

**DISABILITY DISCRIMINATION AND REASONABLE
ACCOMMODATION IN THE SOUTH AFRICAN WORKPLACE**

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ABSTRACT

DISABILITY DISCRIMINATION AND REASONABLE ACCOMMODATION IN THE SOUTH AFRICAN WORKPLACE

People with disabilities are a minority group who has suffered disadvantage especially in the workplace. They currently enjoy Constitutional and legislative protection in a democratic South Africa.

Their rights to equality and non-discrimination are entrenched in the Constitution,¹ the Employment Equity Act² and the Promotion of Equality and Prevention of Unfair Discrimination Act,³ where disability is a listed prohibited ground of unfair discrimination. The disability of an employee is also a prohibited reason for dismissal in terms of the Labour Relations Act.⁴ People with disabilities furthermore are also a designated group⁵ who are beneficiaries under affirmative action measures in terms of the EEA.⁶

Even though “disability” is a ground protected under Constitutional and statutory anti-discrimination provisions, the ground itself is not defined in South African law.

¹ Sections 9(3) and 9(4) of the Final Constitution of the Republic of South Africa of 1996

² Section 6(1) of the Employment Equity Act 55 of 1998 (Hereinafter “the EEA”)

³ Section 9 of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000

⁴ 66 of 1995, section 187(1)(f)

⁵ Section 1 of the EEA

⁶ Section 15 of the EEA

There are currently two approaches to disability, namely the medical and social approaches to disability.⁷ The medical approach to disability views disability as an issue of welfare⁸ and requires the person with a disability to be cured to fit in with “able-bodied” society. The social approach views disability as something that is created by the social environment and not necessarily only by the impairment a person is living with.⁹ It requires society to cure itself to accommodate people with disabilities.¹⁰

The two South African court decisions of *Hoffmann v South African Airways*¹¹ and *IMATU and another v City of Cape Town*,¹² have illustrated that disability discrimination remains an important issue, even though the Constitutional Court in *Hoffmann* did not treat HIV positive status as a disability,¹³ and the Labour Court in *IMATU* held that the second applicant’s insulin dependent *diabetes mellitus* did not amount to a disability.¹⁴

Reasonable accommodation is another important aspect in respect of persons with disabilities in the workplace. Designated employers have a duty to provide reasonable accommodation to people with disabilities as part of affirmative action

⁷ Chapter 1 of the White Paper on Integrated National Disability Strategy, Office of the Deputy President November 1997

⁸ *Ibid*

⁹ Chapter 1 of the White Paper on Integrated National Disability Strategy

¹⁰ *Ibid*

¹¹ (2000) 21 ILJ 2357 (CC)

¹² [2005] 11 BLLR 1084 (LC)

¹³ *Hoffmann v South African Airways* 2375

¹⁴ *IMATU and another v City of Cape Town* 1115

measures taken under the EEA.¹⁵ Even though reasonable accommodation is phrased as an affirmative action duty in terms of the Act, it is also a principle of non-discrimination on the basis of disability.¹⁶

What has been said above makes it clear that even in the light of disability being a protected ground in the Constitution and mentioned statutes, the Labour- and other courts were not swamped with cases dealing with disability discrimination. The cases of *Hoffmann v SAA*, which dealt with unfair discrimination on the basis of HIV positive status, and *IMATU and another v City of Cape Town*, which concerned unfair discrimination on the basis of insulin dependent *diabetes mellitus*, were the closest that the courts came to the issue of disability discrimination.

Moreover, even though affirmative action is a Constitutional imperative,¹⁷ and it has been followed in South African law for quite some time, most of its jurisprudence have evolved from cases dealing with the other two designated groups (namely black people and women under the EEA¹⁸), and not so much from people with disabilities.

¹⁵ Section 15(2)(c) of the EEA

¹⁶ Item 6.1 of the Technical Assistance Guidelines on the Employment of People with Disabilities
Department of Labour 2003

¹⁷ Section 9(2) of the Constitution

¹⁸ Section 1 of the EEA

Disability surely is a novel¹⁹ and important equality issue. This dissertation will attempt to bring some clarity to the confused areas. That will be done in the light of relevant domestic and foreign jurisprudence. These will include South African legislation and case law, International Instruments and Conventions, foreign case law, journal articles and books.

November 2008

¹⁹ Ngwena “Interpreting Aspects of the Intersection between Disability, Discrimination and Equality: Lessons for the Employment Equity Act from Comparative Law. Part I (Defining Disability)” (2005) 16(2) *Stellenbosch Law Review* 210 at 211

KEYWORDS AND PHRASES

People with disabilities

The social and medical approaches to disability

Unfair discrimination

Affirmative action

Designated group

Reasonable accommodation

Unjustifiable hardship

Inherent requirements of the job

Automatically unfair dismissal

Ill – health or injury incapacity

DECLARATION

I declare that the work presented in this mini-thesis is my own, that it has not been submitted before for any degree or examination and that all the sources I have used or quoted have been indicated and acknowledged as complete references.

Dawn Nadine Hurling

Signature

November 2008

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I dedicate this paper to God, the Almighty Father, His Son, the Saviour Jesus Christ and the Holy Spirit. *Soli Deo Gloria.*

I also thank my mother, sisters and the rest of my family.

To my late father: *Pappa*, rest in peace.

“Again and again I admonish my students in Europe and America: Don’t aim at success - the more you aim at it and make it a target, the more you are going to miss it. For success, like happiness, cannot be pursued; it must ensue, and it only does so as the unintended side effect of one’s personal dedication to a cause greater than oneself or as the by-product of one’s surrender to a person other than oneself. Happiness must happen, and the same holds for success: you have to let it happen by not caring about it. I want you to listen to what your conscience commands you to do and go on to carry it out to the best of your knowledge. Then you will live to see that in the long-run – in the long-run I say! – success will follow you precisely because you had forgotten to think about it.”

Viktor Emil Frankl

“Do not curse a deaf man or put something in front of a blind man so as to make him stumble over it. Obey me; I am the LORD your God.”

Leviticus 18:14

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CHAPTER 1

INTRODUCTION

The Constitution²⁰ provides that neither the State²¹ nor any person²² may unfairly discriminate directly or indirectly against anyone on the basis of disability.

The Employment Equity Act²³ (hereinafter “the EEA”), which promotes the right of equality in the Constitution,²⁴ lists people with disabilities as one of the designated groups under affirmative action measures²⁵ and also contains a definition of “people with disabilities”.²⁶ Bargaining councils,²⁷ the Commission for Conciliation, Mediation and Arbitration²⁸ and the Labour Court²⁹ have interpreted this definition in the context of employment.

The EEA also provides that no person may unfairly discriminate, directly or indirectly, against an employee or applicant for employment, in any employment

²⁰ Constitution of the Republic of South Africa 1996

²¹ Section 9(3) of the Constitution

²² Section 9(4) of the Constitution

²³ 55 of 1998

²⁴ Preamble to the EEA

²⁵ Section 1 of the EEA

²⁶ *Ibid*

²⁷ *National Education Health and Allied Workers Union on behalf of Lucas and Department of Health (Western Cape)* (2004) 25 ILJ 2091 (BCA)

²⁸ *Wylie and Standard Executors and Trustees* (2006) 27 ILJ 2210 (CCMA)

²⁹ *IMATU and another v City of Cape Town* [2005] 11 BLLR 1084 (LC) and *Standard Bank of South Africa v Commission for Conciliation, Mediation and Arbitration and others* [2008] 4 BLLR 356 (LC)

policy or practice, on one or more grounds, including disability.³⁰ South African courts have not yet dealt with the issue of disability discrimination, but two cases, both of which had been decided in the employment context, have come close to this matter. *Hoffmann v South African Airways*,³¹ a Constitutional Court decision, concerned the validity of an employer's refusal in terms of a blanket employment ban to appoint a person to a position of cabin attendant for reason of the job applicant's HIV status. In *IMATU and another v City of Cape Town*,³² the Labour Court had to determine the validity of a person's exclusion in terms of a blanket employment ban from a position of firefighter for reason of the person living with insulin dependent *diabetes mellitus*.

The EEA further requires people with disabilities to be reasonably accommodated in a job or the working environment, where it is needed.³³ The Labour Court in *Standard Bank of South Africa v Commission for Conciliation, Mediation and Arbitration*³⁴ exposed, amongst others, the content of an employer's duty to reasonably accommodate, where needed, an employee or job applicant with a disability. A Code of Good Practice on the Employment of People with Disabilities, which "... deals with the full employment cycle..."³⁵ of people with disabilities, has also been issued in terms of the EEA. The Promotion

³⁰ Section 6(1) of the EEA

³¹ (2000) 21 ILJ 2357 (CC)

³² [2005] 11 BLLR 1084 (LC)

³³ Section 1 of the EEA

³⁴ See footnote 10

³⁵ *National Education Health and Allied Workers Union on behalf of Lucas and Department of Health (Western Cape)* (2004) 25 ILJ 2091 (BCA) 2098

of Equality and Prevention of Unfair Discrimination Act,³⁶ which is not labour legislation and does not apply to anyone to whom the EEA applies, nor to the extent to which the EEA applies,³⁷ also prohibits unfair discrimination on the basis of disability.³⁸

The Labour Relations Act³⁹ gives effect to the constitutional right to fair labour practices⁴⁰ and provides that a dismissal for which the reason is that an employer unfairly discriminated against an employee, directly or indirectly, on any arbitrary ground, including disability, is automatically unfair.⁴¹

The Republic of South Africa is also a signatory State to the United Nations Convention on the Rights of Persons with Disabilities. The purpose of the Convention is “to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity.”⁴² South Africa has accordingly acquired International Law obligations towards people with disabilities which it must fulfil.

In light of the abovementioned protections that people with disabilities enjoy under International Law, the Constitution and, importantly, labour legislation, this

³⁶ 4 of 2000

³⁷ Section 5(3) of the Promotion of Equality and Prevention of Unfair Discrimination Act

³⁸ Section 9 of the Promotion of Equality and Prevention of Unfair Discrimination Act

³⁹ 66 of 1995

⁴⁰ Section 27 of the Interim Constitution of the Republic of South Africa 1993, which is now section 23(1) of the current Constitution.

⁴¹ Section 187(1)(f) of the Labour Relations Act

⁴² Article 1 of the UN Convention on the Rights of Persons with Disabilities

paper will investigate who the “people with disabilities”, that form the subject of the abovementioned protections, in terms of the EEA are. It will further examine how a person needs to prove a claim of unfair discrimination on the basis of disability in terms of the EEA and when discrimination on the basis of disability will not be unfair in terms of the EEA. This study will further investigate the content of an employer’s duty to reasonably accommodate an employee or job applicant with a disability where needed, and whether there is a difference between a disability and medical incapacity of an employee in the context of dismissal.

CHAPTER 2

THE DEFINITION OF PEOPLE WITH DISABILITIES

2.1 The medical and social approaches to disability

There are two schools of thought with respect to the concept of disability, namely the medical and social approaches to disability.

The older medical approach treated disability as a health and welfare issue and called upon the State and society to care for people with disabilities.⁴³ It dictated that people with disabilities were objects of pity and were to be cared for⁴⁴ and thereby did not treat the group as independent human beings with human dignity. The White Paper on Integrated National Disability Strategy states that many of the organizations that were founded for people with disabilities, are run by “able-bodied” individuals,⁴⁵ who may not have the expertise for what people with disabilities really require. The medical model focused on the medical condition or impairment of the person with a disability.⁴⁶ A fatal flaw in this approach is that it “personalises” disability by treating it as the person’s own problem and advocates

⁴³ Chapter 1 of the White Paper on National Integrated Disability Strategy
Office of the Deputy President, November 1997

⁴⁴ Chapter 1 of the White Paper on Integrated National Disability Strategy: The Medical Model of Disability

⁴⁵ *Ibid*

⁴⁶ Grobbelaar–Du Plessis “Gestremdheid as ‘n menseregte–konsep: ‘n Internasionale klemverskuiwing” (2005) 2 *De Jure* 353 at 359

that attempts to cure or treat the disability would manage or solve the person's disability problem.⁴⁷

The social model is based on the notion that the adverse circumstances that people with disabilities endure, and the unfair discrimination to which they are subjected do not flow from their impairment, but from the social environment.⁴⁸

This school of thought places emphasis on the failure of society to accommodate people with disabilities and the fact that disability (of an individual) does not mean "inability".⁴⁹ The social model, which is also known as the human rights model of disability, centralizes the person with the disability – and his or her human dignity – and does not focus on impairment.⁵⁰ The disability of the person, which was the individual's problem in terms of the medical model, becomes society's problem⁵¹ and the latter must change to fit the impaired person and not *vice versa*.⁵² The social model of disability as described here, is in line with substantive equality.⁵³ No country follows the social approach to disability in its purest form⁵⁴ and both the medical and social approaches to disability are required when disability is interpreted.⁵⁵

⁴⁷ Olivier and Smit "Disability" in Joubert (ed) *The Law of South Africa* 13(2) *Labour Law and Social Security Law* 230

⁴⁸ Chapter 1 of the White Paper on Integrated National Disability Strategy: The Social Model of Disability

⁴⁹ *Ibid*

⁵⁰ Grobbelaar–Du Plessis *op cit* 359

⁵¹ *Ibid*

⁵² Chapter 1 of the White Paper on Integrated National Disability Strategy

⁵³ Olivier and Smit *op cit* 230

⁵⁴ Ngwena "Interpreting Aspects of the Intersection between Disability, Discrimination and Equality: Lessons for the Employment Equity Act from Comparative Law. Part I (Defining Disability)" (2005) 16(2) *Stellenbosch Law Review* 210 at 222

⁵⁵ *Ibid*

2.2 The definition of “people with disabilities”

The Standard Rules on the Equalization of Opportunities for Persons with Disabilities provides that “disability” refers to different functional limitations that occur in any population in any country of the world.⁵⁶ The Standard Rules provide that people may be disabled by physical, intellectual or sensory impairments, medical conditions or mental illness, all of which may be permanent or transitory in nature.⁵⁷ In terms of the Rules, a “handicap” is a loss or a limitation of opportunities for a person to participate in society on an equal basis with others.⁵⁸ “Handicap” also refers to the interplay between the person with a disability and the environment and it illustrates that the social environment, amongst others, does not sufficiently cater for the needs of persons with disabilities and prevents persons with disabilities from participating on an equal basis with others.⁵⁹ Article 14 of the Standard Rules on the Equalization of Opportunities for Persons with Disabilities states that the Rules are not compulsory, but may become customary international rules if it is applied by a sufficient number of states which have the intention of adhering to a rule in international law.

⁵⁶ Article 17 of the UN Standard Rules on the Equalization of Opportunities for Persons with Disabilities

Adopted by UN General Assembly Resolution 48/96 of 20 December 1993

⁵⁷ *Ibid*

⁵⁸ Article 18 of the UN Standard Rules on the Equalization of Opportunities for Persons with Disabilities

⁵⁹ *Ibid*

The World Health Organization's International Classification of Functioning, Disability and Health of 2001 describes disability as a result of a relationship between a person's medical or health condition and the person's personal circumstances as well as environmental factors, and has also moved towards a social approach to disability.

South Africa has recently become a signatory state to the UN Convention on the Rights of Persons with Disabilities (hereinafter "the UN Disability Convention"),⁶⁰ which contains a definition of persons with disabilities. The UN Disability Convention states that persons with disabilities are individuals with long-term physical, mental, intellectual or sensory impairments, whose impairments may in interaction with various barriers hinder the individual's full and effective participation in society on an equal basis with others.⁶¹ The UN Disability Convention acknowledges that a physical, mental, sensory or intellectual impairment is but the tip of the iceberg when it comes to defining a person with a disability. There are also existing structures ("various barriers") that in synergy with the individual's particular impairment ("interaction"), prevent, limit or exclude ("hinder") the individual from fully and effectively participating in society on an equal basis with other "able-bodied" individuals.

The Employment Equity Act stipulates that people with disabilities are people who have a long-term or recurring physical or mental impairment that

⁶⁰ The Convention is not yet being adhered to.

⁶¹ Article 1 of the UN Disability Convention

substantially limits their prospects of entry into, or advancement in, employment.⁶² Item 5.1 of the Code of Good Practice on the Employment of People with Disabilities,⁶³ states that the Code provides protection for people with disabilities in employment and does so by not focusing on the impairment or on the medical diagnosis of the person concerned, but on the effects that the person's disability has on the person in the working environment. Even though the abovementioned provision indeed portrays strong characteristics of the social approach to disability, the South African definition of "people with disabilities" does not subscribe to a purely social model. Rather, there is a marriage of the two approaches in the definition. The South African definition combines the certainty⁶⁴ of the medical model ("people who have a long-term or recurring physical or mental impairment...") with the social model's sensitivity and awareness that external factors also contribute to the creation of disability ("...which substantially limits their prospects of entry into, or advancement in, employment"), to produce "people with disabilities". Where disability is based on impairment, as is the case with the South African definition, it will not be difficult to identify people with disabilities as a group.⁶⁵ Moreover, when impairment forms the basis of disability, it will enable someone to differentiate between people who experience disadvantage because of their disability and those who are marginalised because of other attributes.⁶⁶

⁶² Section 1 of the EEA

⁶³ This Code was issued in terms of section 54(1)(a) of the EEA and will hereinafter be referred to as "the Disability Code".

⁶⁴ Ngwena and Pretorius "Code of Good Practice on the Employment of People with Disabilities: An Appraisal" (2003) 24 *Industrial Law Journal (ILJ)* 1817 at 1821

⁶⁵ Ngwena (2005) 227

⁶⁶ Ngwena and Pretorius (2003) 1822

The Disability Code analyses the definition of “people with disabilities” as contained in section 1 of the EEA and provides three requirements for an individual to be a person with a disability in terms of the Act. The Code provides that a person must have a physical or mental impairment, which must be long-term or recurring and that such impairment must have a substantial limitation on the person’s prospects of entering into or advancing in employment.⁶⁷

The Disability Code states that an impairment can be physical or mental in nature, or can be a combination of the two.⁶⁸ A physical impairment is a partial or total loss of a person’s bodily function or a part of a person’s body, and includes sensory impairments.⁶⁹ A mental impairment is a condition or illness that has been “clinically recognized” (by a medical professional) and that influences or impacts on the thought processes, emotions or judgement of the person.⁷⁰

The International Classification of Functioning, Disability and Health defines an impairment as a “problem” in an anatomical part of the body, or in a psychological or physiological function of a body system.⁷¹ This “problem” may flow from a loss, variance or defect in a body part or physiological or psychological function of a body system, or where such a body part or function “substantially deviates” from what is accepted to be normal in a biomedical

⁶⁷ Item 5.1 of the Disability Code

⁶⁸ Item 5.1.1(i) of the Disability Code

⁶⁹ Item 5.1.1(ii) of the Disability Code

⁷⁰ Item 5.1.1(iii) of the Disability Code

⁷¹ *International Classification of Functioning, Disability and Health* World Health Organization 2001

sense.⁷² When a person's leg is amputated above the knee or a person is short sighted, such persons are impaired, because they "significantly deviate" from what is accepted to be normal in the biomedical sense, viz. that people normally have two fully functioning legs or sufficient sight.

With regards to mental impairments, the Disability Code emphasises that the condition or illness must be "clinically recognized".⁷³ There is a presumption of sanity in South African law⁷⁴ and a person who relies on a mental condition or illness must prove that such condition or illness exists.⁷⁵ A court or *quasi-judicial* body must hear expert evidence on a condition or illness that is claimed to form the basis of, or amounts to, a mental impairment and must make a finding of fact on whether such condition or illness is clinically recognized.⁷⁶

It is important to note that when a physical or mental impairment is established through medical evidence or otherwise, the presence thereof lays a foundation for disability, but does not, *in itself*, constitute a disability. Physical and mental impairments encompass more than diseases or disorders⁷⁷ and in the words of the Technical Assistance Guidelines on the Employment of People with Disabilities,⁷⁸ "[p]eople with disabilities are not conditions or diseases".⁷⁹ An

⁷² *Ibid*

⁷³ Item 5.1.1 (iii) of the Disability Code

⁷⁴ Burchell and Milton *Principles of Criminal Law* 390

⁷⁵ *Ibid* 391

⁷⁶ Ngwena and Pretorius (2003) 1822

⁷⁷ *International Classification of Functioning, Disability and Health* 2001

⁷⁸ The Technical Assistance Guidelines on the Employment of People with Disabilities
Department of Labour 2003

⁷⁹ Item 1.3.1.1 of the Technical Assistance Guidelines on the Employment of People with

impairment is but one component to establish in determining whether an individual is a person with a disability.

The second requirement of the definition is that the physical or mental impairment, if established, must be long-term or recurring.⁸⁰ A physical or mental impairment is long-term if such impairment has lasted or is likely to last for at least twelve months.⁸¹ A mental or physical impairment is recurring if such impairment is likely to occur again *and* if it is substantially limiting.⁸²

The abovementioned requirement addresses the period of the physical or mental impairment⁸³ and indicates that the EEA (which precedes the Disability Code) seeks to protect people whose disabilities persist, rather than people who have temporary disabilities.⁸⁴ The fact that a “long-term” impairment is one that has lasted or is likely to last for at least twelve months, provides a matter of certainty in respect of the duration of the impairment,⁸⁵ and yet it is only a starting point, as it will be difficult in certain instances to predict how long an impairment may continue.⁸⁶ The twelve month period for a long-term impairment is a flexible yardstick for determining duration.⁸⁷

Disabilities

⁸⁰ Item 5.1.2 of the Disability Code

⁸¹ Item 5.1.2 (i) of the Disability Code

⁸² Item 5.1.2 (ii) of the Disability Code

⁸³ Ngwena and Pretorius (2003) 1823

⁸⁴ Ngwena (2005) 228

⁸⁵ *Ibid* 230

⁸⁶ Ngwena and Pretorius (2003) 1824

⁸⁷ *Ibid*

The Disability Code further states that a progressive condition is a condition that is likely to change, develop or recur. It also states that people who have progressive conditions only become people with disabilities if their progressive conditions become substantially limiting.⁸⁸ The Code also provides that progressive or recurring conditions that are asymptomatic or that do not have a substantially limiting effect on a person, are not disabilities.⁸⁹

In respect of progressive or recurring conditions that do not constitute disabilities where such conditions are asymptomatic or not substantially limiting, Ngwena states that such an approach follows the medical model and not the social model of disability.⁹⁰ He states that the above provision of the Disability Code is indifferent to the fact that perceptions of medical conditions, even where such a condition is not a disability for the purposes of the EEA or the Code, can also have a disabling effect on the particular individual and make the “carrier” of the medical condition vulnerable to discrimination.⁹¹ In doing so, he endorses the social approach to disability.⁹² In this regard it is submitted that the South African definition of “people with disabilities” focuses on people with actual disabilities and does not include people with perceived disabilities, as is the case with the Americans with Disabilities Act of 1990, which will be discussed later in this Chapter.

⁸⁸ Item 5.1.2 (iii) of the Disability Code

⁸⁹ *Ibid*

⁹⁰ Ngwena (2005) 230

⁹¹ *Ibid*

⁹² *Ibid*

The third requirement of “people with disabilities” is that the long-term or recurring physical or mental impairment must be substantially limiting.⁹³ Ngwena and Pretorius state that a court or *quasi*-judicial body has to holistically assess the effects of a person’s long-term or recurring physical or mental impairment on the latter’s employment to make a factual finding whether such impairment is substantially limiting.⁹⁴ According to the Disability Code, an impairment is substantially limiting if in its nature, duration or effects, it substantially limits the person’s ability to perform the essential functions of the job for which the person is considered.⁹⁵ The abovementioned means that the impairment itself (the type of impairment), the period of the impairment or the impact the impairment has on the person, can substantially limit the person’s ability to perform the essential functions of the job in question.

