IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, CAPE TOWN

Reportable

Case no: CA3/2019

In the matter between:

LEGAL AID SOUTH AFRICA **Appellant**

and

OCKERT JANSEN **Respondent**

Heard: **12 May 2020**

Delivered: **21 July 2020**

Coram: Waglay JP, Phatshoane ADJP and Murphy AJA

JUDGMENT

MURPHY AJA

[1] The appellant, Legal Aid South Africa, appeals against the judgment of the Labour Court ("Mthombeni AJ") which held that the respondent's dismissal was automatically unfair in terms of section 187(1)(f) of the Labour Relations Act[1] ("the LRA") and that he had been unfairly discriminated against in terms of section 6 of the Employment Equity Act[2] ("the EEA") on the ground of his suffering depression. The Labour Court ordered the respondent's

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

reinstatement with full retrospective effect and the payment of compensation equivalent to six months' salary.

[2] Section 187(1)(*f*) of the LRA provides that a dismissal will be automatically unfair if the reason for the dismissal is that the employer unfairly discriminated against an employee, directly or indirectly, *inter alia* on grounds of disability and/or an analogous arbitrary ground. Section 6 of the EEA includes a similar prohibition. The respondent maintains that the dominant reason for his dismissal was the fact that he was suffering depression. The Labour Court, for reasons we will come to later, agreed. The primary contention raised by the appellant in this appeal is that the respondent was in fact dismissed for misconduct and failed to show that he was dismissed as a result of any medical condition or that there was any causal link between his depression and the misconduct which led to his dismissal.

The factual background

[3] The respondent commenced employment as a paralegal with the appellant at the George Justice Centre in March 2007, reporting to Mr. Mark Nicholls. Generally, he performed well and received favourable performance evaluations for most of his employment.

[4] His mental health problems started in or around 2010, when he was diagnosed with depression for the first time, and prescribed anti-depressants accordingly. In October 2010, the respondent participated in the appellant's Employee Wellness Programme ("EWP") for the first time. In November 2011, the respondent was booked off work by a doctor for about a week with the diagnosis of depression with high anxiety for which he was prescribed anti-depressant medication. He submitted medical certificates to the appellant who was thus aware that he suffered from depression on an ongoing basis.

[5] During 2012, the respondent was divorced. In September 2012, domestic violence proceedings were launched against him by his ex-wife who was represented by Mr P Terblanche, the appellant's Justice Centre Executive for the George area and the respondent's colleague and superior. The respondent believed that Terblanche had a conflict of interest and had acted

improperly and therefore lodged a grievance against him. The domestic violence application was settled on mutually acceptable terms and subsequently withdrawn after the respondent attended four counselling sessions.

[6] Correspondence during 2012 reveals that the respondent's struggle with depression was an ongoing problem of which the appellant remained aware. Thus, in an email dated 29 August 2012 to Nicholls and others, the respondent stated "you are aware … that I am been (sic) treated for depression". Likewise, the appellant's Labour Relations Manager in an email dated 11 September 2012 wished him a speedy recovery "from the depression". Moreover, the respondent voluntarily submitted to the EWP for the second time in September 2012, on account of workplace-related stress.

[7] The respondent consulted a clinical psychologist, Ms Farre, and attended four counselling sessions with her during September and October 2012. Farre produced a report dated 18 October 2012 in which she identified the primary cause of the respondent's condition as being Terblanche's representation of his wife in the domestic violence case. She recommended that the issue be resolved through some form of conflict resolution process. Ms Farre did not conclude that the respondent was suffering from chronic, major or ongoing depression. She did, however, express the view that he "carries a lot of frustration and shows symptoms of burnout".

[8] The respondent presented this report to the appellant but there was no follow through on the Terblanche matter. On 23 October 2012, the respondent addressed a comprehensive letter to the appellant's CEO setting out his grievance against Terblanche and the effect it had on his mental health. The appellant took no action.

[9] The appellant maintains that although the respondent was on anti-depressant medication, he continued to discharge his duties adequately. On a few occasions prior to September 2013, the respondent was absent from work without leave and without furnishing any explanation for such absence. He was given a final warning in respect of this category of transgression.

