

# The Stigmatising Effect of Medical Testing on Mental Illness

By Kellie Hennessy

In the case of *EWN v PHARMACO DISTRIBUTION (PTY) LTD (LC) (2016) 37 ILJ 449 (LC)*, the Employer relied heavily on a clause in the employment contract whereby the employee agreed that she would submit herself to undergo a specialist medical examination, including psychological evaluations. In this matter, the relationships between the parties had significantly soured over grievances relating to non-payment of commission. Opportunely, the employer caught wind of the fact that the employee was suffering from a bipolar disorder and despite consistent ratings of excellent performance, the employer instructed the employee to present herself to a psychiatrist for a medical exam. The employee refused and the employer invoked the employment contract which contained the relevant clause. The employee maintained her refusal to submit to the examination. As a consequence, the employee was suspended and charged with *'particularly serious and/or repeated wilful refusal to carry out a lawful instructions or perform duties'*. Despite the employer receiving legal letters from attorneys refuting the *'lawfulness'* of such an instruction, the employer buoyantly relied on the clause in the employment contract and ultimately dismissed the employee.

The employee took the matter to the Labour Court on the grounds that the instruction was unlawful and an act of unfair discrimination based on disability, amounting to an act of harassment as well as an automatically unfair dismissal. The Labour Court, per Lagrange J, held that medical testing is only permitted in limited circumstances as set out in Section 7 of the Employment Equity Act 55 of 1998. The judge went on to state that *'no exception to the prohibition against medical testing is made on the basis that an employee consented to medical testing.'* Accordingly, consent is not a listed exception recognised by the courts.

When considering the exceptions in section 7, the onus rests on the employer to prove that medical testing is justifiable in terms of medical facts and employment conditions or is an inherent requirement of the job. The court held, *'in the absence of being able to establish [the clause] was justifiable under one of the exceptions to the prohibition [in term of section 7], the provision is unlawful and unenforceable'*.

The court went on to find that the *'dismissal in the circumstances was based on [the employee's] refusal as a person with a bipolar condition to undergo a medical examination, which she would not have been required to undergo, but for her condition. The stigmatising effect of being singled out on the basis of an illness that [the employee] was managing, notwithstanding the absence of any objective basis for doubting her ability to perform, is obvious. The act of requiring her to submit to the examination in the circumstances was ... an act of unfair discrimination in terms of section 6 of the Employment Equity Act.'*

It is the author's obiter comments that the employer in this matter was the architect of its own demise. In utilising this particular contractual clause effectually dismiss an unwanted employee had the stigmatising effect of discriminating against the employee on the basis of her bipolar disorder as well as committing an automatically unfair dismissal. Employers are cautioned to consider the binding effect of clauses in employment contracts which contain a *consent* to undergo medical testing. In terms of section 7 of the Employment Equity Act, employers may not force workers or job applicants to undergo medical testing unless the law permits or order it; or alternatively, it is acceptable because of medical facts; employment conditions; social policy; the fair distribution of benefits; or inherent job requirements. The onus will rest on the employer to prove that the instruction to undergo medical testing is lawful. Moreover, employers are cautioned of the bitter consequences resulting from the reliance on an unenforceable contractual clause with the stigmatising effect of discrimination against mental illness.

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