The Disability Code states that certain impairments that can easily be controlled, corrected or lessened, are not substantially limiting.⁹⁶ It states that when a person uses corrective devices which correct or ameliorate his or her impairment, such a person will not have a disability.⁹⁷ When the particular impairment is however substantial even with the use of the corrective devices – in other words, when the corrective devices do not correct or ameliorate the impairment – the person has a disability.⁹⁸

⁹³ Item 5.1.3 of the Disability Code

⁹⁴ Ngwena and Pretorius (2003) 1826

⁹⁵ Item 5.1.3 (i) of the Disability Code

⁹⁶ Item 5.1.3 (ii) of the Disability Code

⁹⁷ *Ibid*

⁹⁸ *Ibid*

The Code also states that when an assessment is conducted to determine whether the effects of an impairment is substantially limiting, such assessment must determine whether medical treatment or other devices can control or correct the impairment so that the effects thereof can be prevented or removed.⁹⁹ In other words, the abovementioned assessment must determine whether “medical treatment or other devices” can control or correct the impairment so that such impairment is not substantially limiting. The Code further states that when there is uncertainty about whether an impairment is substantially limiting, an assessment to that effect may be done by a suitably qualified person.¹⁰⁰

The Disability Code also states that certain conditions and impairments may for public policy reasons not be regarded as disabilities.¹⁰¹ The conditions and impairments include, but are not limited to:

- sexual behaviour disorders that are against public policy;
- tattoos and body piercing;
- compulsive gambling and a tendency to steal or light fires;
- disorders that affect a person’s mental or physical state if caused by the current use of illegal drugs or alcohol, unless the individual affected is participating in a recognized treatment programme and
- normal deviations in height, weight and strength and conventional physical and mental characteristics and common personality traits.¹⁰²

⁹⁹ Item 5.1.3 (iii) of the Disability Code

¹⁰⁰ Item 5.1.3 (v) of the Disability Code

¹⁰¹ Item 5.1.3 (iv) of the Disability Code

¹⁰² Item 5.1.3 (iv) (a) – (e) of the Disability Code

In respect of the public policy exclusions that are contained in item 5.1.2(iv) of the Disability Code, Ngwena and Pretorius confirm that the Disability Code is premised on the principle of non-discrimination on the basis of disability.¹⁰³ They state that when a person has an impairment that falls within the ambit of the public policy exclusions, the person does not have a disability for the purposes of the Disability Code and the person is not covered by the protections offered in the Code and the EEA.¹⁰⁴ Owing to the fact that the public policy exclusions do not constitute disabilities, it follows that when discrimination is perpetrated against such persons on such grounds, the discrimination will either be regarded as automatically fair because of the public policy exclusion, or the perpetrator of the discrimination need not show that it is justified or fair.¹⁰⁵ They submit that this goes against the Constitution which, in section 9(5), requires discrimination to be shown to be fair.¹⁰⁶ Ngwena and Pretorius state that the public policy exclusions, that is a limitation on the constitutional right of non-discrimination on the basis of disability, cannot usurp the function of the limitations clause in determining whether a limitation of a specific right (in this instance, equality) is fair.¹⁰⁷

When a person has an impairment or condition that falls within the scope of the public policy exclusions, such person will not have a disability, as is apparent from item 5.1.3(iv) of the Disability Code. The Disability Code flows from the EEA

¹⁰³ Ngwena and Pretorius (2003) 1829. Item 4 of the Disability Code states that the Code is based

on the principle that no person may unfairly discriminate against a person on the basis of disability, as contained in section 9(4) of the Constitution.

¹⁰⁴ *Ibid*

¹⁰⁵ *Ibid*

¹⁰⁶ *Ibid*

¹⁰⁷ *Ibid* 1830

that deals *inter alia* with the prohibition of unfair discrimination in the context of employment. When discrimination is perpetrated in the employment context against a person on the basis of the abovementioned impairments or conditions, the complainant will not be able to allege discrimination on the basis of disability. The complainant must prove the facts upon which discrimination can be established¹⁰⁸ as well as the relevant impairment or condition that is the ground for discrimination, for example tattoos, body piercing or a tendency to light fires.

If a court finds that the complainant was able to show discrimination and that the ground relied upon by the complainant amounts to an analogous ground of discrimination, then the employer needs to show that the discrimination on the analogous ground is fair.¹⁰⁹ In the employment context, the employer may do so either in terms of the inherent requirements of the job or in terms of affirmative action taken in accordance with the purpose of the EEA.¹¹⁰ The limitations clause that is contained in section 36 of the Constitution usually does not come into play in respect of the fairness or justification of discrimination in the employment context.

The public policy exceptions accordingly do not represent an automatic justification of discrimination on the grounds contained therein, nor does it usurp the functions of the limitations clause. It does not concern discrimination or its

¹⁰⁸ Cooper "The Boundaries of Equality in Labour Law" (2004) 25 *ILJ* 813 at 829

¹⁰⁹ Section 11 of the EEA. In *IMATU and another v City of Cape Town*, Murphy AJ held at 1113 that an employer needs to show fairness of discrimination on both listed and unlisted grounds.

¹¹⁰ Section 6(2) of the EEA

justification, but lists impairments and conditions that do not constitute disabilities. If these grounds are established as analogous to the listed grounds of discrimination, the legal principles pertaining to employment discrimination must run its course and an employer needs to establish the fairness of discrimination on these grounds.

2.3 South African case law

In *IMATU and another v City of Cape Town*,¹¹¹ the Labour Court had to determine amongst others, whether the insulin dependent *diabetes mellitus* of Mr Murdoch, a law enforcement officer who wished to become a firefighter, amounted to a disability for the purposes of the EEA.

The Labour Court applied the requirements of “people with disabilities” as contained in the Disability Code, to determine whether Mr Murdoch’s type I diabetes constituted a disability.¹¹² The Labour Court heard extensive medical evidence on the issue of diabetes and found that insulin dependent *diabetes mellitus* was a physical (bodily) impairment.¹¹³ The court also found that type I diabetes was a long-term impairment, because it lasted for the rest of a person’s life and is incurable.¹¹⁴ It stated that type I diabetics were, for the rest of their lives, dependent on insulin that had to be administered either by themselves, or

¹¹¹ [2005] 11 BLLR 1084 (LC)

¹¹² *Supra* 1114

¹¹³ *Ibid*

¹¹⁴ *Ibid*

by other persons and that a failure to take insulin would result in the death of the person.¹¹⁵

Murphy AJ also had to determine whether Mr Murdoch's long-term physical impairment substantially limited his ability to perform the essential functions of the job of a firefighter.¹¹⁶ The court cited the provisions of the Disability Code that required a court or *quasi-judicial* body to take into account medical treatment or other corrective devices that could control or correct an impairment so that the adverse effects thereof were prevented or removed, in determining whether an impairment is substantially limiting.¹¹⁷ It found on the basis of medical evidence, that Mr Murdoch could, by using fast-acting insulin, control his type I diabetes so that the adverse effect thereof (which was a possible hypoglycaemic attack whilst on fighting a fire) were prevented or removed in his working environment.¹¹⁸ The fast-acting insulin was the "medical treatment" or "corrective device" that Mr Murdoch had used for years to control his diabetes to prevent debilitating hypoglycaemia, which the Labour Court took into account in determining that his long-term impairment was not substantially limiting.¹¹⁹

The court found that even though Mr Murdoch's type I diabetes was a long-term physical impairment, it was not a substantial limitation on his ability to perform

¹¹⁵ *Ibid*

¹¹⁶ *Ibid*

¹¹⁷ *Ibid*

¹¹⁸ *Ibid* 1114–1115

¹¹⁹ *Ibid* 1115

the essential duties of a firefighter,¹²⁰ and he was already performing duties as a voluntary firefighter for a period of thirteen years without suffering a hypoglycaemic attack.¹²¹ Murphy AJ stated that a person living with *diabetes mellitus* was not a person with a disability for the purposes of the EEA and that Murdoch did not satisfy the definition of “people with disabilities” as contained in the Disability Code.¹²²

Ngwena and Pretorius state that the Labour Court in *IMATU* appeared to have treated the Disability Code as the main source of the term “people with disabilities”, while the main source of the term is the EEA itself.¹²³ Although item 5 of the Disability Code restates the definition of “people with disabilities”, the main source thereof remains section 1 of the EEA.¹²⁴

In *National Education Health and Allied Workers Union on behalf of Lucas and Department of Health (Western Cape)*¹²⁵ the applicant, Ms Lucas, was a general worker in a hospital’s nursing department who sustained a work-related injury to her back. She also sustained another injury in the course of employment nine months later that had an adverse effect on her initial injury.¹²⁶ *In casu*, the Arbitrator determined amongst others, whether Ms Lucas was a person with a

¹²⁰ *Ibid*

¹²¹ *Ibid* 1106

¹²² *Ibid* 1115

¹²³ Ngwena and Pretorius “Conceiving Disability, and Applying the Constitutional Test for Fairness and Justifiability : A Commentary on *IMATU v City of Cape Town*” (2007) 28 *ILJ* 747 at 759

¹²⁴ Ngwena “Deconstructing the Definition of ‘Disability’ under the Employment Equity Act: Legal Deconstruction” (2007) 23(1) *South African Journal on Human Rights* 116 at 150

¹²⁵ (2004) 25 *ILJ* 2091 (BCA)

¹²⁶ *Supra* 2093

disability for the purposes of the EEA.¹²⁷ The Arbitrator applied the analysis of the term “people with disabilities” as contained in item 5 of the Disability Code¹²⁸ and found that Ms Lucas was a person with a disability, because:

Ms Lucas’s back injury was a physical impairment.¹²⁹ Her physical impairment was also long-term, because her back injury lasted for at least twelve months.¹³⁰ The Arbitrator found that Ms Lucas’s back injury was also substantially limiting, because it had an adverse effect on her ability to perform some of her duties as a general worker in the nursing department.¹³¹ As a result of her spinal injury, Ms Lucas could no longer pick up heavy objects in the nursing department.¹³² The Arbitrator held, on the basis of evidence, that Ms Lucas walked and climbed stairs with difficulty.¹³³ She also could not sit or stand for long periods as a result of the injury, and the medication that she used for her injury, affected her ability to work adversely.¹³⁴ The medication often caused her to fall asleep at her desk in the sewing room, to where she was moved from the nursing department.¹³⁵ The Arbitrator also held that Ms Lucas could not perform her duties in the needlework department efficiently.¹³⁶ She stated that Ms Lucas’s back injury could not be ameliorated or corrected to remove its limiting effects on her ability

¹²⁷ *Ibid* 2100

¹²⁸ *Ibid*

¹²⁹ *Ibid*

¹³⁰ *Ibid*

¹³¹ *Ibid* 2100 – 2101

¹³² *Ibid* 2093

¹³³ *Ibid* 2101

¹³⁴ *Ibid*

¹³⁵ *Ibid* 2094

¹³⁶ *Ibid* 2101

to perform the functions of her job in the nursing department and the sewing room,¹³⁷ which made her impairment substantially limiting.

Ms Lucas's back injury also restricted her from entering into other employment. She applied unsuccessfully for an administrative post and could make no progress when she applied for posts with duties she could fulfil.¹³⁸ The applicant was accordingly a person with a disability.

The Arbitrator comprehensively and compassionately applied the requirements and analysis of the term "people with disabilities" as contained in the EEA and Disability Code to determine whether Ms Lucas was a person with a disability. She thereby set an example for courts and *quasi*-judicial bodies to do the same.

In *Wylie and Standard Executors and Trustees*,¹³⁹ Ms Wylie, the applicant, was living with multiple sclerosis.¹⁴⁰ The Commissioner had to determine whether Ms Wylie was a person with a disability.¹⁴¹ He considered the analysis of "people with disabilities" as contained in item 5 of the Code of Good Practice on the Employment of People with Disabilities (incorrectly cited by the Commissioner as "the Technical Assistance Guidelines on the Employment of People with Disabilities" – which is supplementary to the Code of Good Practice) and found

¹³⁷ *Ibid*

¹³⁸ *Ibid*

¹³⁹ (2006) 27 ILJ 2210 (CCMA)

¹⁴⁰ *Supra* 2212

¹⁴¹ *Ibid* 2218

that Ms Wylie's multiple sclerosis constituted a disability for the purposes of the EEA and Disability Code.¹⁴²

The Commissioner in *Wylie* followed *NEHAWU on behalf of Lucas and Department of Health (Western Cape)*, but did not apply the requirements of "people with disabilities" as comprehensively as Arbitrator Christie did in the latter. On the basis of considering the requirements of "people with disabilities", he found that Ms Wylie had a disability and therefore was a person with a disability for the purposes of the EEA.¹⁴³

In *Van Zyl v Thebe Employee Benefits Risk Group (Pty) Ltd*,¹⁴⁴ the respondent dismissed for operational reasons an applicant who suffered from schizophrenia. The Commissioner treated the applicant's schizophrenia as a disability without determining whether the applicant's medical condition amounted to a disability. The Commissioner did so because the respondent admitted that the applicant's schizophrenia constituted a disability.¹⁴⁵

¹⁴² *Ibid*

¹⁴³ *Ibid* 2221

¹⁴⁴ [2004] 10 BALR 1298 (CCMA)

¹⁴⁵ *Supra* 1305

2.4 Is a person who has a disability necessarily a person with a disability?

It is submitted that the third requirement of “people with disabilities” as contained in the EEA and Disability Code – namely that the long-term or recurring impairment must be substantially limiting – is the determining factor in deciding whether or not an individual is a person with a disability. Without the third requirement, an individual is a person with a long-term or recurring physical or mental impairment (similar to what the Labour Court decided in respect of Mr Murdoch in *IMATU v City of Cape Town*) and not a person with a disability. Ngwena and Pretorius confirm¹⁴⁶ with regards to the abovementioned issue that the EEA prohibits unfair discrimination on the basis of disability, but does not define disability.¹⁴⁷ In fact, the EEA only contains a definition of “people with disabilities”. They pose the question whether a court can utilize the requirements of “people with disabilities” as contained in the EEA and Disability Code to determine whether a medical condition constitutes a disability, as was the case in *IMATU v City of Cape Town*.¹⁴⁸

Their question essentially is whether “people with disabilities” in terms of the EEA amounts to “disability” in terms of the EEA¹⁴⁹ and whether a person who *has* a disability is indeed a person *with* a disability in terms of section 1 of the EEA.

¹⁴⁶ Ngwena and Pretorius (2007) 754

¹⁴⁷ In doing so, they refer to *IMATU* at 1114, where Murphy AJ stated that the EEA does not define disability, but that the Disability Code (and the EEA) defines “people with disabilities”.

¹⁴⁸ Ngwena and Pretorius (2007) 755

¹⁴⁹ *Ibid*

Ngwena and Pretorius state that disability (which is not defined in the EEA), needs to be defined for the purpose of non-discrimination in the EEA,¹⁵⁰ because the Act states it as a ground upon which unfair discrimination is prohibited. They propose that *disability* for the purpose of non-discrimination in the EEA should be a “long-term or recurring physical or mental impairment”¹⁵¹ and state that the Labour Court in *IMATU* erred by not finding that Mr Murdoch’s insulin-dependent *diabetes mellitus* amounted to a disability.¹⁵²

Ngwena and Pretorius argue that the requirement that a long-term or recurring physical or mental impairment be substantially limiting, is more at home with the concept of “people with disabilities” than with “disability”,¹⁵³ because people who are disabled have suffered discrimination in the workplace for reason of their physical or mental impairments and not because the extent of their disabilities have restricted them from entering into or advancing in employment.¹⁵⁴ In other words, people who have disabilities have suffered discrimination in the workplace not because their disabilities were substantially limiting, but because they *had* disabilities.

On the issue whether “disability” is equivalent to “people with disabilities”, Ngwena and Pretorius confirm that the EEA lists disability as a prohibited ground of unfair discrimination in its Chapter II, but that “people with disabilities” is one of

¹⁵⁰ *Ibid* 758

¹⁵¹ *Ibid*

¹⁵² *Ibid* 748

¹⁵³ *Ibid* 760

¹⁵⁴ *Ibid* 759

the groups to whom affirmative action measures are directed in terms of Chapter III of the EEA.¹⁵⁵ They state that the term “people with disabilities” is a “legal term of art” in terms of the EEA.¹⁵⁶ To them, the term “people with disabilities” refers to a specific group of persons who have been chosen to be beneficiaries under affirmative action and not owing to disability.¹⁵⁷

What is interesting about the *IMATU* judgment, is that the Labour Court applied the term “people with disabilities” not to determine whether Mr Murdoch was a “person with a disability”, but whether he *had* a disability. The Labour Court had to determine the status of his medical condition to establish whether the ground of the alleged discrimination was indeed that of disability.¹⁵⁸ Mr Murdoch’s alleged disability itself was one of the focus points of the court and not whether he was a “person with a disability” as envisaged by the EEA.

Wylie and Standard Executors and Trustees is a mirror image of the Labour Court’s approach in *IMATU*, but only with an opposite outcome. In *Wylie*, the status of the applicant’s medical condition (multiple sclerosis) was also an issue before the CCMA. The Commissioner considered the Disability Code and came to the conclusion that Ms Wylie’s multiple sclerosis amounted to a disability:

“When this definition is considered the conclusion is inescapable that the applicant’s condition amounts to a disability as envisaged in the EEA and disability code.”¹⁵⁹

¹⁵⁵ *Ibid*

¹⁵⁶ *Ibid*

¹⁵⁷ *Ibid*

¹⁵⁸ *IMATU* 1113–1115

¹⁵⁹ *Wylie and Standard Executors and Trustees* 2218

The Commissioner used deductive reasoning and concluded that because Ms Wylie *had* a disability, she was a “person *with* a disability” (as a member of the designated group in terms of section 1 of the EEA):

“Since the applicant is a person with a disability it must be considered whether the respondent could not have reasonably accommodated her prior to the dismissal.”¹⁶⁰

In *NEHAWU on behalf of Lucas and Department of Health (Western Cape)*, the status of Ms Lucas’s medical condition was not an issue. In other words, the Arbitrator did not decide whether Ms Lucas’s spinal injury amounted to a disability. Instead the Arbitrator employed the term “people with disabilities” to determine whether Ms Lucas was a “person with a disability” and not whether she had a disability.

There must be a distinction between instances where the status of an individual’s medical condition needs to be determined and where it has to be determined whether a person with an impairment is a member of the designated group as a “legal term of art”. In cases where the term “people with disabilities” is applied to determine whether a person’s medical condition amounts to a disability, the status of the person’s condition may be confirmed – whether the person has a disability or not – but there might still be uncertainty whether the individual is a person with a disability.

¹⁶⁰ *Ibid* 2221

Ngwena and Pretorius state that due to the fact that the Constitution lists “disability” in an unqualified manner in its anti-discrimination clause¹⁶¹ and that the EEA (and Promotion of Equality and Prevention of Unfair Discrimination Act), which give effect to the Constitution’s anti-discrimination clauses, also refers to disability in the same manner in their own antidiscrimination clauses,¹⁶² “disability” should be interpreted in a generous manner, without the qualification of substantial limitation that is required for “people with disabilities”.¹⁶³

The Labour Court, in *Standard Bank of South Africa v Commission for Conciliation, Mediation and Arbitration and Others*,¹⁶⁴ appears to have appreciated the distinction between “disability” and “people with disabilities” as proposed by Ngwena and Pretorius. In *supra* case the third respondent was living with a medical condition known as fibromyalgia, which resulted from a back injury she sustained.¹⁶⁵ The Labour Court stated that the parties to the dismissal dispute agreed that the employee’s fibromyalgia was a long-term physical impairment and accordingly a disability.¹⁶⁶ It equated a long-term physical impairment to a disability in this case, without mentioning that such impairment must also substantially limit the person’s prospects of entry into, or advancement in employment, which is required for “people with disabilities”.

¹⁶¹ Sections 9(3) and 9(4) of the Constitution

¹⁶² Sections 6(1) of the EEA and 9 of the PEPUDA

¹⁶³ Ngwena and Pretorius (2007) 764

¹⁶⁴ [2008] 4 BLLR 356 (LC)

¹⁶⁵ *Supra* 360

¹⁶⁶ *Ibid*

The court later also stated that when a court or other forum was confronted with an employee who was dismissed for incapacity, such court or forum also had to determine whether such employee is a person with a long-term or recurring physical or mental impairment which substantially limits the person's prospects of entering into or advancing in employment – in other words, a member of the group “people with disabilities” as defined in section 1 of the EEA.¹⁶⁷ It distinguished between “disability”, which does not contain the requirement of substantial limitation and “people with disabilities”, which contains the last requirement.

2.5 The definitions of “disability” contained in the Americans with Disabilities Act of 1990 and United Kingdom Disability Discrimination Act of 1995

The Americans with Disabilities Act of 1990 contains a definition of “disability”. It states that disability in respect of a person refers to a physical or mental impairment that substantially limits one or more of the major life activities of the person.¹⁶⁸ A “disability” of a person also means a record of a physical or mental impairment that substantially limits one or major of the major life activities of the person¹⁶⁹ or where the person is regarded as having a physical or mental impairment that substantially limits one or more of his/her major life activities.¹⁷⁰

¹⁶⁷ *Ibid* 371

¹⁶⁸ 42 USC § 12102 (2)(a)

¹⁶⁹ 42 USC § 12102(2)(b)

¹⁷⁰ 42 USC § 12102(2)(c)

The Act provides that a “qualified individual with a disability” is a person who, with or without reasonable accommodation, can perform the essential functions of the job in which the person is employed or which the person wishes to do.¹⁷¹

The United Kingdom Disability Discrimination Act of 1995 provides that a person has a disability for the purposes of the Act if the person has a physical or mental impairment that has a long-term adverse effect on the person’s ability to carry out normal day-to-day activities.¹⁷² A “disabled person” in terms of the UK Disability Discrimination Act is a person who has a disability as defined.¹⁷³ A disabled person is not only a person who has a current disability, but also one who had a disability as defined in the past.¹⁷⁴ The effect of a physical or mental impairment is long-term where the impairment has lasted for at least twelve months, is likely to last for at least twelve months or is likely to last for the rest of the life of the person concerned.¹⁷⁵ According to the UK Disability Discrimination Act, a physical or mental impairment affects the ability of the person to carry out normal day-to-day activities only if such impairment affects one of the following: mobility, manual dexterity, physical coordination, continence, the ability to lift, carry or otherwise move everyday objects, speech, hearing or eyesight, memory or ability to concentrate, learn or understand or the perception of the risk of physical danger.¹⁷⁶

¹⁷¹ 42 USC § 12111(8)

¹⁷² Chapter 50 § 1(1) of the UK Disability Discrimination Act

¹⁷³ Chapter 50 § 1(2) of the UK Disability Discrimination Act

¹⁷⁴ Chapter 50 § 2(1) of the UK Disability Discrimination Act

¹⁷⁵ UK Disability Discrimination Act 1995 Schedule 1 paragraph 2(1)

¹⁷⁶ Schedule 1 paragraphs 4(1)(a) – (h)

Both the Americans with Disabilities Act and the UK Disability Discrimination Act base their concepts of “disability” on physical and mental impairment. Both pieces of legislation also emphasise the importance of substantial limitation of the physical or mental impairment in respect of a person with a disability, which make their definitions of “disability” to that extent similar to the EEA’s definitional requirements of “people with disabilities”. The South African definition of “people with disabilities” is however narrower than its counterparts in the Americans with Disabilities Act and UK Disability Discrimination Act. The definition of “disability” contained in the Americans with Disabilities Act is very broad and focuses on actual, past or perceived physical and mental impairment, while the UK Disability Discrimination Act focuses on actual and past mental and physical impairment. The South African definition of “people with disabilities” focuses only on actual physical or mental impairment. This will inevitably mean that the South African definition will be narrowly interpreted and that not every person with a medical condition, no matter how it may be perceived, will be a person with a disability.

