IN THE LABOUR COURT OF SOUTH AFRICA JOHANNESBURG

Reportable

Case no: JA104/2015

In the matter between:

PHARMACO DISTRIBUTION (PTY) LTD **Appellant**

and

LIZE ELIZABETH WEIDEMAN **Respondent**

Heard: **23 February 2017**

Delivered: **04 July 2017**

Summary: unfair discrimination on account of disability in terms of section 187(1)(f) of the LRA – employer subjecting employee to psychiatric assessment subsequent to employee lodging grievances for the late and incorrect payment of her commissions – employee's refusal to submit to psychiatric testing led to her dismissal - employer relying on a clause in the employee's contract to justify the assessment. Held that

The known fact was that employee suffers from bipolar and that it did not affect her work performance – Section 7(1) of the EEA prohibits medical testing of an employee unless the legislation permits or requires the testing or it is justifiable in light of medical facts, employment conditions, social policy, the fair distribution of employee benefits or the inherent requirements of the job - that Consent is not a justification as contemplated in s7(1) of the EEA - common cause facts reveals that none of the sales persons was subjected to any pre-employment medical assessments or questionnaires relating to their

ability to cope with stress on the job. Clause 17.3 of the contract of employment is patently offensive and invasive of the privacy rights of the employee and is plainly inconsistent with s7(1) (b) of the EEA. evidence reveals that employer had discriminated against the employee because of her bipolar disorder. Crucially, on the employer's primary concern was the employee's bipolar disorder and the perceived dangers associated with it -no matter the employee's exceptional performance reviews, and no matter the legitimacy of her grievance, the mere fact that she suffered from bipolar disorder was a matter of such grave concern to the employer, that she had to be subjected to a psychiatric assessment - there was, as a result, a direct causal connection between the employee's bipolar disorder and her dismissal.

Cross-appeal and Compensation – Labour Court failed to take into account that the employer manipulates the employee's medical condition in order to secure her dismissal – employee suffers humiliation as a result of the employer's conduct – held when considering the appropriate award to make under s194(3) of the LRA, the court must take into account that such dismissals are frowned upon and should deter employers from automatically unfairly dismissing their employers –Labourt Court's award of compensation set aside –

Damages for *injuria* - the employee claims damages for non-patrimonial damages for impairment of her dignity as a result of being unfairly discriminated against held there is in principle no difference between her claim for compensation under s194(3) of the LRA and her damages claim under s50(2)(b) of the EEA for non-patrimonial loss. To award both non-patrimonial damages and compensation to the employee for the same wrongful conduct of the appellant would not be just and equitable as it would amount to penalising the employer twice.

Appeal dismissed with costs - cross-appeal partially upheld – Labour Court's judgment set aside as far as compensation is concerned.

Coram: Davis, Jappie JJA and Kathree-Setiloane AJA

JUDGMENT

KATHREE-SETILOANE AJA

[1] This is an appeal and cross-appeal against the judgment of the Labour Court (Lagrange J) in terms of which it found the dismissal of the respondent by the appellant to constitute an automatically unfair dismissal in terms of s187(1)(f) of the Labour Relations Act 66 of 1995 ("the LRA") on account of unfairly discriminating against her, on the grounds of her disability, by singling her out to undergo a psychiatric assessment because she suffered from bipolar disorder. The Labour Court also found the dismissal to be an act of unfair discrimination in terms of s6(1)[1] of the Employment Equity Act 55 of 1998 ("the EEA"). The Labour Court ordered the appellant, in terms of s194(3)[2] of the LRA, to pay the respondent the sum of R222 000,00 as compensation for her automatically unfair dismissal and the sum of R15 000,00, in terms of s50(2)(b) of the EEA, as damages for the unfair discrimination committed against her under the EEA.

Background

[2] On 1 July 2008, the parties concluded a fixed-term contract of employment in terms of which the appellant employed the respondent as a pharmacy sales representative in its pharmacy division. During December 2008, the appellant had assessed the respondent in a performance appraisal as "*exceptional and consistently demonstrates excellent standards in all job requirements*". Subsequently, on 16 July 2009, the parties concluded an indefinite-term contract, in terms of which the respondent earned a monthly basic salary of R9 650, 00 a travel allowance of R8 350,00 and a telephone allowance of R500,00. She also earned a commission on sales generated.

[1] Section 6(1) of the EEA provides:
'No person may unfairly discriminate, directly or indirectly, against an employee, in any employment policy or practice, on one or more grounds, including race, gender, sex, pregnancy, marital status, family responsibility, ethnic or social origin, colour, sexual orientation, age, disability, religion, HIV status, conscience, belief, political opinion, culture, language and birth'.

[2] Section 194(3) of the LRA provides:
'The compensation awarded to an employee whose dismissal is automatically unfair must be just and equitable in all the circumstances, but not more than the equivalent of 24 months' remuneration calculated at the employee's rate of remuneration on the date of dismissal.'

[3] During January to October 2009, the respondent raised various queries in relation to the calculation and late payment of her commission. On 25 September 2009, the respondent received a sales printout identifying the sales she had made for the quarter to date and reflecting her commission due. Approximately two weeks later, on 13 October 2009, she received another printout. This printout reflected sales figures substantially lower than the first one. On 15 October 2009, the respondent took the issue up with Mr Roy Tindale ("Tindale"), the appellant's National Sales Manager, whom she spoke to telephonically. She pointed out the discrepancies to him and indicated that she was prepared to put the calculations in writing and provide the hardcopies of the invoices. Tindale informed her that her query "*would not be entertained at all, even if I put it in writing*" and that she should query the issue with Mr Robert Augustoni ("Augustoni"), the appellant's Chief Executive Officer.

