



DEALING WITH 'INVISIBLE' ILLNESSES

Managing an employee who suffers from a 'visible' illness or injury (e.g. a damaged or lost limb or back injury) is difficult enough. Managing a situation involving an 'invisible' illness, e.g. depression, can be even more challenging, as the employer in *Marsland v New Way Motor & Diesel* discovered.

Marsland, a marketing manager, suffered from depression and anxiety following his wife's decision during their Christmas vacation to divorce him after 24 years of marriage. He was absent from work for several weeks as a result and was placed on anti-depressant medication.

After his return to work his employer, not knowing how to deal with the problem, unilaterally started taking responsibilities away from Marsland. He was also made to feel that he was 'different' and should be treated with circumspection. This frustrated the employee endlessly and caused him to feel isolated. Over a period of about five months the relationship deteriorated to the extent that a disciplinary hearing was held that resulted in Marsland receiving a final written warning for certain aspects of his behaviour. Importantly in the context of this case, the employer found nothing wrong with his performance.

Shortly afterwards Marsland had another serious depressive episode and was booked off for two weeks. Upon his return he was confronted with a plan to outsource his functions. After a serious altercation with his boss about this, during which the boss threatened to assault Marsland, the latter stormed off the premises, never to return.

In subsequent proceedings before the Labour Court, it was found that Marsland had been constructively dismissed because of his depression. The dismissal, said the court, was also automatically unfair because it related to a prohibited ground in terms of s 187 of the LRA.

The case holds a number of lessons for employers. First, an employee may not be dismissed purely because he or she suffers from depression. In Marsland's case the only reason for his dismissal was his depression – there were no further incidents of misconduct, nor was there a problem with his performance. Therefore, the only reason that remained in this case, was his depression.

Second, employers are often caught between a rock and a hard place in these situations: on the one hand, the law requires one to reasonably accommodate the employee, yet one cannot ignore the fact that an employee's performance might be compromised as a result of their illness. In such cases employers are advised to obtain expert advice, e.g. from the employee's or another psychologist, on how to manage the problem in a way that recognises the employee's problem, yet ensures an acceptable level of performance. Part of the problem in Marsland's case was that the employer had failed to seek such advice and as a result did not know how to handle the situation. Unilaterally taking away the employee's responsibilities and isolating him is possibly the worst thing Marsland's employer could have done in the circumstances.

Finally, dismissal of someone 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 was the case, one would first need to consider alternatives to dismissal in consultation with the employee, e.g. hiring a temporary replacement, or temporarily adjusting the employee's functions, before resorting to dismissal.

Barney Jordaan
Maserumule Consulting
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