Ngwena and Pretorius state that the Disability Code focuses on people with actual disabilities and fails to acknowledge that there are conditions such as HIV that substantially limits the entry and advancement in employment of the person living with it, even though the person with HIV is not impaired.¹⁷⁷

¹⁷⁷ Ngwena and Pretorius (2003) 1824

2.6 Does HIV positive status constitute a disability?

The White Paper on Integrated National Disability Strategy states that a person who is infected with the Human Immunodeficiency Virus (a person who is HIV positive) is not a person with a disability, even though such persons are subjected to the same type of discrimination that people with disabilities experience.¹⁷⁸ According to the White Paper, a person living with HIV is a person with a disability when symptoms that arise from HIV infection interfere with the person's normal functioning.¹⁷⁹ Where the virus in HIV positive persons has progressed to full-blown AIDS and people have acquired disabilities as a result of the progression, such persons are a vulnerable group¹⁸⁰ and qualify as people with disabilities for the purpose of the White Paper.

In terms of the Code of Good Practice: Key Aspects of HIV/AIDS and Employment, the Human Immunodeficiency Virus is a virus that attacks and may destroy the body's natural immune system. A person is HIV positive when a person has tested positive for infection with the Human Immunodeficiency Virus,¹⁸¹ and has Acquired Immune Deficiency Syndrome or AIDS when a person's immune system has ceased to function properly because of HIV

¹⁷⁸ Chapter 1 of the White Paper on Integrated National Disability Strategy: People with Acquired Immune Deficiency Syndrome (AIDS)

¹⁷⁹ *Ibid*

¹⁸⁰ *Ibid*

¹⁸¹ Code of Good Practice: Key Aspects of HIV/AIDS and Employment

infection, which has led to the onset of life-threatening infections in such a person.¹⁸²

A person who is HIV positive is accordingly not a person with a disability for the sole reason of his or her HIV positive status. When the symptoms of HIV have a disabling effect or a person acquires disabilities as a result of the progression of the virus, such a person will have a disability, not for reason of HIV, but due to its effects or disabilities acquired.

The Constitution did not initially list HIV status as a ground of unfair discrimination in its equality clause. In the year 2000 however, the Constitutional Court in *Hoffmann v South African Airways*¹⁸³ elevated HIV positive status to one of the unlisted analogous grounds of unfair discrimination in the Constitution. In *Hoffmann v SAA*, the Constitutional Court had to decide on the constitutionality of an employment practice of South African Airways of not appointing people living with HIV to the position of cabin attendants.

¹⁸² *Ibid*

¹⁸³ (2000) 21 ILJ 2357 (CC)

Hoffmann v South African Airways

Mr Hoffmann applied to the SAA for the position of cabin attendant.¹⁸⁴ He was found to be a suitable job applicant for this position during selection, but also had to undergo a medical examination and a blood test before SAA would appoint him to the position.¹⁸⁵ According to the medical examination, Mr Hoffmann was fit and suitable for the position of cabin attendant.¹⁸⁶ The blood test revealed that Mr Hoffmann was a person living with HIV.¹⁸⁷ Owing to Mr Hoffmann's HIV status and the respondent's employment practice (or blanket ban), he was found to be unsuitable for employment and not appointed to the position of cabin attendant.¹⁸⁸ Mr Hoffmann approached the Witwatersrand Local Division to challenge the constitutionality of the employer's blanket ban on the basis that the ban had infringed upon his rights to equality, human dignity and fair labour practices in the Constitution.¹⁸⁹ He also applied to the Witwatersrand Local Division for an order directing SAA to appoint him as a cabin attendant.¹⁹⁰ The High Court dismissed Mr Hoffmann's application¹⁹¹ and he appealed to the Constitutional Court against the Witwatersrand Local Division's dismissal of his application.¹⁹²

¹⁸⁴ *Hoffmann v SAA* 2362

¹⁸⁵ *Ibid*

¹⁸⁶ *Ibid*

¹⁸⁷ *Ibid*

¹⁸⁸ *Ibid*

¹⁸⁹ *Ibid*

¹⁹⁰ *Ibid*

¹⁹¹ *Ibid* 2364

¹⁹² *Ibid*

At the hearing before the Constitutional Court¹⁹³ (and the Witwatersrand Local Division¹⁹⁴) four stages of untreated HIV-infection were identified:

- (1) The acute stage, that begins shortly after a person has been infected with the Human Immunodeficiency Virus. During this stage the immune system of the infected person is depressed, but returns to its normal activity when the person recovers. During this period, the person may test to be HIV negative, even though the person is infected with the virus.¹⁹⁵
- (2) In the asymptomatic immunocompetent stage, the person with HIV functions normally and is unaware of symptoms of HIV infection. The Human Immunodeficiency Virus has not substantially affected the person's immune system at this stage.¹⁹⁶
- (3) The asymptomatic immunosuppressed stage is the stage when the amounts of the HI-virus that have gradually destroyed the person's immune system, have increased in the body of the person who is HIV positive. During this stage, the CD 4+ lymphocytes are destroyed by the increasing HI-virus in the person's body and the body cannot replace the lymphocytes. At the beginning of the immunosuppressed stage, the CD 4+ lymphocyte count drops below 500 cells per microlitre of blood. Only when the CD 4+ count drops below 350 cells per microlitre of blood, can the

¹⁹³ *Ibid* 2364

¹⁹⁴ *Hoffmann v SAA* (2000) 21 *ILJ* 891 (W) at 899

¹⁹⁵ *Hoffmann v SAA* (Constitutional Court) 2364–2365

¹⁹⁶ *Ibid* 2365

person with HIV not be effectively vaccinated against yellow fever. The immune system of the person with HIV is depressed, but the person may not show any symptoms of HIV infection or be unaware of the progression of the HI-virus in the body.¹⁹⁷

- (4) At the stage of Acquired Immune Deficiency Syndrome, the immune system of the person with HIV has gradually been weakened to such an extent that it cannot fight opportunistic infections that the person contracts, which can be fatal for such a person.¹⁹⁸

The High Court's approach to whether HIV amounted to a disability

The High Court referred to HIV status as a disability when Hussein J stated that:

"The respondent's policy [of not appointing people living with HIV to the positions of cabin attendants], in my opinion, is not directed at persons suffering from a disability such as that experienced by the applicant".¹⁹⁹

Interestingly enough, after the High Court referred to Mr Hoffmann's HIV status as a "disability", Hussein J proceeded to determine whether SAA's policy unfairly discriminated against Mr Hoffmann on the basis of *HIV* and not disability.

¹⁹⁷ *Ibid*

¹⁹⁸ *Ibid*

¹⁹⁹ *Hoffmann v SAA* (High Court) 906

The approach of the Constitutional Court

Ngwena and Matela state that HIV may amount to a disability, based on both the medical and social approaches to disability.²⁰⁰ In terms of the medical approach to disability, HIV would amount to a disability if the person living with HIV becomes functionally impaired as a result of HIV.²⁰¹ In terms of the social approach, HIV would amount to a disability because it is perceived as such.²⁰² They state that where HIV is regarded as a “disability” for the purposes of the listed grounds in section 9(3) of the Constitution, it would be beneficial for the complainant of the discrimination, as the discrimination on this ground would be presumed to be unfair and the respondent would have to prove the fairness thereof in terms of section 9(5)²⁰³ of the Constitution.²⁰⁴ In this regard it is submitted that HIV is indeed an analogous ground of discrimination in the Constitution, but a listed ground of discrimination in the EEA²⁰⁵ and where discrimination on this ground is perpetrated in the employment context, the respondent in any event will have to show the fairness thereof.²⁰⁶

²⁰⁰ Ngwena and Matela “*Hoffmann v South African Airways and HIV/AIDS in the workplace: subjecting corporate ideology to the majesty of the Constitution*” (2003) 18 *SA Public Law* 306 at 324

²⁰¹ *Ibid*

²⁰² *Ibid*

²⁰³ Section 9(5) of the Constitution provides that discrimination on one or more of the grounds listed in section 9(3) of the Constitution, including disability, is unfair, unless it is established that the discrimination is fair.

²⁰⁴ Ngwena and Matela *op cit* 324

²⁰⁵ Section 6(1) of the EEA

²⁰⁶ Section 11 of the EEA

Before the Constitutional Court, counsel for Mr Hoffmann submitted that HIV status constituted a disability for the purpose of the non-discrimination clause in the Constitution, because people with HIV were perceived to have a disability, even when such persons were able to work.²⁰⁷

The *Amicus Curiae* in the *Hoffmann* case, which was the AIDS Law Project at the University of Witwatersrand, took the view that HIV status did not constitute a disability. The AIDS Law Project submitted that if HIV status was to constitute a disability for the purpose of the Constitution, it would bring about problems in the future application and interpretation of the EEA,²⁰⁸ that gives effect to the Constitution. They held that section 6(1) of the EEA, which deals with unfair discrimination in the employment sphere, distinguished between “disability” and “HIV status”, because both grounds were included in the provision.²⁰⁹ The EEA also distinguished between medical and HIV testing.²¹⁰ The AIDS Law Project also acknowledged that the EEA dealt with affirmative action programmes and submitted that if people with HIV fell within the scope of “people with disabilities” only for reason of their HIV status, designated employers needed to provide affirmative action measures for such persons, irrespective of whether they were healthy or not.²¹¹ According to them, it was not the intention of the EEA that

²⁰⁷ *Hoffmann v SAA* Constitutional Court Case Number 17/2000 Appellant’s Heads of Argument page 48 at paragraph 73, accessible at www.constitutionalcourt.org.za

²⁰⁸ *Hoffmann v SAA* Constitutional Court Case Number 17/2000 *Amicus Curiae*’s Heads of Argument page 23–24, accessible at www.constitutionalcourt.org.za

²⁰⁹ *Ibid* page 24

²¹⁰ *Ibid*

²¹¹ *Ibid*

designated employers should provide affirmative action measures for people with HIV who are also healthy.²¹²

The *Amicus Curiae* submitted that people with HIV who were asymptomatic could perform all their duties.²¹³ They also proposed that people with HIV needed to be protected from unfair discrimination in the employment context and did not need affirmative action measures to support them.²¹⁴

It is important to note that the AIDS Law Project took a very legalistic approach to the issue of why HIV status does not constitute a disability. The Constitutional Court itself did not decide on the above matter and stated that it was:

“...unnecessary to consider whether [Mr Hoffmann] was discriminated against on a listed ground of disability ... or whether people who are living with HIV ought not to be regarded as having a disability...”²¹⁵

A person living with HIV does not have to be tested against the requirements of a long-term or recurring physical or mental impairment that is substantially limiting, to determine whether the individual is as a matter of fact a person with a disability in terms of the EEA. A reason for this is that the decision of the highest Court in the country not to treat HIV as a disability indicates that the Court at least to some extent took cognisance of the AIDS Law Project’s submission that the EEA distinguished, amongst others, between HIV and disability as *legal* grounds of

²¹² *Ibid*

²¹³ *Ibid*

²¹⁴ *Ibid* page 25

²¹⁵ *Hoffmann v SAA* (Constitutional Court) 2374–2375

discrimination. These two grounds are therefore not the same. This choice of the Constitutional Court also implies that it was not seduced by perceptions that HIV status amounts to a disability. The Court's treatment of HIV as HIV and not as a disability, signals that although HIV status may be perceived as a disability, it does not as a *matter of law* constitute a disability.

2.7 Conclusion

It is significant that a definition of "people with disabilities" is found in labour legislation. It is even more significant that this legislation (the EEA) seeks to give effect to the Constitution's equality clause in the employment context, because the workplace is the one area in which this group experiences marginalisation and discrimination and where much emphasis on their "incapabilities" as a group is placed.²¹⁶

Disability is a heterogeneous concept²¹⁷ and people with disabilities are a heterogeneous group, because not all members of the group have the same type of impairments. Some members have physical impairments, others sensory impairments (which count as physical impairments), some mental impairments and others a combination of these impairments.²¹⁸ The Disability Code recognizes the potpourri of people with disabilities and so does the UN Disability

²¹⁶ *Standard Bank v CCMA* 369

²¹⁷ Ngwena "Equality for people with disabilities in the workplace: an overview of the emergence of disability as a human rights issue" (2004) 29(2) *Journal for Juridical Science* 167 at 171

²¹⁸ Item 5.1.1 of the Disability Code

Convention, which states that Member States to the Convention must acknowledge the diversity of persons with disabilities.²¹⁹

The Convention also states that Member States must recognize that individual autonomy and independence are important for people with disabilities and so is their freedom to make their own choices.²²⁰ The group must also be afforded the opportunity to be actively involved in decision-making processes about policies and programmes, including those which directly concern them.²²¹

“People with disabilities” need to be defined, not only for the purpose of legal certainty and in order to distinguish them from other disadvantaged groups, not only because their rights and interests require protection and recognition in law and not only because reasonable accommodation must be afforded to them, to mention but a few reasons. Apart from the abovementioned essential objectives, a definition of “people with disabilities” is important for the purpose of affirming the human dignity and worth of the group.

Almost any group can define another group who are different from them, by assigning characteristics or traits to the other group.²²² The question arises whether the second group will define *itself* in the same manner in which it was defined by the first group.²²³ When a particular group, which has suffered past

²¹⁹ Principle (i) of the Preamble to the UN Disability Convention

²²⁰ Principle (n) of the Preamble to the UN Disability Convention

²²¹ Principle (o) of the Preamble to the UN Disability Convention

²²² Ngwena “Deconstructing the Definition of ‘Disability’ under the Employment Equity Act: Social Deconstruction” (2006) 22(4) *South African Journal on Human Rights* 613 at 616

²²³ *Ibid*

disadvantage as a result of characteristics inherent to the group, has to define itself, such a definition is likely to be in line with human dignity rather than a definition that another group who are not carriers of the traits, assign to the group which has the traits.²²⁴

The Labour Court acknowledged that “able-bodied” people are more predisposed to labelling people with disabilities as being incapacitated and abnormal.²²⁵ When people with disabilities defined themselves, when they became “actively involved in decision-making processes” (as the UN Disability Convention requires Member States to consider) regarding their legal identity, the term “people with disabilities” emerged.²²⁶

Grogan confirms that the EEA acknowledges “people with disabilities” as one of the designated groups. He states that unlike other previously disadvantaged groups, people with disabilities “will always be with us”.²²⁷ Disability is here to stay and a definition of “people with disabilities” must focus on the abilities and potential of the group and not the shortcomings of its members. A definition should accordingly focus on the members of the group and what they can do instead of what they cannot do. Such a definition will affirm the human dignity of the members of the group, be in line with the social model of disability and will

²²⁴ *Ibid*

²²⁵ *Standard Bank v CCMA* 369

²²⁶ Ngwena (2006) 616

²²⁷ Grogan “Protecting the disabled: The new Code” (2002) 18(5) *Employment Law* 13

justify the various legislative protections that are afforded to people with disabilities in the workplace.

CHAPTER 3

DISABILITY AND THE EMPLOYMENT EQUITY ACT

3.1.1 The Employment Equity Act

Section 6(1) of the EEA provides that no person may unfairly discriminate, directly or indirectly, against an employee in any employment policy or practice,²²⁸ on one or more grounds, including disability. The complainant of discrimination in the employment context will usually be an employee or job applicant, as an “employee” for the purpose of the abovementioned section also includes an applicant for employment.²²⁹ A worker other than an employee or applicant for employment may bring a claim for unfair discrimination in terms of the Promotion of Equality and Prevention of Unfair Discrimination Act.

²²⁸ Section 1 of the EEA states that an “employment policy or practice” includes, but is not limited to:

- (a) recruitment procedures, advertising and selection criteria,
- (b) appointments and the appointment process,
- (c) job classification and grading,
- (d) remuneration, employment benefits and terms and conditions of employment,
- (e) job assignments,
- (f) the working environment and facilities,
- (g) training and development,
- (h) performance evaluation systems,
- (i) promotion,
- (j) transfer,
- (k) demotion,
- (l) disciplinary measures other than dismissal and
- (m) dismissal.

²²⁹ Section 9 of the EEA

Section 6(2) of the EEA states that it is not unfair discrimination to take affirmative action measures consistent with the purpose of the Act,²³⁰ or to distinguish, exclude or prefer any person on the basis of an inherent requirement of a job.²³¹

Section 11 of the Act provides that, whenever unfair discrimination is alleged in terms of the EEA, the employer against whom the allegation is made must establish that the discrimination is fair.

The EEA is a statute that was enacted in terms of section 9(4) of the Constitution which provides, amongst others, that national legislation must be enacted to prevent or prohibit unfair discrimination. The purpose of this Act is to achieve equity in the workplace.²³² One of the means by which this purpose is to be accomplished, is by eradicating unfair discrimination so as to promote equal opportunity and fair treatment in employment.²³³

The prohibition of unfair discrimination in terms of the Act applies to all employers and employees (and also applicants for employment).²³⁴ Every employer must also take steps to promote equal opportunity in the workplace by eliminating unfair discrimination in any employment policy or practice.²³⁵

²³⁰ Section 6(2)(a) of the EEA

²³¹ Section 6(2)(b) of the EEA

²³² Section 2 of the EEA

²³³ Section 2(a) of the EEA

²³⁴ Section 4(1) of the EEA

²³⁵ Section 5 of the EEA

Section 3 of the EEA states that the Act must be interpreted in compliance with the Constitution,²³⁶ so as to give effect to its purpose (which is to achieve equity in the workplace),²³⁷ taking into account any relevant code of good practice that is issued in terms of the EEA (including the Disability Code) or any other employment law,²³⁸ and in compliance with the international law obligations of the Republic of South Africa, in particular those contained in ILO Discrimination (Employment and Occupation) Convention 111 of 1958.²³⁹

Two of the “international law obligations” of the Republic that must be complied with when the EEA is interpreted with regard to disability discrimination, are those contained in the ILO Discrimination (Employment and Occupation) Convention 111 of 1958 and the UN Convention on the Rights of Persons with Disabilities, which will be discussed below.

3.1.2 The ILO Discrimination (Employment and Occupation) Convention 111 of 1958

Article 1(1) of the abovementioned Convention (hereinafter “Convention 111”) provides that “discrimination”, for its purposes, includes:

“(a) any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin, which

²³⁶ Section 3(a) of the EEA

²³⁷ Section 3(b) of the EEA

²³⁸ Section 3(c) of the EEA

²³⁹ Section 3(d) of the EEA

- has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation
- (b) such other distinction, exclusion or preference which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation as may be determined by the Member [State] concerned after consultation with representative employers' and workers' organisations, where such exist, and with other appropriate bodies."

Article 1(3) states that "employment" and "occupation" include access to vocational training, access to employment and to particular occupations and also terms and conditions of employment.

Article 1(2) of the Convention provides that any distinction, exclusion or preference in respect of a particular job, based on the inherent requirements thereof, shall not be regarded as (unfair) discrimination. This is known as the inherent job requirement defence to a claim of unfair discrimination, which is also contained in section 6(2)(b) of the EEA.

Article 2 of the Convention states that every Member State for which Convention 111 is in force (one of which is the Republic of South Africa), must undertake to declare and pursue, by means which are appropriate to the Member State's national conditions and practice, a national policy that is designed to promote

equality of opportunity in employment and the elimination of discrimination in employment and occupation.

3.1.3 The UN Convention on the Rights of Persons with Disabilities (hereinafter “the UN Disability Convention”)

The UN Disability Convention provides that Member States to the Convention must reaffirm the universality, indivisibility, interdependence and interrelatedness of all human rights and fundamental freedoms. Member States must guarantee the need of persons with disabilities to fully enjoy the abovementioned rights and freedoms without discrimination.²⁴⁰

The Convention also provides that Member States must acknowledge that discrimination against any person with a disability is a violation of the inherent dignity and worth of the human person.²⁴¹

Article 2 provides that “‘discrimination on the basis of disability’ means any distinction, exclusion or restriction on the basis of disability which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise, on an equal basis with others, of all human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field. It includes all forms of discrimination, including denial of reasonable accommodation.”

²⁴⁰ Principle (c) of the Preamble to the UN Disability Convention

²⁴¹ Principle (h) of the Preamble to the UN Disability Convention

Article 4(1) provides that Member States to the Convention must undertake to ensure and promote the full realization of all human rights and fundamental freedoms for all persons with disabilities, without discrimination of any kind on the basis of disability and must undertake, *inter alia*, to:

- adopt all appropriate legislative, administrative and other measures for the implementation of the rights that the Convention recognizes,²⁴²
- take all appropriate measures to change or abolish existing laws, regulations, customs and practices that amount to discrimination against persons with disabilities,²⁴³
- take into account the protection and promotion of human rights of persons with disabilities in all State policies or programmes,²⁴⁴
- refrain from engaging in any act or practice that is in conflict with the UN Disability Convention and ensure that its public authorities and institutions also adhere to the Convention,²⁴⁵ and
- take all appropriate measures to eliminate discrimination on the basis of disability by any person, organization or private enterprise.²⁴⁶

Article 5(1) of the UN Disability Convention provides that Member States must acknowledge that all persons are equal before the law and are entitled to equal protection and benefit of the law. Member States must also prohibit all discrimination on the basis of disability and must guarantee that persons with

²⁴² Article 4(1)(a) of the UN Disability Convention

²⁴³ Article 4(1)(b) of the UN Disability Convention

²⁴⁴ Article 4(1)(c) of the UN Disability Convention

²⁴⁵ Article 4(1)(d) of the UN Disability Convention

²⁴⁶ Article 4(1)(e) of the UN Disability Convention

disabilities will enjoy equal and effective legal protection against discrimination on all grounds.²⁴⁷

Article 27(1) states that Member States must acknowledge the rights of persons with disabilities to work on an equal basis with others. This right includes the right to the opportunity to gain a living by work freely chosen or accepted in a labour market and a work environment that is open, inclusive and accessible to persons with disabilities. Member States must safeguard and promote the realization of the right to work, including for persons who acquire a disability during the course of employment, by taking appropriate steps, including legislative steps, to *inter alia* prohibit discrimination on the basis of disability with regard to all matters concerning all forms of employment, including conditions of recruitment, hiring and employment, continuance of employment, career advancement and safe and healthy working conditions.²⁴⁸

3.2 Proving unfair discrimination on the basis of disability under the EEA

The principles pertaining to proving a claim of unfair discrimination on the basis of disability will now be discussed. Reference to the case of *Hoffmann v SAA*²⁴⁹ will be made throughout to illustrate the application of these principles, even

²⁴⁷ Article 5(2) of the UN Disability Convention

²⁴⁸ Article 27(1)(a) of the UN Disability Convention

²⁴⁹ (2000) 21 *ILJ* 2357 (CC)

though this case dealt with unfair discrimination on the basis of HIV and not disability, and was decided under the Constitution and not the EEA.