[10] In 2013, the respondent continued to struggle with depression and anxiety. However, his performance was satisfactory, so much so that he was appointed as one of the appellant's brand ambassadors in July 2013. He testified though that at this stage he had begun to withdraw socially, his dose of anti-depressants was increased and he found it difficult to attend work, with the result that he began not reporting for work. He informed Nicholls that he was suffering from stress and could not cope. His absence in excess of his entitlement to leave pay was regarded as unpaid leave.

[11] It is common cause that the respondent failed to report for duty at work on 17 working days in the period 30 August 2013 to 5 November 2013. The appellant's policy is that employees unable to report for duty due to illness must notify the appellant at the start of the workday on which they are unable to work, and must thereafter present a medical certificate substantiating the medical condition which allegedly rendered them unable to work. It was undisputed that the respondent did not contact the appellant on any of the days he was absent indicating that he would not be coming to work. Nicholls unsuccessfully tried to contact the respondent by phone on several of those days.

[12] On 1 October 2013, Terblanche attended the Commission for Conciliation, Mediation and Arbitration (CCMA) at Riversdale, where he coincidentally encountered the respondent and enquired why he had been absent. The respondent reacted to this enquiry by turning his back on Terblanche, walking away and making a dismissive gesture with his hands. The appellant regarded this conduct as an act of insolence and defiance.

[13] The respondent was then contacted by Nicholls and Mr Sait, the Administration Manager at George Justice Centre, on 2 and 3 October 2013 enquiring about why he had failed to report for duty. The respondent told Nicholls and Sait that he was awaiting a dismissal letter as he no longer wished to work for the appellant.

[14] The respondent presented one medical certificate accounting for his absence from work due to depression on some of the days of his absence during this

period. The medical certificate reflects that the respondent consulted the doctor on 16 October 2013, although the certificate booked him off work from 11 to 18 October 2013.

[15] Disciplinary proceedings were instituted against the respondent on 7 November 2013. He was charged with four counts: i) absence from work for 17 days in the period 30 August to 5 November 2013; ii) transgression of the appellant's policies by failing to inform his manager of his absence from work; iii) insolence relating to the occasion at the CCMA in Riversdale; and iv) refusal to obey a lawful and reasonable instruction from Nicholls to attend to a prisoner at Mossel Bay Prison on 10 October 2013.

[16] In October 2013, the respondent submitted to the EWP for the third time. He then again consulted Ms Farre and attended four counselling sessions with her between 21 November and 12 December 2013. At the conclusion of these sessions, Farre addressed a report to Nicholls informing the appellant that the respondent's condition had worsened and he was not coping with his circumstances at work. She stated that the respondent showed "intense symptoms of a reactive depression" and signs of burnout. Ms Farre described his symptoms as follows:

> '[D]iminished interest in almost all activities, he has no tolerance re frustration, his mood is greatly affected, his emotional control is limited, 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.'

[17] By the time she drafted the report, Farre was aware, in general terms, of the disciplinary charges. She recorded that the respondent's behaviour reflected his state of mind and noted that he was avoiding "all possible stressors" and this accounted for his absence from work. Farre made the following recommendations in light of her diagnosis:

> 'I would strongly 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 prioritize his life. Therapy alone is not enough. His resources for

impulse control seems limited therefore he needs timeout. This is a case of great importance. Please take note.'

[18] In her evidence before the Labour Court, Farre elaborated on her report and confirmed that the respondent showed intense symptoms of temporary reactive depression which had deteriorated in 2013 and that he was clearly not coping with his work circumstances. She also said that he exhibited signs of burnout - "a state of fatigue or frustration brought about by devotion to a cause, way of life or relationship that failed the expected reward". In her view, the respondent was no longer capable of handling his daily commitments and was so emotionally drained that he could not function properly in his day to day tasks.

[19] As regards the charges of misconduct relating to alleged insolence towards his superiors, Farre claimed the respondent was in a state that he no longer cared and was avoiding every possible demand. His lack of rational thought processing resulted in self-destructive behaviour. He was unable to see how to rectify certain behavioural patterns. She believed that if he had been given some time off work to resolve his issues (as she had recommended in her report), it was possible that the whole misconduct scenario that played out could have been avoided.

[20] Various managerial employees of the appellant were aware of the respondent's condition. For instance, when Nicholls served the notice to attend the disciplinary hearing on the respondent personally at his home, the respondent immediately told Nicholls that he was unwell and could not cope with work. He then handed Nicholls a detailed print-out he had received from a medical professional setting out the symptoms for reactive depression. Nicholls read this document in Jansen's presence, and then returned it to him.