[4] On 16 October 2009, the respondent made an appointment with Augustoni's personal assistant to meet with him, but was not afforded a meeting. Later, on 20 October 2009, she prepared a report setting out how she arrived at her sales' figures together with supporting documents ("the report"), which she delivered to Augustoni's son. On 23 October 2009, the respondent met with Tindale at the head office, where she handed him the report. Tindale refused to accept the report and threatened to throw it in the bin.

[5] On 28 October 2009, the respondent raised a grievance. The grievance was only considered after the respondent had sent numerous reminders to management to attend to it. On the same day, the appellant charged the respondent with *inter alia* insolence and insulting behaviour, wilful refusal to carry out a lawful instruction or to perform her duties, intimidation of fellow employees and damaging the reputation of the appellant by insisting that it had produced incorrect figures to deprive her of commission.

[6] The disciplinary enquiry took place on 30 October 2009 and the respondent was found guilty as charged, and was issued with a final written warning. She appealed against the findings and her sanction, but it was never considered. Instead, on 20 November 2009, the appellant summoned the respondent to its

head office. She was placed on immediate suspension and issued with a letter, dated 18 November 2009, signed by Augustoni.

[7] Augustoni explained, in the letter, that the respondent's recent behaviour had given rise to "*serious concern*" and that she had made a statement "*to Mr Hippele and Mr Tindale to the effect that you were suffering from bipolar depression*". Augustoni indicated in the letter that the respondent was concerned about her health and its "*legitimate and lawful interests*" as her employer. He then instructed her, in the letter, to attend a medical examination with a psychiatrist, Dr Liebenberg, who would be required to advise the appellant on "*whether or not you are fit to deal with your tasks for the Company and whether you can resume and attend to such tasks without there being any risk for yourself or the lawful and legitimate interests of your employer*". Augustoni concluded the letter by warning the respondent that a failure to attend or attendance coupled with "*sabotage*" of the examination would "*constitute a serious offence*" and would be dealt with as a disciplinary infraction.

[8] In response to the instruction to attend the medical examination, the respondent's attorneys addressed a letter, dated 20 November 2009, to the appellant recording that its instruction amounted to an act of victimisation which was precipitated by her grievance in relation to the payment of her commission. The letter also called upon the appellant to withdraw the instruction, failing which the respondent would launch an application to the Labour Court. The appellant did not withdraw the instruction. Instead, on 23 November 2009, Augustoni addressed a further letter to the respondent's attorney in which he repeated his view that "*there have been incidents in our company which force us as a caring and responsible employer to insist that [the respondent] attend the doctor's appointment*" and that her failure to attend "*would constitute a very serious offence and be dealt with accordingly"*.

[9] On the same day, the respondent's attorneys addressed a further letter, on her behalf, to the appellant calling upon it to suspend the medical examination pending finalisation of the court application, which she intended to launch. The respondent also submitted a letter, from her counselling psychologist, Mr

K. Fourie ("Fourie"), to the appellant explaining that she suffered from bipolar disorder that was well managed as she was in therapy with him and was medication compliant. Fourie concluded the letter by stating "*I can therefore see no reason why this condition should in any significant way have affected her ability to function effectively in the work environment."*

[10] The appellant did not respond to the respondent's letter and simply ignored the letter of Fourie. On 24 November 2009, the respondent launched an urgent application in the Labour Court in which she sought an order setting aside her suspension and interdicting the appellant from instructing her to attend a medical examination. The application was dismissed. The respondent failed to attend the medical examination scheduled for 24 November 2009 and, on 26 November 2009, the appellant charged her with misconduct. On 27 November 2009, the appellant considered the respondent's grievance and rejected it. The disciplinary enquiry proceeded on 2 December 2009. The respondent was found guilty and was dismissed.

Judgment of the Labour Court

[11] The respondent disputed the fairness of her dismissal and referred a dispute to the Commission for Conciliation, Mediation and Arbitration (CCMA) on 3 December 2009. On 17 May 2010, the arbitrator ruled that the respondent may refer the dispute to the Labour Court as the CCMA had no jurisdiction to determine it. The respondent referred the dispute to the Labour Court.

[12] The Labour Court considered the validity of clause 17.3 of her contract of employment in light of the provisions of s7(1) of the EEA. The appellant's case, observed the Labour Court, was essentially "*that the testing was justified given that [the respondent] had consented to undergoing a medical test when reasonably required by it, and her behaviour coupled with the disclosure of her psychiatric condition"*. It observed that s7(1) of that Act prohibits medical testing "*unless*" either of the circumstances contemplated in paragraphs (a) or (b) applies. It found that under subsection 1(b) medical testing would not be prohibited if "*justifiable in the light of medical facts, employment conditions, social policy, the fair distribution of employee benefits*

or the inherent requirements of a job", but that consent was not one of the exceptions contained in the subsection. On considering the "*medical facts*" in s7(1)(b), the Labour Court stated that "*the known medical facts"* were that the respondent suffered from bipolar disorder, was undergoing regular therapy and was taking medication for her condition. It observed that there was also the opinion of her psychologist that her condition should not affect her ability to function effectively in her work environment.

