

# BURNOUT IN THE WORKPLACE

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## SUMMARY

Burnout, defined as chronic workplace stress that has not been successfully managed, has reached epidemic proportions in many countries. The condition has a profound impact on the health and well-being of individuals suffering from it as well as on their families, the workplace, and the economy. Mental and physical exhaustion, cynicism, reduced accomplishment, and mental impairment have been identified as dimensions of burnout. Research indicated that workplace culture and psychosocial risk factors such as overworking, tight deadlines, and long hours contribute to burnout. Current South African legislation does not offer sufficient protection to employees regarding mental illness caused by burnout. Consequently, measures incorporated into European health and safety legislation to prevent burnout and to deal with it once it has occurred, as well as judgments handed down in Australia and the United Kingdom regarding measures that employers should have taken to comply with their duty of care in respect of the mental health of their employees, may provide valuable guidance to South Africa. The article concludes by recommending that burnout be recognised as a distinguishable disease in South Africa; that the Occupational Health and Safety Act 85 of 1993 be amended to require employers to assess psychosocial risks at their workplace and to address these risks; that a code on psychosocial safety in the workplace be adopted guiding employers to recognise the symptoms of burnout and how to support affected employees; that regular working hours be reduced to 40 hours; that a national code as well as an individual code for each workplace be adopted on the right to disconnect; that amendments to the Basic Conditions of Employment Act 75 of 1997 be aligned with an amended Unemployment Insurance Act 63 of 2001 to provide for extended sick leave for burnout; that the Compensation for Occupational Injuries and Diseases Act 130 of 1993 be amended to include burnout as a compensable disease, making provision for psychotherapy, rehabilitation, and reintegration of employees suffering from burnout in the workplace.

## 1 INTRODUCTION

Burnout in the workplace is a mental health issue that by all indications seems to be reaching epidemic proportions in many countries.<sup>1</sup> However, it is by no means a new phenomenon. During the second half of the nineteenth century, the condition has been described as nervous exhaustion associated with the demands of urban life called neurasthenia<sup>2</sup> or

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<sup>1</sup> ILO "Workplace Stress: A Collective Challenge" [https://www.ilo.org/wcmsp5/groups/public/--ed\\_protect](https://www.ilo.org/wcmsp5/groups/public/--ed_protect) (accessed 2022-01-31) 1–49 7.

<sup>2</sup> Maslach, Leiter and Schaufeli "Measuring Burnout" in Cartwright and Cooper (eds) *The Oxford Handbook of Organizational Well-Being* (2009) 86–108 87.

“Americanitis”,<sup>3</sup> thought to be caused by industrialisation and the concomitant fast pace of living of American society.<sup>4</sup> The Japanese use the term “karoshi” to refer to the extreme form of burnout, namely the phenomenon of people working themselves to death.<sup>5</sup>

Freudenberger first used the term burnout in 1974 to describe a condition of total exhaustion (linked with other symptoms) as an occupationally specific phenomenon.<sup>6</sup> From 1976 to date, Christina Maslach (a social psychologist) together with colleagues have been publishing articles on the measurement of burnout.<sup>7</sup> Their earliest research on models for establishing burnout focused on employees in human services which models were later adapted to apply to all professions.<sup>8</sup>

Burnout has a profound impact on the health of workers, their future ability to work, and on the workplace since it decreases productivity.<sup>9</sup> It causes high staff turnover, loss of motivation, increased absenteeism, and impacts on the worker’s family and, ultimately, the healthcare system.<sup>10</sup>

Data on burnout in different countries points to a high prevalence of this condition. For example, in a 2018 survey in the United Kingdom (UK) undertaken by the Virgin Group in which workers were asked to assess themselves, 51 per cent of those surveyed indicated that they suffered from burnout.<sup>11</sup> Furthermore, in a 2020 online survey, 76 per cent of American workers reported that they experience worker burnout.<sup>12</sup> A recent study conducted by McKinsey in the United States of America (USA), which compared the burnout rate for different sexes, indicated that more women than men suffered from burnout (41 per cent compared to 35 per cent) with the percentage of women who suffer from burnout rising steadily. In 2020, 32 per cent of women and in 2021, 42 per cent of women suffered from

<sup>3</sup> Mohammed “Workplace Burnout is Nothing New” (15 June 2019) <https://daily.jstor.org/workplace-burnout-is-nothing-new/> (accessed 2022-01-31).

<sup>4</sup> Schaufeli, Leiter and Maslach “Burnout: 35 Years of Research and Practice” 2009 14 *Career Development International* 204–220 208.

<sup>5</sup> Kanai “Karoshi (Work to Death) in Japan” 2009 84 *J Bus Ethics* 209–216; McCurry “Japanese Woman Dies from Overwork after Logging 159 Hours of Overtime in a Month” (5 October 2017) <https://www.theguardian.com/world/2017/oct/05/japanese-woman-dies-overwork-159-hours-overtime> (accessed 2022-01-31).

<sup>6</sup> Lastokova, Carder, Rasmussen, Sjöberg, De Groene, Sauni, Vedovo, Lasfarques, Svartengren, Varga, Colosio and Peclova “Burnout Syndrome as an Occupational Disease in the European Union: An Exploratory Study” 2018 56 *Industrial Health* 160–165 161.

<sup>7</sup> Heinemann and Heinemann “Burnout Research: Emergence and Scientific Investigation of a Contested Diagnosis” 2017 7 *SAGE Open* 1–12.

<sup>8</sup> Demerouti, Bakker, Peeters and Breevaart “New Directions in Burnout Research” 2021 *European Journal of Work and Organizational Psychology* 686–691 686.

<sup>9</sup> Demerouti *et al* 2021 *European Journal of Work and Organizational Psychology* 686–691 687.

<sup>10</sup> *Ibid.*

<sup>11</sup> Aumayr-Pintar, Cerf and Parent-Thirion “Burnout in the Workplace: A Review of Data and Policy Responses in the EU” (10 September 2018) <https://www.eurofound.europa.eu/publications/report/2018/burnout-in-the-workplace-a-review-of-data-and-policy-responses-in-the-eu> (accessed 2022-01-31).

<sup>12</sup> Spring Health “16 Important Statistics about Employee Burnout” <https://www.springhealth.com/16-statistics-employee-burnout/> (accessed 2022-01-31).

burnout according to the McKinsey study. The survey indicated further that a third of these women considered resigning.<sup>13</sup>

A study by Höglund *et al* in Sweden indicated that the highest prevalence of burnout was found amongst young women. Men between the ages of 30-39 years had the highest burnout rate of all males, while men and women between the ages of 60 and 69 had the lowest rate of burnout.<sup>14</sup> Although these figures cannot be a basis for comparison due to the different diagnostic tools used, it does indicate the alarming and growing incidence of burnout.

Considering burnout in different professions, a 2019 survey of global industries conducted by Szimiegera indicated that employees in the hospitality sector have the highest risk of burnout, followed by persons involved in manufacturing, healthcare, teaching, and social work.<sup>15</sup>

A 2020 study by the International Labour Organisation (ILO) found that the Covid-19 pandemic exacerbated burnout with workers having to work from home, especially for parents with young children who have to cope with their job and simultaneously have to care for their children. Moreover, competing work- and home-life priorities have blurred the boundaries between working time and rest time, resulting in employees always being on call.<sup>16</sup>

Despite these concerns, there is a lack of acknowledgement of burnout as a distinguishable mental disorder.<sup>17</sup> In this article, the terms psychological illness, disorder or disease, mental illness disorder, or disease, will be used interchangeably. In certain contexts, the term psychiatric injury or disease will be used.

This article argues that to prevent burnout and to provide remedies for employees suffering from burnout, it should be recognised as a distinguishable mental disease or disorder in South Africa. Section 2 of this article delves into the definition of burnout and discusses the most widely recognised model designed to measure burnout. Section 3 discusses the causes and effects of burnout, while section 4 deals with the right to disconnect. Burnout in academia as an example of burnout in a specific

<sup>13</sup> McKinsey & Co "Women in the Workplace 2021" [https://wiw-report.s3.amazonaws.com/Women\\_in\\_the\\_Workplace\\_2021.pdf](https://wiw-report.s3.amazonaws.com/Women_in_the_Workplace_2021.pdf) (accessed 2022-01-31).

<sup>14</sup> Höglund, Hakelind and Nordin "Severity and Prevalence of Various Types of Mental Ill-health in a General Adult Population: Age and Sex Differences" 2020 20 *BMC Psychiatry* 1–11.

<sup>15</sup> Szimiegera "Industries with the Highest Employee Burnout Rate Worldwide in 2019" (8 November 2021) <https://www.statista.com/statistics/1274617/industries-burnout-globally/> (accessed 2022-01-31). See also Kheswa "Factors and Effects of Work-Related Stress and Burnout on the Well-Being of Social Workers in the Eastern Cape Province, South Africa" 2019 45 *SA Journal of Industrial Psychology* 1661.

<sup>16</sup> International Labour Organisation (ILO) *Managing Work-Related Psychosocial Risks During the COVID-19 Pandemic* (2020) [https://www.ilo.org/wcmsp5/groups/public/---ed\\_protect/---protrav/---safework/documents/instructionalmaterial/wcms\\_748638.pdf](https://www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/---safework/documents/instructionalmaterial/wcms_748638.pdf) 19–20; Jackson and Rothman "An Adapted Model of Burnout for Educators in South Africa" 2005 25 *South African Journal of Education* 100–108. See also Fu, Greco, Lennard and Dimotakis "Anxiety Responses to the Unfolding Covid-19 Crisis: Patterns of Change in the Experience of Prolonged Exposure to Stressors" 2021 106 *Journal of Applied Psychology* 48–61.

<sup>17</sup> Heinemann and Heinemann 2017 *SAGE Open* 1–12.

sector is discussed in section 5. Section 6 deals with the protection of employees suffering from burnout as well as remedies available to victims in Europe, the UK, and Australia. Section 7 deals with the current (and in certain aspects inadequate) protection of and remedies for employees who suffer from burnout in South Africa. The conclusion and recommendations are contained in section 8.