[21] The disciplinary hearing took place on 20 to 21 November and 9 December 2013. The material facts were largely common cause. The respondent did not dispute the substance of the allegations against him. He instead maintained that he suffered from depression and had acted out of character. He gave extensive evidence regarding the history of his condition, the effects it had on his behaviour and the medication he had been prescribed. He read into the

record a document setting out the causes, symptoms and effects of reactive depression.

[22] Following the completion of the evidence on 21 November 2013, the hearing stood down until 9 December 2013. By that date, the respondent had been furnished with Farre's second report. As mentioned, Farre sent her report directly to Nicholls on 4 December 2013, and it was escalated to HR officials by 7 December 2013. The chairperson of the disciplinary enquiry refused to admit the report into evidence because the respondent had not called Farre as a witness, and thus the admission of a hearsay report at such a late stage of the proceedings would be "prejudicial" to the appellant. The chairperson rejected the respondent's submissions regarding his psychological condition on the basis that there was no expert medical evidence to confirm his claims. She also noted that she was not busy with an incapacity hearing.

[23] Having disallowed the medical evidence tendered by the respondent, the chairperson concluded that he was guilty of all four counts of misconduct. In its final decision dated 24 February 2014, the appellant stated:

> '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.'

[24] The respondent's internal appeal was also rejected. He was dismissed with effect from 25 February 2014.

The Labour Court proceedings

[25] The respondent thereafter referred a dispute to CCMA alleging that the employer had discriminated against him "based on my illness". On 21 May 2014, the CCMA issued a jurisdictional ruling in the following terms:

> 'At the start of the hearing the respondent raised a point *in limine* that should the applicant be alleging discrimination in terms of section 10 of the Employment Equity Act, as was stated in his referral made to the CCMA, the CCMA would lack jurisdiction to arbitrate the dispute.

> It was explained to the applicant that should this be his submission the CCMA would lack jurisdiction to arbitrate the matter and it would need to be referred to the Labour Court.
> The applicant stated he understood and wished to refer the matter to the Labour Court.
> In light of the above the CCMA lacks the jurisdiction to arbitrate the matter. Should the applicant wish to proceed with the matter he needs to refer the dispute to the Labour Court.'

[26] After exchanging pleadings, the legal representatives of the parties concluded and agreed to a pre-trial minute on 15 December 2015. The respondent's statement of claim limited his cause of action to discrimination. However, in the pre-trial minute, the parties agreed on a number of legal issues to be decided by the Labour Court. The most relevant are set out as follows:

> '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 an analogous arbitrary ground and, as such, whether the applicant's dismissal was automatically unfair within the meaning of section187(1)(f) of the LRA;
>
> 6.6 In the alternative, and only in the event that the court should find that the applicant's dismissal was not automatically unfair, whether the applicant's dismissal was substantively and/or procedurally unfair within the meaning of section 188 of the LRA. In this regard, whether the court should exercise its discretion under section 158(2)(a) of the LRA to determine this part of the dispute between the parties.'

[27] The alternative prayer in paragraph 6.6 of the pre-trial minute in effect requested the Labour Court to exercise its discretion in terms of section 158(2) of the LRA which in relevant part reads:

> 'If at any stage after a dispute has been referred to the Labour Court, it becomes apparent that the dispute ought to have been referred to arbitration, the Court may –

> (a) stay the proceedings and refer the dispute to arbitration; or
>
> (b) if it is expedient to so, continue with the proceedings, in which case the Court may only make any order that a commissioner or arbitrator would have been entitled to make.'

[28] Paragraph 6.7 of the pre-trial minute sets out the issues for determination in regard to whether the dismissal was substantively and/or procedurally unfair in the event that section 158(2) applied. In particular, the parties asked the Labour Court to determine *inter alia* whether the appellant gave sufficient regard to the applicant's mental condition as a mitigating factor in deciding that dismissal was an appropriate sanction and whether the dismissal was substantively or procedurally unfair because the appellant failed to comply with items 10 and 11 of the Code of Good Practice: Dismissals[3] governing dismissal for ill health.

