board[43]. This judgment can be summarised as follows[44]: The employee was employed as a paralegal by his employer for a period of approximately 7 years when he was summarily dismissed. For approximately four year prior to his dismissal, the employee was diagnosed as suffering from depression. During this time, the employee handed several medical certificates to his employer certifying this fact. The employee also informed his employer that his depression stemmed from both personal and professional difficulties.

During the same period, the employee was also going through a divorce and his condition was exacerbated when, unbeknown to him at the time, he found out that his line manager represented his wife in the divorce proceedings. The situation was further aggravated by the employee’s children being financially prejudiced and deprived of necessities including food and clothing, a fact which the employee found to be a bitter pill to swallow.

Against the aforesaid back ground, the employer alleged that there were various acts of misconduct perpetrated by the employee 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.

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[42] See: https://www.labourguide.co.za/general/433-law-expects-employers-to-go-the-extra-mile

[43] Supra – footnote 21

[44] Also see: https://www.golegal.co.za/psychological-disorders-ockert/

At the disciplinary proceedings, the employee raised the fact that he suffered from a mental condition but this was ignored by the employer and the chairperson presiding over the disciplinary proceedings. The employee was found guilty of the charges levelled against him and ultimately dismissed. Hereafter, the employee proceeded to institute a claim for unfair discrimination and automatic unfair dismissal in the Labour Court.

The Labour Court firstly held that the true reason for the employee's dismissal was, in fact, his mental condition and not his alleged misconduct and that the two were inextricably linked. The Labour Court then proceeded to find that the employer should have followed an incapacity procedure and, since this was not done, the employee's claim succeeded: The Labour Court ordered reinstatement with retrospective effect which resulted in the employee receiving five years of back pay. Furthermore, he also received six months' remuneration as compensation for unfair discrimination.

As with the Standard Bank judgment, the Jansen judgment serves as a warning to take the plight of employees suffering from a mental illness, seriously. Employers should seek formal legal advice in order to respond appropriately to submissions from such disabled employees and hedge against any prospective legal risk which may arise. Making the distinction between a disciplinary enquiry and an incapacity enquiry can be problematic in practice because the lines dividing them are not always clear. However, a failure to make this distinction can have negative consequences to the employer's patrimony and reputation.

Remedies for unfair dismissal because of ill health

Disputes pertaining to unfair discrimination under the EEA may be referred to the CCMA within six months after the act or omission allegedly constituting unfair discrimination, took place.[45] In such case, the employer bears the onus of proof that the alleged act of unfair discrimination was in fact a fair act.[46] The CCMA, at first, only has the power to attempt to resolve the dispute through a conciliation process.[47] However, if the dispute remains unresolved after such

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[45] EEA – S10(2) Note that in terms of EEA – S10(3), the CCMA may at any time permit a party that shows good cause to refer a dispute after the 6 months' time period has lapsed.

[46] EEA – S11

[47] EEA – S10(5)

conciliation process took place, either party can refer the dispute to the Labour Court for adjudication. Alternatively, the parties can consent to arbitration of the dispute.[48]

If the Labour Court decides that an employee has been unfairly discriminated against, it may make an appropriate order that is just and equitable in the circumstances.[49] Such an order can include, amongst others, an order that the employer pays compensation and/or damages[50] to the employee as well as an order directing the employer to take steps to prevent the same unfair discrimination occurring in the future in respect of other employees.[51] The EEA also determines[52] that a CCMA commissioner may, in any arbitration proceedings before the CCMA pertaining to unfair discrimination, make any appropriate arbitration award that gives effect to the provisions of the EEA. It is submitted that this provision should be interpreted to mean that a CCMA commissioner can make the same award as the Labour Court in so far as damages, compensation and other preventative measures are concerned. This is an important distinction from compensation awarded under the LRA as such latter compensation is limited to 12 months' remuneration and in the case of an automatic unfair dismissal, 24 months' remuneration.[53]

As opposed to referring a dispute pertaining to the dismissal of an employee suffering from a disability to the CCMA in terms of the EEA, such a dispute can also be referred to the CCMA[54] as a dispute pertaining to an automatic unfair dismissal in accordance with S187(1)(f) of the LRA. Whilst condonation for a late referral might be granted, a dispute pertaining to an unfair dismissal must be referred to the CCMA within 30 days[55] of the date of a dismissal or, if it is a later date, within 30 days of the employer making a final decision to dismiss or uphold a

[48] EEA – S10(6). Such arbitration proceedings will be conducted before the CCMA: See LRA – S141

[49] EEA - S50

[50] "Compensation" in this context refer to payment of remuneration not received by an employee, whilst "damages" refer to compensation (or in legal parlance, *contumelia*,) for emotional suffering as a result of the unfair discrimination inflicted on the employee. Such damages were one of the awards afforded to the employee in the Jansen v Legal Aid judgment (see footnote 21 above as well as the discussion of this judgment under the heading "Dismissal for ill health"

[51] EEA – S50(2)

[52] S48

[53] LRA - S194

[54] Or to a bargaining council if the dispute falls within the registered scope of such council: LRA – S191(a)(ii)

[55] Not 6 months as in the case of a dispute referred under the auspices of the EEA

dismissal.[56] However, by choosing this route the employee possibly limits[57] the claim to compensation payable in terms of the LRA, i.e. 24 months' remuneration without the possibility of any additional damages for emotional trauma suffered as a result of such dismissal.[58]

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[56] LRA – S191(1)(b)(ii)

[57] It is submitted that since an automatic unfair dismissal in terms of S187(1)(f) of the LRA also entails a finding of unfair discrimination, the provisions of the EEA will find automatic application as well. There is, however, at present no known case law on this point

[58] See: S194 of the LRA