[13] With regard to the "*employment conditions*" in s7(1)(b) of the EEA, the Labour Court stated:

> '[41] Insofar as the respondent might find support in the section [i.e. section 7(1)(b)] that 'employment conditions' justified the psychiatric examination, the respondent made some attempt to try and suggest that the working environment of Weideman was very pressurised and stressful. By implication, as I understand the argument, it could not risk employing someone in the position if there was a question mark about their ability to remain mentally stable to cope with the demands of the job. However, the balance of evidence did not support the view that conditions of work in the job were inherently stressful, still less that any expressions of anger or frustration would render the person unable to perform their duties.
>
> [42] It should also be mentioned that what triggered Weideman's outburst, had nothing to do with the performance of her duties but arose out of a dispute over an important aspect of her remuneration. On the evidence presented, it seems clear that the applicant lost her temper on 23 October 2009 as a result of her frustrations over what she perceived was an attempt by Pharmaco to avoid addressing her complaints about her commission flowing from what she believed were erroneous sales figures attributed to her. ….In any event, insofar as it may be relevant, Weideman had a genuine belief that she had been severely prejudiced by an unwarranted revision of the sales figures.'

[14] The Labour Court considered the possible argument based on the inherent requirements of the job and noted that the appellant had "*failed to*

demonstrate such a threshold health qualification was required to perform the duties that the job entailed". It therefore concluded that:

> 'I am not persuaded that the [appellant] established that its instruction to the [respondent] to undergo a psychiatric examination to determine if she was fit to do her work was one that was not prohibited in terms of Section 7 of the Employment Equity Act, as it failed to establish that it met any of the exceptions to the prohibition.'

[15] The Labour Court held that the "*ostensible"* purpose of the examination was not to establish whether the respondent suffered from an unknown disease that was affecting her ability to work; on the contrary, [the respondent's condition was known] and it was common cause that her work performance was not affected. It found, in the circumstances, that the appellant had failed to establish that its instruction was not prohibited and concluded that:

> 'In the absence of being able to establish that clause 17.3 of [the respondent's] contract was justifiable under one of the exceptions to the prohibition in section 7 of the Employment Equity Act, that provision is unlawful and unenforceable.'

[16] The Labour Court, accordingly, found that the appellant unfairly discriminated against the respondent and that her dismissal was automatically unfair in terms of s187(1)(f) of the LRA. It also found that the respondent had discriminated against the respondent in terms of s6 of the EEA. In arriving at that decision, it reasoned as follows:

> 'It has already been established that the instruction which Weideman was dismissed for disobeying was an unlawful one. But in itself that is not sufficient to establish that her dismissal was on account of a prohibited reason. The applicant contends that the reason for her dismissal was that the instruction was only issued because she suffered from a bipolar disorder and that if that had not been the case she would not have been required to undergo a medical examination and would not have been dismissed. In effect, it was her bipolar condition which led to her being required to undergo the examination on pain of dismissal. That in itself was unfair discrimination in terms of s 6 of the [EEA]. Consequently, her subsequent dismissal for

refusing to accede to being tested for that reason was also dismissal for a prohibited reason in terms of s 187 (1)(f) of the [LRA].

Augustoni admitted that he would not have required Weideman to undergo testing on account of the conduct for which she was disciplined alone. The knowledge that she was bipolar was therefore decisive. It is noteworthy that Weideman's performance had been rated as *"exceptional"*; she had no history of absenteeism; the company had not considered it necessary to subject any employees to pre-employment medical or psychological examinations; when Weideman had an outburst on 23 October 2009 over her commission dispute, none of the staff had felt threatened by her. Consequently, I agree with the applicant that there was no factual basis to doubt her ability to perform her work duties or discharge her functions. Accordingly, the ostensible rationale advanced for the examination, namely to determine if she was fit to do the work, is hard to believe. It seems more probable on the evidence that the predominant reason she was required to undergo the testing was because senior management became aware of her bipolar status. Had she not suffered from that condition, she would consequently not have been placed in a situation where she faced dismissal for not acceding to an examination based solely on her condition.

Consequently, I'm satisfied that her dismissal in the circumstances was based on her refusal as a person with a bipolar condition to undergo a medical examination, which she would not have been required to undergo, but for the condition. The stigmatising effect of being singled out on the basis of an illness that she 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 also an act of unfair discrimination in terms of s 6 of the [EEA].'

The Labour Court accordingly held that "*clause 17.3 … is not permissible in terms of section 7 of the Employment Equity Act and can be declared null and void"*.

[17] In relation to the claim for general damages for *injuria*, the Labour Court held that "*though closely related*" to the unfair discrimination, "*the two claims do not overlap entirely*". The unfair discrimination, he held, was the "*greater of the two wrongs"*. He held that singling the respondent out for medical examination on account of her bipolar illness, despite the performance record, "*was a*

stigmatising act and was aggravated by the remark made by Tindale about her mental stability". The Labour Court considered that an amount of R15 000 was "*adequate recompense"*.

[18] In assessing an appropriate amount of compensation for the respondent's automatically unfair dismissal, the Labour Court considered that:

> 'The [respondent's] previous length of service with the [appellant] and the fact that even though the [appellant] ought to have realised the stigmatising effect of its conduct, and should have reflected on whether its instruction was a reasonable one in the circumstances; it appears to have genuinely believed that the terms of the [respondent's] contract protected it against any legal challenge to the instruction it issued. I must also consider that the [appellant] did have an early opportunity to reflect on the lawfulness of its actions when confronted by the [respondent's] original attorneys of record, but ploughed ahead with its intended course of action regardless. Its ostensible rationale for demanding the [medical] examination also lacked a credible basis for wanting to assess her fitness to perform her duties.'