3.2.1 Discrimination

Neither the Constitution²⁵⁰ nor the EEA contains a definition of “discrimination”, but Convention 111 contains such a definition, as stated above, that must be followed when discrimination under the EEA is interpreted.²⁵¹ “Discrimination” under Convention 111 must be interpreted as “unfair discrimination” for the purposes of the EEA.²⁵² In *Hoffmann v SAA*, the Constitutional Court also referred to South Africa’s international law obligations under Convention 111, to outlaw and prohibit unfair discrimination in employment²⁵³ and stated that unfair discrimination against a person diminishes the person’s human dignity.²⁵⁴

Section 6(1) of the EEA prohibits both direct and indirect discrimination. Discrimination against an employee or applicant for employment is direct when the reason for the discrimination is clear.²⁵⁵ The appellant in *Hoffmann* was able to prove that he was not appointed to the position of cabin attendant in terms of SAA’s employment practice, for the clear reason of his HIV status.²⁵⁶

²⁵⁰ Section 9 of the Constitution of South Africa

²⁵¹ Du Toit *et al Labour Relations Law : A Comprehensive Guide* 579

²⁵² *Ibid*

²⁵³ *Hoffmann v SAA* 2378

²⁵⁴ *Ibid* 2370

²⁵⁵ Du Toit *op cit* 582

²⁵⁶ *Hoffmann* 2362

The employee or job applicant who wishes to establish direct discrimination on the basis of disability must show, on a balance of probabilities, that there was differential treatment in respect of him or her in terms of the definition of “discrimination” contained in Convention 111, for which the reason was the person’s disability, which diminishes his or her human dignity.²⁵⁷

Discrimination is indirect when a *prima facie* neutral yardstick is applied in the workplace, which has an adverse effect on a group of people in this area that can be identified in terms of a listed or unlisted prohibited ground in the EEA and objective criteria in the workplace cannot justify the application of the yardstick mentioned.²⁵⁸ The employee or job applicant, who wishes to prove indirect discrimination on the basis of disability, must show that he or she belongs to a group of people who fall within one of the grounds in section 6(1) of the EEA,²⁵⁹ who are people who have disabilities. The complainant must also show an employment policy or practice that is *prima facie* neutral, but which, in its application, discriminates and adversely affects a disproportionate number of persons who have disabilities, the application thereof which cannot be justified.²⁶⁰

²⁵⁷ Du Toit *op cit* 610

²⁵⁸ *Ibid* 583

²⁵⁹ *Ibid* 611

²⁶⁰ *Ibid*

3.2.2 Causation

The complainant who alleges unfair discrimination on the basis of disability must, on the basis of evidence, also prove that his or her disability was the ground, reason or cause of the differential treatment to which he or she had been subjected.²⁶¹ The employee or job applicant must show that the respondent had knowledge of the former's disability and that this knowledge prompted or caused the adverse treatment towards the person, and not merely that the disability of the complainant coincided with the adverse treatment.²⁶² In *Woolworths (Pty) Ltd v Whitehead*,²⁶³ Zondo AJP (as he then was) stated that the respondent, who alleged unfair discrimination on the ground of pregnancy, could not show on the basis of evidence that she would have been appointed to the post of human resources generalist had it not been for her pregnancy.²⁶⁴ There was accordingly no *nexus* between her pregnancy and her non-appointment.²⁶⁵ Willis JA confirmed that there is no connection between a prohibited ground of discrimination and adverse treatment a person suffers, if the prohibited ground did not cause the adverse treatment against the person.²⁶⁶

²⁶¹ *Ibid* 586

²⁶² *Mayor and Burgesses of the London Borough of Lewisham v Malcolm* [2008] UKHL 43. In *Raol Investments (Pty) Ltd t/a Thekwini Toyota v Madlala* (2008) 29 ILJ 267 (SCA), our own Supreme Court of Appeal stated at 270 that a court should be cautious to conclude that discrimination on a prohibited ground (in this instance, race) was present merely because differentiation between two employees coincided with the prohibited ground.

²⁶³ (2000) 21 ILJ 571 (LAC)

²⁶⁴ *Supra* 580

²⁶⁵ *Ibid*

²⁶⁶ *Ibid* 591–592

The Labour Appeal Court laid down a test for causation in *SA Chemical Workers' Union and others v Afrox Ltd*,²⁶⁷ which requires a court to investigate both factual and legal causation to determine whether a prohibited reason for dismissal was a reason or cause for dismissal.²⁶⁸ This test was followed and applied with approval in a number of Labour Court and Labour Appeal Court decisions.²⁶⁹ If the *Afrox* test is adapted in respect of a discrimination claim, to determine whether the prohibited ground of disability is the reason for discrimination against an employee or job applicant, the adaptation will be as follows:

1. To determine factual causation, a court must firstly ascertain whether “but for” the disability of the complainant, the person would have been subjected to discrimination.²⁷⁰
 - If the court finds that the complainant would have been discriminated against even if he or she had been an “able-bodied” person, the complainant’s disability is not the factual cause of the discrimination.²⁷¹
 - If the court finds that the complainant would not have been discriminated against had he or she been an “able-bodied” person, the person’s

²⁶⁷ (1999) 20 ILJ 1718 (LAC)

²⁶⁸ *Supra* 1726–1727

²⁶⁹ *Wardlaw v Supreme Mouldings (Pty) Ltd* [2004] 6 BLLR 613 (LC) 619–620; *NUMSA and Others v Dorbyl and another* [2004] 9 BLLR 914 (LC) 933, 939– 940 and 946; *Kroukam v SA Airlink (Pty) Ltd* [2005] 12 BLLR 1172 (LAC) 1223–1224 and 1226–1227; *Pedzinski v Andisa Securities (Pty) Ltd (Formerly SCMB Securities (Pty) Ltd* [2006] 2 BLLR 184 (LC) 195 and *Van der Velde v Business and Design Software (Pty) Ltd and another (2)* [2006] 10 BLLR 1004 (LC) 1010, 1017 and 1018

²⁷⁰ *SACWU v Afrox* 1726 (adaptation of the test)

²⁷¹ *Ibid*

disability is the factual cause of the discrimination and the court needs to investigate legal causation.²⁷²

2. To determine legal causation, the court must secondly ascertain whether the disability of the complainant is the “most probable inference” it can draw from the facts and circumstances surrounding the discrimination against the person, in that disability was the “main”, “dominant”, “proximate” or “most likely” cause of the discrimination.²⁷³ Even if the complainant’s disability was not the principal cause of the discrimination, a court will still find that it was the cause thereof if it “played a significant role”²⁷⁴ in the discrimination against the person.

If a court finds that the disability of the complainant was both the factual and legal causes of the discrimination, disability will be the cause or reason for the discrimination against the person.²⁷⁵

3.2.3 Defences by the employer

If it is established that the complainant’s disability was the reason for the discrimination against the person, the discrimination is on a prohibited ground,

²⁷² *Ibid*

²⁷³ *Ibid*

²⁷⁴ Zondo JP in *Kroukam v SA Airlink (Pty) Ltd* 1206

²⁷⁵ *SACWU v Afrox* 1727

which will render it unfair.²⁷⁶ The employer may, however, show that its actions were not unfair with reference to an inherent requirement of a job, which is one of the instances in which discrimination will not be unfair.²⁷⁷

In *Hoffmann v SAA*, the airline had justified its employment practice on the basis of commercial rationale and public perceptions, amongst others, which the High Court accepted as legitimate justifications,²⁷⁸ but which the Constitutional Court rejected. The Constitutional Court stated that SAA's commercial requirements of ensuring the health and safety of its passengers were important, but so was protecting people with HIV from prejudice²⁷⁹ and "[p]rejudice can never justify unfair discrimination."²⁸⁰ Ngcobo J further stated that public perceptions and practices of foreign airlines also could not govern the constitutional right to equality.²⁸¹

From the abovementioned case, it is clear that public perception, prejudice, commercial rationale and foreign discriminatory practices cannot operate as defences to discrimination in the employment context, but an inherent

²⁷⁶ Du Toit *op cit* 585

²⁷⁷ Section 6(2)(b) of the EEA.

²⁷⁸ *Hoffmann v SAA* (2000) 21 ILJ 891 (W) 907. Hussain J accepted that SAA's competitors also applied a policy whereby people with HIV were not employed as flight personnel and stated that if the airline had a duty to appoint such persons, it would have "serious commercial consequences" for SAA. The judge also stated that if people with HIV were to be appointed as cabin attendants at SAA, it would diminish the public perception about the business operations of the airline. In this regard, Rycroft and Louw state that the High Court had erroneously treated public perceptions about HIV as a justification for discrimination on this basis, and that discrimination by SAA's competitors on the basis of HIV cannot justify SAA's own discrimination on this basis (Rycroft and Louw "Discrimination on the basis of HIV: Lessons from the *Hoffmann* case" (2000) 21 ILJ 856 at 860).

²⁷⁹ *Hoffmann* (Constitutional Court) 2732–2733

²⁸⁰ *Ibid* 2733

²⁸¹ *Ibid*

requirement of the job however may render discrimination in this context not to be unfair. *Hoffmann v SAA* illustrates what may amount to an inherent requirement of a job for the purposes of the EEA.

The High Court in *Hoffmann* stated that it was an inherent job requirement, “at least for the moment”, for a person to be HIV negative for the position of cabin attendant.²⁸²

Before the Constitutional Court, the AIDS Law Project, who was an *amicus curiae* in the case, submitted that it was an inherent job requirement for a cabin attendant to be able to be vaccinated against yellow fever, rather than be HIV negative.²⁸³ Ngcobo J stated that SAA’s own medical evidence brought before the Court – which indicated that only people who have reached the immunosuppressed stage of HIV infection and whose CD 4+ lymphocyte count has dropped below 350 cells per microlitre of blood could not be immunized or were prone to contracting infections, but not all people with HIV²⁸⁴ – did not support the High Court’s finding that it was an inherent requirement for a person to be HIV negative for the position of cabin attendant.²⁸⁵

²⁸² *Hoffmann* (High Court) 908

²⁸³ *Hoffmann v SAA* Constitutional Court Case Number 17/2000 *Amicus Curiae*’s Heads of Argument at paragraph 28, accessible at www.constitutionalcourt.org.za

²⁸⁴ *Hoffmann* (Constitutional Court) 2371

²⁸⁵ *Ibid* 2374

Medical evidence indicated that Hoffmann's CD 4+ lymphocyte count was 469 cells per microlitre of blood.²⁸⁶ He could indeed be vaccinated against yellow fever, was asymptomatic and not prone to opportunistic infections, and a suitable candidate for the position of cabin attendant.²⁸⁷ Hoffmann could accordingly perform duties as a cabin attendant on flights over yellow fever endemic countries.

The Constitutional Court judgment implies that people living with HIV who have reached the immunosuppressed stage of HIV infection and whose CD 4+ lymphocyte count is below 350 cells per microlitre of blood and cannot be vaccinated against yellow fever, cannot be appointed as cabin attendants, because of the inherent requirements of the job. Indeed, the Court stated that the safety, health and operational considerations upon which SAA's employment practice was premised – and in terms of which people with HIV were not appointed as cabin attendants because they could not effectively be vaccinated against yellow fever,²⁸⁸ amongst others – did not apply to all people with HIV, but only to those mentioned who could not effectively be vaccinated against yellow fever.²⁸⁹

²⁸⁶ *Ibid* 2379

²⁸⁷ *Ibid*

²⁸⁸ *Hoffmann* (High Court) 898

²⁸⁹ *Hoffmann* (Constitutional Court) 2371

3.2.3.1 The inherent requirement of a job as a defence to unfair discrimination

It is not unfair discrimination to distinguish, exclude or prefer any person on the basis of an inherent requirement of a job.²⁹⁰ According to Du Toit *et al*, the abovementioned distinction, exclusion or preference in respect of a person constitutes differential treatment, but does not amount to unfair discrimination²⁹¹ or fair discrimination.²⁹² Grogan states that the defence of an inherent requirement of a job acknowledges that a person under certain circumstances needs to possess or lack a trait that falls in the prohibited grounds of unfair discrimination in the EEA, in respect of a job, which must relate to a proven inherent requirement of a job.²⁹³ The job applicant or employee must accordingly possess or lack a trait to meet an inherent requirement of a job, in which event differential treatment on this basis will not amount to unfair discrimination against the person affected by the proven inherent requirement of a job.²⁹⁴ Emphasis is placed on the word “proven”, because an employer who wishes to rely on an inherent requirement of a job as a defence to unfair discrimination on a prohibited ground, needs to prove that the defence is applicable.²⁹⁵ An “inherent requirement of a job” needs to be narrowly interpreted as distinction, exclusion or

²⁹⁰ Section 6(2)(b) of the EEA

²⁹¹ Du Toit *op cit* 599

²⁹² *Ibid* 604

²⁹³ Grogan *Dismissal, Discrimination and Unfair Labour Practices* 126

²⁹⁴ Du Toit *op cit* 604

²⁹⁵ Partington and Van der Walt “The development of defences in unfair discrimination cases (Part 1)” (2005) 26(3) *Obiter* 357 at 364

preference of any person on this basis is an exception to the principle of non-discrimination.²⁹⁶

In *Swart v Mr Video (Pty) Ltd*²⁹⁷ a 28 year old applicant applied for a position of a shop assistant, who had to be under the age of 25 years, in terms of the respondent's advertisement. The respondent refused to appoint the applicant to the position, because she did not comply with the age requirement in the advertisement. The respondent averred that the age requirement was for the purpose of ensuring compatibility amongst its employees and an "older" employee might be reluctant to accept instructions from his or her younger colleagues.²⁹⁸ The Commissioner held that the respondent had unfairly discriminated against the applicant on the basis of age, marital status and family responsibility and that discrimination may be justified if based upon the inherent requirements of the job, but none were in question.²⁹⁹ The respondent also had to use a different yardstick than age to measure compatibility and had to employ an applicant who was willing to perform the job and not unwilling to take instructions from younger colleagues.³⁰⁰

The Labour Court, in *Whitehead v Woolworths (Pty) Ltd*,³⁰¹ defined the term "inherent requirement of the job". The respondent offered the applicant a position

²⁹⁶ *IMATU and Another v City of Cape Town* 1118

²⁹⁷ [1997] 2 BLLR 249 (CCMA)

²⁹⁸ *Supra* 251

²⁹⁹ *Ibid* 252

³⁰⁰ *Ibid*

³⁰¹ [1999] 8 BLLR 862 (LC)

as human resource generalist on a permanent basis. After having learned that the applicant was pregnant, the respondent offered her a fixed-term contract. Ms Whitehead brought a claim of unfair discrimination on the basis of pregnancy before the Labour Court.³⁰² The respondent conceded that it had discriminated against the applicant, but that the discrimination was based on an inherent job requirement of “uninterrupted job continuity”, which rendered the discrimination against her not to be unfair.³⁰³ In essence, the employer discriminated against the applicant on the basis of pregnancy, but stated that, due to her pregnancy, she will not be able to meet the alleged inherent job requirement of “uninterrupted job continuity”, which rendered its discrimination on this basis not to be unfair.

The Labour Court stated that “an inherent requirement of the particular job” meant that the job itself had to have “some indispensable attribute”... [that had to] relate in an inescapable way to the performing of the job required”.³⁰⁴ An inherent requirement of a job also had to be so inherent that an applicant would not be eligible for a position in question if the person is unable to fulfil that requirement.³⁰⁵ The “indispensable attribute” that an employer relies upon as an inherent requirement of a job had to be connected to the job and where a job

³⁰² *Supra* 866

³⁰³ *Ibid* 867

³⁰⁴ *Ibid* 869

³⁰⁵ *Ibid* 870

could be performed without the requirement, such would not constitute an inherent job requirement.³⁰⁶

The court found that the requirement of uninterrupted job continuity was arbitrary and unreasonable, and that no job applicant could guarantee uninterrupted job continuity for twelve months or for any period.³⁰⁷ In deciding whether the requirement of uninterrupted job continuity was commercially justifiable, the Labour Court held that a Bill of Rights would not be required, where commercial reasons could determine whether discrimination (in this case, on the basis of pregnancy) is fair or unfair.³⁰⁸ The respondent discriminated against the applicant on the basis of a job requirement that was not an inherent requirement of the job. This constituted unfair discrimination against the applicant.³⁰⁹

The applicant in *Public Servants' Association on behalf of Louw v Department of Roads, Transport and Public Works*³¹⁰ was a general assistant in a traffic department, who applied for the position of Provincial Manager in the department. The requirements of the position were the possession of a Grade 10 certificate and Code 8 driver's licence and the undergoing of a training programme.³¹¹ The applicant was not in possession of a Grade 10 certificate, but had enrolled for a similar qualification, which he had not yet completed.³¹² He

³⁰⁶ *Ibid*

³⁰⁷ *Ibid* 868

³⁰⁸ *Ibid* 869

³⁰⁹ *Ibid* 870

³¹⁰ [2004] 11 BALR 1388 (GPSSBC)

³¹¹ *Supra* 1389

³¹² *Ibid*

was not appointed to the position of Provincial Manager and alleged an unfair labour practice because he had not been promoted.³¹³

The respondent argued that the possession of a Grade 10 qualification was an inherent requirement of the job of Provincial Manager and that the integrity of the traffic profession would be compromised when people who did not fulfil that requirement, were allowed to enter the profession.³¹⁴ Moreover, a person could only be appointed as a traffic officer when a Traffic Diploma is acquired from a Traffic College and only enter such institution on a Grade 10 or equivalent qualification.³¹⁵

The Commissioner found that a Grade 10 or equivalent qualification was an inherent requirement of the job of the traffic profession, because traffic officials were professionals and their positions required a higher educational qualification.³¹⁶ If a person with a lower educational level than that of Grade 10 or its equivalent were allowed to enter such positions, it would ridicule the Traffic Diploma and compromise the integrity of the job.³¹⁷ The applicant did not meet the inherent requirement of the job and no unfair labour practice was committed in respect of him.³¹⁸

³¹³ *Ibid*

³¹⁴ *Ibid*

³¹⁵ *Ibid*

³¹⁶ *Ibid* 1390

³¹⁷ *Ibid*

³¹⁸ *Ibid*

*Dlamini and others v Green Four Security*³¹⁹ was decided in the context of dismissal, in which the Labour Court also had to determine the validity of an inherent job requirement an employer claimed. The applicants were security guards and members of the Baptised Nazareth Group whose faith prohibited them from trimming their beards.³²⁰ The employer had a workplace rule in place that required security guards to be clean shaven.³²¹ It issued the applicants with final warnings for being unshaven on duty and later dismissed them.³²² The applicants argued that the rule unfairly discriminated against them on the basis of religion and that their dismissals were automatically unfair.³²³ The court confirmed that the respondent had to prove that the rule to be clean shaven was in place and that it was an inherent requirement of the job.³²⁴

The Labour Court considered the Dress Orders in the South African National Defence Force and the South African Police Service to determine whether the employer's workplace rule was an inherent requirement of the job.³²⁵ The reason for shaven beards in terms of the Dress Orders was neatness,³²⁶ and the workplace rule also sought to achieve this objective and to portray the image of

³¹⁹ [2006] 11 BLLR 1074 (LC)

³²⁰ *Supra* 1076

³²¹ *Ibid*

³²² *Ibid*

³²³ *Ibid*

³²⁴ *Ibid* 1077

³²⁵ *Ibid* 1085–1086

³²⁶ *Ibid* 1086

the security company.³²⁷ The workplace rule was an inherent requirement of the job of security guards.³²⁸

In *Wallace v Du Toit*,³²⁹ the applicant was an *au pair* to the two children of the respondent and his wife. She was unmarried and had no children when she started working as a child minder for the respondent. Two years after she commenced employment, she became pregnant and the respondent dismissed her.³³⁰ The applicant approached the Labour Court and claimed compensation for an automatically unfair discrimination based on pregnancy and damages for unfair discrimination on the basis of pregnancy.³³¹

The Labour Court held that the applicant's dismissal was automatically unfair,³³² because her employment was terminated solely because she fell pregnant.³³³

The respondent argued that he had terminated the applicant's employment, because it was an inherent requirement of the job of a child minder not to have children, nor to be pregnant.³³⁴ The court found that this was not an inherent requirement of the job and that there was unfair discrimination against the applicant on the ground of pregnancy.³³⁵ The respondent acted unfairly towards

³²⁷ *Ibid* 1086–1087

³²⁸ *Ibid* 1087

³²⁹ [2006] 8 BLLR 757 (LC)

³³⁰ *Supra* 759

³³¹ *Ibid* 761 – 762

³³² *Ibid* 763

³³³ *Ibid*

³³⁴ *Ibid*

³³⁵ *Ibid*

the applicant when he failed to determine whether she could still perform her job as a child minder even though she was pregnant.³³⁶

In *IMATU and another v City of Cape Town*,³³⁷ Murdoch, the second applicant, who was a person living with insulin dependent *diabetes mellitus*, applied for a position as a firefighter and was not appointed in terms of the respondent's employment practice.³³⁸ The City of Cape Town stated that it was an inherent requirement of the job of a firefighter to not expose himself, his colleagues or the public to a "real risk of harm to [the public's and his colleagues'] or [his] own safety."³³⁹ To meet the abovementioned inherent requirement, the particular fire fighter also had not to be at risk of suffering a severe hypoglycaemic attack³⁴⁰ and had not to be living with type I diabetes. The respondent argued that every person with type I diabetes was prone to severe hypoglycaemic attacks and that the inherent job requirements of the position of firefighter justified the exclusion of such persons in terms of its blanket employment ban.³⁴¹ It relied on the inherent requirement of a job to defend its discriminatory conduct in respect of Murdoch as a type I diabetic.³⁴²

The Labour Court stated that the test for an inherent job requirement is whether the inherent requirements are so as to justify the discrimination and referred to

³³⁶ *Ibid*

³³⁷ [2005] 11 BLLR 1084 (LC)

³³⁸ *Supra* 1087

³³⁹ *Ibid* 1119

³⁴⁰ *Ibid*

³⁴¹ *Ibid* 1120

³⁴² *Ibid* 1119

the Australian case of *X v The Commonwealth* [1999] HCA 63.³⁴³ In the aforementioned case, a soldier who was living with HIV was dismissed because he could not meet the inherent requirements of the job, which, according to the Commonwealth, was the ability to bleed safely.³⁴⁴ The Labour Court adopted the High Court of Australia's approach that a court should not determine whether the degree of risk that flows from a medical condition is an inherent requirement of a job, but rather whether the degree of risk from a medical condition (in Murdoch's case, a severe hypoglycaemic attack flowing from type I diabetes) is relevant in assessing whether the person living with such condition can meet the inherent requirements of a job.³⁴⁵ Grogan states that employers, who claim that job applicants and employees living with a medical condition create a danger as a result of risk attached to such medical condition, must prove to the satisfaction of a court that the specific individual in question is prone to such risk and not that persons living with that medical condition are prone to the risk in general.³⁴⁶

The court held that the degree of risk of a debilitating hypoglycaemic attack in the case of Murdoch was insignificant³⁴⁷ and accordingly irrelevant. The medical evidence that was put forward by the applicant's physician, who was "a leader in the field"³⁴⁸ of diabetes, suggested that Murdoch was a fit person whose diabetes was well controlled. Even though Murdoch was a type I diabetic, he did not

³⁴³ *Ibid* 1120

³⁴⁴ *Ibid* 1120 – 1121

³⁴⁵ *Ibid* 1121

³⁴⁶ Grogan "Fit to fight fires? Discriminating against diabetics" (2005) 21 (6) *Employment Law* 4 at 8

³⁴⁷ *IMATU* 1121

³⁴⁸ *Ibid* 1094

experience a debilitating hypoglycaemic attack during his thirteen years of fighting fires on a voluntary basis.³⁴⁹ Murphy AJ stated that a minimal risk of a hypoglycaemic attack, which was the case with Murdoch, should not preclude him from performing the inherent requirement of the job of firefighter (which was not to pose a threat to the safety of oneself or others while carrying out duties) and it could not justify imposing a blanket ban on the employment of persons with diabetes as firefighters.³⁵⁰

Du Toit *et al* state that an inherent requirement of a job, upon which basis distinction, exclusion or preference of a person will not amount to unfair discrimination, must be a permanent attribute of the particular job that must be inherent to the job and necessary to perform the work that is attached to the particular job.³⁵¹

3.2.3.2 The inherent requirements and essential functions of a job

The Disability Code provides that “[t]he ‘inherent requirements of the job’ are those requirements the employer stipulates as necessary for a person to be appointed to a job, and are necessary in order to enable an employee to perform the essential functions of the job”.³⁵² Ngwena and Pretorius state that the “essential functions” of a job are an even stricter interpretation of the “inherent

³⁴⁹ *Ibid* 1090

³⁵⁰ *Ibid* 1121

³⁵¹ Du Toit *op cit* 608

³⁵² Item 7.1.2 of the Disability Code

requirements of a job”³⁵³ (which must itself be strictly interpreted). The “essential functions of a job” aim to remove functions that are not essential to performing a job, from the ambit of the inherent requirements of the particular job.³⁵⁴ It also requires the employer to base the decision to appoint a suitably qualified person to a particular job on a practical (objective) evaluation of what the particular job requires and not only on the employer’s (subjective) judgment.³⁵⁵ An employer needs to differentiate between essential and non–essential functions of a particular job.³⁵⁶ People with disabilities only need to perform the essential functions of a job³⁵⁷ and cannot be excluded from employment on the basis of non–essential tasks.³⁵⁸

3.2.4 *IMATU and another v City of Cape Town*

This is the first South African case in which a claim of unfair discrimination on the basis of disability was brought under the EEA. Murdoch was a law enforcement officer who was employed by the Municipality of the City of Cape Town. He also performed service as a volunteer firefighter.³⁵⁹ He applied for the position of firefighter and passed a recruitment interview as well as physical tests that he undertook.³⁶⁰

³⁵³ Ngwena and Pretorius (2003) 1832

³⁵⁴ *Ibid*

³⁵⁵ *Ibid* 1833

³⁵⁶ *Ibid*

³⁵⁷ Ngwena (2004) 181

³⁵⁸ Ngwena and Pretorius (2003) 1833

³⁵⁹ *IMATU and another v City of Cape Town* 1087

³⁶⁰ *Ibid* 1088

The physician who was employed by the City of Cape Town, found that Murdoch was medically unfit for the position of firefighter because the latter had insulin dependent *diabetes mellitus*.³⁶¹ The respondent had a blanket ban in place whereby people living with this medical condition were not appointed to the positions of firefighters³⁶² and Murdoch was for reason of his type I diabetes, accordingly not appointed as a firefighter in terms of the respondent's blanket ban.