## 2 DEFINITION AND MODEL FOR ASSESSING BURNOUT

There is no generally accepted definition of burnout. Maslach and Leiter, leading authorities on research regarding burnout, define the phenomenon as a psychological syndrome emerging as a prolonged response to chronic interpersonal stressors on the job. According to their model for measuring burnout, the Maslach Burnout Index (MBI), the three key dimensions of burnout are “overwhelming exhaustion, feelings of cynicism and detachment from the job as well as a sense of ineffectiveness and a lack of accomplishment.”<sup>18</sup>

The authors explain the three dimensions in more detail as follows:

“The exhaustion dimension is also described as wearing out, loss of energy, depletion, debilitation, and fatigue. The cynicism dimension was originally called depersonalization (given the nature of human services occupations), but was also described as negative or inappropriate attitudes towards clients, irritability, loss of idealism, and withdrawal. The inefficacy dimension was originally called reduced personal accomplishment, but was also described as reduced productivity or capability, low morale, and an inability to cope.”<sup>19</sup>

Added to the cynicism dimension are factors such as the “inability to feel”,<sup>20</sup> disillusionment, and a lack of compassion<sup>21</sup> (also known as compassion fatigue). Persons suffering from burnout have more recently reported a fourth dimension to the existing three, namely cognitive impairment<sup>22</sup> with symptoms such as slow thinking and decreased creativity, often for extended periods.<sup>23</sup>

Although there are other models to assess burnout, the MBI has been called the “almost universally accepted gold standard to measure burnout.”<sup>24</sup>

The World Health Organisation (WHO) has listed burnout as an occupational phenomenon in the most recent International Classification of

<sup>18</sup> Maslach *et al* in Cartwright and Cooper *The Oxford Handbook of Organizational Well-Being* 86–108 90.

<sup>19</sup> Maslach and Leiter “Understanding the Burnout Experience: Recent Research and its Implications for Psychiatry” 2016 15 *World Psychiatry* 103–111.

<sup>20</sup> Tavella, Hadzi-Pavlovic and Parker “Burnout: Re-examining its Key Constructs” 2020 287 *Psychiatry Research* 1.

<sup>21</sup> Schaufeli *et al* 2009 *Career Development International* 207.

<sup>22</sup> Schaufeli, Desart and De Witte “Burn-out Assessment Tool (BAT) Development, Validity, Reliability” 2020 17 *Int J Environ Res Public Health* 9495.

<sup>23</sup> Demerouti *et al* 2021 *European Journal of Work and Organizational Psychology* 686–691 686.

<sup>24</sup> Bria, Spănu, Băban and Dumitrașcu “The Factorial Validity of the Maslach Burnout Inventory – General Survey (MBI-GS) Across Occupational Groups and Countries” 2000 73 *Journal of Occupational and Organizational Psychology* 53–66.

Diseases (ICD-11), but the organisation does not recognise burnout as a disease. The WHO defines burnout as “a syndrome conceptualized as resulting from chronic workplace stress that has not been successfully managed”,<sup>25</sup> and characterises burnout in terms of the same three dimensions identified by the MBI. The WHO further clarifies that burnout only relates to work-related stress, thereby indicating that employers may have a role in preventing burnout. Before a person can be diagnosed with burnout, factors not connected to the person’s job will thus have to be ruled out.<sup>26</sup> The WHO, in a seemingly ambivalent manner, included burnout in their list of diseases as an occupational phenomenon yet simultaneously denied that it is a disease.

Authors such as Maslach and Leiter, Chirico, as well as Parker and Tavella argue that burnout should be recognised as a distinguishable disease because it is job-specific whereas depression and other mental illnesses are more general and context-free diseases.<sup>27</sup> The three dimensions of burnout of the MBI model will moreover not always manifest in people who suffer from other types of psychiatric illnesses.

## 2.1 Clinical burnout

Burnout does not happen suddenly, it is often a slow process with the worker feeling increasingly exhausted, responsible for a high workload, guilty about less time with the family, cutting out on all other activities, and eventually losing sight of the meaning of life entirely – all signs pointing to chronic burnout.<sup>28</sup> A question that has to be answered is how can the “tipping point” be diagnosed to distinguish when someone is suffering from burnout instead of only displaying symptoms of burnout?

Clinical psychologists regard burnout as “a mental disorder assessed in patients who apply for psychological treatment and no longer work because of their symptoms or experience of serious problems in functioning at work.”<sup>29</sup> This definition of burnout is mostly referred to as “clinical burnout”.<sup>30</sup>

The difference between the conceptualisation of burnout by clinical physicians and work- and organisational psychologists (such as Maslach) is that the former takes a biological view of the condition while the latter mainly focuses on psychosocial factors.<sup>31</sup>

<sup>25</sup> WHO “Burnout an ‘Occupational Phenomenon’: International Classification of Diseases” (28 May 2019) <https://www.who.int/news/item/28-05-2019-burn-out-an-occupational-phenomenon-international-classification-of-diseases> (accessed 2022-01-31) 9.

<sup>26</sup> *Ibid.*

<sup>27</sup> Maslach and Leiter 2016 *World Psychiatry* 103–111; Chirico “Burnout Syndrome and Depression are not the Same Thing” 2007 190 *The British Journal of Psychiatry* 81; Parker and Tavella “Is Burnout Simply a Stress Reaction?” 2022 *Australian and New Zealand Journal of Psychiatry*.

<sup>28</sup> Demerouti *et al* 2021 *European Journal of Work and Organizational Psychology* 686–691 688.

<sup>29</sup> Van Dam “A Clinical Perspective on Burnout: Diagnosis, Classification, and Treatment of Clinical Burnout” 2021 30 *European Journal of Work and Organizational Psychology* 732–741.

<sup>30</sup> Van Dam 2021 *European Journal of Work and Organizational Psychology* 1.

<sup>31</sup> *Ibid.*

The Tenth Revision of the WHO's International Classification of Diseases (ICD-10) formulates criteria for the diagnosis of neurasthenia (the term is omitted from the ICD-11's list of diseases) which are still used for the clinical diagnosis of burnout. The criteria are physical and/or emotional exhaustion and at least two of the following symptoms: "dizziness, dyspepsia, muscular aches or pains, tension headaches, inability to relax, irritability, and sleep disturbance".<sup>32</sup> Clinical psychologists use these criteria in the Netherlands to diagnose burnout (*overspannenheid*)<sup>33</sup> with the requirement that symptoms must be work-related.<sup>34</sup>

Apart from the above symptoms, clinical burnout further manifests as cognitive impairment of executive functions, impacts problem solving and memory retention, and causes difficulties regarding attention and concentration and slower reaction time. A lack of ability to control emotions and behavioural problems such as excessive drinking may be further indicators of chronic burnout. While in the early stages of burnout a person may become hyperactive, a person in the final stages may exhibit a lack of motivation and adopt a passive attitude caused by feeling helpless about the situation.<sup>35</sup>

It is important to diagnose clinical burnout and to assess the degree of cognitive impairment in order to prescribe the necessary treatment for the person, to ultimately reintegrate them into the workplace,<sup>36</sup> and further to provide a basis for claiming from health insurance companies,<sup>37</sup> delictual damages from employers and workmen's compensation.

Research indicates that persons suffering from mild burnout will normally recover in a period of six to twelve weeks, while those suffering from clinical burnout may not be able to work for a year or longer and will often relapse.<sup>38</sup>

### 3 CAUSES AND EFFECTS OF BURNOUT

This section argues that an unsafe psychosocial workplace undoubtedly contributes to burnout.<sup>39</sup> Different aspects of an unsafe psychosocial workplace are discussed below.

<sup>32</sup> Schwarz "Why is Neurasthenia Important in Asian Cultures?" 2002 176 *West J Med* 257–258.

<sup>33</sup> Schaufeli *et al* 2009 *Career Development International* 214.

<sup>34</sup> Lastakova, Boersma and Brown "The Tired Hero and Her (II)legitimation: Reworking Parsons to Analyse Experiences of Burnout within the Dutch Employment System and Lifeworld" 2020 265 *Social Science and Medicine* 113471.

<sup>35</sup> Van Dam 2021 *European Journal of Work and Organizational Psychology* 5.

<sup>36</sup> Gavelin, Domellöf, Åström, Nelson, Launder, Neely and Lampit "Cognitive Function in Clinical Burnout: A Systematic Review and Meta-analysis" 2021 *Work and Stress*.

<sup>37</sup> Van Dam 2021 *European Journal of Work and Organizational Psychology* 2.

<sup>38</sup> *Ibid.*

<sup>39</sup> Demerouti *et al* 2021 *European Journal of Work and Organizational Psychology* 686–691 688.

### 3 1 Discrepancies between the expectations of employers and employees

Leiter and Maslach have identified six areas of work-life that provide a paradigm for the organisational context of burnout.<sup>40</sup> The authors found that if there is a discrepancy in the “psychological contract” between the employer and the employee (whether explicit or implicit), it may lead to burnout. This discrepancy leads to a lack of alignment between the expectations of employees regarding the job and the reality of the job itself. The discrepancy could exist regarding workload, control, rewards, community, fairness, and values.

Leiter and Maslach found that there is a strong correlation between workload and exhaustion. If workers do not have the necessary support to enable them to cope with the workload, it could eventually lead to burnout. The second area of work-life that may bear a correlation to burnout is control. If there is a role conflict and/or a lack of direction by management, the employee’s lack of control over their workload may lead to exhaustion and ultimately burnout. Thirdly, a discrepancy between rewards such as financial rewards or recognition by superiors and colleagues, and the demands placed on the worker may cause feelings of inefficacy which is one of the dimensions of burnout.<sup>41</sup> Fourth, community (social support) encompasses both internal support by supervisors and colleagues and external support by family members. Where there is a lack of social support, there is a strong correlation between the demands of the job and exhaustion. In the fifth place, a lack of fairness may also contribute to burnout. The authors have found that employees are not only interested in the outcome of procedures, but also in the fairness of procedures for decision making: “A fair decision is one in which people have an opportunity to present their arguments and in which they are treated with respect and politeness.”<sup>42</sup> Lastly, if a conflict arises between individual values and organisational values<sup>43</sup> it may drain energy, undermine efficacy, and contribute to employees feeling that their work is meaningless, which is another dimension of burnout, namely cynicism.<sup>44</sup> This could be the case where there is a discrepancy between an organisation’s stated values and the reality of how the organisation is being managed. Employees may perceive this as “corporate hypocrisy” and may become disillusioned.<sup>45</sup>

<sup>40</sup> Leiter and Maslach “Six Areas of Worklife: A Model of the Organizational Context of Worklife” 1999 21 *Journal of Health and Human Services Administration* 472–489.

<sup>41</sup> Leiter and Maslach 1999 *Journal of Health and Human Services Administration* 478; Montero-Marin, Araya, Blasquez, Skapinakis, Vizcaino and Campayo “Understanding Burnout According to Individual Differences: Ongoing Explanatory Power Evaluation of Two Models for Measuring Burnout Types” 2012 12 *BMC Public Health*.

<sup>42</sup> Leiter and Maslach 1999 *Journal of Health and Human Services Administration* 481.

<sup>43</sup> Schaufeli *et al* 2009 *Career Development International* 209.