The Labour Court found that compensation in the amount of 12 months' salary was appropriate and that the monthly salary was to be calculated as R18 500, 00 being the gross remuneration excluding commission, as it was of the view that the amount of commission was not proved. It, therefore, awarded the respondent the sum R222 000.00 as compensation for her automatically unfair dismissal.

[19] The Labour Court accordingly granted the following relief:

(a) Declaring that clause 17.3 of the respondent's contract of employment with the appellant was in breach of the provisions of s 7 of the EEA and was accordingly of no legal force and effect;

(b) Declaring that the respondent had been unfairly discriminated against in terms of s 6 of the EEA when the appellant instructed her to undergo a psychiatric examination;

(c) Ordering the appellant within 14 days of receipt of the judgment to pay the respondent an amount of R15 000.00 as damages for unfair discrimination committed against her in terms of s 6 of the EEA and a further amount of R222 000.00 as compensation for her automatically unfair dismissal;

(d) Costs.

The appellant appeals against the whole of the judgment and order of the Labour Court and the respondent cross-appeals against its award of compensation and damages. Both the appeal and cross-appeal are with leave of the Labour Court.

Clause 17.3 of the contract

[20] The issues which the Labour Court had to decide in the unfair dismissal claim before it were correctgly outlined by it as:

> '3.1 whether the provisions in the respondent's contract of employment requiring her to undergo medical testing are enforceable or void;
>
> 3.2 whether her dismissal for failing to submit to a medical examination on the employer's instruction was automatically unfair in terms of section 187 (1)(f) of the [LRA];
>
> 3.3 in the event that her dismissal was not automatically unfair, was it substantively or procedurally unfair.'

[21] Clause 17.3 of the respondent's contract of employment was central to the first issue for determination by the Labour Court. Clause 17 of the contract read as follows:

> '17.1 The nature of the Employee's job in the Company's business requires good health and physical, as well as mental fitness.
>
> 17.2 The Employee warrants that, at the time of signing this agreement he/she is free from any disease or illness which is contagious all of which will, or may in time lead to the Employee's in incapacity, disability or death. Misrepresentation in this respect will make the contract voidable.

> 17.3 The Employee will, whenever the Company deems necessary, undergo a specialist medical examination at the expense of the Company, by a medical practitioner nominated and appointed by the company. The Employee gives his/her consent to any such medical practitioner making the results and record of any medical examination available to the Company and to discuss same with such medical practitioner. The above shall include and apply to psychological evaluations.'

[22] Section 7(1) of the EEA prohibits medical testing of an employee unless the legislation permits or requires the testing or it is justifiable in light of medical facts, employment conditions, social policy, the fair distribution of employee benefits or the inherent requirements of the job. For the appellant to have succeeded on the first issue, it had to show that clause 17(3) of the respondent's employment contract was consistent with s7(1) of the EEA. In so doing, it had to demonstrate that its reasons for requiring the respondent to undergo a medical examination in terms clause 17.3 of the contract fell within the ambit of the exceptions in s7(1)(b) of the EEA. In other words, the appellant could only require the respondent to undergo a medical examination if it was justified on the basis of one or more of the exceptions set out in s 7(1)(b) of the EEA, namely the "medical facts, employment conditions, social policy, the fair distribution of employee benefits or the inherent requirements of the job".

[23] The appellant, however, sought to justify its decision to require the respondent to submit to psychiatric testing on the basis that she had consented to it in her contract of employment; that it had concerns about her behaviour; and that the work performed by her was inherently stressful and demanded that she be "*of sound body and mind to adequately perform her duties".* "Consent" is not a justification as contemplated in s7(1) of the EEA. It was therefore correctly rejected by the Labour Court. The appellant's latter justification that the job was "*inherently stressful*" and that the respondent was required to be of "*sound body and mind to adequately perform her duties*" was not borne out by the evidence.

[24] The evidence on record reveals quite the opposite. It was common cause, in this regard, that the appellant had never required any of the sales staff to undergo a medical examination prior to taking up employment. Of the three witnesses who testified at the trial on the question of the "*inherently stressful*" nature of the job performed by a salesperson, only the respondent and Ms Chater ("Chater") were salespersons. Both testified that they did not find the work itself to be particularly stressful. Chater, however, stated that she found the "*environment that the companies put you under with the budgets and meeting the targets*" to be stressful, but not the job content. Augustoni was the third witness to testify on this aspect. Since he was the CEO of the appellant and not a salesperson, his testimony on this aspect had no probative value. Importantly, in this regard, he made no reference in his testimony to the inherently stressful nature of the job, the impact that it had on the ability of the sales persons, and the measures taken to deal with such stress. On the contrary, it was common cause that none of the sales persons were subjected to any pre-employment medical assessments or questionnaires relating to their ability to cope with stress on the job. The Labour Court's rejection of Augustoni's evidence on this aspect is therefore not open to question.

[25] The appellant contended that the Labour Court exceeded the bounds in striking down clause 17.3 of the contract of employment as the clause may be permissible in other circumstances. It, however, failed to lead evidence at the trial which revealed this to be the case. Nor was this foreshadowed on the pleadings. It is impermissible, in the circumstances, for the appellant to appeal against some undisclosed defence. The dispute is between the parties alone and the judgment is binding only upon them. Therefore, should the appellant wish to enforce the provisions of clause 17.3 against another employee, it would not be bound by the ruling of this Court in these proceedings.