IMATU alleged that the City of Cape Town, through its blanket ban, unfairly discriminated against Murdoch on the basis of disability or, alternatively, on the analogous ground of his medical condition, which was type I diabetes.³⁶³ The Labour Court had to determine whether the respondent's blanket ban constituted unfair discrimination³⁶⁴ against Murdoch in terms of the EEA. It applied the *Harksen v Lane*³⁶⁵ test to determine the issue.³⁶⁶

The Labour Court's application of the *Harksen v Lane* inquiry:

- (a) The court, firstly, had to determine whether the respondent's employment practice differentiated between people or categories of people.³⁶⁷

³⁶¹ *Ibid*

³⁶² *Ibid* 1087

³⁶³ *Ibid*

³⁶⁴ *Ibid* 1087

³⁶⁵ *Harksen v Lane NO and others* 1998 (1) SA 300 (CC)

³⁶⁶ *IMATU* 1111

³⁶⁷ *Ibid*

The City of Cape Town admitted that it had differentiated between Murdoch and other applicants for positions of firefighter, by refusing, in terms of the blanket ban, to transfer him to such position because he was living with type I diabetes.³⁶⁸ The respondent's rationale for doing so was that it had to provide fire protection services as a municipality under the Constitution³⁶⁹ and had to take legislative measures³⁷⁰ to ensure a safe working environment to its employees and third parties.³⁷¹ The respondent also had to take steps to guard against reasonably foreseeable harm to its employees and third parties.³⁷²

The court found that there was a link between the differential treatment of Murdoch in terms of the blanket ban and the legitimate purpose of ensuring public safety.³⁷³ This rationality constituted "mere differentiation" and section 9(1) of the Constitution was not infringed upon.³⁷⁴

(b) The court, secondly, had to determine whether the differentiation in respect of Murdoch amounted to unfair discrimination.³⁷⁵

The court had to determine whether the differential treatment in respect of Murdoch was based on a listed ground.³⁷⁶ Murphy AJ held that *diabetes mellitus*

³⁶⁸ *Ibid* 1112

³⁶⁹ *Ibid*

³⁷⁰ In terms of the Occupational Health and Safety Act 85 of 1993

³⁷¹ *IMATU* 1112

³⁷² *Ibid*

³⁷³ *Ibid* 1113

³⁷⁴ *Ibid*

³⁷⁵ *Ibid* 1111

³⁷⁶ *Ibid* 1113

does not constitute a disability and that the respondent's blanket ban, accordingly, did not differentiate on a listed ground.³⁷⁷

The judge held that type I diabetes, however, was an analogous ground of discrimination, because it was an attribute that Murdoch possessed that had an adverse effect on his human dignity.³⁷⁸ The exclusion of people with diabetes from employment on the basis of outdated assumptions as to this attribute had an adverse affect on the human dignity of a person living with it.³⁷⁹ The respondent's blanket ban discriminated against Murdoch on the unlisted ground of type I diabetes.³⁸⁰

The court considered the *Harksen v Lane* factors to determine whether the blanket ban perpetrated unfair discrimination:³⁸¹

The position of the complainant in society and whether the complainant has suffered from past patterns of disadvantage:³⁸²

The court held that people with type I diabetes are excluded from jobs and discouraged to pursue professions due to the attribute they are living with and erroneous perceptions that exist about type I diabetes.³⁸³

³⁷⁷ *Ibid* 1115

³⁷⁸ *Ibid.* Murphy AJ was "satisfied that Type I diabetes is an analogous ground to the grounds of disability, HIV status and, given its genetic origins, perhaps even birth."

³⁷⁹ *Ibid*

³⁸⁰ *Ibid*

³⁸¹ *Ibid* 1116

³⁸² *Ibid* 1112

The nature of the provision of power and the purpose it sought to achieve.³⁸⁴

The respondent's employment practice and the reason for its existence, which was to reduce risks to firefighters and third parties, was based on incorrect assumptions about people living with Type I diabetes.³⁸⁵ Medical evidence, which the City of Cape Town did not consider, showed that not all people with type I diabetes were prone to debilitating hypoglycaemic attacks.³⁸⁶

The extent to which the discrimination had affected the rights or interests of the complainant.³⁸⁷

Murphy AJ held that the blanket ban was not custom-made to give effect to the purpose of public safety and it curbed Murdoch's rights more than which was needed.³⁸⁸ The ban constituted an "overreach"³⁸⁹ and such ban, and the application thereof, amounted to unfair discrimination against Murdoch.³⁹⁰ It regarded all people with type I diabetes as being at risk of having severe hypoglycaemic attacks – and accordingly unfit to be appointed as firefighters – regardless of whether a specific individual living with the medical condition exhibits that risk, which was not the case with Murdoch.³⁹¹ The respondent failed

³⁸³ *Ibid* 1116

³⁸⁴ *Ibid* 1112

³⁸⁵ *Ibid* 1116

³⁸⁶ *Ibid*

³⁸⁷ *Ibid* 1112

³⁸⁸ *Ibid* 1117

³⁸⁹ *Ibid*

³⁹⁰ *Ibid*

³⁹¹ *Ibid* 1122

to acknowledge that Murdoch “[lived] a normal life apart from his medication regime”³⁹² and that he was otherwise a healthy individual.³⁹³ Murdoch also had good vision³⁹⁴ and no complications that arose from his diabetes.³⁹⁵

The City of Cape Town had to show that the discrimination was fair in terms of the EEA³⁹⁶ and not the Constitution’s limitations clause, because the applicants claimed unfair discrimination in terms of the EEA and not the Constitution.³⁹⁷ This approach of the Labour Court was in line with the principle laid down in the later Constitutional Court case of *Minister of Health and Another v New Clicks SA (Pty) Ltd and Others (Treatment Action Campaign and Innovative Medicines SA as Amici Curiae)*³⁹⁸ *In casu*, Ngcobo J stated that where the Constitution imposed a duty on the Legislature to enact legislation to give effect to a right in the Constitution and where Parliament had done so, a person had to found a claim in terms of the “subordinate” Parliamentary legislation and not on the right in the Constitution from which the legislation originates.³⁹⁹ Where a person founded a claim on the legislation, a court had to decide the matter in terms of the “subordinate” legislation and not the Constitution.⁴⁰⁰

³⁹² *Ibid* 1115

³⁹³ *Ibid* 1122

³⁹⁴ *Ibid* 1088

³⁹⁵ *Ibid* 1097

³⁹⁶ *Ibid* 1115

³⁹⁷ *Ibid* 1118

³⁹⁸ 2006 (1) BCLR 1 (CC)

³⁹⁹ *Supra* 118

⁴⁰⁰ *Ibid* 118–119

The court found that the respondent's defence of excluding Murdoch on the basis of an inherent requirement of the job failed and its unfair discrimination against Murdoch could not be justified.⁴⁰¹ Murphy AJ also referred to the Constitutional Court case of *Hoffmann v SAA*, which confirmed that differentiation amongst persons on the basis of a medical – or health condition, called upon an individual assessment in respect of a person living with the condition, instead of a blanket exclusion of such persons from employment.⁴⁰²

The Labour Court declared the respondent's blanket ban, as well as its failure to transfer Murdoch from the position of law enforcement officer to firefighter, to be unfair discrimination.⁴⁰³ The court ordered the City of Cape Town to conduct an individual assessment on own merits or objective criteria, in respect of every applicant for the post of firefighter⁴⁰⁴ and to second Murdoch in the position of learner firefighter for a Firefighter I Training Course.⁴⁰⁵

Grogan states that *IMATU*, which endorsed *Hoffmann* by preferring individual assessments over blanket employment exclusions when it comes to differentiation on the basis of a medical condition, did not send the message across that blanket exclusions will never pass constitutional muster, but that individual assessments will be the fairer alternative.⁴⁰⁶ A blanket employment ban

⁴⁰¹ *IMATU* 1121

⁴⁰² *Ibid* 1122

⁴⁰³ *Ibid* 1123

⁴⁰⁴ *Ibid*

⁴⁰⁵ *Ibid*

⁴⁰⁶ Grogan (2005) 8

must be premised on an unadulterated and scientifically proven link between a specific medical condition and the ability to perform a job.⁴⁰⁷ Even if such link is established, the ban itself must still yield to fairness in order to pass constitutional muster.⁴⁰⁸

The respondent in *Hoffmann* could not establish such a proven link between HIV, an inability to be effectively vaccinated against yellow fever and the inability to perform the duties of a cabin attendant, in respect of its blanket ban, upon which the Constitutional Court stated that:

“[SAA’s employment] practice, therefore, judged and treated all persons who are living with HIV on the same basis. It judged all of them to be unfit for employment as cabin attendants on the basis of assumptions that are true only for an identifiable group of people who have HIV.”⁴⁰⁹

Nor could the respondent in *IMATU* establish this link between type I diabetes, a predisposition to debilitating hypoglycaemic attacks and the incapability to perform the duties of a firefighter, in respect of its blanket ban, whereupon the Labour Court responded that:

“[The City of Cape Town] is treating all insulin dependent diabetics the same and imposing a blanket ban on the employment of that group as fire-fighters, irrespective of whether the particular individual – such as Murdoch, who is physically fit and in optimal control of his diabetes – displays any susceptibility to uncontrolled hypoglycaemic episodes.”⁴¹⁰

⁴⁰⁷ *Ibid*

⁴⁰⁸ *Ibid*

⁴⁰⁹ *Hoffmann v SAA* 2371

⁴¹⁰ *IMATU* 1122

3.3 Conclusion

Even though *IMATU and another v City of Cape Town* did not deal with discrimination on the basis of disability under the EEA, it dealt with the entire spectrum on how discrimination on the basis of disability ought to be approached.⁴¹¹ The case dealt with extensive medical evidence of a medical condition that was argued to be a disability, until the Labour Court found otherwise. It also dealt in detail with the issues of discrimination, the unfairness of the discrimination and the validity of the employer's defence to it.⁴¹² A prominent feature of the *IMATU* decision, as stated above, was the Labour Court's dissatisfaction with a blanket employment that was linked to legitimate purposes and seemed to protect valid interests, but which unfairly discriminated against a person on the basis of a medical condition. The situation is aggravated when the ban is premised on generalised erroneous perceptions such as that all people with insulin dependent *diabetes mellitus* are prone to severe hypoglycaemic attacks. Fortunately, the Labour Court in *IMATU* (and the Constitutional Court in *Hoffmann*), has welcomed individual assessments in respect of differentiation based on a medical condition.

An individual assessment plays an important role in not only in respect of a medical condition, but also disability. It provides an employee or job applicant with a disability, or other medical condition, with some form of "*audi alterem*

⁴¹¹ Van der Walt and Van der Walt "The defence of inherent requirements of the job: A blanket ban for medical reasons not justifiable" (2005) 26(2) *Obiter* 447 at 453

⁴¹² *Ibid*

partem” in respect of an employment position. According to the Constitutional Court, “[p]rejudice can never justify unfair discrimination”.⁴¹³ An individualised assessment provides an opportunity to such an employee or job applicant to answer to and counter any prejudices the employer may have in respect of the person’s disability or other medical condition. It may assist the employer to not discriminate against the person based on prejudices or perceptions as to the person’s disability or medical condition. Moreover, it may also serve as a measure of reasonable accommodation, because once the employer has individually assessed the person’s disability or other medical condition, the employer can make the appropriate and required adjustments to reasonably accommodate, where necessary, the needs of such employee or job applicant.

⁴¹³ *Hoffmann v SAA* 2373

CHAPTER 4

PEOPLE WITH DISABILITIES AND REASONABLE ACCOMMODATION

4.1 The origin of reasonable accommodation in respect of people with disabilities

“Where a rule or a practice makes generalizations about people solely on the basis of disability without regard to the particular circumstances of the specific class of individuals affected, then this is, in my view, entirely unfair to the individuals. Moreover, in order for there to be true individualization, a close assessment should be made of the individual in question since even persons with the same disability vary markedly in how they personally function and cope with their affliction, or vary in the degree of impairment because of different stages of their infirmity. I concede that this method may make matters somewhat burdensome for the employers. However, this is a small price to pay for the high value society has placed on the rights of disabled persons.”⁴¹⁴

As was stated in an earlier Chapter, the South African definition of “people with disabilities” is to a large extent premised on the social model of disability. According to the social model, disability is something that society creates, rather than something that exists.⁴¹⁵ In this regard, the White Paper on Integrated National Disability Strategy provides that:

⁴¹⁴ Judge Jajbhay in *McLean v Sasol Mine (Pty) Ltd Secunda Colliery; McLean v Sasol Pension Fund* (2003) 24 ILJ 2083 (W) at 2097

⁴¹⁵ The White Paper on Integrated National Disability Strategy Chapter 1: The Social Model of

“It is the stairs leading into a building that disable the wheelchair user rather than the wheelchair. It is defects in the design of everyday equipment that cause difficulties, not the abilities of people using it.

It is society’s lack of skill in using and accepting alternative ways to communicate that excludes people with communication disabilities.

It is the inability of ordinary schools to deal with diversity in the classroom that forces children with disabilities into special schools”⁴¹⁶

In terms of the social model of disability, “able-bodied” society must change itself to cater to the needs of people with disabilities and these changes must seek to reasonably accommodate people with disabilities.⁴¹⁷

The EEA defines “reasonable accommodation” as “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 or participate or advance in employment”.⁴¹⁸ The “designated groups” who are beneficiaries under affirmative action measures⁴¹⁹ are black people, women and people with disabilities.⁴²⁰

Section 15(2)(c) of the EEA also states that affirmative action measures taken by a designated employer⁴²¹ must include providing reasonable accommodation for

Disability

⁴¹⁶ *Ibid*

⁴¹⁷ Ngwena (2006) 638

⁴¹⁸ Section 1 of the EEA

⁴¹⁹ Section 15(1) of the EEA provides that “affirmative action measures” are measures that are designed to ensure that suitably qualified people from the designated groups enjoy equal opportunities in employment and are equitably represented in the workforce of a designated employer.

⁴²⁰ Section 1 of the EEA

⁴²¹ Section 1 of the EEA provides that a “designated employer” means:

- (a) an employer who employs more than 50 employees;
- (b) an employer who employs less than 50 employees, but who has a total annual turnover

people from the designated groups (which include people with disabilities) to ensure that such persons enjoy equal opportunities and are equitably represented in the workplace of the designated employer.

Reasonable accommodation is a constitutional principle and a tool to achieve substantive equality.⁴²² It flows from section 9(2) of the Constitution, which provides that “[e]quality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons disadvantaged by unfair discrimination may be taken.”

The abovementioned constitutional provision is also the origin of affirmative action measures. Item 6.1 of the Technical Assistance Guidelines on the Employment of People with Disabilities, states that reasonable accommodation, however, is not only an affirmative action measure, but also a non-discrimination principle.⁴²³ In such an instance, it is also a manifestation of sections 9(3) and

-
- that is equal to or above the applicable annual turnover of a small business in terms of Schedule 4 of the EEA;
- (c) a municipality as referred to in Chapter 4 of the Constitution;
 - (d) an organ of state as defined in section 239 of the Constitution, but excluding local spheres of government, the National Defence Force, the National Intelligence Agency and the South African Secret Service;
 - (e) an employer bound by a collective agreement in terms of section 23 and 31 of the LRA, which appoints it as a designated employer in terms of the Act, to the extent provided for in the agreement.

⁴²² Ngwena (2004) 191

⁴²³ The Promotion of Equality and Prevention of Unfair Discrimination Act also recognizes the above and states in section 9(c) states that a failure to eliminate obstacles that unfairly limits people with disabilities from enjoying equal opportunities or a failure to take steps to reasonably accommodate the needs of such persons, amounts to unfair discrimination on the basis of disability. Article 2 of the UN Disability Convention also contains “the denial of reasonable accommodation” as a form of discrimination on the basis of disability. This

9(4) of the Constitution, which respectively prohibits both the State and persons from directly or indirectly unfairly discriminating against anyone on the basis of disability.

4.2 The Code of Good Practice on the Employment of People with Disabilities

The Disability Code provides that employers should reasonably accommodate people with disabilities and that the purpose of such accommodation is to minimize the effect of the particular person's disability on the ability of the person to fulfil the essential functions of a job.⁴²⁴

The employer must implement the most cost-effective measure of accommodating the employee or job applicant with a disability, which must eliminate the impediments the particular person in employment faces and enable the person to benefit from employment on an equal basis with others.⁴²⁵ The abovementioned provision contains the requirements of reasonable accommodation for people with disabilities: that the accommodation must enable a person with a disability to enter a job for which the person is suitably

provision of the Convention also states that "[r]easonable accommodation means necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms" – in other words, equality. Moreover, section 5(3) of the Convention states further that Member States to the Convention must take all appropriate steps to provide reasonable accommodation to persons with disabilities for the purposes of promoting equality and eliminating discrimination.

⁴²⁴ Item 6.1 of the Disability Code

⁴²⁵ Item 6.2 of the Disability Code

qualified,⁴²⁶ that it must enable the person to advance in existing employment⁴²⁷ and that it be cost-effective in giving effect to the abovementioned two requirements.⁴²⁸

The Technical Assistance Guidelines state that an employer is not under a duty to employ a person with a disability where the particular person cannot perform the essential functions of a job even with reasonable accommodation.⁴²⁹ In such a case, the employer is not obliged to create a new job for the person for the purpose of reasonably accommodating the person, nor must the employer re-assign the essential functions of the job to another employee.⁴³⁰ Where a job-applicant or employee with a disability is, with or without reasonable accommodation, able to fulfil the essential functions of a particular job, an employer may restructure that job for the person with a disability by re-assigning peripheral job functions to another employee.⁴³¹

Employers who need to reasonably accommodate an employee or job applicant with a disability, need to pay for such accommodation, unless it imposes an unjustifiable hardship on the business of the employer.⁴³²

⁴²⁶ Item 6.2 of the Technical Assistance Guidelines on the Employment of People with Disabilities

⁴²⁷ *Ibid*

⁴²⁸ *Ibid*

⁴²⁹ Item 6.2 of the Technical Assistance Guidelines

⁴³⁰ *Ibid*

⁴³¹ *Ibid*

⁴³² Item 6.14.2 of the Technical Assistance Guidelines

Job applicants and employees with disabilities, who are suitably qualified for the job, need to be reasonably accommodated.⁴³³ Such persons may require it during the recruitment and selection processes, in the working environment, the way work is usually performed, evaluated or rewarded and in benefits and privileges attached to employment.⁴³⁴ An employer accordingly needs to provide reasonable accommodation to a suitably qualified person with a disability even before the person is appointed.⁴³⁵ An employer must also accommodate employees with disabilities whose work, working environment or impairment changes to such an extent that it may have an effect on the capacity of the person to fulfil the essential functions of the job.⁴³⁶

The employer has a duty to reasonably accommodate a job applicant or employee with a disability when the person voluntarily discloses a need for accommodation of a disability or where a need for accommodation of the person's disability is patently obvious to the employer.⁴³⁷ An employer may only request specific information on the particular type of accommodation the person requires after the employer has determined that the job applicant is suitably qualified for the position and has made a conditional job offer to the applicant.⁴³⁸ If the employer discusses a particular accommodation need prior to a conditional job offer has been made and the applicant is not offered the job, it may indicate

⁴³³ Item 6.3 of the Disability Code

⁴³⁴ *Ibid*

⁴³⁵ Item 6.3 of the Technical Assistance Guidelines

⁴³⁶ Item 6.5 of the Disability Code

⁴³⁷ Item 6.4 of the Disability Code

⁴³⁸ Item 6.4 of the Technical Assistance Guidelines

unwillingness on the part of the employer to provide the requested accommodation, which courts may perceive as disability discrimination.⁴³⁹

The employer and employee with a disability must consult with each other and, where it is needed, also with technical experts, to determine measures by which the person with a disability can be reasonably accommodated.⁴⁴⁰ The Technical Assistance Guidelines provide that the employer and the particular employee in need of reasonable accommodation must consult with each other and jointly identify and establish the particular accommodation the employee needs to meet the inherent requirements of the job in which the person is employed.⁴⁴¹ Consultation between the parties is required, because the employee with a disability may have the best comprehension of the particular accommodation he or she needs.⁴⁴² Where a technical expert is needed to assist in identifying and establishing suitable accommodation for the employee, the expert must make recommendations on such accommodation in consultation with both the employer and employee, for the purpose of ensuring accommodation that will cater to the needs of both.⁴⁴³

The employer must take into account the person with a disability, the person's type and extent of impairment, the effect of the impairment of the person and the job and working environment of the person, in providing specific accommodation