<sup>44</sup> Schaufeli *et al* 2009 *Career Development International* 209; Zamini, Zamini and Barzegary “The Relationship Between Organizational Culture and Job Burnout Among the Professors and Employees in the University of Tabriz” 2011 30 *Procedia – Social and Behavioral Sciences* 1964–1968.

<sup>45</sup> *Ibid.*

Aumayr-Pintar identifies workload, as the main risk of burnout and further emphasises the lack of employee autonomy as a trigger for burnout.<sup>46</sup> Huhtala and Tolvanen further found that an organisation's low ethical culture could also cause burnout.<sup>47</sup>

### 3.2 Workplace culture

Kokt defines workplace culture as "the distinctive pattern of shared assumptions, values and norms that shape the socialisation activities, language, symbols, rites and ceremonies of a group of people."<sup>48</sup>

Four main types of organisational cultures have been identified: first, a rational culture, aimed at achieving the goals of the business, namely, to be competitive and productive; secondly, a hierarchical culture, with rigid rules; thirdly a group culture with considerable support from colleagues; and fourthly, a developmental culture which offers development opportunities and encourages creativity and risk-taking. It was found that a rational culture and a hierarchically structured workplace-based on power relationships pressurised employees which could lead to higher stress levels and ultimately burnout.<sup>49</sup> A workplace culture based on effective communication and some individual autonomy was shown to be less prone to lead to burnout.<sup>50</sup>

Apart from the four different workplace cultures discussed above, a workplace culture of encouraging workers to habitually work overtime (whether explicitly or not), to work late at night, or send emails in the early hours of the morning could contribute to burnout.<sup>51</sup> This could certainly be aligned with the "rational culture" of some organisations described above. If a culture of glorifying overwork and viewing it as a marker of success is embedded in a workplace, there is a danger that employees will not take annual leave and will not rest during weekends. Employees who are exhausted, sleep-deprived, and leading an unbalanced life will become the norm and be seen as something to aspire to, especially if this is the example of "the ideal worker" set by managers and other senior persons at the

<sup>46</sup> Aumayr-Pintar *et al* <https://www.eurofound.europa.eu/publications/report/2018/burnout-in-the-workplace-a-review-of-data-and-policy-responses-in-the-eu>.

<sup>47</sup> Huhtala, Tolvanen, Mauno and Feldt "The Associations between Ethical Organizational Culture, Burnout, and Engagement: A Multilevel Study" 2015 30 *Journal of Business and Psychology* 399–414.

<sup>48</sup> Kokt "Impact of Organisational Culture on Job Stress and Burnout in Graded Accommodation Establishments in the Free State province, South Africa" 2015 27 *International Journal of Contemporary Hospitality Management* 1198–1213 1200.

<sup>49</sup> Belias and Versanis "Organizational Culture and Job Burnout" 2014 2 *International Journal of Research in Business Management* 43–61 57.

<sup>50</sup> Belias and Varsanis 2014 *International Journal of Research in Business Management* 43–61 55.

<sup>51</sup> Lufkin "Why Do We Buy into the Cult of Overwork" (10 May 2021) <https://www.bbc.com/worklife/article/20210507> (accessed 2022-01-31); LaMere "A Culture of Overworking" (11 December 2019) <https://reporter.rit.edu/leisure/culture-overworking> (accessed 2022-01-31); Ansel "How the First in Last Out Ethic is Creating a Culture of Overwork" (12 July 2016) <https://www.theguardian.com/sustainable-business/2016/jul/12/overworked-america-long-hours-productivity-balance> (accessed 2022-01-31).



workplace. Serious physical, psychological, and social problems and eventually burnout are almost a certainty.

The effects of burnout include a heightened risk of heart attacks, psychosomatic illnesses, substance abuse, deteriorating family relationships, insomnia, and depression.<sup>52</sup> A heavy workload could lead to absenteeism (frequent periods of sick leave),<sup>53</sup> or presenteeism with employees suffering from burnout but still insisting to be at work.<sup>54</sup> This could lead to decreased productivity and an inability to cope, thus exacerbating the symptoms of burnout.<sup>55</sup>

It seems as if workload (long hours, tight deadlines), inefficient resources (support at work and home), and a lack of feedback and autonomy may be among the most important factors to play a role in burnout.<sup>56</sup>

External factors such as a downturn in the economy and increased competition because of globalisation undoubtedly also play a role.

### 3.3 The correlation between personality types and burnout

Five personality types have proved to have either a positive or negative correlation with burnout. These are first, neuroticism (anxiety, depression, self-consciousness, and affective instability); secondly, extraversion (enjoyment of social contact, experiencing positive emotions, taking the lead to initiate activities, being lively and energetic); thirdly, openness to experience (appreciation of beauty in objects, open to new ideas, intellectually curious and creative); fourthly, agreeableness (kindness, helpfulness, honesty, and genuineness, capacity to restrain aggression, sympathetic, and showing humility); and fifthly, conscientiousness (orderly and neat, ambitious, hard worker, reliable, self-disciplined and goal-driven).

Neuroticism has been shown to have a positive correlation with burnout.<sup>57</sup> The same can be said of conscientious employees<sup>58</sup> since people with these qualities are often perfectionists who drive themselves too hard.<sup>59</sup> The

<sup>52</sup> Belias and Varsanis 2014 *International Journal of Research in Business Management* 47.

<sup>53</sup> ILO [https://www.ilo.org/wcmsp5/groups/public/---ed\\_protect/---protrav/---safework/documents/instructionalmaterial/wcms\\_748638.pdf](https://www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/---safework/documents/instructionalmaterial/wcms_748638.pdf) 14.

<sup>54</sup> ILO [https://www.ilo.org/wcmsp5/groups/public/---ed\\_protect](https://www.ilo.org/wcmsp5/groups/public/---ed_protect) 7.

<sup>55</sup> Smuts and Smit "Excessive Stress and Eliminating Barriers to Decent Work" 2020 41 *ILJ* 779–804 791.

<sup>56</sup> Demerouti *et al* 2021 *European Journal of Work and Organizational Psychology* 686–691 687.

<sup>57</sup> Maylor *The Relationship between Big Five Personality Traits and Burnout* (doctoral thesis Walden University) 2018 40.

<sup>58</sup> De Vine and Morgan "The Relationship Between Personality Facets and Burnout" 2020 46 *South African Journal of Industrial Psychology*; Magnano, Paolillo and Barrano "Relationships between Personality and Burn-Out: An Empirical Study with Helping Professions' Workers" 2015 1 *International Journal of Humanities and Social Science Research* 10–19 12.

<sup>59</sup> Childs and Stoeber "Do You Want Me to be Perfect? Two Longitudinal Studies on Socially Prescribed Perfectionism, Stress and Burnout in the Workplace" 2012 26 *Work and Stress* 347–364; Philp, Egan and Kane "Perfectionism, Over Commitment to Work, and Burnout in

personality type of an employee may therefore be relevant in the context of civil claims against employers for a psychiatric injury. An employer may argue that it is not liable since it was not foreseeable that a neurotic employee would suffer burnout. Landman, referring to South African and UK judgments, points out that the “thin skull” rule has been interpreted to mean that a wrongdoer must take a victim as he finds him. The wrongdoer can thus not avoid liability by relying on a pre-existing weakness of the complainant.<sup>60</sup>

### 3 4 The impact of hours of work on employee burnout

It has long been recognised that extensive work hours may pose a health risk to employees. The first Convention of the ILO was the Hours of Work (Industry) Convention, 1919 (No 1). Several other conventions limiting hours of work, making provision for paid leave, and weekly rest periods have since been adopted.<sup>61</sup>

Research supported by the WHO and the ILO indicates that the risk of ischemic heart disease (where the heart receives insufficient blood and oxygen) and strokes are considerably higher for persons working more than 55 hours a week compared to persons working 35 to 40 hours a week.<sup>62</sup> In 2016, 488 million people globally worked more than 55 hours per week, which led to an estimated 745 194 deaths and the disablement of 23.3 million people due to ischemic heart disease and stroke.<sup>63</sup> There are two pathways leading from excessive work hours to disease. The first is physical: stress hormones are released which negatively affect the cardiovascular system causing structural lesions which could be fatal. The second pathway is behavioural patterns (which could also be fatal) following excessive work hours such as a lack of exercise, substance abuse, bad eating habits, and smoking.<sup>64</sup>

Why do people work such long hours? Apart from the most obvious reason that employers often expect output that can only be achieved by long work hours, some workers, earning small salaries, have to work the maximum (voluntary) overtime allowed by law to make ends meet.<sup>65</sup> It is

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Employees Seeking Workplace Counselling” 2012 64 *Australian Journal of Psychology* 68–74 64; Tavella *et al* 2020 287(2020) *Psychiatry Research* 287 (2020) 3.

<sup>60</sup> Landman and Ndou “Some Thoughts on Development of Claims for Pure Some Thoughts on Developments Regarding the Recovery of Damages for Pure Psychiatric or Psychological Injury Sustained in the Workplace” 2015 36 *ILJ* 2460–2473 2471.

<sup>61</sup> See, for example, Hours of Work (Commerce and Offices) Convention, 1930 (No 30).

<sup>62</sup> Pega, Nafradi, Momen, Ujita, Streicher and Pruss-Ustun “Global, Regional, and National Burdens of Ischemic Heart Disease and Stroke Attributable to Exposure to Long Working Hours for 194 Countries, 2000–2016: A Systematic Analysis from the WHO/ILO Joint Estimates of the Work-related Burden of Disease and Injury” 2021 154 *Environment International*.

<sup>63</sup> *Ibid.*

<sup>64</sup> *Ibid.*

<sup>65</sup> 93rd International Labour Conference Working Hours Around the World: Balancing Flexibility and Protection [https://www.ilo.org/global/about-the-ilo/newsroom/news/WCMS\\_075524/lang--en/index.htm](https://www.ilo.org/global/about-the-ilo/newsroom/news/WCMS_075524/lang--en/index.htm) (accessed 2022-01-31).

ironic that those at the other end of the spectrum, earning high salaries and whose working hours are typically not monitored, often work extremely long hours too. The reason for this has been ascribed to stringent competition, a glorification of overwork sprouting from the protestant work ethic that emphasises the virtue of hard work, and also the words of high-flying achievers such as Elon Musk who said that “nobody ever changed the world on 40 hours a week”.<sup>66</sup> Sadly overwork has become something to boast about to impress people.