[26] Clause 17.3 of the contract of employment is patently offensive and invasive of the privacy rights of the respondent in its overbreadth, and is plainly inconsistent with s7(1) (b) of the EEA. As pointed out by the Labour Court:

> 'Amongst other things [Augustoni] believed that the clause would permit the company to ask a female employee who was sluggish at a particular point of

the month, to subject herself to the company's appointed gynaecologist, or to request an employee who has lesions on their body to submit to a blood test.'

In the premises, the Labour Court correctly considered clause 17.3 of the contract of employment in the context of s7(1) of the EEA and found that "consent" inherent in clause 17.3 of the contract of employment was not among the exceptions contemplated in the section. Hence, its declaratory order that clause 17.3 of the contract of employment is of no legal force and effect is undeniably correct.

Hearsay evidence

[27] A further contention raised by the appellant is that the Labour Court erred by accepting the hearsay evidence contained in the letter from Fourie (the respondent's counselling psychologist), explaining that she suffered from bipolar disorder that was well managed with therapy and medication and, in his opinion, should not in any significant way affect her ability to function effectively at work. There is no merit in this argument, as there is nothing in the reasoning of the Labour Court to suggest that it accepted the opinion of Fourie. It is clear from the judgment, that the Labour Court in considering s7(1)(b) of the EEA, which prohibits medical testing unless it is justifiable *inter alias* "*in light of the medical facts*", noted that "the known medical facts" were that the respondent suffered from bipolar disorder, for which she was undergoing regular treatment and medication and "*there was also the opinion of her psychologist*". The Labour did not state that it accepted that opinion, only that the opinion was one of the known facts. As rightly contended for on behalf of the respondent, the letter from Fourie had never been tendered for the truth of its contents, but rather as proof of the unreasonable stance adopted by the appellant in insisting, without justification in terms of s7(1)(b) of the EEA, that the respondent submits to a psychiatric assessment by a psychiatrist of its choice.

[28] It was never in dispute that the respondent suffered from bipolar disorder. However, what was in dispute was whether the appellant was entitled to demand that the respondent submits herself to a psychiatric assessment by a

psychiatrist of its choice. The appellant bore the *onus* to justify its invocation of clause 17.3 of the contract of employment in the circumstances, and that it had not discriminated against the respondent by singling her out on account of her bipolar disorder for a medical examination. If expert evidence was required, it was for the appellant (and not the respondent) to lead this evidence to demonstrate that there was a reasonable basis to its demands.

[29] In my view, the respondent's alleged behaviour did not call for psychiatric intervention. Even on the version of the appellant's witnesses, the respondent's behaviour was simply that of an aggrieved person whose complaints were persistently ignored by management. It was common cause, in this regard, that the respondent had been complaining for some time about the incorrect calculation and late payment of her commissions. Augustoni, the appellant's CEO, felt constrained to concede that the respondent would have a legitimate grievance if that were the case, and would be entitled to be upset in the circumstances. In any case, the evidence of the appellant's witnesses failed to establish that the respondent behaved in an irrational and aggressive manner. Naidoo testified that the respondent used no crude language and did not "*call her names*". She did not fear for her safety or feel threatened and did not consider the matter to be sufficiently serious to put it in writing or lodge a complaint. Ms Mnyengeza, who was present during the exchange between Naidoo and the respondent, also testified that neither she nor Naidoo were in any danger. In the circumstances, I find this ground of appeal to be without merit.

<u>The reasons for the respondent's dismissal</u>

[30] The appellant's final ground of appeal is that the Labour Court erred in finding that the appellant singled the respondent out for medical testing merely because she was suffering from bipolar disorder. The essence of this ground of appeal is that the respondent failed to establish a causal nexus between her bipolar condition and the dismissal. I consider this ground of appeal to lack substance. The record of evidence is replete with references to Augustoni's testimony that it was because of his knowledge of the

respondent's bipolar condition that he considered it necessary to subject her to a medical examination.

[31] Relying upon the test laid down in *Kroukam,*[3] the Labour Court concluded that the respondent's dismissal "*in the circumstances was based on her refusal as [a] person with a bi-polar condition to undergo a medical examination, which she would not have been required to undergo, but for her condition*". The Labour Court did not err in arriving at this conclusion. In *Kroukam,* this Court held that:

> '[28] In my view, s 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 circumstances envisaged in s 187 for constituting an automatically unfair dismissal.'

[32] It is manifestly clear from the record of evidence that the appellant had discriminated against the respondent because of her bipolar disorder. Crucially, on the appellant's version, its primary concern was the respondent's bipolar disorder and the perceived dangers associated with it. On this account, no matter her exceptional performance reviews, and no matter the legitimacy of her grievance, the mere fact that she suffered from bipolar disorder was a matter of such grave concern to the appellant, that she had to be subjected to a psychiatric assessment. So grave did the appellant consider her condition to be, that her refusal to undergo a psychiatric assessment resulted in her dismissal. There was, as a result, a direct causal connection between the respondent's bipolar disorder and her dismissal. Simply put, but for her medical condition, the appellant would not have dismissed her.

[33] However, as a last resort, the appellant sought to contend that its real concern related to the respondent's fitness to perform her duties rather than her medical condition. "Motive" is central to this contention. However, as was held by this Court in *Department of Correctional Services and Another v Police &*

[3] *Kroukam v. SA Airlink (Pty) Ltd* (2005) 26 ILJ 2153 (LC), at 2184 and 2206.