[29] At the commencement of the trial, the Labour Court made certain procedural rulings, which had an impact on the evidence presented. Firstly, it held that the respondent had not pleaded a claim based on an unfair dismissal, and that the appellant was accordingly only required to answer to allegations of automatically unfair dismissal and discrimination. After an exchange with Mr Leslie (counsel for the respondent) on the issue, the Labour Court ruled that it would not entertain a claim of unfair dismissal. It stated:

> 'My view, after perusing the pleadings, is that that claim has not been pleaded, and I think Mr Du Preez (counsel for the appellant) is correct that it cannot be pleaded in the pre-trial minute. In the statement of case, the applicant concedes that the charges on which he has been found guilty are very serious, but his defence is that all this happened due to his disability. There is nowhere where I find that his dismissal was substantively and procedurally unfair. That has not been pleaded.'

[30] This ruling was to the effect that the respondent was precluded from seeking relief in terms of section 158(2) of the LRA, in the event that an automatically unfair dismissal was not proved, because he had not sought that relief in his

[3] Schedule 8 of the LRA.

statement of claim. There is no cross-appeal against that ruling before us, nor did the respondent apply to the Labour Court to amend his statement of claim to bring it into line with paragraphs 6.6 and 6.7 of the pre-trial minute.

[31] The Labour Court also ruled that appellant was obliged to commence with the adducing of evidence. This, the appellant submits, was a misdirection. Ordinarily, and save where specific procedural enactments provide to the contrary, the party bearing the onus in respect of a specific issue must first call evidence on that issue, and only thereafter is the opposing party required to present its case on the issue. Faced with the Labour Court's ruling, the appellant had to commence with the adducing of evidence, even though it did not bear the onus. It opted simply to close its case because it thought it unfair to expect it to present evidence on an issue where the onus rested on respondent without even knowing what respondent's evidence on that issue was. There is probably merit in the appellant's complaint about this ruling. However, for reasons that will become apparent, nothing turns on the question.

[32] The only witnesses to testify before the Labour Court were the respondent and Ms. Farre. At the close of their evidence, the appellant applied for absolution from the instance on the grounds that the respondent had failed to make out a *prima facie* case of automatically unfair dismissal or discrimination. The Labour Court rejected the application and held that the reason for the dismissal was that the appellant had discriminated against the respondent on the grounds of his mental condition. It accepted that the evidence confirmed that the respondent suffered from depression and that dismissal for that reason would amount to discrimination on grounds of disability or an analogous ground.[4] The learned judge then reasoned as follows:

> '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…The most probable inference to be drawn from

[4] *New Way Motor & Diesel Engineering (Pty) Ltd v Marsland* (2009) 30 ILJ 2875 (LAC) at para 24.

> the uncontested evidence led by the applicant and Farre is that the probable cause for the applicant's dismissal was his mental condition.
>
> 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 has failed to discharge the onus to prove the reason for dismissal was permissible….I am therefore satisfied that the applicant has raised a credible possibility that the dominant reason for the dismissal was his mental condition.'

[34] The Labour Court held that in light of the appellant's failure to lead evidence, and in terms of the decision of this court in *Kroukam v SA Airlink (Pty) Ltd*[5] (discussed below), the respondent's evidence about his depression was sufficient to give rise to a credible possibility that an automatically unfair dismissal had taken place. It relied on this conclusion to hold that the dismissal was automatically unfair under the LRA and at the same time amounted to unfair discrimination under the EEA, and it granted relief accordingly.

Evaluation

[35] An applicant seeking to establish that a dismissal is automatically unfair on any of the grounds listed in section 187(1) of the LRA must meet the requirements of causation as articulated in *SA Chemical Workers Union & others v Afrox Limited*[6] as follows:

> '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 immediately render the dismissal automatically unfair; the next issue

[5] [2005] 12 BLLR 1172 (LAC).
[6] (1999) 20 ILJ 1718 (LAC) para 32.

> 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. … 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*).'

[36] The evidentiary burdens regarding the issues arising in an alleged automatically unfair dismissal were defined in *Kroukam v SA Airlink (Pty) Ltd*[7] as follows:

> 'In my view, section 187 imposes an evidential burden upon the employee to produce evidence which is 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 s 187 for constituting an automatically unfair dismissal.'

[37] In accordance with this scheme, it is incumbent on an employee alleging that the reason for his dismissal was discrimination on prohibited grounds to produce sufficient evidence raising a credible possibility that the dismissal amounted to differential treatment on the alleged ground. In the present case: is there a credible possibility that the respondent was subject to differential treatment on the prohibited ground of depression? If that credible possibility is established then the employer, in order to prevail, needs to produce sufficient evidence rebutting that credible possibility or offering fair justification for the differential treatment.