In a 2019 Organisation for Economic Co-operation and Development (OECD) survey of work-life balance in different countries,<sup>67</sup> the average working hours for each country were indicated as well as the percentage of workers working “long hours”, which was defined as more than 50 hours per week. The survey indicated that South Africans work among the longest hours in the world, but that productivity was low. A comparison between India and Germany provides an example of a country with long working hours and low productivity and a country with low average hours and high productivity respectively.<sup>68</sup> It is a small wonder that countries with low average hours and a low percentage of workers working long hours are at the top of the World Happiness Report.<sup>69</sup>

#### 4 THE RIGHT TO DISCONNECT

The notion of being always available and “reachable”, made possible by electronic communication, is exacerbated by the Covid-19 pandemic with employees working flexible hours from home. The line between work time and personal time has become more blurred than ever, which makes it difficult for employees to maintain a work-life balance.<sup>70</sup> One of the measures to counter this problem is to implement a “right to disconnect”. Eurofound defines the right to disconnect as “a worker’s right to be able to disengage from work and refrain from engaging in work-related electronic communications, such as emails or other messages, during non-work hours”.<sup>71</sup>

<sup>66</sup> Lufkin <https://www.bbc.com/worklife/article/20210507>.

<sup>67</sup> OECD Better Life Index 2019 <https://www.oecdbetterlifeindex.org/#/111111111111> (accessed 2022-01-31).

<sup>68</sup> Time Analytics “Average Working Hours in 2021 | Countries | Cities | Trends | Professions” <https://timeanalyticssoftware.com/average-working-hours-in-2021-countries-cities-trends-professions/> (accessed 2022-01-31).

<sup>69</sup> World Population Review “Happiest Countries in the World” <https://worldpopulationreview.com/country-rankings/happiest-countries-in-the-world> (accessed 2022-01-31).

<sup>70</sup> Waizenegger, McKenna, Cai and Benz “An Affordance Perspective of Team Collaboration and Enforced Working from Home during COVID-19” 2020 29 *European Journal of Information Systems* 429–442 430.

<sup>71</sup> EurWork European Observatory of Working Life (1 December 2021) <https://www.eurofound.europa.eu/observatories/eurwork/industrial-relations-dictionary/right-to-disconnect> (accessed 2022-01-31).

On 21 January 2021, the European Parliament adopted a resolution supporting the right to disconnect.<sup>72</sup> The resolution entails that employers may not penalise employees for disconnecting after hours.<sup>73</sup> The European Commission is now required to consider adopting a directive on the right to disconnect after working hours.<sup>74</sup>

European-based companies such as Volkswagen, BMW, and Puma practice self-regulation and have adopted measures to restrict emails to be sent to employees by managers after hours.<sup>75</sup> These firms installed software to put emails and official calls on hold after hours.<sup>76</sup> In this regard, Secunda points out that German employers are more willing to restrict hours than employers in, for example, the USA since in the USA there is a culture of glorifying continuous work while the German work culture places a premium on “productive, effective use of employee time”.<sup>77</sup>

France took the lead in Europe in 2016 by adopting legislation (the El Khomri law) requiring employers to formulate a policy on the right to disconnect with the participation of their employees.<sup>78</sup> By 2021 Belgium, France, Italy, and Spain have adopted legislation regarding the right to disconnect.<sup>79</sup>

Instead of legislation, Ireland has adopted a Code of Practice on the Right to Disconnect.<sup>80</sup> The aim is for employers to develop a workplace culture that supports employees disconnecting after hours. Significantly, one of the aims is to “provide assistance to those employees who feel obligated to routinely work longer hours than those agreed in their terms and conditions of employment”. It seems as if guidance or counselling would be offered to so-called workaholics.<sup>81</sup> Employees can refer an unresolved dispute about the right to disconnect in terms of the Code to the Work Relations Commission.<sup>82</sup>

The next section discusses burnout among academics as an example of burnout in a specific sector.

<sup>72</sup> European Parliament “Resolution of 21 January 2021 with Recommendations to the Commission on the Right to Disconnect” [https://www.europarl.europa.eu/doceo/document/TA-9-2021-0021\\_EN.html](https://www.europarl.europa.eu/doceo/document/TA-9-2021-0021_EN.html) (accessed 2022-01-31).

<sup>73</sup> Article 26.

<sup>74</sup> Eurofound “The Right to Disconnect” <https://www.eurofound.europa.eu/observatories/eurwork/industrial-relations-dictionary/right-to-disconnect> (accessed 2022-01-31).

<sup>75</sup> Secunda “The Employee Right to Disconnect” 2019 9 *Notre Dame Journal of International and Comparative Law* 1–39 29.

<sup>76</sup> Hesselberth “Discourses on Disconnectivity and the Right to Disconnect” 2018 20 *New Media & Society* 1994–2010 1995.

<sup>77</sup> Secunda 2018 *Notre Dame Journal of International and Comparative Law* 30.

<sup>78</sup> Secunda 2018 *Notre Dame Journal of International and Comparative Law* 28.

<sup>79</sup> Eurofound <https://www.eurofound.europa.eu/observatories/eurwork/industrial-relations-dictionary/right-to-disconnect>.

<sup>80</sup> Workplace Relations Commission (WRC) “Code of Practice for Employers and Employees on the Right to Disconnect” [https://www.workplacerelations.ie/en/what\\_you\\_should\\_know/codes\\_practice/code-of-practice-for-employers-and-employees-on-the-right-to-disconnect.pdf](https://www.workplacerelations.ie/en/what_you_should_know/codes_practice/code-of-practice-for-employers-and-employees-on-the-right-to-disconnect.pdf) (accessed 2022-01-31).

<sup>81</sup> WRC [https://www.workplacerelations.ie/en/what\\_you\\_should\\_know/codes\\_practice/code-of-practice-for-employers-and-employees-on-the-right-to-disconnect.pdf](https://www.workplacerelations.ie/en/what_you_should_know/codes_practice/code-of-practice-for-employers-and-employees-on-the-right-to-disconnect.pdf) 3.

<sup>82</sup> WRC [https://www.workplacerelations.ie/en/what\\_you\\_should\\_know/codes\\_practice/code-of-practice-for-employers-and-employees-on-the-right-to-disconnect.pdf](https://www.workplacerelations.ie/en/what_you_should_know/codes_practice/code-of-practice-for-employers-and-employees-on-the-right-to-disconnect.pdf) 10.

## 5 BURNOUT IN ACADEMIA AS AN EXAMPLE OF BURNOUT IN A SPECIFIC SECTOR

In a survey of 1 100 academics in the United States, it was found that the Covid-19 pandemic had a significantly negative impact on academics to such an extent that 55 per cent of those participating in the survey indicated that they have seriously considered making a career change or taking early retirement. This percentage is more than double compared to those who considered such steps in 2019. Almost 70 per cent of participants felt stressed and fatigued compared to the 32 per cent in 2019.<sup>83</sup> While 82 per cent of women indicated that their workload has increased, only 59 per cent of men indicated that this was the case, clearly showing that female academics in the workplace have been impacted disproportionately.<sup>84</sup>

In the South African context, Rothman and Barkhuizen found that academics suffer a significant risk of burnout if there is a lack of job resources concomitant to the person's workload. Further, poor relations with a supervisor, a lack of clarity of what is expected of the academic, little or no room for participating in decision making, low diversity of duties, and a lack of learning and training opportunities were conducive to burnout.<sup>85</sup> It was found that unresolved stressors, of which Covid-19 is an example, may lead to heightened anxiety and disengagement from work.<sup>86</sup>

Research involving South African academics indicated that exhaustion levels among academics are high for the age group 20-39, most likely caused by a heavy workload of undergraduate teaching which is not as rewarding as postgraduate teaching,<sup>87</sup> often reserved for senior academics. Undergraduate teaching could also be more stressful because of larger classes, more marking to be done than in the case of postgraduate classes, and more time spent addressing queries from students.<sup>88</sup> Academics aged 40-49 demonstrated higher levels of burnout due to increased responsibilities in the faculty.<sup>89</sup> Senior academics (60-69) were less prone to burnout because of their established status as professors through research outputs without experiencing the stress of having to work for career progression.<sup>90</sup>

Academics have pointed out that there is increased pressure to publish and that they have to fulfil more roles than was the case traditionally, namely

<sup>83</sup> Business Wire "Fidelity Investments and The Chronicle of Higher Education Study" (25 February 2021) <https://www.businesswire.com/news/home/20210225005616/en/Fidelity-Investments-The-Chronicle-of-Higher-Education-Study> (accessed 2022-01-31).

<sup>84</sup> Business Wire <https://www.businesswire.com/news/home/20210225005616/en/Fidelity-Investments-The-Chronicle-of-Higher-Education-Study>.

<sup>85</sup> Rothman, Barkhuizen and Van de Vijver "Burnout and Work Engagement of Academics in Higher Education Institutions in South Africa: Effects of Dispositional Optimism" 2014 30 *Stress Health* 322–333 326.

<sup>86</sup> Fu *et al* 2021 *Journal of Applied Psychology* 48 48–50.

<sup>87</sup> Rothman and Barkhuizen "Burnout and Work Engagement of Academics in Higher Education Institutions in South Africa" 2008 22 *SAJHE* 439–456 445.

<sup>88</sup> Rothman and Barkhuizen 2008 *SAJHE* 439–456 451–452.

<sup>89</sup> *Ibid.*

<sup>90</sup> Rothman and Barkhuizen 2008 *SAJHE* 451

to obtain research grants from overseas;<sup>91</sup> establish and teach extracurricular courses; market the university; obtain extra funding;<sup>92</sup> and teach underprepared students.<sup>93</sup> All these demands can add up and lead to burnout.<sup>94</sup> Regarding the MBI, female academics experienced higher levels of exhaustion than male colleagues, while male academics seemed to be higher on a scale of depersonalisation or cynicism (detachment from students) than female colleagues.<sup>95</sup>

A study among academic physicians (attached to academic medical centres) indicated that there is a strong correlation between burnout and the percentage of time spent on the activity that they found most meaningful.<sup>96</sup> For persons spending 20 per cent or more of their time on activities that they found meaningful, the rate of burnout is 50 per cent less than for those who spent less than 20 per cent of their time on an activity that they found meaningful, be it teaching, consulting patients, conducting research or being involved in administrative tasks.<sup>97</sup> This will be different for each person, so this is a question of job fit. Not everyone finds meaning in the same tasks. Having said that, academics presumably do not enter the profession to be involved in administrative tasks which are becoming a progressively greater burden for academics. They would prefer to be involved in either research or lecturing or both and according to the results of the research above, could suffer from burnout if they do not spend at least 20 per cent of their time on their preferred activities.

The next section discusses research on the prevalence of burnout, the protection against burnout, and the remedies available to employees suffering from burnout in Europe, the UK, and Australia. The discussion of the position in Europe indicates a progressive acknowledgement of burnout as a distinguishable form of psychological harm. Case law in the UK and Australia further provides valuable insight into the psychosocial factors at workplaces that lead to burnout and the circumstances in which courts held employers liable for their employees' damages.