Prisons Civil Rights Union and Others "motive" is irrelevant to a determination of whether there has been discrimination: [4]

> 'The respondents have rightly submitted that the explanation for the dismissal tendered or suggested by the employer (or for that matter the employee) can never without more simply be accepted as the reason postulated by the section. The reason contemplated and to be sought by the court is the objective reason in a causative sense. The court must enquire into the objective causative factors which brought about the dismissal, and should not restrict the enquiry to a subjective reason, in the sense of an explanation from one or other of the parties. Counsel for the respondents has referred to various UK authorities directly on point. In *R v Birmingham City Council, ex parte Equal Opportunities Commission*, the issue was whether certain criteria which were applied by the council for entry to single sex grammar schools were discriminatory. Because there were more places for boys in such schools than girls, the girls had to do better in the entrance exam in order to secure a place. Although the council's motive in setting the entrance criteria was laudatory (it was trying to ensure entry on merit), the House of Lords held that the disparity constituted unlawful discrimination on the grounds of sex, contrary to the Sex Discrimination Act 1975. The court observed:
>
> "There is discrimination under the statute if there is less favourable treatment on the ground of sex, in order words if the relevant girl or girls would have received the same treatment as the boys but for their sex. The intention or motive of the defendant to discriminate, although it may be relevant insofar as remedies are concerned ... is not a necessary condition of liability; it is perfectly possible to envisage cases where the defendant had no such motive, and yet did in fact discriminate on the ground of sex. Indeed ... if the Council's submission were correct it would be a good defence for an employer to show that he discriminated against women not because he intended to do so but (for example) because of customer preference, or to save money, or even to avoid controversy. In the present case, whatever may have been the intention or motive of the Council, nevertheless it is because of their sex that the girls in question receive less favourable treatment than the boys, and so are the subject of discrimination under the Act of 1975."
>
> In other words, discrimination is not saved by the fact that a person acted from a benign motive. Usually motive and intention are irrelevant to the

[4] (2011) 32 ILJ 2629 (LAC) at paras 34-35.

determination of discrimination because that is considered by asking the simple question: would the complainant have received the same treatment from the defendant or respondent but for his or her gender, religion, culture, etc.?'

[34] Thus, no matter the appellant's "motive", it is abundantly clear from the evidence that but for the respondent's bipolar condition, she would not have been instructed by the appellant to undergo a psychiatric assessment – and would not have been dismissed for refusing to do so. This, in my view, amounts to unfair discrimination on the grounds of disability as contemplated in both s187(1)(f) of the LRA and s6 of the EEA. For these reasons, I am satisfied that the Labour Court found correctly that the respondent's dismissal was automatically unfair on the basis that she was unfairly discriminated against by the appellant on the ground of her bipolar disorder, which is a disability as contemplated in s187(1) f) of the LRA and s6 of the EEA. But for her disorder, the appellant would not have singled her out to undergo a psychiatric assessment. In the result, the decision of the Labour Court on the merits must stand.

The Cross-Appeal

[35] The respondent cross-appeals against the Labour Court's award of compensation and damages. The thrust of her contention is that the Labour Court erred: (a) in failing to find that she proved that she had earned on average R22 500.00 per month inclusive of commission; (b) in not awarding her compensation, for the automatically unfair dismissal, in the amount that she would have earned over a period of 24 months' (as opposed to 12 months') prior to her dismissal; (c) in awarding her general damages in the amount of R15 000.00 instead of R100 000.00 for the unfair discrimination in terms of s6 of the EEA.

[36] Section 194(3) of the LRA confers a wide discretion upon the Labour Court to award compensation to an employee whose dismissal was found to be automatically unfair. The compensation awarded "must be just and equitable" in all the circumstances, but not more than the equivalent of 24 months' remuneration calculated at the employee's rate of remuneration on the date of

dismissal. The power of a court to interfere with the compensation awarded by the Labour Court on appeal is circumscribed and can only be interfered with on the narrow grounds that the judge acted capriciously, or upon the wrong principle, or with bias, or that the discretion exercised was not based on proper reasons or that the decision-maker adopted an incorrect approach. It follows that this Court has no power to interfere with the quantum of compensation awarded by the Labour Court unless it is established that one or more of the grounds listed above is present.[5]

Compensation for automatically unfair dismissal

[37] The purpose of awarding a dismissed employee compensation in terms of s187(1) (f) of the LRA is for the restitution of his or her dignity as a result of being unfairly discriminated against by the employer. In determining what is just and equitable compensation in the circumstances where an employee has been unfairly discriminated against on one or more of the prohibited grounds listed in s187(1)(f) of the LRA, the court must have regard to, *inter alia*, the nature and seriousness of the injuria; the circumstances in which the infringement took place; the behaviour of the employer; the extent of the employee's humiliation or distress; the abuse of the relationship between the parties; and the attitude of the employer after the injuria took place. These factors are by no means exhaustive.[6]

[38] The Labour Court awarded the respondent compensation in the amount of R220 000,00 as it found this to be what the respondent had earned over a 12-month period in the appellant's employ prior to her dismissal. The Labour Court clearly used the respondent's remuneration as a basis for quantifying the compensation award. It, however, erred in doing so as s193(4) of the LRA does not oblige a court to determine compensation based on the dismissed employees' remuneration prior to her dismissal; it merely employs remuneration "as a means of capping the amount of the award" at 24 months' remuneration[7]. As such, this provides sufficient grounds to determine the

[5] *Kukard v GKD Delkor (Pty) Ltd* (2015) 36 ILJ 640 (LAC) at para 35.
[6] *Minister of Justice & Constitutional Development and Another v Tshishonga* (2009) 30 ILJ 1799 (LAC) (*Tshishonga*) at para 18.
[7] *Tshishonga* at para 15

appropriate amount of compensation to be awarded to the respondent on appeal.