[38] The respondent does not deny the misconduct with which he was charged. It is common cause that he committed the alleged transgressions. He admitted his absence from work for the 17 day period; transgression of the applicable workplace regulations in failing to inform his manager of his absence from work; acting insolently on the occasion at the CCMA in Riversdale; and refusing to obey a lawful and reasonable instruction regarding the Mossel Bay

[7] [2005] 12 BLLR 1172 (LAC) at para 28.

Prison visit on 10 October 2013. The respondent's admissions are cogent evidence that the reason for his dismissal was misconduct.

[39] The respondent maintains that all this misconduct, committed over a period of time, was caused by his depression. He essentially asserts that his depression occluded his ability to conduct himself in accordance with an appreciation of the wrongfulness of his misconduct and that he had no self-control. Had he not been depressed, he argues, he would not have misconducted himself. Accepting that as true, the question remains whether the dominant or proximate reason for his dismissal was his misconduct or his depression. The respondent wishes us to equate the two and claims they are causally inextricably interlinked.

[40] The stresses and pressures of modern day life being what they are, depression is common in the workplace. Employers from time to time will need to manage the impact of depression on an individual employee's performance. The approach to be followed will depend on the circumstances.

[41] In the first instance, depression must be looked at as a form of ill health. As such, an incapacitating depression may be a legitimate reason for terminating the employment relationship, provided it is done fairly in accordance with a process akin to that envisaged in Items 10 and 11 of the Code of Good Practice: Dismissal.[8] If an employee is temporarily unable to work for a sustained period due to depression, the employer must investigate and consider alternatives short of dismissal before resorting to dismissal. If the depression is likely to impair performance permanently, the employer must attempt first to reasonably accommodate the employee's disability. Dismissal of a depressed employee for incapacity without due regard and application of these principles will be substantively and/or procedurally unfair.

[42] Depression may also play a role in an employee's misconduct. It is not beyond possibility that depression might, in certain circumstance negate an employee's capacity for wrongdoing. An employee may not be liable for misconduct on account of severe depression impacting on his state of mind

[8] Schedule 8 of the LRA.

(cognitive ability) and his will (conative ability) to the extent that he is unable to appreciate the wrongfulness of his conduct and/or is unable to conduct himself in accordance with an appreciation of wrongfulness. Should the evidence support such a conclusion, dismissal for misconduct would be inappropriate and substantively unfair, and the employer would need to approach the difficulty from an incapacity or operational requirements perspective. Alternatively, where the evidence shows that the cognitive and conative capacities of an employee have not been negated by depression, and he is able to appreciate the wrongfulness of his conduct and act accordingly, his culpability or blameworthiness may be diminished by reason of the depression. In which case, the employee's depression must be taken into account in determining an appropriate sanction. A failure to properly take account of depression before dismissal for misconduct could possibly result in substantive unfairness.

[43] Conative ability is a question of fact and an employee denying conative ability, as the respondent in effect does, bears an evidentiary burden to prove the factual basis of the defence. To hold otherwise would unduly undermine the managerial prerogative of discipline where misconduct is committed by employees suffering all manner of mental difficulties such as depression, anxiety, alcoholism, grief and the like. As explained, the fact that an employee was depressed, anxious, grieving or drunk at the time of the misconduct (but not entirely incapacitated thereby) is most appropriately viewed as a potential mitigating factor diminishing culpability that may render dismissal for misconduct inappropriate or may require an incapacity investigation before dismissal. That much is trite.

[44] However, for an employee to succeed in an automatically unfair dismissal claim based on depression, the question is different. Here the enquiry is not confined to whether the employee was depressed and if his depression impacted on his cognitive and conative capacity or diminished his blameworthiness. Rather, it is directed at a narrower determination of whether the reason for his dismissal was his depression and if he was subjected to differential treatment on that basis. Here too, the employee bears the

evidentiary burden to establish a credible possibility (approaching a probability) that the reason for dismissal was differential treatment on account of his being depressed and not because he misconducted himself.