⁴³⁹ *Ibid*

⁴⁴⁰ Item 6.6 of the Disability Code

⁴⁴¹ Item 6.6 of the Technical Assistance Guidelines

⁴⁴² *Ibid*

⁴⁴³ *Ibid*

to the particular person with a disability.⁴⁴⁴ The person with a disability may also be reasonably accommodated either on a permanent or temporary basis, taking into account the person's type of disability and the extent to which the person is disabled.⁴⁴⁵

The measures of reasonable accommodation for people with disabilities include, but are not limited to –

- (a) adapting existing facilities to make them accessible for such persons;
- (b) adapting existing equipment or acquiring new equipment including computer hardware and software;
- (c) re-organizing workstations;
- (d) changing training and assessment materials and systems;
- (e) restructuring jobs so that non-essential functions are re-assigned;
- (f) adjusting working time and leave; and
- (g) providing specialized supervision, training and support in the workplace.⁴⁴⁶

The employer may evaluate the work performance of the employee with a disability against the same standards as for other employees, but the type of disability the person has may necessitate an adaptation of the manner in which the employer measures such person's performance.⁴⁴⁷ The Technical Assistance Guidelines state that the work performance of such employees should only be

⁴⁴⁴ Item 6.7 of the Disability Code

⁴⁴⁵ Item 6.8 of the Disability Code

⁴⁴⁶ Item 6.9 of the Disability Code

⁴⁴⁷ Item 6.10 of the Disability Code

assessed on the essential, and not the peripheral, job functions of the position in which the person with a disability is employed.⁴⁴⁸

4.3 Practical application of the Disability Code and Technical Assistance Guidelines in determining whether or not a person with a disability has been reasonably accommodated

The applicant in *NEHAWU on behalf of Lucas and Department of Health (Western Cape)*⁴⁴⁹ was as a result of her spinal injury unable to pick up heavy objects in the nursing department in which she performed cleaning duties.⁴⁵⁰ It was recommended that she be given “light duties”,⁴⁵¹ but the Department of Health, who was the employer, held that there were no light duties available to her in the nursing department.⁴⁵² Lucas was placed in the hospital’s needlework department on a temporary basis, because there was no vacancy in such department.⁴⁵³

Lucas could not perform her work satisfactorily in the needlework department, as a result of, amongst others, the medication that she used in respect of her back

⁴⁴⁸ Item 6.10 of the Technical Assistance Guidelines

⁴⁴⁹ (2004) 25 *ILJ* 2091 (BCA)

⁴⁵⁰ *Supra* 2093

⁴⁵¹ *Ibid*

⁴⁵² *Ibid* 2094

⁴⁵³ *Ibid*

injury.⁴⁵⁴ She also applied for an administrative position in the hospital, to which she was not appointed.⁴⁵⁵ She was dismissed for incapacity due to ill health.⁴⁵⁶

In determining whether the Department of Health had reasonably accommodated Lucas as a person with a disability, the Arbitrator considered item 6 of the Disability Code and Technical Assistance Guidelines.⁴⁵⁷ She stated that the purpose of reasonable accommodation is to enable people with disabilities to be employed and retained in employment.⁴⁵⁸ “Reasonable” accommodation for a person with a disability depends on the circumstances of both the workplace (and employer) and the employee.⁴⁵⁹ It also requires the parties to an employment relationship to jointly adopt a problem-solving approach to alter employment practices, to afford an employee with a disability an opportunity to perform a job similarly or equal to a similarly situated “able-bodied” employee.⁴⁶⁰

The Arbitrator stated that if Lucas, her representative trade union and the Department of Health had adhered to the EEA, Disability Code and the Technical Assistance Guidelines, in conjunction with expert advice and – assistance, they could have identified and explored accommodation that would not impose an unjustifiable hardship on the employer.⁴⁶¹ In respect of the Department of Health’s failure to reasonably accommodate Lucas in the nursing department

⁴⁵⁴ *Ibid*

⁴⁵⁵ *Ibid* 2095

⁴⁵⁶ *Ibid* 2093

⁴⁵⁷ *Ibid* 2102

⁴⁵⁸ *Ibid* 2103

⁴⁵⁹ *Ibid*

⁴⁶⁰ *Ibid*

⁴⁶¹ *Ibid* 2102–2103

because there were no “light duties” in that department, the Arbitrator stated that “light duty” is not a job and that an employer could only mention it by referring to the content of a specific job.⁴⁶² A “light duty” is “an abstract notion to denote low-intensity physical activity”.⁴⁶³ By mentioning that there were no “light duties” available in the nursing department, the employer was not exonerated from reasonably accommodating Lucas in that department.⁴⁶⁴ It could not produce evidence that the applicant’s work in the nursing department could not be adapted to suit her needs,⁴⁶⁵ nor did the Department of Health fulfil its obligation to reasonably accommodate Lucas in the nursing department by mentioning that she no longer was able to pick up heavy objects.⁴⁶⁶ On there being no vacancies for the post which Lucas held in the nursing department, the Arbitrator stated that reasonably accommodating a person with a disability may involve more than just looking at an alternative position for the person.⁴⁶⁷

On the placement of Lucas in the needlework department on a temporary basis because there were no vacancies in that particular department, the Arbitrator stated that an employer should seek to permanently, and not temporarily, accommodate a person with a permanent disability.⁴⁶⁸

⁴⁶² *Ibid* 2103

⁴⁶³ *Ibid*

⁴⁶⁴ *Ibid*

⁴⁶⁵ *Ibid* 2104

⁴⁶⁶ *Ibid*

⁴⁶⁷ *Ibid*

⁴⁶⁸ *Ibid*

According to the Arbitrator, Lucas's dismissal flowed from the fact that she was not appointed to the administrative position for which she applied, and not that the employer would incur unjustifiable hardship in reasonably accommodating her.⁴⁶⁹ The Department of Health did not reasonably accommodate Lucas in the nursing department or in the sewing department and only "accommodated" her in respect of the senior administrative position for which she applied.⁴⁷⁰

In *Wylie and Standard Executors and Trustees*,⁴⁷¹ the applicant was an estate administrator in a bank who, as a result of her multiple sclerosis, could no longer perform her work in an adequate manner. At a medical panel meeting, alternative accommodations for Wylie in respect of her illness were discussed.⁴⁷² The proposed accommodations which were to be explored for three months, were to accommodate the applicant in her position as estate administrator, seek another position for her in the bank and assist her to pursue a position outside the bank.⁴⁷³

Wylie's failure to meet the performance standard of an estate administrator caused many of her estates to be diverted to other employees, which caused an increase in such employees' workload.⁴⁷⁴ Management considered a half-day job not to be a practicable option for the applicant in the business environment in

⁴⁶⁹ *Ibid* 2105

⁴⁷⁰ *Ibid*

⁴⁷¹ (2006) 27 ILJ 2210 (CCMA)

⁴⁷² *Supra* 2212

⁴⁷³ *Ibid* 2213

⁴⁷⁴ *Ibid* 2214

which she was performing her job.⁴⁷⁵ The respondent's Provincial Manager indicated to the applicant that she could not be accommodated in her current position as estate administrator.⁴⁷⁶ The applicant could not achieve the target of the amount of deceased estates that had to be processed and completed every year.⁴⁷⁷ Wylie considered obtaining a placement to another bank for the position of customer information consultant, but there was no vacancy for such a position.⁴⁷⁸

The respondent employer indicated to Wylie that it would assist her in pursuing a position outside her job in the bank.⁴⁷⁹ The applicant did not wish to pursue a position outside the bank,⁴⁸⁰ but sought accommodation within the bank.⁴⁸¹ She was dismissed for incapacity due to ill health.⁴⁸²

The Commissioner at the Commission for Conciliation, Mediation and Arbitration had to determine, amongst others, whether the respondent reasonably accommodated Wylie as a person with a disability prior to her dismissal.⁴⁸³ The Commissioner held that the respondent employer did not, as the Disability Code guidelines provide, restructure Wylie's job so that peripheral functions to her job

⁴⁷⁵ *Ibid*

⁴⁷⁶ *Ibid* 2215

⁴⁷⁷ *Ibid*

⁴⁷⁸ *Ibid* 2213

⁴⁷⁹ *Ibid* 2215

⁴⁸⁰ *Ibid*

⁴⁸¹ *Ibid* 2216

⁴⁸² *Ibid* 2212

⁴⁸³ *Ibid* 2221

as estate administrator could be re-assigned to other employees.⁴⁸⁴ The employer also gave no reasons for not adjusting working time and leave for the applicant.⁴⁸⁵ The Commissioner held that the management's view that a half-day job would not be practicable in respect of Wylie, implied a difficulty to locate estate administrators that could do the applicant's job,⁴⁸⁶ but that management nevertheless had to explore the possibility of a half-day post, which it did not seriously consider.⁴⁸⁷

An occupational therapist did not play any role in any of the processes that had resulted in the dismissal of the applicant.⁴⁸⁸ The Commissioner also stated that, where none of the managers was qualified to determine reasonable accommodation for Wylie and where the Medical Advisor of Corporate Health advised that the applicant was not permanently incapacitated, the assistance of an occupational therapist had to be sought to effect appropriate reasonable accommodation for the applicant.⁴⁸⁹

To look or wait for posts to become vacant for Wylie was insufficient reasonable accommodation for the applicant as a person with a disability.⁴⁹⁰ The employer merely diverted estates from the applicant as a measure or attempt of

⁴⁸⁴ *Ibid*

⁴⁸⁵ *Ibid*

⁴⁸⁶ *Ibid*

⁴⁸⁷ *Ibid*

⁴⁸⁸ *Ibid*

⁴⁸⁹ *Ibid*

⁴⁹⁰ *Ibid*

accommodation.⁴⁹¹ The Commissioner held that the employer failed to reasonably accommodate Wylie as a person with a disability.⁴⁹²

In *Standard Bank of South Africa v Commission for Conciliation Mediation and Arbitration and Others*,⁴⁹³ Ms Ferreira, the third respondent (hereinafter “the respondent” or “the employee”) worked as a mobile home loan consultant for Standard Bank, the applicant (hereinafter also “the employer”). She sustained a back injury when she was involved in a motor vehicle accident in the course of employment.⁴⁹⁴ She returned to the position she held in the bank prior to the accident, but after her back injury exacerbated, the employer created an administrative position with lighter duties for the respondent.⁴⁹⁵

The respondent found that the administrative post, by which she assisted other employees, was not challenging enough given her work experience and length of employment with the bank, which was 15 years at the time of the accident.⁴⁹⁶ She later performed loan confirmation work, which she found motivating, but which caused her to experience pain, because she was required to speak on the telephone and write simultaneously.⁴⁹⁷ To enable her to perform such work effectively, the employee requested a placement in a particular division in

⁴⁹¹ *Ibid*

⁴⁹² *Ibid* 2221–2222

⁴⁹³ [2008] 4 BLLR 356 (LC)

⁴⁹⁴ *Supra* 357

⁴⁹⁵ *Ibid* 358

⁴⁹⁶ *Ibid*

⁴⁹⁷ *Ibid*

Standard Bank where telephone headsets were used.⁴⁹⁸ On the employer's supposition that the employee would only perform such a job on a half-day basis, and that it accordingly had to create a position to that effect, it declined a placement to that division.⁴⁹⁹

In her own division, the respondent was able to perform telephone duties if she was provided with a telephone headset.⁵⁰⁰ She requested a headset and communicated the costs thereof to her line manager, but the employer did not supply her with the telephone headset.⁵⁰¹ The manager then required her to perform duties which did not involve the use of a telephone.⁵⁰²

The employee was able to perform data capturing duties, but a workplace rule prohibited her from entering another employee's password to be able to access a computer.⁵⁰³ She had her own password inserted in a computer to enable her to perform such duties, after which her line manager prohibited her from using the computer.⁵⁰⁴ She also refused to take up a position as switchboard operator that was proposed by her line manager and human resources consultant.⁵⁰⁵ The respondent's line manager then required her to perform manual tasks, which proved painful, especially in light of her back condition and even though a

⁴⁹⁸ *Ibid*

⁴⁹⁹ *Ibid*

⁵⁰⁰ *Ibid* 359

⁵⁰¹ *Ibid*

⁵⁰² *Ibid*

⁵⁰³ *Ibid*

⁵⁰⁴ *Ibid*

⁵⁰⁵ *Ibid*

colleague assisted her.⁵⁰⁶ The employer regarded her as a poor performer in the workplace.⁵⁰⁷ It later employed her as a Home Loan Fulfilment Officer, but informed her approximately six weeks thereafter that she would be dismissed for medical incapacity.⁵⁰⁸ She was subsequently dismissed.

The respondent was unable to “lift heavy objects [and]... raise her arms above a certain height”,⁵⁰⁹ nor could she work with a computer without experiencing pain, because of the height of the keyboard.⁵¹⁰ She experienced difficulty to walk, sit or stand for long periods.⁵¹¹ She also performed duties even though she was in pain, experienced difficulty to work a full day and was absent from work for lengthy periods.⁵¹²

The respondent was unable to provide the applicant with medical reports that she was medically incapacitated, because she was not.⁵¹³ Early retirement for the applicant was declined because medical experts from Standard Bank indicated that she was “not permanently incapacitated” and she should continue to work.⁵¹⁴ Medical practitioners on Standard Bank’s Corporate Health Panel on various occasions also recommended that an occupational therapist investigate and report on the respondent’s circumstances at work and present adjustments and

⁵⁰⁶ *Ibid*

⁵⁰⁷ *Ibid*

⁵⁰⁸ *Ibid* 359–360

⁵⁰⁹ *Ibid* 360

⁵¹⁰ *Ibid*

⁵¹¹ *Ibid*

⁵¹² *Ibid*

⁵¹³ *Ibid*

⁵¹⁴ *Ibid* 361

alterations to her workstation that would accommodate her disability.⁵¹⁵ Orthopaedic surgeons have also advised the applicant to fine-tune the workstation of the respondent.⁵¹⁶

The Labour Court stated that the employer did not involve an occupational therapist (hereinafter “a therapist”) to consult with the respondent and make recommendations on how her workstation could be adjusted, because the business unit that employed the respondent had to carry the costs of such a therapist’s report.⁵¹⁷ Another reason why the employer failed to obtain the report was that such report might have instructed the employer to accommodate the employee, while the employer was adamant to dismiss her.⁵¹⁸

The court found that the applicant refused to provide the respondent with a headset, because it was believed that she would only be able to work half a day.⁵¹⁹ Management was also disinclined to reallocate work to other employees in the event of the respondent being absent from work and the employer was disinclined to adjust her workstation,⁵²⁰ which were the motivations for not providing her with a headset.⁵²¹

⁵¹⁵ *Ibid*

⁵¹⁶ *Ibid*

⁵¹⁷ *Ibid* 364

⁵¹⁸ *Ibid* 365

⁵¹⁹ *Ibid*

⁵²⁰ *Ibid*

⁵²¹ *Ibid*

Management was unwilling to allocate computer duties to the respondent because, in its view, the effects of the medication the respondent used rendered her incapable of performing such work.⁵²² In this regard, the court stated that the line manager did not evaluate the respondent on the computers to determine whether the effect of her medication would indeed render her unable to perform such work.⁵²³

The applicant did not provide the respondent with a comfortable chair as recommended by Corporate Health to ameliorate the effects of her disability.⁵²⁴ The court found that the respondent herself chose a chair which had broken thrice and which the line manager did not replace nor repair when it had come to the latter's attention.⁵²⁵

The applicant did not want to place the respondent in a half-day confirmation administration job.⁵²⁶ The respondent admitted that she worked half a day, but that the other confirmation administrators would compensate for any purported lack of productivity on her part and that the provision of a headset would minimize the chances of such lack of productivity as it would enable her to work for longer.⁵²⁷ The court stated that the applicant did not offer any response to whether the respondent's abovementioned proposed measure constituted

⁵²² *Ibid* 366

⁵²³ *Ibid*

⁵²⁴ *Ibid*

⁵²⁵ *Ibid*

⁵²⁶ *Ibid* 367

⁵²⁷ *Ibid*

reasonable accommodation and, if not, why such measure would impose an unjustifiable hardship on Standard Bank.⁵²⁸

It also stated that the applicant did not adjust the workstation of the respondent, nor did it move her to the other business unit, which was provided with headsets, to perform work as a confirmation administrator⁵²⁹ and that, given the positions in which the respondent was placed following her accident, her manager wished to have her employment terminated, instead of accommodating her in the workplace.⁵³⁰

The Labour Court further stated that an employer's duty to reasonably accommodate employees and job applicant with disabilities is inherent to its duty not to discriminate against such persons, which is required by the Constitution and EEA.⁵³¹ An employer acts unreasonably where it does not reasonably accommodate a person with a disability short of incurring an unjustifiable hardship where it is needed, or fails to explain why it does not accommodate such person.⁵³² There is also a heavier duty on an employer to reasonably accommodate disability, as opposed to religion and culture because, in the words of the court "[p]ractising religious and cultural beliefs is a freedom whereas disability is an imposition."⁵³³

⁵²⁸ *Ibid*

⁵²⁹ *Ibid* 367

⁵³⁰ *Ibid* 364

⁵³¹ *Ibid* 374

⁵³² *Ibid*

⁵³³ *Ibid* 375

The employer who has to provide reasonable accommodation for a person with a disability where it is needed, must find an accommodation and prove that it is reasonable.⁵³⁴ The employee, who requests a particular measure of accommodation, must prove that such measure is *prima facie* reasonable.⁵³⁵ This person must also accept an accommodation that is reasonable, even though it is not the requested accommodation.⁵³⁶ The employer, on the other hand, must provide proper reasons for proposing certain measures of accommodation and declining others.⁵³⁷

The court stated that the applicant had declined to accommodate the respondent as the accommodation would not be cost-effective, would pose a risk to her health and because she had admitted that she could not work.⁵³⁸ The employer had to follow the medical recommendations to procure an occupational therapy report, compel the employee to undergo an evaluation by an occupational therapist and pay for the therapist's report, as it was in a position to do so.⁵³⁹ Apart from the fact that the applicant was able to pay for the costs of the report, the necessity of the report being obtained – which could have prevented the employee's dismissal on the basis of incapacity – prevailed over the costs thereof.⁵⁴⁰ The employer, furthermore, could not decide that such report was costly or inapplicable without firstly procuring it and following its

⁵³⁴ *Ibid* 377

⁵³⁵ *Ibid*

⁵³⁶ *Ibid*

⁵³⁷ *Ibid* 376

⁵³⁸ *Ibid* 379

⁵³⁹ *Ibid* 381

⁵⁴⁰ *Ibid*

recommendations.⁵⁴¹ In the absence of an occupational therapy report, the employer and employee could not effectively consult on how the employee is to be reasonably accommodated in her job or the working environment, as the parties lacked the essential information to do so.⁵⁴² In addition to this, the employer also did not consider the measures of accommodation the employee proposed, which resulted in ineffective consultation between the parties.⁵⁴³

With the employer's duty to reasonably accommodate the employee, the former has an obligation to retain the latter in employment and not force or encourage her to resign.⁵⁴⁴ The court found that Standard Bank encouraged the employee to leave her employment, because discussions pertaining to early retirement ensued after the latter returned to work following her accident, and her line manager requested her to make application for early retirement, even though the employee wished not to.⁵⁴⁵

Pillay J also held that the employer requested the employee to accept the position of a switchboard operator, which did not match the expertise she possessed and refused to equip her with a headset and computer with her own password that would enable her to perform work for which she had the skills,

⁵⁴¹ *Ibid*

⁵⁴² *Ibid* 382

⁵⁴³ *Ibid*

⁵⁴⁴ *Ibid*

⁵⁴⁵ *Ibid*

expertise and capabilities.⁵⁴⁶ The employer also would have refused to place her in a half-day position even if she had requested such accommodation.⁵⁴⁷

The court stated that the employee found loan confirmation work satisfying and had demonstrated that a chair which suited her back condition, a headset and the use of a computer with her own password accommodated her disability⁵⁴⁸ and would enable her to perform such work. In this regard, the employer could not prove that the abovementioned measures were not reasonable accommodation that would enable her to work longer hours.⁵⁴⁹ Standard Bank also had a heavier duty to accommodate the employee as she was injured in the course of employment.⁵⁵⁰

The employer placed the employee in positions that would not interrupt its business.⁵⁵¹ This, the Labour Court found, constituted (mere) tolerance of the employee and not reasonable accommodation by the employer to retain her in employment.⁵⁵² The employer also could not prove why the employee's absenteeism or any of the proposed accommodations amounted to an unjustifiable hardship, which constituted discrimination on the basis of disability against her.⁵⁵³

⁵⁴⁶ *Ibid* 382–383

⁵⁴⁷ *Ibid* 383

⁵⁴⁸ *Ibid*

⁵⁴⁹ *Ibid*

⁵⁵⁰ *Ibid* 385

⁵⁵¹ *Ibid* 386

⁵⁵² *Ibid*

⁵⁵³ *Ibid* 387

The cases above have illustrated that an employer should not only “wait for better days” or for posts to become vacant, as it occurred in *Wylie* or search for “light duties” or an alternative position, which was the case with *NEHAWU*. The Labour Court in *Standard Bank v CCMA* made it clear that an employer must be pro-active in reasonably accommodating an employee or job applicant with a disability and must do so short of incurring an unjustifiable hardship.

4.4 Unjustifiable hardship

“Unjustifiable hardship” is a limitation on an employer’s obligation to reasonably accommodate a qualified person with a disability, where needed.⁵⁵⁴ The UN Disability Convention also recognizes a “disproportionate or undue burden” as a limitation on the duty to reasonably accommodate people with disabilities.⁵⁵⁵ In *Central Okanagan School District No. 23 v Renaud*,⁵⁵⁶ Sopinka J stated in the context of accommodation of religious beliefs that: “[m]ore than mere negligible effort is required to satisfy the duty to accommodate. The use of the term ‘undue’ infers that some hardship is acceptable; it is only ‘undue’ hardship that satisfies this test. The extent to which the discriminator must go to accommodate is limited by the words ‘reasonable’ and ‘short of undue hardship’. These are not independent criteria, but are alternate ways of expressing the same concept.”⁵⁵⁷

⁵⁵⁴ Item 6.11 of the Disability Code. This was confirmed by the Arbitrator in *NEHAWU* at 2103 and the Labour Court in *Standard Bank v CCMA* at 378.