## **6 PROTECTION AGAINST AND REMEDIES FOR EMPLOYEES WHO SUFFER FROM BURNOUT IN EUROPE, THE UK AND AUSTRALIA**

### **6 1 Europe**

Data on working hours, average salary, and work-life balance were considered by the OECD to establish which European countries' workers run the highest risk of burnout. The "world happiness index" and the percentage

<sup>91</sup> *Ibid.*

<sup>92</sup> Rothman *et al* 2014 *Stress Health* 322–333 323.

<sup>93</sup> Tewari and Ilesanmi "Teaching and Learning Interaction in South Africa's Higher Education: Some Weak Links" 2020 6 *Cogent Social Sciences*.

<sup>94</sup> Rothman and Barkhuizen 2008 *SAJHE* 451.

<sup>95</sup> Rothman and Barkhuizen 2008 *SAJHE* 442–443.

<sup>96</sup> Shanafelt, West, Sloan, Novotny, Poland, Menaker, Rumman and Dyrbye "Career Fit and Burnout Among Academic Faculty" 2009 169 *Arch Intern Med* 990–995 992.

<sup>97</sup> Shanafelt *et al* 2009 *Arch Intern Med* 994.

of employees reporting risk factors for mental health at the workplace were taken into account. The finding was that employees in Portugal, Greece, and Latvia were most at risk of burnout. Countries least at risk were Denmark, Germany, and Lithuania.<sup>98</sup> Research regarding burnout in certain large cities revealed that Tallinn (in Estonia), Oslo, Copenhagen, Barcelona, Amsterdam, and Frankfurt have the lowest rate of burnout while cities with the highest burnout rate are Tokyo, Mumbai, Istanbul, Los Angeles, and Buenos Aires.<sup>99</sup>

In Europe burnout is increasingly seen as a condition caused by psychosocial factors at the workplace.<sup>100</sup> Researchers found that a high workload, a low level of control, a lack of support at the workplace, and a discrepancy between effort and rewards contributed to burnout.<sup>101</sup> These findings confirm the results of the research by Maslach and Leiter discussed above.<sup>102</sup>

Council Directive 89/391/EEC deals with physical as well as mental health and safety at work.<sup>103</sup> To support mental health in workplaces, the European Commission published an e-guide to assist employers in managing stress and psychosocial risks.<sup>104</sup>

Nine countries in Europe, namely Denmark, Estonia, France, Hungary, Latvia, Netherlands, Portugal, Slovakia, and Sweden acknowledge burnout as an occupational disease, although the term is not explicitly used. Latvia is the only country that included burnout explicitly in a list of occupational diseases and the country further plans to adopt labour legislation to prescribe measures to prevent burnout in the workplace.<sup>105</sup> Denmark, France, Latvia, Portugal, and Sweden compensate persons who suffer from burnout in terms of their workmen's compensation schemes.<sup>106</sup>

Countries in Europe use different criteria to establish whether workers suffer from burnout. In Denmark, where the most claims were lodged, burnout syndrome will be recognised if a psychiatric diagnosis was made

<sup>98</sup> Business Money "End of year WFH Burnout -stressed out countries revealed in new study" (11 December 2020) <https://www.business-money.com/announcements/end-of-year-wfh-burnout-stressed-out-countries-revealed-in-new-study/> (accessed 2022-01-31); SmallBusinessPrices.co.uk "The European Countries with the Highest Risk of Burnout" <https://smallbusinessprices.co.uk/european-employee-burnout/> (accessed 2022-01-31).

<sup>99</sup> Corporate Vision "Global Cities with the Lowest and Highest Levels of Workplace Burnout Revealed" (26 March 2020) <https://www.corporatevision-news.com/global-cities-with-the-lowest-and-highest-levels-of-workplace-burnout-revealed/> (accessed 2022-01-31).

<sup>100</sup> Lastokova *et al* 2018 *Ind Health* 160–165.

<sup>101</sup> Lastokova *et al* 2018 *Ind Health* 161.

<sup>102</sup> Leiter and Maslach 1999 *Journal of Health and Human Services Administration* 472–489.

<sup>103</sup> European Agency for Safety and Health at Work "Interpretative Document of the Implementation of Council Directive 89/391/EEC in relation to Mental Health in the Workplace" <https://osha.europa.eu/en/legislation/guidelines/interpretative-document-implementation-council-directive-89391eec-relation> (accessed 2022-01-31).

<sup>104</sup> European Agency for Safety and Health at Work <https://osha.europa.eu/en/tools-and-resources/e-guides/e-guide-managing-stress-and-psychosocial-risks>.

<sup>105</sup> Eurofound <https://www.eurofound.europa.eu/observatories/eurwork/industrial-relations-dictionary/right-to-disconnect> 9.

<sup>106</sup> Lastokova *et al* 2018 *Ind Health* 162–163.

after exposure to, *inter alia*, working in a stressful environment, strict deadlines, and inadequate support from management.<sup>107</sup>

In the Netherlands, burnout is recognised as an occupational illness, and doctors are trained to diagnose and treat the condition. The term “overspanning” is used and the factors in the diagnosis of neurasthenia by the WHO in its ICD-10 list are applied for a diagnosis in terms of the “Continued Payment of Salary Act”.<sup>108</sup> The Netherlands has an insurance-based health care system<sup>109</sup> in terms of which employees may be entitled to undergo psychotherapy; participate in reintegration programmes; and take sick leave (sometimes on full salary) paid by the employer for up to two years, as well as rehabilitation for a number of years. In exceptional cases, employees will be entitled to monetary compensation.<sup>110</sup>

## 6.2 The United Kingdom

The 2020 Labour Force Survey and the 2021 statistics on work-related stress, anxiety, and depression in the UK indicated that these conditions comprised 51 per cent of ill-health at workplaces. Half of the participants reported that the pandemic exacerbated their stress levels.<sup>111</sup> The above conditions caused 55 per cent of all days lost in the workplace due to ill-health. Workers in healthcare, education (teachers and other persons involved in education), and social care experienced the highest levels of stress. Workers who participated in the survey indicated that a high workload, rigid deadlines, a high level of responsibility, insufficient support from management, unclear employment roles, and a lack of efficient communication with co-workers contributed to burnout.<sup>112</sup>

In the UK, employers are responsible for the physical as well as mental safety of their employees in terms of the Health and Safety at Work Act 1974. They have a legal duty to conduct a workplace risk assessment and on the basis of this make changes to work practices to reduce the risk to employees’ health.<sup>113</sup>

Employees in the UK may institute civil claims against their employers and may also claim compensation in terms of employer’s liability insurance. In 1973 the separate compensation fund to which UK employers had to contribute was abolished<sup>114</sup> and compensation was from then on funded by taxes. However, employers are required to insure (with private insurers) against tort claims by employees for personal injury.<sup>115</sup> Many of these claims

<sup>107</sup> Lastokova *et al* 2018 *Ind Health* 163.

<sup>108</sup> Lastokova *et al* 2020 *Social Science and Medicine* 2.

<sup>109</sup> *Ibid.*

<sup>110</sup> *Ibid.*

<sup>111</sup> HSE “Work-related Stress, Anxiety or Depression Statistics in Great Britain” (16 December 2021) <https://www.hse.gov.uk/statistics/causdis/stress.pdf> (accessed 2022-01-31).

<sup>112</sup> Labour Force Survey “Work-related Stress, Depression or Anxiety Statistics in Great Britain” (4 November 2020) <https://www.hse.gov.uk/statistics/causdis/stress.pdf> (accessed 2022-01-31).

<sup>113</sup> UK Statutory Instruments: The Management of Health and Safety at Work Regulations 1999 No 3242.

<sup>114</sup> S 94(1) of the Social Security Act 1973.

<sup>115</sup> Employers Liability (Compulsory Insurance Act) 1969.



are settled out of court.<sup>116</sup> If an employee was successful in claiming against their employer as well as against the Compensation Fund, the State can claim back the amount paid by the Compensation Fund.<sup>117</sup> In terms of the Industrial Injuries Compensation Scheme, an employee must prove that the injury arose out of and in the course of employment.<sup>118</sup> Regarding diseases, a presumption that the injury or disease arose out of and in the course of employment will only be triggered if the illness can be linked to a particular occupation.<sup>119</sup> Stress-related illness is not included in the list of diseases. Employees suffering from mental illness will only be successful in their claim if the mental illness is related to a physical accident at work, or if the employee saw an accident that happened at work that had caused the mental injury. Lewis remarks that it is not surprising that workers instituting mental stress claims in terms of workmen's compensation find it almost impossible to claim.<sup>120</sup>

Two seminal UK judgments that dealt with civil claims against employers in so-called "work stress" cases are discussed below. These judgments provide insight into the circumstances in which courts would hold employers liable for the damages suffered by their employees as a result of burnout, although the term is not used. In the first case, *Walker v Northumberland County Council (Walker)*,<sup>121</sup> a social worker who was responsible for an area fraught with child abuse complained for three years about an increasing workload but to no avail. He eventually suffered a breakdown with symptoms of "mental exhaustion, acute anxiety, headaches, sleeplessness, irritability, inability to cope with any form of stress ..." – clearly a case of burnout. Returning to work after a period of sick leave, he found a large paperwork backlog, exacerbating his symptoms. After a second breakdown, he was dismissed based on permanent ill-health.

The court ordered his employer to pay damages for breach of its duty of care as the employer failed to take reasonable steps to protect the employee against foreseeable psychiatric harm.

The court remarked as follows on the role of the type of work in psychiatric harm:

"[a]lthough sheer volume of work often imposes stress which can cause psychiatric damage to a normally robust personality, the character of the work can itself impose stresses capable of causing such psychiatric change, regardless of volume of work ..."

Eight years later, in *Hatton v Sutherland (Hatton)*,<sup>122</sup> the court likewise held that an employer would be in breach of the duty of care if it did not take reasonable steps to avoid foreseeable harm.

<sup>116</sup> Lewis "Employers' Liability and Workers' Compensation: England and Wales" in Oliphant and Wagner (eds) *Employers' Liability and Workers' Compensation: Tort and Insurance Law* (2012) 137–202 188.

<sup>117</sup> Lewis in Oliphant and Wagner *Employers' Liability and Workers' Compensation* 173.

<sup>118</sup> S 94(1) of the Social Security Contributions and Benefits Act 1992.

<sup>119</sup> Lewis in Oliphant and Wagner *Employers' Liability and Workers' Compensation* 157.

<sup>120</sup> Lewis in Oliphant and Wagner *Employers' Liability and Workers' Compensation* 160.

<sup>121</sup> [1994] EWHC QB 2.

<sup>122</sup> (2002) All ER 1.