[45] The evidence in this case, convincingly shows that the respondent was depressed. He was taking anti-depression medication, his personal circumstances and working life were fraught; and Ms Farre's reports and evidence confirm as much. However, the respondent failed to adduce cogent evidence, whether medical or otherwise, showing that his acts of misconduct were caused by his depression or that he was dismissed for being depressed. Farre, during her testimony, could not say whether the depression caused the specific acts of misconduct leading to the respondent's dismissal. She had not consulted the respondent for approximately one year prior to him committing the misconduct and thus could not testify as to his mental state or health at the time of each incident of misconduct. She conceded that the notice to attend the disciplinary hearing could have triggered or caused the reactive depression which she observed in her second round of consultations with him. She also testified that, in her opinion, the respondent appreciated the difference between right and wrong and that he was capable of acting in accordance with such appreciation.

[46] Accepting thus that the respondent was depressed and had been suffering from depression since 2011, he nonetheless remained reasonably functional and able to carry out his duties throughout most of that period. He was not wholly incapacitated. Moreover, the appellant's policy was merely to require employees compelled to take sick leave to advise the appellant of the fact that they would not be reporting for duty. All the respondent was required to do was to make a phone call or send an email. The evidence does not show that the respondent was debilitated to the extent that he was unable to do these things. Furthermore, on 1 October 2013, he was sufficiently well to attend the Riversdale CCMA and had an opportunity to explain his illness to Terblanche. Instead, he was antagonistic.

[47] In the circumstances, the appellant had a legitimate basis for imposing discipline, the respondent's depression notwithstanding. That being the case,

the proximate reason for disciplining the respondent was his misconduct and not the fact that he was depressed. He was relatively capable and knowingly conducted himself in contravention of the rules of the workplace. Discipline was justifiably called for.

[48] It may well be that but for his depression factually (*conditio sine qua non*) the respondent might not have committed some of the misconduct; but, still, he has not presented a credible possibility that the dominant or proximate cause of the dismissal was his depression. The mere fact that his depression was a contributing factual cause is not sufficient ground upon which to find that there was an adequate causal link between the respondent's depression and his dismissal so as to conclude that depression was the reason for it. The criteria of legal causation, it must be said, are based upon normative value judgments. The overriding consideration in the determination of legal causation is what is fair and just in the given circumstances. One must ask what was the most immediate, proximate, decisive or substantial cause of the dismissal. What most immediately brought about the dismissal? The proximate reason for the respondent's dismissal was his four instances of misconduct. It was not his depression, which at best was a contributing or subsidiary causative factor.

[49] Thus, the respondent did not produce credible evidence, and accordingly has failed to prove, either that the treatment accorded to him by appellant in any way differed from the treatment accorded to other employees, or, more importantly, that the reason for any such alleged differential treatment was his condition of depression. The respondent has not established a credible possibility that his dismissal was automatically unfair. Nor has he shown on a balance of probabilities discrimination on a prohibited ground under the EEA. The more probable reason for his dismissal was the misconduct to which he admitted in the disciplinary enquiry and recorded as common cause in the pre-trial minute.

[50] As already discussed, but worthy of repeating, that is not to say that the depression of an employee is of insignificant relevance. Depression, sadly, is a prevalent illness in the current environment. Employers have a duty to deal

with it sympathetically and should investigate it fully and consider reasonable accommodation and alternatives short of dismissal.[9] In addition, where depression may account in part for an employee's misconduct, depending on the circumstances and the nature of the misconduct, dismissal may not be appropriate. However, for the reasons explained, in this instance, there was no proper claim of substantive unfairness before the Labour Court which is the subject of an appeal or cross-appeal before us. Our jurisdiction in this appeal is constrained by the pleadings.

[51] For the reasons discussed, the Labour Court accordingly erred in finding unfair discrimination and that the dismissal was automatically unfair.

[52] This is not a case in which fairness justifies an award of costs.

[53] In the premises, the appeal is upheld. The orders of the Labour Court are set aside and substituted with an order dismissing the application.

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JR Murphy

Acting Judge of Appeal

I agree

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B Waglay

Judge President

I agree

[9] Items 10 and 11 of Schedule 8 of the LRA.

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M Phatshoane

Acting Deputy Judge President

APPEARANCES:

FOR THE APPELLANT:	Adv A Oosthuizen SC and Adv T Du Preez
	Instructed by: CK Attorneys
FOR THE RESPONDENTS:	Adv GA Leslie SC
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