⁵⁵⁵ Article 2 of the UN Disability Convention

⁵⁵⁶ [1992] 2 S.C.R. 970

⁵⁵⁷ *Ibid*

Item 6.11 of the Disability Code provides that an employer is not under an obligation to reasonably accommodate a qualified employee or applicant with a disability if such accommodation would impose an unjustifiable hardship on the business of an employer. The employer must firstly investigate the particular accommodation the person with a disability requires, how effective it will be in reducing the impact of the person's disability on the person's capacity to perform the essential functions of the job, as well as the costs of the accommodation, amongst others, before deciding that unjustifiable hardship will be incurred.⁵⁵⁸

The Disability Code defines "unjustifiable hardship" as "action that requires significant or considerable difficulty or expense" and provides for two inclusive factors to consider in determining whether particular accommodation for a person with a disability, where needed, will impose an unjustifiable hardship on the business of the employer.⁵⁵⁹ The one factor, which represents the interest of the employee or job applicant with a disability, is the effectiveness of the accommodation for such person and the other factor, which represents the interest of the employer, is whether the specific accommodation would seriously disrupt the operation of the employer's business.⁵⁶⁰ An employer needs to investigate both these factors to objectively determine whether it will incur unjustifiable hardship in respect of a particular accommodation.⁵⁶¹ In conducting such an investigation, the employer must consider what effect the provision of

⁵⁵⁸ Item 6.11 of the Technical Assistance Guidelines

⁵⁵⁹ Item 6.12 of the Disability Code

⁵⁶⁰ *Ibid*

⁵⁶¹ Item 6.12 of the Technical Assistance Guidelines

reasonable accommodation will have on the person with a disability, as well as the effect if the person is not reasonably accommodated.⁵⁶²

The Code further provides that accommodation for a person with a disability, which imposes an unjustifiable hardship on a specific employer at a given time, may not impose the same type of hardship for another employer or the same employer at another time.⁵⁶³ The Labour Court in *Standard Bank v CCMA* stated that there is no formula to determine what accommodation will amount to unjustifiable hardship and that each case in which an employer advances it, needs to be decided on its merits.⁵⁶⁴

Item 6.18 of the Technical Assistance Guidelines provides that an employer should not use the cost of reasonable accommodation as an excuse not to provide it. The cost of reasonable accommodation is accordingly but one factor to consider in determining whether or not the accommodation will impose an unjustifiable hardship on the business of the employer. An employer who claims that a particular accommodation of a job applicant or employee with a disability will impose an unjustifiable hardship on its business, needs to prove the unjustifiable hardship.⁵⁶⁵

⁵⁶² *Ibid*

⁵⁶³ Item 6.13 of the Disability Code

⁵⁶⁴ At 379

⁵⁶⁵ *Ibid* 377

Ngwena states that the qualification of unjustifiable hardship seeks to maintain equilibrium between the interest of an employee or job applicant with a disability not to be discriminated against and the interest of an employer to manage its business in an open economy free from a disproportionate burden.⁵⁶⁶ He also states that unjustifiable hardship is premised on the principle of proportionality,⁵⁶⁷ which is contained in section 36(1) of the Constitution.

The employer must, accordingly, not limit the right of equality of the person with a disability (by refusing to reasonably accommodate the person in the workplace where needed) more than what is necessary and only to the extent that the purpose of the limitation is served, which is to *not* impose an unjustifiable hardship on the business of the employer. This is just another way of saying that an employer must give effect to the right of equality of a person with a disability, by reasonably accommodating the person where needed, short of incurring an unjustifiable hardship.

If “reasonable accommodation” and “short of [unjustifiable] hardship” encompass the same notion according to the Canadian Supreme Court, it follows that a court or *quasi-judicial* body that has to determine whether an employer has reasonably accommodated a person with a disability, must assess whether the employer had done so short of incurring an unjustifiable hardship. If so, the employer has

⁵⁶⁶ Ngwena “Interpreting Aspects of the Intersection between Disability, Discrimination and Equality: Lessons for the Employment Equity Act from Comparative Law Part II: Reasonable Accommodation” (2005) 16(3) *Stellenbosch Law Review* 534 at 560.

⁵⁶⁷ *Ibid*

reasonably accommodated the person with a disability. If not, the person with a disability has not been reasonably accommodated. Only unjustifiable hardship relieves an employer from its duty to reasonably accommodate such a person where needed and it requires employers to take more steps to eliminate disability discrimination, where reasonable accommodation is used as a non-discrimination tool, and to advance affirmative action, where it is implemented as an affirmative action measure.⁵⁶⁸

4.5 The inherent requirement of a job and an employer's duty to reasonably accommodate an employee or job applicant with a disability

The inherent requirement of a particular job may exclude a member of a specific group, for example a person with a disability, but reasonably accommodating such a person where needed may enable the person to enter the job.⁵⁶⁹ The Supreme Court of Canada devised a test in *British Columbia (Public Service Employee Relations Commission) v BCGSEU*,⁵⁷⁰ albeit in the context of sex discrimination, to determine whether a “*prima facie* discriminatory standard” that an employer imposes for job performance constitutes a *bona fide* occupational requirement (or an inherent requirement of a job).⁵⁷¹ The court stated that a *prima facie* discriminatory standard may impact negatively or exclude employees

⁵⁶⁸ Item 6.11 of the Technical Assistance Guidelines

⁵⁶⁹ Cohen “Justifiable Discrimination – Time to Set the Parameters” (2000) 12 *South African Mercantile Law Journal* 255 at 267

⁵⁷⁰ [1999] 3 S.C.R. 3 (Hereinafter referred to as “*BCGSEU*”)

⁵⁷¹ *Ibid* paragraph 54

belonging to a specific group and the test sought to ensure that employers design and remodel employment and performance standards, which would include and accommodate in the workplace employees from all groups, short of this imposing an unjustifiable hardship on the employer.⁵⁷²

If the *BCGSEU* test is applied to determine whether an employer can successfully defend a claim of disability discrimination on the basis of an inherent requirement of a job, the application thereof would be as follows:

The employer, firstly, needs to show that the criterion it specifies as necessary for any person to be appointed to a job and discharge the essential functions of a job,⁵⁷³ was implemented for a legitimate work-related purpose and that there is a link between this purpose and the objective requirements of the particular job.⁵⁷⁴ The court will then determine whether the employer imposed the criterion for a legally valid objective.⁵⁷⁵

Where a court has concluded that the imposed criterion has a legitimate objective, the employer, secondly, needs to show that it had genuinely and subjectively believed that the criterion was needed to achieve its legitimate objective and that it had no intention to discriminate against an employee or job

⁵⁷² *Ibid* paragraph 55

⁵⁷³ Item 7.1.2 of the Disability Code

⁵⁷⁴ *BCGSEU* paragraph 58

⁵⁷⁵ *Ibid* paragraph 59

applicant with a disability.⁵⁷⁶ Where an employer cannot establish the abovementioned requirement, the criterion will not constitute an inherent requirement of the job.⁵⁷⁷

Where the two abovementioned requirements are met, the employer thirdly needs to show that the criterion was reasonably necessary to achieve its legitimate purpose, by establishing that it cannot reasonably accommodate the person with a disability without incurring an unjustifiable hardship.⁵⁷⁸ To determine whether the employer is able to prove this last requirement, a court needs to consider the factors the Canadian Supreme Court laid down in *BCGSEU*,⁵⁷⁹ which are:

- whether the employer has explored other measures that do not discriminate against people with disabilities;⁵⁸⁰

⁵⁷⁶ *Ibid* paragraph 60

⁵⁷⁷ *Ibid*

⁵⁷⁸ *Ibid* paragraph 54. In *Dlamini and others v Green Four Security* [2006] 11 BLLR 1074 (LC), the South African Labour Court stated at 1078 that where a court has found a workplace rule to be an inherent requirement of a job, such rule may still discriminate against a person adversely affected by it if it cannot reasonably accommodate the person. The court has acknowledged the role that reasonable accommodation plays in respect of an inherent requirement of a job.

⁵⁷⁹ Our Constitutional Court has relied on Canadian law in various cases: *Western Cape Legislature and Others v President of the Republic of South Africa and Others* 1995 (10) BCLR 1289 (CC); *Ferreira v Levin NO and Others and Vryenhoek and Others v Powell NO and Others* 1996 (1) BCLR 1 (CC); *Case and Another v Minister of Safety and Security and others*; *Curtis v Minister of Safety and Security and others* 1996 (5) BCLR 609 (CC); *President of the Republic of South Africa and Another v Hugo* 1997 (6) BCLR 708 (CC); *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others* 1998 (12) BCLR 1517 (CC); *National Coalition for Gay and Lesbian Equality and Another v Minister of Home Affairs and Others* 2000 (1) BCLR 39 (CC); *Minister of Home Affairs v National Institute for Crime Prevention and the Re-integration of Offenders (NICRO) and Others* 2004 (5) BCLR 445 (CC); *Magajane v Chairperson, North West Gambling and Others* 2006 (10) BCLR 1133 (CC); *AAA Investments (Pty) Ltd v Micro Finance Regulatory Council and Another* 2006 (11) BCLR 1255 (CC), to name but a few.

⁵⁸⁰ *BCGSEU* paragraph 65

- if the employer found the abovementioned measures to exist, which could also achieve the legitimate objective of the employer’s criterion, why those were not applied to the person with a disability;⁵⁸¹
- whether all employees in the workplace (whether they have disabilities or are “able-bodied” persons) have to adhere this criterion or whether the employer can put a different criterion in place that would accommodate people with disabilities;⁵⁸²
- whether the person with a disability can perform the job in a manner that would not discriminate against him or her and still fulfil the legitimate objective of the employer’s criterion;⁵⁸³
- whether the application of the criterion achieves its legitimate purpose without unduly placing people with disabilities at a disadvantage;⁵⁸⁴ and
- whether all the involved role players have discharged their duty to search for reasonable accommodation for the person with a disability.⁵⁸⁵

With regards to the third requirement of the *BCGSEU* test, the Supreme Court of Canada stated that a court needs to consider the processes an employer

⁵⁸¹ *Ibid*

⁵⁸² *Ibid*

⁵⁸³ *Ibid*

⁵⁸⁴ *Ibid*

⁵⁸⁵ *Ibid*

underwent to accommodate the person where needed, as well as the content of an alternative yardstick an employer proposes which accommodates the person, or why an employer failed to propose such a criterion.⁵⁸⁶ Where an employer can accommodate a person with a disability short of incurring an unjustifiable hardship, its criterion does not constitute an inherent requirement of the job, in terms of the *BCGSEU* test.⁵⁸⁷ Where the employer cannot accommodate the person with a disability short of incurring an unjustifiable hardship, its criterion imposed will amount to an inherent requirement of the job.⁵⁸⁸

4.6 Conclusion

An employer's duty to reasonably accommodate a person with a disability, where needed, does not entail tolerating the person or making concessions for the person in a job or working environment. The employer must not only make the required "modification[s] and adjustment[s] to a job or ... the working environment..."⁵⁸⁹ just for the purpose of taking such measures, but do so in a manner that will enable the person with a disability to "have access to or participate or advance in employment".⁵⁹⁰ Reasonable accommodation is more about substance than form. An employer make take various measures to adjust and modify the job and working environment of a person with a disability and still

⁵⁸⁶ *Ibid* paragraph 66

⁵⁸⁷ *Ibid* paragraph 67

⁵⁸⁸ *Ibid* paragraph 55

⁵⁸⁹ Section 1 of the EEA

⁵⁹⁰ *Ibid*

not reasonably accommodate the person, as it occurred in *NEHAWU* and *Standard Bank v CCMA*.

Of course, this does not mean that an employer should go beyond itself to reasonably accommodate such a person if this will impose an unjustifiable hardship on its business. The EEA and Disability Code relieve employers of their duty to reasonably accommodate if this will impose an *unjustifiable* hardship on its business. A failure to reasonably accommodate an employee or job applicant with a disability where needed constitutes an infringement of such person's right to equality, and such an infringement by an employer will only be authorised in limited instances, where the latter is able to prove an unjustifiable hardship on its business.

In *McGill v University Health Centre (Montreal General Hospital) v Syndicat des employés de l'Hôpital general de Montréal*,⁵⁹¹ the Supreme Court of Canada stated, in the context of reasonable accommodation of an employee with a disability, that an employee should not be afforded less protection in the workplace than that which is prescribed by human rights legislation.⁵⁹² Protecting the right of equality of people with disabilities in the employment sphere, by reasonably accommodating them where needed – whether it occurs in the context of non-discrimination or affirmative action – should accordingly not be less than that afforded to them in the Constitution.

⁵⁹¹ [2007] 1 S.C.R. 161

⁵⁹² *Ibid* paragraph 20

CHAPTER 5

DISABILITY AND DISMISSAL

5.1 The Labour Relations Act 66 of 1995⁵⁹³

The LRA provides that a dismissal is automatically unfair if the reason for the dismissal is that the employer unfairly discriminated against an employee directly or indirectly on any arbitrary ground, including, but not limited to, disability.⁵⁹⁴

Section 187(2)(a) of the Act states that despite the abovementioned provision, a dismissal may be fair if the reason thereof (direct or indirect unfair discrimination on the basis of disability) is based on an inherent requirement of the particular job.

A dismissal that is not automatically unfair, is unfair if the employer fails to prove that the reason for the dismissal is a fair reason that relates to the employee's conduct or capacity or is based on the employer's operational requirements (substantive fairness) and the employee was dismissed in accordance with a fair procedure (procedural fairness).⁵⁹⁵ The LRA provides that any person who has to determine whether the dismissal of a particular employee is substantively and procedurally fair, must take into account any relevant code of good practice (that

⁵⁹³ Hereinafter "the LRA"

⁵⁹⁴ Section 187(1)(f) of the LRA

⁵⁹⁵ Section 188(1) of the LRA

includes the Code of Good Practice: Dismissal⁵⁹⁶) issued in terms of the Act.⁵⁹⁷ In proceedings concerning the dismissal of an employee, the employee must establish the existence of a dismissal⁵⁹⁸ in terms of section 186(1) of the LRA and, if so established, the employer must prove that the dismissal was substantively and procedurally fair.⁵⁹⁹

Section 191(1)(a) of the LRA provides that, where there is a dispute regarding the fairness of a dismissal, amongst others, the dismissed employee may refer the dispute in writing to a bargaining or statutory council, if the parties to the dispute fall within the registered scope of that council, or to the Commission for Conciliation, Mediation and Arbitration (the CCMA) if no bargaining or statutory council has jurisdiction. The dismissed employee must make the referral to the council or CCMA within 30 days of the date of dismissal⁶⁰⁰ or, if it is a later date, within 30 days of which the employer made a final decision to dismiss or uphold the dismissal of the employee.⁶⁰¹ The dismissed employee must be able to show to the council or the CCMA that a copy of the referral of the dispute had been served on the employer⁶⁰² and the council or CCMA must attempt to resolve the dispute through conciliation.⁶⁰³

⁵⁹⁶ Schedule 8 to the LRA

⁵⁹⁷ Section 188(2) of the LRA

⁵⁹⁸ Section 192(1) of the LRA

⁵⁹⁹ Section 192(2) of the LRA

⁶⁰⁰ Section 190(1) of the LRA provides that the “date of dismissal” is the earlier of the date on which the employee’s contract of service terminated or the employee left the service of the employer.

⁶⁰¹ Section 191(1)(b)(i) of the LRA

⁶⁰² Section 191(3) of the LRA

⁶⁰³ Section 191(4) of the LRA

If a council or a Commissioner certifies that the dismissal dispute remains unresolved, or if 30 days have expired since the council or the CCMA received the referral and the dispute remains unresolved, the employee may refer the dispute to the Labour Court for adjudication if the employee has alleged that the dismissal was effected for an automatically unfair reason,⁶⁰⁴ or to the CCMA if the parties to the dispute agree in writing.

The LRA provides that, if a dismissal is automatically unfair, the Labour Court may in addition to reinstatement, re-employment or compensation to the employee, make any other order that it considers appropriate in the circumstances.⁶⁰⁵ If compensation is awarded to an employee whose dismissal is found to be automatically unfair, it must be just and equitable in all the circumstances, but not more than the equivalent of 24 months' remuneration that is calculated at the employee's remuneration rate at the date of dismissal.⁶⁰⁶

The LRA also provides that an order or award of compensation that is made in terms of Chapter 8 of the LRA (that deals with unfair dismissals, amongst others), is in addition to, and not a substitute for, any other amount to which an employee is entitled to in terms of any law, collective agreement or contract of employment.⁶⁰⁷ An order or award of compensation to an employee who has been dismissed for an automatically unfair reason accordingly does not take the

⁶⁰⁴ Section 191(5)(b)(i) of the LRA

⁶⁰⁵ Section 193(3) of the LRA

⁶⁰⁶ Section 194(3) of the LRA

⁶⁰⁷ Section 195 of the LRA

place of any other amount that such employee is entitled to in terms of any law, collective agreement or contract of employment.

An automatically unfair dismissal is “automatically unfair” because the law prohibits the reason for the dismissal⁶⁰⁸ such as direct or indirect unfair discrimination on the basis of disability, which the Constitution, EEA and LRA amongst others, proscribe. Where the law prohibits the reason for the dismissal, a court must necessarily find that such dismissal is unfair.⁶⁰⁹ This means that, where a court is satisfied that direct or indirect unfair discrimination on the basis of disability is the reason for an employee’s dismissal, the court must conclude that the employee’s dismissal is unfair, unless the employer can show that the reason thereof is based on an inherent requirement of the particular job in which the dismissed employee was employed, which may render the dismissal fair if the employee was also dismissed in accordance with a fair procedure.

When an employee alleges that an employer has effected an automatically unfair dismissal, a court must determine the true or actual reason for the dismissal.⁶¹⁰ This means that a court must determine whether the prohibited reason the employee alleges (for example, direct or indirect unfair discrimination on the prohibited ground of disability) is the actual reason for the dismissal. Where a court has determined the actual reason for the dismissal, it must further

⁶⁰⁸ Grogan *Dismissal, Discrimination and Unfair Labour Practices* 224

⁶⁰⁹ *Ibid* 225

⁶¹⁰ *Ibid*

determine whether such reason falls within the scope of section 187(1) of the LRA that deals with automatically unfair dismissals.⁶¹¹

When an employee alleges a prohibited reason for dismissal (that would render the dismissal automatically unfair) and an employer advances that the dismissal was for a valid reason (that might render the dismissal fair), a court must scrutinize the relationship between the valid reason the employer claims and the prohibited reason the dismissed employee alleges.⁶¹² The Labour Appeal Court in *Kroukam v SA Airlink (Pty) Ltd*,⁶¹³ per Zondo JP, stated that a court should be cautious to conclude that a dismissal had been effected for a prohibited reason, unless there is ample evidence before the court with which a judge can substantiate this finding.⁶¹⁴ He also stated that a court should even be more cautious to conclude that an automatically unfair dismissal had been effected where evidence indicates that the employer might have had a valid reason to dismiss the employee.⁶¹⁵

When an employee is dismissed for a permissible reason, but alleges that a prohibited reason for dismissal played a subordinate or minor role in such dismissal, a court must determine to what extent the prohibited reason had “contaminated” the employer’s decision to dismiss the employee.⁶¹⁶ Zondo JP

⁶¹¹ *Ibid*

⁶¹² *Ibid*

⁶¹³ [2005] 12 BLLR 1172 (LAC)

⁶¹⁴ *Supra* 1201

⁶¹⁵ *Ibid*

⁶¹⁶ *Grogan op cit* 226

stated in *Kroukam* that a dismissal will also be automatically unfair where the prohibited reason has “played a significant role in the [employer’s] decision to dismiss” the employee, even if this reason was not the main reason for the dismissal.⁶¹⁷

In the same case, Davis AJA stated that section 187 of the LRA requires the dismissed employee who alleges an automatically unfair dismissal to produce the court with evidence that raises a convincing possibility of the presence of an automatically unfair dismissal to the court.⁶¹⁸ Thereafter, the employer must provide evidence to the court to prove that the employee was not dismissed for a reason that would render the dismissal automatically unfair.⁶¹⁹

The onus of proof in automatically unfair dismissals was discussed in *Janda v First National Bank*.⁶²⁰ The Labour Court held that in a dispute concerning an alleged automatically unfair dismissal, the onus of proving that the dismissal was substantively and procedurally fair rested on the employer throughout the proceedings.⁶²¹ The dismissed employee has a burden to produce sufficient evidence to show that he or she was not dismissed for the valid reason that the employer had advanced, but for another prohibited reason that would render the dismissal automatically unfair.⁶²² If an employee fails to do so, the person may be

⁶¹⁷ *Kroukam* 1206

⁶¹⁸ *Ibid* 1224

⁶¹⁹ *Ibid*

⁶²⁰ (2006) 27 ILJ 2627 (LC)

⁶²¹ *Supra* 2633

⁶²² *Ibid* 2634

unsuccessful in claiming an automatically unfair dismissal,⁶²³ because the employer's evidence of a valid reason would be uncontested. After both sides to the dismissal dispute had presented their evidence, the court must decide whether the employer had proved that the employee's dismissal was substantively and procedurally fair.⁶²⁴ According to the court in *Janda*, an employee who alleges an automatically unfair dismissal does not have to produce evidence that such a dismissal had taken place before the court will hear the matter.⁶²⁵

5.2 The dismissal of an employee for reason of disability

An employee who claims to have been automatically unfairly dismissed for reason of direct or indirect unfair discrimination for reason of disability, must prove a dismissal⁶²⁶ and provide a court with sufficient evidence that his or her disability was the reason or cause for dismissal.⁶²⁷ A court that such employee approaches in respect of a dismissal dispute, may utilize the *SACWU v Afrox*⁶²⁸ test that was referred to in Chapter II of this paper, to determine whether disability was both the factual and legal cause (and subsequently the reason) for

⁶²³ *Ibid*

⁶²⁴ *Ibid*

⁶²⁵ *Ibid* 2634 – 2635

⁶²⁶ Cohen "Onus of Proof in Automatically Unfair Dismissals – *Janda v First National Bank* (2006) 27 *ILJ* 2627 (LC)" (2007) 28 *ILJ* 1465 at 1471

⁶²⁷ In *Pedzinski v Andisa Securities (Pty) Ltd (Formerly SCMB Securities (Pty) Ltd)* [2006] 2 BLLR 184 (LC), the Labour Court stated at 201 that an employee who claims that an automatically unfair dismissal had taken place for reason of unfair discrimination on the basis of disability, needs to establish on a balance of probabilities and with supporting evidence, a causal *nexus* between his or her dismissal and unfair discrimination on the basis of disability.

⁶²⁸ (1999) 20 *ILJ* 1718 (LAC)

dismissal. If so, the dismissal for reason of the employee's disability will be automatically unfair, unless the employer can prove that such reason was based on an inherent requirement of the particular job.

In terms of the application of the *BCGSEU*⁶²⁹ test of the Supreme Court of Canada as discussed in Chapter III of this paper, the employer who bases a dismissal for reason of an employee's disability on an alleged inherent requirement of the particular job, needs to prove to a court that it could not reasonably accommodate the employee short of incurring an unjustifiable hardship. An employer who is unable to establish the abovementioned requirement, cannot rely on section 187(2)(a) of the LRA. The employer who is able to establish this, can rely on section 187(2)(a) of the LRA and the dismissal of the employee may be fair if the employer effected it in accordance with a fair procedure.

Reasonable accommodation of an employee who has a disability, short of incurring an unjustifiable hardship, plays an important role, not only to determine whether an otherwise automatically unfair dismissal of the employee was premised on an inherent requirement of the particular job, but also whether an employer sought to retain the employee in employment, which will be discussed below.

⁶²⁹ *British Columbia (Public Service Employee Relations Commission) v BCGSEU* [1999] 3 S.C.R 3

5.3 The Code of Good Practice on the Employment of People with Disabilities

The Disability Code provides that employees who become disabled during employment should be reintegrated into work, where it is reasonable, and employers should seek to reduce the effect an employee's disability has on the person.⁶³⁰

When an employee acquires a disability, the employer must consult with the employee to determine whether it can reasonably accommodate the employee's disability.⁶³¹ In remaining in contact with the employee, the employer should also encourage the employee to early return-to-work, where this is reasonable.⁶³²

The early return-to-work for the employee concerned, may call for vocational rehabilitation, transitional work programmes, or temporary or permanent flexible working time, where this is needed.⁶³³

When an employee is frequently absent from work due to an illness or injury on his or her part, the employer must, in consultation with the employee, determine whether the latter is absent due to a disability that the employer needs to reasonably accommodate.⁶³⁴

⁶³⁰ Item 11.1 of the Disability Code

⁶³¹ Item 11.2 of the Disability Code

⁶³² Item 11.3 of the Disability Code

⁶³³ *Ibid*

⁶³⁴ Item 11.4 of the Disability Code

The Disability Code provides that employers should explore the possibilities of offering alternative work, reduced work or flexible work placement for the employee with a disability, *where this is reasonable*, so that employees are not persuaded, or do not become obliged, to resign from their employment.⁶³⁵

The Code also states that an employer may dismiss an employee who has a disability if the employer is unable to retain the employee in terms of the provisions mentioned above.⁶³⁶ The dismissal must be for a fair reason and in accordance with a fair procedure, as the LRA requires.