The House of Lords approved the principles laid down in *Hatton* in the case of *Barber v Somerset Council (Barber)*<sup>123</sup> in which Mr Barber, one of the teachers in *Hatton*, appealed. The House of Lords allowed the appeal on the basis that the harm to Mr Barber was foreseeable even though he did not spell out the consequences that the heavy workload (which he did bring to his superiors' attention) would lead to a breakdown, as required by the Court of Appeal. The House of Lords importantly remarked that overworked senior employees do not all act in a similar way. Some may be reluctant to admit that they are overworked fearing the stigma of incompetency and due to professional pride. They may fear the impact on their colleagues who are also overworked, should they take leave.<sup>124</sup>

Although the term burnout was not used in *Walker* or *Hatton*, the mental harm of employees in these two cases clearly points to symptoms of burnout.

Significantly, these judgments require employers to be sensitive to indications of possible mental harm to their employees. This is the case even if the employees did not spell out the consequences of a heavy workload and further that not only the sheer volume of work but also the type of work could lead to mental harm.

### 6 3 Australia

Mental ill-health in Australia has been described as an epidemic and a catastrophe that costs employers and the country billions.<sup>125</sup> Australian workplaces are seen as contributing significantly to mental illness.

Factors that were identified as causing impaired mental health in workplaces include excessive workloads with unrealistic deadlines; long hours of work; high job demands with limited worker control; a discrepancy between work effort and reward; insecure employment; violence, bullying, and harassment at the workplace; and inequality and a lack of opportunity for employees to voice their opinions.<sup>126</sup>

A report by the Australian Health and Safety Institute indicated that 66 per cent of workers suffered from mental illness because they could not reach unrealistic deadlines. It further indicates that women are three times more likely to suffer from work stress than men, particularly in healthcare, social assistance sectors, teaching, and training. While there are over 20 official regulations for physical health and safety in place, there is none in place for mental injuries.<sup>127</sup> In terms of the Queensland Workers' Compensation and

<sup>123</sup> [2004] 2 All ER 385 64.

<sup>124</sup> *Barber supra* par 67.

<sup>125</sup> Carter and Stanford "Investing in Better Mental Health in Australian Workplaces" (13 May 2021) <https://australiainstitute.org.au/report/investing-in-better-mental-health-in-australian-workplaces/> (accessed 2022-01-31) 6.

<sup>126</sup> AIHS Carter and Stanford <https://australiainstitute.org.au/report/investing-in-better-mental-health-in-australian-workplaces/> 8.

<sup>127</sup> Australian Institute of Health and Safety "Rise in Workers Comp Claims Leads ACTU to Call for Action on Mental Health Injuries" <https://www.aihs.org.au/news-and-publications/news/rise-in-workers%E2%80%99-comp-claims-leads-actu-call-action-mental-health> (accessed 2022-01-31).

Rehabilitation Act 2003, from 20 May 2021 post-traumatic stress disorder (PTSD) suffered by first responders such as police officers, ambulance personnel, fire and emergency services, child safety and corrective services, doctors, and nurses in emergency and trauma care<sup>128</sup> as well as other eligible employees<sup>129</sup> will, due to the nature of their work, be presumed to be work-related. This eases the evidentiary burden on these employees substantially.<sup>130</sup>

Each Australian jurisdiction has its own no-fault system of workers' compensation. Some jurisdictions require employers to insure against claims by employees for work-related injuries. In other jurisdictions, there is a central fund to which employers are required to contribute which will pay out for claims by injured employees. Most jurisdictions allow employees to also institute a civil claim against their employers for damages. Generally, employees may only claim amounts from their employers for which they were not compensated in terms of workers' compensation.<sup>131</sup>

In *Doulis v State of Victoria*,<sup>132</sup> a teacher who had to teach pupils with behavioural problems often requested the employer to diminish his teaching responsibilities in respect of the specific classes, to no avail. Doulis suffered a psychiatric injury and the court found that the employer breached its duty of care towards the teacher in that his breakdown was foreseeable. His classes could have been reduced; the school could have supported him.<sup>133</sup> The lack of these measures caused a mental injury. The court did not require the employee to refer to an external standard to establish whether the workload was excessive.

Likewise, in *Roussety v Castricum Brothers Pty Ltd (Roussety)*,<sup>134</sup> the employee on numerous occasions pointed out to the employer that his workload was too heavy. He collapsed at work after having worked through the night and went on sick leave. When he returned, he still had the same workload. He suffered a psychiatric injury in the form of major depression. The court held that the employer was in breach of its duty to take reasonable care to avoid foreseeable risk of psychiatric injury to the plaintiff and that the employer's duty would include lessening his workload, monitoring his hours after his return, appointing extra staff, allowing him to take sick leave and time off work if he has worked long hours.<sup>135</sup>

What these cases have in common is that the court applied the norm of whether a reasonable person would have foreseen that the specific employee would suffer psychiatric harm. If so, the employer had the duty to take certain practical measures to ensure that the employee would not be harmed. The measures that the court proposed that the employers could

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<sup>128</sup> Employees who are required to be the first on a scenario of trauma to assist victims.

<sup>129</sup> S 36EC of the Workers' Compensation and Rehabilitation Act 2003.

<sup>130</sup> S 36ED of the Workers Compensation and Rehabilitation Act 2003.

<sup>131</sup> Lunney "Employers' Liability and Workers' Compensation: Australia" in Oliphant and Wagner (eds) *Employers' Liability and Workers' Compensation* (2012).

<sup>132</sup> [2014] VSC 395.

<sup>133</sup> *Doulis supra* par 581.

<sup>134</sup> [2016] VSC 466.

<sup>135</sup> *Roussety supra* par 241.

have taken, could provide guidance to prevent and address burnout in South Africa.

## 7 PROTECTION FOR EMPLOYEES SUFFERING FROM BURNOUT IN SOUTH AFRICA

A number of research articles have been published in South Africa, dealing with burnout mainly among health care professionals,<sup>136</sup> teachers,<sup>137</sup> and academics.<sup>138</sup> The studies indicate that burnout is alarmingly high for workers in these sectors. Although companies have reported a significant increase in mental health issues,<sup>139</sup> and it has been reported that one out of four South African employees suffer from depression,<sup>140</sup> there are no general studies, statistics, or surveys that document burnout or work stress in South Africa's working population.

There are no specific standards for ensuring psychological health in South African workplaces. However, employers have the general duty to provide safe workplaces to employees in terms of the Constitution of the Republic of South Africa, 1996 (the Constitution),<sup>141</sup> the common law,<sup>142</sup> the Occupational Health and Safety Act (OHSA),<sup>143</sup> the Mine Health and Safety Act,<sup>144</sup> the Compensation for Occupational Injuries and Diseases Act (COIDA),<sup>145</sup> and the Basic Conditions of Employment Act (BCEA).<sup>146</sup> Although not explicitly stated, some sections of the Labour Relations Act (LRA)<sup>147</sup> and the Employment Equity Act (EEA)<sup>148</sup> protect employees suffering from burnout against adverse consequences in the workplace.<sup>149</sup> The discussion in the following subsections deals with protection against and

<sup>136</sup> Payne, Koen, Niehaus and Smit "Burnout and Job Satisfaction of Nursing Staff in a South African Acute Mental Health Setting" 2020 26 *South African Journal of Psychiatry* <https://sajp.org.za/index.php/sajp/article/view/1454/1719>; Msomi "South African Healthcare Workers Been Experiencing Burnout Long Before Covid-19 Pandemic" (20 January 2021) <https://www.news24.com/health24/mental-health/mental-health-in-sa/sa-healthcare-workers-been-experiencing-burnout-long-before-covid-19-pandemic-20210318-2> (accessed 2022-01-31).

<sup>137</sup> Jackson and Rothmann 2005 25 *South African Journal of Education* 100–108.

<sup>138</sup> See, for example, Rothman *et al* 2014 *Stress Health* 322–333.

<sup>139</sup> Business Tech "South African Companies Report Big Increase in Mental Health Issues" (24 August 2021) <https://businesstech.co.za/news/business/511288/south-african-companies-report-big-increase-in-mental-health-issues/> (accessed 2022-01-31).

<sup>140</sup> University of Stellenbosch Business School "One in Four Employees Suffer from Depression" (23 May 2021) [https://www.usb.ac.za/usb\\_news/one-in-four-employees-suffer-from-depression/](https://www.usb.ac.za/usb_news/one-in-four-employees-suffer-from-depression/) (accessed 2022-01-31).

<sup>141</sup> The right to fair labour practices in s 23 of the Constitution.

<sup>142</sup> *Van Heerden v Pulp and Paper Industries Ltd* 1946 AD 385; Tshoose "Employer's Duty to Provide a Safe Working Environment: A South African Perspective" 2011 6 *Journal of International Commercial Law and Technology* 165–175 166.

<sup>143</sup> S 8 of Act 85 of 1993.

<sup>144</sup> S 2 of Act 29 of 1996.

<sup>145</sup> 130 of 1993.

<sup>146</sup> S 7 of Act 75 of 1997.

<sup>147</sup> 66 of 1995.

<sup>148</sup> 55 of 1998.

<sup>149</sup> Ss 6 and 60.

remedies for workplace psychological injuries or illnesses that could apply to victims of burnout and points out the shortcomings in these measures.

## 7 1 The Constitution

Section 9 (the equality clause) and section 23 (the right to fair labour practices) of the Constitution protect employees suffering from work-related psychiatric illness. The Labour Court in *Piliso v Old Mutual*<sup>150</sup> interpreted section 23 to encompass the right to a psychologically safe workplace.<sup>151</sup>

## 7 2 The common law

In *Media 24 v Grobler (Media 24)*<sup>152</sup> the Supreme Court of Appeal (SCA) emphasised that the common-law duty of employers to provide a safe workplace to employees (in this case against sexual harassment) is not only a duty to protect employees against physical harm, but also psychological harm.<sup>153</sup>

Employees who suffer from burnout could arguably bring a delictual claim based on either the direct or the vicarious liability of their employers. The requirements for a successful delictual claim based on an omission of the respondent were explained in *Minister of Justice and Constitutional Development v X*:

“[w]here the conduct complained of manifests itself in an omission, the negligent conduct will be wrongful only if the defendant is under a legal duty to act positively to prevent the harm suffered by the plaintiff. The omission will be regarded as wrongful when the legal convictions of the community impose a legal duty, as opposed to a mere moral duty, to avoid harm to others through positive action.”<sup>154</sup>

In light of the above, employees suffering from burnout could be successful in claiming damages on the ground that their employers had a legal duty to protect them from psychological harm caused by burnout. It may, however, be a costly and lengthy process for employees suffering from burnout to bring a civil claim for damages against their employers. They will further probably be barred from claiming against their employers by section 35 of COIDA,<sup>155</sup> which is discussed below. A claim for compensation in terms of COIDA does not require proof of fault, but the amount would be far less than the amount of damages awarded in a civil action.