[39] In determining the quantum of compensation to be awarded to the respondent, under s194(3) of the LRA, the Labour Court took into account the respondent's previous length of service, the humiliation that she suffered at the conduct of the appellant, and that even though the appellant should have recognised the stigmatising effect of its conduct it "*genuinely believed that the terms of the applicant's contract protected it against any legal challenge to the instruction at issue"*. In addition, it considered that although the appellant had an opportunity to reflect upon its actions, it had failed to do so and that its rationale for requiring the respondent to submit to a psychiatric examination "*lacked a credible basis for wanting to assess her fitness to perform her duties"*.

[40] What the Labour Court, in my view, failed to take into account is that the respondent had performed at a superior level for the extent of her employment with the appellant. She had enjoyed her work, was brilliant at it, and interacted well with other members of staff. The appellant then used her bipolar condition as a means to intimidate her into submitting to its demands insofar as her grievance relating to her commission was concerned.

[41] A further aspect that the Labour Court ought to have taken into account, is the objective of deterrence inherent in s194(3) of the LRA. The Legislature has considered it appropriate to cap the amount of compensation that a court may in its discretion award, in terms of s194(3) of the LRA to no more than the employee's remuneration for 24 months' prior to her dismissal. This is twice the maximum amount that a court may award to an employee, in terms s 194(1) of the LRA, who is unfairly dismissed for misconduct or incapacity or the employer's operational requirements. Whilst s194(3) of the LRA does not make it mandatory for a court to award such an employee double the compensation that it would award for an ordinary unfair dismissal, the objective of deterrence is inherent in the provision. In other words, when considering the appropriate award to make under s194(3) of the LRA, "*the court must take into account that such dismissals are frowned upon and*

should deter employers from automatically unfairly dismissing their employers."[8] This the Labour Court failed to do.

[42] The Labour Court, in my view, also failed to take it into account that the appellant clearly tried to manipulate the respondent's medical condition in order to secure her dismissal. During the course of a meeting with the respondent, Tindale enquired disparagingly of her whether she was "still on her medication" and later informed Chater that she (the respondent) was "mentally instable". In the termination letter, Augustoni stated that the company "also has rights, including the rights that its employees and clients are protected and safe at all times", implying that she posed a threat to the employees and customers of the company.

[43] The approach adopted by the appellant was insulting, degrading and humiliating. Even after the dismissal, the appellant did not appear to appreciate the offensiveness of its conduct in invoking a clause, in the respondent's employment contract, which it had no real interest in. I have no doubt that if it did, it would have insisted that every employee in sales undergo a medical examination before taking up employment. The appellant's failure to recognise its disgraceful conduct was, moreover, borne out by Augustoni's belief, which was apparent from his testimony in the trial, that he was entitled to ask an employee who had lesions on his face to submit to a blood test or ask a female employee who appeared sluggish to submit to the company's gynaecologist for assessment.

[44] For these reasons, I consider it to be just and equitable to award the respondent the amount of R285 000,00 as compensation for her automatically unfair dismissal in terms of s187(1)(f) of the LRA. Contrary to the erroneous finding of the Labour Court, it is clear on the evidence that the respondent had in fact proved that she earned an average monthly commission of R4000.00 in addition to her monthly salary of R18 500,00, which added together yield a monthly income of R22 500,00, an annual income of R270 000,00, and an income of R540 000,00 over two years. Accordingly, the compensation award which I consider appropriate does not exceed the cap in s193(4) of the LRA.

[8] *De Beer v SA Export Connection CC trading as Global Paws* (2008) 29 ILJ 347 (LC) at para 53.

The award of damages for *injuria*

[45] Turning to the respondent's claim for general damages, the Labour Court awarded her R15 000.00 on the basis that the appellant's conduct in singling her out for a psychiatric examination on account of her bipolar disorder was a stigmatising act, which was aggravated by Tindale's remark to the effect that she was mentally instable. Although the respondent sought an order for general damages in the amount of R100 000.00, the Labour Court found that she had not motivated such an award but, nonetheless, awarded her a solatium in the sum of R15000,00 for impairment of dignity.

[46] The respondent contends that the Labour Court erred in only awarding her a solatium of R15000,00 since a deliberate aggression upon her personal dignity is not a trivial matter and warrants a much graver award. It important to remain mindful that the purpose of the compensation which the Labour Court awarded to the respondent under s194(3) of the LRA was for impairment of her dignity arising from the automatically unfair dismissal on account of being unfairly discriminated against on the grounds of her bipolar disorder, which is a disability. The damages which the respondent sought against the appellant, in terms of s50(2)(b) of the EEA, was also for impairment of her dignity arising from the self-same act of unfair discrimination against her on the grounds of her disability. The respondent's dismissal was, therefore, also an act of discrimination as contemplated under s6 of the EEA. In the circumstances, the wrongful conduct of the appellant had to be viewed as a "singe wrongful act".

[47] In *ARB v Electrical Wholesalers (Pty) Ltd v Hibbert*,[9] which concerned a matter where the employee's dismissal, under s187(1)(f) of the LRA, on the grounds of his age was also an act of unfair discrimination under s6 of the EEA, this Court had to consider whether he was entitled to claim both under the LRA and the EEA in a single action, or whether he was entitled to separate remedies under both Acts for what was effectively a single wrongful act by the employer. The Court found that there is no bar for an employee, in a single action, to claim: (a) "compensation" for an automatically unfair

[9] (2015) 36 ILJ 2989 (LAC) (*ARB*) at para 29.

dismissal as a result of unfair discrimination under the LRA, and (b) "compensation" for unfair discrimination under the EEA. The Court, in addition, held that the meaning ascribed to compensation under the LRA is the same as would apply to the concept of compensation under the EEA and that, in so far as an employee may have suffered a loss as a result of being discriminated against, he is also entitled to claim damages under the EEA as the EEA provides for an employee to claim both compensation and damages. However, the Court cautioned that:[10]

> '… where claims are made both in terms of the LRA and the EEA and the court is satisfied that the dismissal was based on unfair discrimination as provided for in the LRA and the employee was unfairly discriminated against in terms of the EEA, the court must ensure that the employer is not penalised twice for the same wrong. In seeking to determine compensation under the LRA and the EEA, the court must not consider awarding separate amounts as compensation but consider what is just and equitable compensation that the employer should be ordered to pay the employee for the humiliation he/she suffered in having his/her dignity impaired. The employees automatically unfair dismissal is so labelled because it is based on a violation of his constitutional right (in this case not to be discriminated against on the basis of his age) and his claim under the EEA is for exactly the same wrong, that of being discriminated on the basis of his age.'

[48] In my view, the same principle would apply to the situation, such as we have here, where the employee seeks both compensation, under s194(3) of the LRA, for her unfair dismissal because the employer unfairly discriminated against her on one of the grounds contemplated in s187(1) (f) of the LRA, and payment of general damages by the employer in terms of s50(2)[11] of the EEA for impairment of dignity or injured feelings as a result of the unfair discrimination. There is a fundamental difference between "damages" and

[10] *ARB* at para 30.

[11] Section 50(2) of the EEA provides:

'If the Labour Court decides that an employee has been unfairly discriminated against, the Court may make any appropriate order that is just and equitable in the circumstances, including –

(a) payment of compensation by the employer to that employee;
(b) payment of damages to the employer to that employee.'

"compensation" as contemplated in s50(2) of the EEA. As held by this Court in *SA Airways (Pty) Ltd v Janse van Vuuren and Another:*[12]

> 'In the EEA 'damages' refer to an actual or potential monetary loss (i.e. patrimonial loss) and 'compensation' refers to the award of an amount as a solatium (i.e. non-patrimonial loss). It is conceivable that cases of unfair discrimination may involve actual (or patrimonial) loss for the claimant as well as injured feelings (or non-patrimonial loss).
>
> …
>
> The purpose of an award for damages for patrimonial loss by means of a monetary award, is to place the claimant in the financial position he or she would have been in had he, or she, not been unfairly discriminated against. This is the common purpose of an award of damages for patrimonial loss in terms of the South African law in both the fields of delict and contract. In the case of compensation for non-patrimonial loss, the purpose is not to place the person in a position he or she would have otherwise have been in, but for the unfair discrimination, since that is impossible, but to assuage by means of monetary compensation, as far as money can do so, the insult, humiliation and indignity or hurt that was suffered by the claimant as a result of the unfair discrimination.'

[49] As indicated, the respondent's claim for damages is for non-patrimonial damages for impairment of dignity as a result of being unfairly discriminated against and not for patrimonial loss. There is in principle no difference between her claim for compensation under s194(3) of the LRA and her damages claim under s50(2)(b) of the EEA for non-patrimonial loss. To award both non-patrimonial damages and compensation to the respondent for the same wrongful conduct of the appellant would, in my view, not be just and equitable as it would amount to penalising the employer twice. This notwithstanding, the Labour Court in the exercise of its discretion under s50(2)(b) of the EEA awarded the respondent a solatium in the amount of R15000,00 for impairment of her dignity as result of being unfairly discriminated against in terms of s6 of the EEA, which it erroneously held to

[12] (2014) 35 ILJ 2774 (LAC) at paras 78-80.

be “the greater of the two wrongs”. This constitutes a ground to interfere with the damages award as an employer should not be required to recompense an employee twice for the same wrongful act. Accordingly, the damages award for injuria falls to be set aside.

Costs

[50] In view of the dismissal of the appeal and the partial success of the cross-appeal, I consider it to be just and equitable to order costs in the appeal and no costs in the cross-appeal.

Order

[51] In the result, I make the following order:

1 The appeal is dismissed with costs.

2 The cross-appeal is partially upheld, with no order as to costs.

3 The award ordering the appellant to pay the respondent R15000,00 as general damages for the unfair discrimination committed in terms of s6 of the Employment Equity Act is set aside.

4 The award ordering the appellant to pay the respondent R220 000,00 in compensation for her unfair dismissal in terms of s187(1)(f) of the Labour Relations Act is set aside and replaced with the following order:

‘The appellant is ordered to pay the respondent R285 000,00 as compensation for her automatically unfair dismissal in terms of s187(1)(f) of the Labour Relations Act.’

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F Kathree-Setiloane AJA

D Davis and A Jappie JJA concurring

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