<sup>150</sup> *Piliso v Old Mutual Life Assurance Company (SA) Limited* (C32/2005) [2006] ZALC 107 (5 December 2006).

<sup>151</sup> *Piliso v Old Mutual Life Assurance Company (SA) Limited* *supra* par 90 and further.

<sup>152</sup> *Media 24 Ltd v Grobler* 2005 (6) SA 328 (SCA).

<sup>153</sup> *Media 24 Ltd v Grobler* *supra* par 65.

<sup>154</sup> 2015 (1) SA 25 (SCA) par 13. The legal duty in the South African law of delict should not be confused with the English duty of care. See Neethling and Potgieter “Foreseeability: Wrongfulness and Negligence of Omissions in Delict—The Debate Goes on *MTO Forestry (Pty) Ltd v Swart* NO 2017 5 SA 76 (SCA)” 2018 43 *Journal for Juridical Science* 145–161 147.

<sup>155</sup> Landman and Ndou 2015 *ILJ* 2462.

While the court held the employer in *Media 24* directly liable for psychological harm in the form of PTSD of the employee, the court in *Mokone v Sahara Computers (Mokone)*<sup>156</sup> held the employer vicariously liable for the employee's psychiatric injury.<sup>157</sup> Even though the injury could not specifically be named, the complainant still succeeded with her claim. The court regarded it as sufficient that her injury required some form of psychiatric treatment.

It is also possible that an employee may rely on the implied duty of fair dealing as formulated in *Murray v Minister of Defence (Murray)*<sup>158</sup> to claim breach of contract. Overburdening an employee may for instance be seen as a breach of such a duty. However, the SCA in *South African Maritime Safety Authority v McKenzie (SAMSA)*<sup>159</sup> in effect overturned the decision in *Murray* by holding that there is no need for the common law to be developed to include an implied duty of fair dealing, as rights in terms of the LRA will be duplicated, at least for those employees included in the LRA.<sup>160</sup> In a more recent development, the Constitutional Court's decision in *National Union of Metalworkers of South Africa obo Nganezi v Dunlop Mixing and Technical Services (Pty) Limited*<sup>161</sup> could be interpreted to cast doubt on the correctness of the decision in *SAMSA*, since the court acknowledged the existence of an employer's general duty of fair dealing with employees.<sup>162</sup>

### 7.3 The Employment Equity Act

The EEA in section 6 prohibits discrimination on listed grounds and also on any other arbitrary ground. One of the listed grounds is disability. People with disabilities are defined in section 1 as "people who have a long term or recurring physical or mental impairment which substantially limits their prospects of entry into, or advancement in, employment". Mental impairment is defined in the Code of Good Practice on Employment of Persons with Disabilities (Disability Code)<sup>163</sup> as "a clinically recognised condition that affects a person's thought processes, judgment or emotions".<sup>164</sup> In terms of this definition, a person suffering from clinical or chronic burnout could be regarded as disabled. If an employer discriminates in any policy or practice against an employee on the ground of disability, the employee can institute a claim for damages based on unfair discrimination against the employer in terms of section 50 of the EEA.

Employers further have a duty to reasonably accommodate disabled employees as one of the designated groups in respect of affirmative

<sup>156</sup> *Mokone v Sahara Computers (Pty) Ltd* (2010) 31 ILJ 2827 (GNP). The judgment was confirmed on appeal in *Sahara Computers (Pty) Ltd v Mokone* (2014) 35 ILJ 2750 (GP).

<sup>157</sup> See also *E v Ikwezi Municipality* [2016] 2 All SA 869 (ECG).

<sup>158</sup> *Murray v Minister of Defence* 2009 (3) SA 130 (SCA); see Bosch "The Implied Term of Trust and Confidence in South African Labour Law" 2006 27 ILJ 28.

<sup>159</sup> 2010 (3) SA 601 (SCA).

<sup>160</sup> *McKenzie supra* par 55.

<sup>161</sup> 2019 (5) SA 354 (CC).

<sup>162</sup> *Dunlop supra* par 10.

<sup>163</sup> Published in terms of s 54 of the EEA under GN 1085 in GG 39383 on 2015-11-09; Item 5.3.1(b).

<sup>164</sup> Item 5.3.1(b) of the Disability Code.

action.<sup>165</sup> Reasonable accommodation in terms of section 1 means “any modification or adjustment to a job or to the working environment that will enable a person from a designated group to have access to, to participate or advance in employment”. Jurisprudence in the UK and Australia regarding measures that the courts expect of employers in burnout cases, as well as social security measures in the Netherlands, can provide some guidance on what reasonable accommodation could mean in the context of burnout. It could include a reduced workload, reduced working hours, transfer of the employee to another department, provision of some form of assistance and support, allowing for time for psychotherapy and rehabilitation, placing an employee in a programme focused on reintegration in the workplace, and granting sick leave and unpaid leave if sick leave is exhausted.

Even if the burnout does not amount to a disability, employees could argue that the mental impairment brought about by burnout is an arbitrary ground (impairing their fundamental dignity comparable to a listed ground)<sup>166</sup> on which an employer may not rely to discriminate against them.

## 7 4 The Labour Relations Act

### 7 4 1 Automatically unfair dismissal

Section 187(1)(e) of the LRA provides that dismissal based on the listed grounds, or any other arbitrary ground will be regarded as automatically unfair. If burnout caused a disability, dismissal will be regarded as automatically unfair and arguably also in the case of a mental impairment not amounting to a disability, which could be seen as an arbitrary ground. In *New Way Motor and Diesel Engineering (Pty) Ltd v Marsland*,<sup>167</sup> for example, an employee was constructively dismissed on account of his depression. The Labour Appeal Court (LAC) found that this was an automatically unfair dismissal on an arbitrary ground since dismissal on the ground of a mental illness impaired his fundamental human dignity.<sup>168</sup>

An employee suffering from “reactive depression, a mental condition, which was triggered by stress in the workplace”, successfully relied on the EEA and the LRA after he had been dismissed in *Jansen v Legal Aid South Africa (Jansen)*.<sup>169</sup> Mr Jansen was dismissed for misconduct related to absence from work, insolence, and refusal to obey an instruction. Before his dismissal, the employee’s psychiatrist reported to the employer that his mental condition was triggered by his job, that he showed signs of burnout, that he could not cope, and that he was close to a breakdown. Because of his mental condition, he avoided all possible stressors and therefore absented himself from work and disobeyed his employer’s instruction to be at work. The psychiatrist recommended that he be granted sick leave,<sup>170</sup> but

<sup>165</sup> S 15(2)(c) of the EEA.

<sup>166</sup> See *Naidoo v Parliament of the Republic of South Africa* [2020] 10 BLLR 1009 (LAC).

<sup>167</sup> (JA 15/2007) [2009] ZALAC 27 (13 August 2009).

<sup>168</sup> The LAC referred to the test in *Harksen v Lane NO* 1997 (11) BCLR 1489 (CC) as the source of this approach.

<sup>169</sup> 39 ILJ 2024 (LC) 2018.

<sup>170</sup> *Jansen supra* par 29.

the employer refused. The court found that Jansen's mental condition was triggered by stress in the workplace and that his conduct was inextricably linked to his mental condition. Further, because the employer was aware of his mental condition, it had to initiate incapacity proceedings instead of misconduct proceedings.<sup>171</sup> The court found that although Mr Jansen's depression did not necessarily mean that he suffered from a disability, his dismissal was automatically unfair because the employer ignored his mental condition. The dismissal thus impaired his fundamental dignity. Jansen was reinstated with retrospective effect. The court further awarded compensation in terms of the EEA for discrimination in terms of the employer's practice and policy.<sup>172</sup>

For a fair dismissal of a person suffering from burnout on the basis of incapacity or illness, the employer will have to follow the requirements of item 10 of the Code of Good Practice on Dismissal in the Workplace.<sup>173</sup> In cases of permanent incapacity, the employer should consider alternative employment or adapting duties or work circumstances to accommodate the employee's disability.<sup>174</sup> Item 10(4) of the Code provides that "[p]articular consideration should be given to employees who are injured at work or who are incapacitated by work-related illness". In such a case, the duty of the employer to accommodate the employee is more onerous. The intrinsic characteristic of burnout is that it is caused by conditions in the workplace. Thus, in the case of burnout, an employer will always have a more onerous duty to accommodate the employee.

#### 7.4.2 Constructive dismissal

Employees who suffer from burnout caused by a heavy workload, long hours, a lack of support from management, unrealistic deadlines, and so forth, could possibly terminate their employment on account of the employer having made continued employment intolerable in terms of section 186(e) of the LRA. In *National Health Laboratory Service v Yona (Yona)*,<sup>175</sup> the employee (Ms Yona) suffered from severe depression and generalised anxiety disorder when her junior, without any prior consultation with her, was promoted to a position in which he would be Yona's superior. The appointment was moreover communicated to other staff members in a way that humiliated Ms Yona. She took sick leave on various occasions until her sick leave was exhausted and she had no further income. The human resource manager did not inform her that she could apply for extended sick leave due to speculation that the employer's underwriters (Alexander Forbes) would not approve. She subsequently resigned to access her funds from the provident fund. The court found that she was indeed constructively dismissed as the employer "failed dismally to accord fair and compassionate treatment to Ms Yona at the time of desperate need – when she was

<sup>171</sup> *Jansen supra* par 43.

<sup>172</sup> *Jansen supra* par 65.

<sup>173</sup> Item 9 of the Code of Good Practice: Dismissal, Schedule 8 to the LRA.

<sup>174</sup> Item 10 of the Code of Good Practice: Dismissal, Schedule 8 to the LRA.

<sup>175</sup> (2015) 36 ILJ 2259 (LAC) par 41; see Tshoose "Constructive Dismissal Arising from Work-Related Stress: *National Health Laboratory Service v Yona & others*" 2017 42 *Journal for Juridical Science* 121–138.



suffering from a severe work-related mental illness and impecuniosity..." and that she was "subjected to a psychological and traumatic degradation of her human dignity".<sup>176</sup> This is clearly a case of burnout where a lack of procedural fairness as explained by Leiter and Maslach (see, section 3.1 above) led to burnout: "A fair decision is one in which people have an opportunity to present their arguments and in which they are treated with respect and politeness."<sup>177</sup>

Employees will have to prove that employment was objectively intolerable and that the employee had no other reasonable option but to terminate the relationship,<sup>178</sup> which could be difficult to prove. This could also result in the employee being without a job for a considerable time with no guarantee that their dismissal will be regarded as unfair.

## 7 5 The Basic Conditions of Employment Act

### 7 5 1 Regulation of working hours and leave in South Africa

The BCEA provides that employers must regulate working time under the OHSA<sup>179</sup> with due regard to the health and safety of employees, the Code of Good Practice on the Regulation of Working Time,<sup>180</sup> and the family responsibilities of employees. This provision applies to persons earning above R211 596.30 per annum<sup>181</sup> as well as senior managerial employees, although they are excluded from the regulation of working time in sections 8-18. These sections deal with maximum weekly hours, namely 45 hours, overtime, daily and weekly rest periods, etcetera. The goal of Schedule 1 of the BCEA, "[p]rocedures for progressive reduction of maximum working hours" is to eventually adopt a 40-hour working week.

Item 3 of the Code of Good Practice on the Arrangement of Working Time (Code on Working Time)<sup>182</sup> aligns working time with the health and safety of employees and provides that employers may be required to consider working schedules to comply with their duties to provide a safe and healthy workplace in terms of OHSA. Section 8 of OHSA in turn provides that employers shall provide and maintain a working environment that is safe and without risk to the health of employees. Employers are furthermore enjoined in section 8(2)(d) to conduct a risk assessment identifying hazards that may pose a risk to the health and safety of employees and eliminate such risks, train employees and give information on risks to their health and the means to control these risks. Clearly, the implication is that hours of work may have an impact on the health and safety of employees. In terms of the Code on

<sup>176</sup> *Yona supra* par 42.

<sup>177</sup> Leiter and Maslach 1999 *Journal of Health and Human Services Administration* 481.

<sup>178</sup> *Jordaan v Commission for Conciliation Mediation and Arbitration* (2010) 31 ILJ 981 (LAC) 985.

<sup>179</sup> s 7 of Act 85 of 1993.

<sup>180</sup> Issued in terms of s 87(1)(a) of the BEA.

<sup>181</sup> This is the current threshold amount which has been announced by the Minister of Labour in terms of the BCEA.

<sup>182</sup> GN R1440 in GG 19453 of 1998-11-13.

Working Time, hazards must be pointed out to employees excluded from the regulation of working time in section 6 of the BCEA.

## 7 6 Health and safety legislation

Evidently, the legislator did not have the psychological safety of employees in mind when the OHSA was formulated. However, section 8(1) is phrased in general terms, which is broad enough to include psychological safety, including burnout, despite this not being explicitly included in the OHSA. Certain types of work could be declared as listed work in terms of section 11 of OHSA, requiring the employer to identify the hazards and evaluate the risks associated with such work. Employers have a more onerous duty to prevent the exposure of such employees to the hazards concerned.<sup>183</sup>

In this regard, the ILO pointed out that health and safety measures can prevent psychosocial hazards present in work organisation, work design, working conditions, and labour relations.<sup>184</sup>

COIDA applies to “employees”, defined widely to cover most employees.<sup>185</sup> Employees may be entitled to benefits from the fund if they suffered an injury as a result of an accident or contracted a disease as a result of which they were disabled. “Accident” is defined as an accident arising out of and during the employee’s employment and resulting in a personal injury, illness, or death of the employee. In the case of a disease, if the disease is listed in Schedule 3 of COIDA, there is a presumption that the disease arose out of and in the course of employment.<sup>186</sup> If the disease is not listed, the onus of proof is on the employee. No mental disease is listed in Schedule 3. Employees who are entitled to claim compensation in terms of COIDA are barred from claiming damages from their employer in terms of section 35.<sup>187</sup> Some categories of employees in the mining sector, as well as employees working for less than 12 months in South Africa in terms of section 23(3)(a), are excluded from claiming in terms of COIDA.<sup>188</sup> These employees are thus not barred by section 35 and can institute a civil claim against their employers.

COIDA, similar to the OHSA, was clearly formulated with only physical illness in mind. However, in *Odayar v Compensation Commissioner (Odayar)*,<sup>189</sup> and *Urquhart v Compensation Commissioner (Urquhart)*,<sup>190</sup> the High Court awarded compensation for PTSD caused by violent scenes that the employees had to witness in their respective jobs (a police officer and a press photographer). Even though *Odayar* and *Urquhart* dealt with PTSD

<sup>183</sup> S 12 of the OHSA.

<sup>184</sup> ILO “Psychosocial Risks and Work-related Stress” [https://www.ilo.org/global/topics/safety-and-health-at-work/areasofwork/workplace-health-promotion-and-well-being/WCMS\\_108557/lang--en/index.htm](https://www.ilo.org/global/topics/safety-and-health-at-work/areasofwork/workplace-health-promotion-and-well-being/WCMS_108557/lang--en/index.htm) (accessed 2022-01-31).

<sup>185</sup> Persons involved in military service, the permanent Defence Force and police officers on service to defend the Republic are excluded.

<sup>186</sup> S 66 of COIDA.

<sup>187</sup> See *Jooste v Score Supermarket* 1999 (2) SA 1 (CC).

<sup>188</sup> *Mankayi v AngloGold Ashanti Ltd* 2011 (3) SA 237 (CC).

<sup>189</sup> 2006 (6) SA 202 (N).

<sup>190</sup> [2006] 2 All SA 80 (E).

and the term burnout was not used, these cases are illustrative of a form of burnout that is caused by the type of work a person does (and not so much by factors such as the volume of work) as the court elucidated in *Walker* in the UK. The court in *Odayar* held that the employee suffered a mental injury while the court in *Urquhart* regarded PTSD as a disease and ordered compensation on that basis.

Meryl du Plessis argued that psychological disorders should preferably be seen as occupational diseases (and not as injuries) in line with the ILO's list of occupational diseases which includes psychological mental disorders.<sup>191</sup>

In certain judgments in which an employer's negligence led to a psychological disorder, the courts did not agree with the employers that psychiatric harm to the employees arose out of employment and that they should thus claim compensation in terms of COIDA and not from their employer.<sup>192</sup> The court in *Media 24* remarked that it may well be that victims of sexual harassment who suffer from a psychiatric disorder arising out of their employment may claim in terms of COIDA, but the court did not have to decide the matter.<sup>193</sup> The SCA in *Churchill v Premier Mpumalanga*<sup>194</sup> found that the employee's psychiatric injury caused by her colleagues who participated in protest action did not arise out of her employment. Thus, the risk of her being injured in this way was not incidental to her employment. In a similar vein, the court in *MEC for Health v Free State v DN*<sup>195</sup> found that injuries suffered by a doctor who was raped while on night duty did not arise out of her employment, as rape cannot be seen as a risk incidental to her employment.

Could the risk of burnout be regarded as arising out of employment? In light of the definition of burnout, which is intrinsically caused by work stress, it cannot but be regarded as a risk incidental to the workplace. Employees covered by COIDA and suffering from burnout would most likely be entitled to claim in terms of COIDA, with the implication that in terms of section 35, they cannot then bring a civil claim against their employer. However, South African employees could claim increased compensation in terms of section 56 of COIDA if their employer's negligence caused their mental injury or disease. Thus, if burnout occurs as a result of a heavy workload, tight deadlines, and long hours, (as illustrated by the UK and Australian cases discussed above) and the employer negligently failed to address the situation, especially if the employee complained or there were other indications that the person was in danger of burnout such as frequent sick leave, the employee could be entitled to increased compensation, paid by the Compensation Fund.

<sup>191</sup> Du Plessis "Mental Stress Claims in South African Workers' Compensation" 2009 ILJ 1476–1494 1491.

<sup>192</sup> *Ntsabo v Real Security CC* (2003) 4 ILJ 2341 (LC).

<sup>193</sup> *Media 24 supra* par 77.

<sup>194</sup> SASCA [2021] 16.

<sup>195</sup> 2015 (1) SA 182 (SCA).

## 8 CONCLUSION AND RECOMMENDATIONS

Burnout is a mental (psychological) disease that is reaching epidemic proportions in workplaces across the world. It has devastating consequences for the physical and psychological health of workers, their families, the workplace, and ultimately the economy of a country. South African employees who suffer from burnout are to a certain extent protected by existing laws, but there are shortcomings, mainly because South African legislation does not make explicit provision for the psychological safety of employees.

This article argues that burnout is a distinguishable disease as it is workplace-specific, and its dimensions distinguish it from other mental diseases. This is also acknowledged in a number of European countries. It is recommended that burnout should be defined in slightly different terms than the definition by the WHO as “a mental illness caused by chronic workplace stress characterised by overwhelming exhaustion, feelings of cynicism, a sense of ineffectiveness and at times mental impairment resulting in difficulties to cope at work”. A diagnosis of clinical burnout may be required to establish partial or total disablement in terms of COIDA.

The article makes a number of recommendations below.

The OHSA should be amended to explicitly require employers to conduct risk assessments of psychosocial factors that could lead to harm such as overwork, long hours, tight deadlines, and so forth. It should also include a specific requirement to take measures to prevent employees from suffering psychological harm (including burnout). It should be recognised that employees in certain professions, for example, in health care, teaching, the police service, and emergency services run a high risk of burnout and that they may suffer from burnout even though their volume of work is not exceptionally high as pointed out in *Walker*. These professions could be declared as listed work in terms of section 11 of OHSA, which would require the employer to take extra measures to protect these employees against workplace hazards.

A code on psychosocial safety in the workplace, with information on the impact of workplace organisation and culture (such as a rigid hierarchical structure, no provision for input by employees, a mismatch between input and reward, and low ethical culture) should be developed to assist employers to restructure the workplace and avoid burnout of employees. This code should further guide employers to recognise symptoms of psychological diseases (including burnout) such as frequent sick leave and to make provision for employees to receive guidance on attaining a healthy work-life balance. However, if the root cause for burnout is overload, training on work-life balance and wellness centres at work will not prevent burnout. An employee should in these circumstances be supported or the workload should be decreased as pointed out by the court in *Rousetty* in Australia.

The BCEA, in coordination with the Unemployment Insurance Act,<sup>196</sup> should make specific provision for extended sick leave for employees

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<sup>196</sup> 63 of 2001.

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suffering from burnout to ensure sufficient time for recovery and rehabilitation.

To ensure a healthy work-life balance the BCEA should furthermore be amended to make provision for a 40-hour instead of a 45-hour workweek. A national code and codes for each workplace should be adopted to make provision for the right to disconnect.

COIDA should specifically make provision for compensation for psychological diseases, including burnout, in the list of compensable diseases. However, instead of (only) providing monetary compensation, the focus should be on providing psychotherapy and rehabilitation for burnout and a programme for gradually reintegrating the employee into the workplace. The Netherlands provides an example of such a system.

The example of the Queensland Workers' Compensation Act could be followed to relieve so-called "first responders" such as ambulance personnel, fire and emergency services, police officers, doctors, and nurses in emergency and trauma care of the evidential burden to prove that their PTSD or burnout arose out of their employment.