When an employer dismisses employees who have disabilities for reasons based upon operational requirements, the employer's selection criteria must not either directly or indirectly unfairly discriminate against people with disabilities.⁶³⁷ The Disability Code also states that employers, who provide disability benefits to their employees, must ensure that employees are appropriately advised before they apply for such disability benefits and before such employees resign from employment due to medical conditions.⁶³⁸

According to *Van Zyl v Thebe Employees Benefits Risk Group (Pty) Ltd*,⁶³⁹ the Disability Code, which has been issued in terms of the EEA, will be applicable to the dismissal in terms of the LRA of an employee who has a disability, where the

⁶³⁵ Item 11.5 of the Disability Code

⁶³⁶ Item 12.1 of the Disability Code

⁶³⁷ Item 12.2 of the Disability Code

⁶³⁸ Item 12.3 of the Disability Code

⁶³⁹ [2004] 10 BALR 1298 (CCMA)

employee's disability or the failure of an employer to reasonably accommodate the employer's disability was the reason for dismissal.⁶⁴⁰

More importantly for the purposes of this Chapter, the Commissioner stated that items 10 and 11 of the Code of Good Practice: Dismissal (hereinafter "the Dismissal Code"), which deals with the guidelines for dismissals for incapacity due to ill health and injury, echo some of the thoughts of items 11 and 12 of the Disability Code.⁶⁴¹ The Disability Code will accordingly be applicable to dismissals based on incapacity due to the ill health or injury of the employee.⁶⁴²

5.4 Items 10 and 11 of the Code of Good Practice: Dismissal

The incapacity of an employee due to ill health or injury is a fair reason for dismissal, which an employer must prove in terms of the LRA.⁶⁴³ Items 10 and 11 of the Dismissal Code deal with effecting a dismissal on this ground. These provisions, together with the Labour Court's interpretation thereof in *Standard Bank v CCMA and others*,⁶⁴⁴ will be discussed.

The Dismissal Code provides that incapacity on the grounds of ill health or injury may be temporary or permanent.⁶⁴⁵ If the employee is temporarily unable to

⁶⁴⁰ *Supra* 1306

⁶⁴¹ *Ibid*

⁶⁴² *Ibid*

⁶⁴³ Section 188(1)(a)(i) of the LRA

⁶⁴⁴ [2008] 4 BLLR 356 (LC)

⁶⁴⁵ Item 10(1) of the Dismissal Code

work, the employer must investigate the extent of the incapacity or injury of the employee.⁶⁴⁶ When an employee is likely to be absent from work for an unreasonably long period due to ill health or injury, the employer should investigate all the possible alternatives short of dismissal.⁶⁴⁷ In determining appropriate alternatives other than dismissal for the absent employee, the employer should consider, amongst others, the nature of the employee's job, the employee's period of absence, the seriousness of the illness or injury of the employee and the possibility of securing a temporary replacement for the employee.⁶⁴⁸ When ill health or injury has permanently incapacitated an employee, the employer should consider securing alternative employment for the employee, or adapting the duties or work circumstances of the employee to accommodate the "disability" of the employee.⁶⁴⁹

The Dismissal Code also provides that, when the employer investigates the extent of the employee's ill health or injury and possible alternatives short of dismissing the employee, amongst others, the particular employee should be allowed the opportunity to state a case in response and to be assisted by a fellow employee or trade union representative in doing so.⁶⁵⁰ The above provision gives effect to the *audi alterem partem* principle.

⁶⁴⁶ *Ibid*

⁶⁴⁷ *Ibid*

⁶⁴⁸ *Ibid*

⁶⁴⁹ *Ibid*

⁶⁵⁰ Item 10(2) of the Dismissal Code

The degree of the incapacity is relevant to the fairness of any dismissal based on the ill health or injury of the employee.⁶⁵¹ The “degree” of the incapacity is the extent to which the employee’s ill health or injury has incapacitated the person. The cause of the incapacity is also relevant to the fairness of a dismissal.⁶⁵² Where an employee’s incapacity is caused by substance abuse or dependency, the employer may consider counselling and rehabilitation for the employee as appropriate steps short of dismissing the employee.⁶⁵³

An employer’s duty to accommodate the incapacity of an employee is also more onerous when the employee has contracted a work–related illness or was injured at work.⁶⁵⁴

The Dismissal Code provides in item 11 that a person who has to determine whether a dismissal arising from medical incapacity is unfair, should consider whether or not the employee is capable of performing the work.⁶⁵⁵

The Code further states that where the employee is not capable of performing the work that was previously performed, the Arbitrator or Commissioner should further consider the extent to which the employee is able to perform his or her work.⁶⁵⁶ The extent to which the work circumstances of the employee might be

⁶⁵¹ Item 10(3) of the Dismissal Code

⁶⁵² *Ibid*

⁶⁵³ *Ibid*

⁶⁵⁴ Item 10(4) of the Dismissal Code

⁶⁵⁵ Item 11(a) of the Dismissal Code

⁶⁵⁶ Item 11(b)(i) of the Dismissal Code

adapted to accommodate the employee's "disability" must be considered.⁶⁵⁷ Where the employee's work circumstances cannot be adapted, it must be considered whether and to which extent the employee's duties might be adapted.⁶⁵⁸ Finally, it must also be considered whether suitable alternative work is available to the employee who is not capable of performing the work.⁶⁵⁹

The Labour Court in *Standard Bank v CCMA*⁶⁶⁰ stated that an employer may take days or even years to investigate whether an employee may validly be dismissed for incapacity due to ill health or injury.⁶⁶¹ The investigation into and subsequent determination whether an employee is medically incapacitated, depends on whether there is a likelihood that the employee may recover from the ill health or injury, whether adjustments in the working environment ameliorate the effects of the employee's medical condition and whether accommodating the employee in the working environment will impose an unjustifiable hardship on the employer.⁶⁶²

Having due regard for the issues an Arbitrator or Commissioner will consider in terms of item 11 of the Dismissal Code, in determining the fairness of a dismissal for medical incapacity, the court in *Standard Bank* stated that an employer's investigation whether an employee is medically incapacitated, has four stages.⁶⁶³

⁶⁵⁷ Item 11(b)(ii) of the Dismissal Code

⁶⁵⁸ *Ibid*

⁶⁵⁹ Item 11(b)(iii) of the Dismissal Code

⁶⁶⁰ [2008] 4 BLLR 356 (LC)

⁶⁶¹ *Supra* 372

⁶⁶² *Ibid*

⁶⁶³ *Ibid*

- The employer must firstly investigate whether or not the employee concerned is able to perform the work he or she performed before the illness was contracted or the injury sustained.⁶⁶⁴ If the employee can do so, the employer must place the person in the position he or she held before the illness or injury.⁶⁶⁵ The specific position the employee is placed in should also be the choice of the employee, where this is possible, and should match the capability of the employee.⁶⁶⁶ Only when the employee cannot perform the work that was performed before the illness or injury and the medical condition persists or is permanent, should the employer proceed to the following three stages of investigation in terms of the Dismissal Code.⁶⁶⁷
- Secondly, the employer must factually establish, through an investigation and with medical– or other expert advice where needed, the effect the employee’s disability has on the ability of the person to perform the work.⁶⁶⁸
- Thirdly, after establishing the abovementioned effect, the employer should first attempt to adapt the work circumstances of the employee, before resorting to adapting the duties of the employee, because an employer

⁶⁶⁴ *Ibid*

⁶⁶⁵ *Ibid*

⁶⁶⁶ *Ibid*

⁶⁶⁷ *Ibid*

⁶⁶⁸ *Ibid*

should preferably reinstate the ill or injured employee where it is possible.⁶⁶⁹

- Fourthly, if neither the employee's work circumstances nor the duties can be adapted to suit the disability of the person, the employer must investigate whether any suitable alternative work is available for the employee.⁶⁷⁰

With the provisions of the Disability Code being applicable to dismissals for medical incapacity, and the Dismissal Code referring in its medical incapacity guidelines to the "disability" of a permanently incapacitated employee⁶⁷¹ and one who was considered to be incapable of performing the work due to medical capacity,⁶⁷² the next question is begged:

5.5 Is disability, which is a prohibited reason for dismissal, equivalent to incapacity, which is a fair reason for dismissal?

Christianson states that the incapacity of an employee due to poor work performance or ill health or injury entails a situation where the employer legitimately loses confidence in the employee's ability to perform the job in

⁶⁶⁹ *Ibid*

⁶⁷⁰ *Ibid* 373

⁶⁷¹ Item 10(1) of the Dismissal Code

⁶⁷² *Ibid* item 11(b)(ii)

accordance with the contract of employment.⁶⁷³ When an employee is dismissed for incapacity due to ill health or injury, it means that an employee is by reason of such ill health or injury unable to perform the job according to the performance standard that was set by the employer.⁶⁷⁴ An incapacity dismissal is also a no-fault dismissal,⁶⁷⁵ because there is no blameworthiness on the part of the incapacitated employee.⁶⁷⁶

She states that even though items 10 and 11 of the Dismissal Code refer to “disability” in respect of the guidelines pertaining to ill health and injury, “incapacity” and “disability” are two distinct legal terms.⁶⁷⁷ An incapacitated employee is an employee who cannot perform the essential functions of the job.⁶⁷⁸ A suitably qualified employee with a disability and who is appropriately reasonably accommodated in the workplace will be able to discharge the essential functions of the job.⁶⁷⁹

In *Standard Bank v CCMA*, the Labour Court had to review a CCMA arbitration award⁶⁸⁰ that an employee’s dismissal for medical incapacity was both substantively and procedurally unfair.⁶⁸¹ The court held that “[d]isability is not

⁶⁷³ Christianson “Incapacity and Disability : A Retrospective and Prospective Overview of the Past 25 Years” (2004) 25 *ILJ* 879 at 882

⁶⁷⁴ *Ibid* 883

⁶⁷⁵ *Ibid* 884

⁶⁷⁶ *Ibid* 883

⁶⁷⁷ *Ibid* 889

⁶⁷⁸ *Ibid*

⁶⁷⁹ *Ibid*

⁶⁸⁰ *Ferreira and Standard Bank of SA* (2006) 27 *ILJ* 1547 (CCMA)

⁶⁸¹ *Supra* 1562

synonymous with incapacity.”⁶⁸² It stated that an employee who has a disability is incapacitated when an employer cannot reasonably accommodate the person without incurring an unjustifiable hardship, or when an employee unreasonably rejects reasonable accommodation offered by an employer, both instances in which an employer may validly dismiss such an employee.⁶⁸³ This approach to incapacity is in line with item 12.1 of the Disability Code, which permits an employer to dismiss an employee with a disability where the latter cannot be reasonably accommodated without the former incurring unjustifiable hardship. An employer, however, may not dismiss an employee who has a disability, but is not incapacitated (in other words, a person whom the employer can reasonably accommodate, without suffering unjustifiable hardship), as it would render the dismissal unfair.⁶⁸⁴

Commissioners and the Labour Court have ruled the dismissals of people with disabilities for medical incapacity to be unfair where such employees were not incapacitated due to ill health or injury.

In *NEHAWU on behalf of Lucas and Department of Health (Western Cape)*,⁶⁸⁵ the Arbitrator at the bargaining council had to determine whether the dismissal of Lucas for medical incapacity was fair. In this case, it was ruled that an employer confronted with a medically incapacitated employee also had the additional duty

⁶⁸² *Standard Bank v CCMA* 378

⁶⁸³ *Ibid*

⁶⁸⁴ *Ibid*

⁶⁸⁵ (2004) 25 ILJ 2091 (BCA)

to determine whether the particular employee is a person with a disability in terms of the EEA, even where the employee does not claim to be such.⁶⁸⁶ This duty, which flows from the Dismissal Code, is part of an employer's obligation to ascertain whether there is a fair reason to dismiss the particular employee.⁶⁸⁷ The Arbitrator held that items 10 and 11 of the Dismissal Code appeared to pertain only to dismissals for incapacity due to ill health and injury, but that an employee with an impairment that constitutes a disability also had a right to be reasonably accommodated under the EEA⁶⁸⁸ and not to be dismissed on the basis of disability.⁶⁸⁹ Item 10 of the Dismissal Code should be interpreted to also include "people with disabilities" in terms of the EEA⁶⁹⁰ and item 11(b)(ii) of the Dismissal Code briefly mentions people with disabilities in respect of the lengths an employer should go to accommodate a disability.⁶⁹¹

The Arbitrator stated that the LRA's Dismissal Code dealt with dismissals in general, including that of people with disabilities and it came into operation before the EEA (or any of the EEA's Codes) came into force.⁶⁹² The EEA's Disability Code, however, encapsulated issues much broader than the LRA's Dismissal Code, because the former Code deals with the "full employment cycle,"⁶⁹³ whereas the LRA's Dismissal Code only deals with dismissal.⁶⁹⁴

⁶⁸⁶ *Ibid* 2099–2100

⁶⁸⁷ *Ibid* 2100

⁶⁸⁸ *Ibid* 2098–2099

⁶⁸⁹ *Ibid* 2099

⁶⁹⁰ *Ibid*

⁶⁹¹ *Ibid*

⁶⁹² *Ibid*

⁶⁹³ *Ibid*

⁶⁹⁴ *Ibid*

The Arbitrator held that the applicant was a person with a disability, but not medically incapacitated and her dismissal was substantively unfair.⁶⁹⁵ The respondent also viewed Ms Lucas's spinal injury as a permanent incapacity and attempted to accommodate her as such under the Dismissal Code, instead of reasonably accommodating her as a person with a disability under the EEA and Disability Code.⁶⁹⁶

In *Wiley and Standard Executors and Trustees*,⁶⁹⁷ which confirmed *NEHAWU*, the Commissioner had to determine the fairness of Wylie's dismissal for medical incapacity. A medical report showed that even though she was living with multiple sclerosis, she was not permanently incapacitated as a result thereof.⁶⁹⁸ The Commissioner found that the employer did not reasonably accommodate her as a person with a disability, but instead treated her as a "poor performer".⁶⁹⁹ Her dismissal for medical incapacity was found to be substantively and procedurally unfair.⁷⁰⁰

Similar to *NEHAWU* and *Wylie*, the Labour Court in *Standard Bank* found that the dismissed employee was a person who had a disability, the employer failed to reasonably accommodate her as such, without incurring unjustifiable hardship, and that her dismissal for medical incapacity was unfair.⁷⁰¹

⁶⁹⁵ *Ibid* 2106

⁶⁹⁶ *Ibid* 2101

⁶⁹⁷ (2006) 27 ILJ 2210 (CCMA)

⁶⁹⁸ *Supra* 2212

⁶⁹⁹ *Ibid* 2221–2222

⁷⁰⁰ *Ibid* 2222

⁷⁰¹ *Standard Bank* 388

Other than the Arbitrator in *NEHAWU* and Commissioner in *Wylie*, the court in *Standard Bank* went one step further, which was to find that the employer also discriminated against the employee on the basis of disability when it failed to reasonably accommodate her short of incurring an unjustifiable hardship.⁷⁰² Moreover, it also stated “[w]hen an employer follows a flawed procedure to dismiss a disabled employee, it is impossible to divorce discrimination from the duty to accommodate.”⁷⁰³

Perhaps the Arbitrator in *NEHAWU* and Commissioner in *Wylie* refrained from finding that the employers’ failure to reasonably accommodate the dismissed employees also constituted discrimination against them, because a bargaining or statutory council or the CCMA does not have jurisdiction to deal with discrimination issues. Perhaps the Labour Court in *Standard Bank* made the additional finding of discrimination because it has the power to deal with discrimination matters. Be that as it may, *NEHAWU* and *Wylie* were decided before *Standard Bank* and the latter case has introduced an aspect that may prospectively affect the jurisdiction of a council or the CCMA to hear disputes concerning medical incapacity dismissals that involve employees with disabilities.

⁷⁰² *Ibid* 387

⁷⁰³ *Ibid* 388

5.6 The jurisdiction of an Arbitrator or Commissioner post–*Standard Bank v CCMA*, to hear a dismissal dispute pertaining to medical incapacity which involves an employee with a disability

It is interesting that the court, in *Standard Bank*, made the additional finding of discrimination upon review of the arbitration award relating to the employee's dismissal⁷⁰⁴ and even though the employee had not advanced discrimination before the Commissioner.⁷⁰⁵ The court also stated that even though the facts and evidence before the Commissioner indicated that the employee was discriminated against, no duty rested on the former to consider this issue.⁷⁰⁶

How does one sidestep the discrimination issue that flows from a finding that the employee's dismissal for medical incapacity was unfair, due to the employer's failure to reasonably accommodate the employee short of incurring an unjustifiable hardship, so that the jurisdiction of a council or the CCMA is not affected in such an instance? One approach may be to say that, according to *Standard Bank*, where disability is distinguished from incapacity, an employer's failure to reasonably accommodate an employee who has a disability does not indicate that the employee was discriminated against, but that the employee was *not* incapacitated.⁷⁰⁷ Such an approach may seem valid to enable a council or the CCMA to "retain" its jurisdiction so to continue to resolve the dispute on its

⁷⁰⁴ *Ibid*

⁷⁰⁵ *Ibid*

⁷⁰⁶ *Ibid*

⁷⁰⁷ *Standard Bank* 378

merits, but is blind to the true essence of a failure to reasonably accommodate short of an unjustifiable hardship, which is something that falls beyond the jurisdiction of such a forum.

Surely, one cannot deny that a failure to reasonably accommodate a person who has a disability, short of incurring unjustifiable hardship, amounts to discrimination on the basis of disability, even if this transpires in a forum that does not have jurisdiction to deal with this matter. The council or CCMA, who deals with a medical incapacity dismissal dispute, must not ignore a discrimination issue that surfaces from a finding that the dismissal was unfair because of a failure on the part of the employer to reasonably accommodate the employee short of unjustifiable hardship. In these circumstances, the forum should also not continue to resolve the dispute on its merits simply because the dismissed employee alleged that the reason for the dismissal was medical incapacity.

In *Wardlaw v Supreme Moulding (Pty) Ltd*,⁷⁰⁸ the Labour Appeal Court held that the true reason for the employee's dismissal will determine which forum will have jurisdiction to resolve a dispute pertaining to a dismissal for this reason, and not the reason the employee alleges.⁷⁰⁹ When an employee alleges a reason for a dismissal and approaches a forum which, upon the employee's allegation, will have jurisdiction to resolve a dispute in respect of such a dismissal, the forum

⁷⁰⁸ [2007] 6 BLLR 487 (LAC)

⁷⁰⁹ *Supra* 495

must assume jurisdiction up to where it determines the true reason for the dismissal.⁷¹⁰ If the true reason for dismissal falls into the ambit of dismissals in respect of which the forum may resolve disputes, the forum must continue to resolve the dismissal dispute on its merits.⁷¹¹ If the true reason does not fall into such ambit, the forum must decline jurisdiction and refer the dispute to the appropriate forum for resolution.⁷¹²

The appropriate forum for resolving a dismissal dispute pertaining to medical incapacity which involves an employee who has a disability is a bargaining or statutory council or, if no such council has jurisdiction, the CCMA,⁷¹³ who will first attempt to conciliate the dispute. If the council or a commissioner certifies that the dispute remains unresolved, or if 30 days have expired since the forum received the dispute and it remains unresolved, the forum must arbitrate the dispute if the employee alleged that the reason for the dismissal was medical incapacity.⁷¹⁴

When an employer accordingly dismisses an employee who has a disability for medical incapacity, and an employee refers a dispute pertaining to this dismissal to a council or the CCMA, such forum must assume jurisdiction over the matter, up to where it determines the true reason for the dismissal. How will this forum determine the true reason for dismissal when the employee approaches it to

⁷¹⁰ *Ibid* 494

⁷¹¹ *Ibid* 494–495

⁷¹² *Ibid* 495

⁷¹³ Section 191(1)(a) of the LRA

⁷¹⁴ *Ibid*

determine the validity of a medical incapacity dismissal? As was stated earlier, an employer who wishes to dismiss an employee for medical incapacity must determine whether the employee is also a person with a disability in terms of the EEA. This duty rests not only on the employer,⁷¹⁵ but also on the forum that needs to determine the validity of the dismissal.⁷¹⁶

Once the forum is aware that the employee dismissed is also a person with a disability, it needs to determine whether the employee's disability or incapacity was the reason for dismissal. In terms of *Standard Bank*, the forum should determine this by considering whether the employer was able to reasonably accommodate the employee, without suffering an unjustifiable hardship. If the forum finds that the employer could not reasonably accommodate the employee without incurring an unjustifiable hardship, or that the employee unreasonably refused reasonable accommodation an employer proposed and the employee was thereupon dismissed, the employee is incapacitated. In this instance, incapacity and not disability is the reason for the dismissal. A dismissal dispute for the true reason of medical incapacity falls within the jurisdiction of a bargaining or statutory council or the CCMA and such forum has the jurisdiction to determine whether a dismissal for medical incapacity is fair.

If the forum finds that the employer could reasonably accommodate the employee, short of incurring an unjustifiable hardship, but failed to do so and

⁷¹⁵ *NEHAWU* 2099–2100

⁷¹⁶ *Standard Bank* 371

dismissed the employee, the person is not incapacitated, and disability – not incapacity – is the reason for the employee’s dismissal. With disability being the reason for dismissal, and discrimination being implied due to the employer’s failure to reasonably accommodate, even if this is not alleged by the employee, the council or CCMA must decline jurisdiction and refer the matter to the Labour Court for adjudication.

The Labour Court in *Standard Bank* accurately contended that “[i]f Ferreira (the employee) wanted to refer a claim based on discrimination she would have had to refer it to this Court, not to arbitration”,⁷¹⁷ but erred when it said that the CCMA Commissioner “was not obliged to respond” to the discrimination that transpired from the case before the latter.⁷¹⁸

6.7 Conclusion

An employee who has a disability may be perceived as being incapacitated, which may “justify” dismissing the employee on this basis. Moreover, the Dismissal Code in its medical incapacity guidelines refers to the “disability” of an incapacitated employee. It is easy to confuse these two concepts, especially in the context of dismissal. Some may view these concepts as one and the same,

⁷¹⁷ *Ibid* 388

⁷¹⁸ *Ibid*

because of the manner in which they appear in the Dismissal Code's medical incapacity guidelines.⁷¹⁹

If disability of an employee is a prohibited reason for dismissal and medical incapacity a fair reason for dismissal, then these two concepts are not the same. If an employer wishes to dismiss an employee who has a disability for medical incapacity (or wishes to hide a disability dismissal under this veil, which is after all a fair reason for dismissal), the employer must prove that the employee is *medically incapacitated*. Apart from the fact that the employer must follow items 10 and 11 of the Dismissal Code and follow a fair procedure in dismissing the person,⁷²⁰ the employer must also prove that it could not reasonably accommodate the employee, short of incurring an unjustifiable hardship, or that the employee unreasonably refused reasonable accommodation the employer proposed. In doing so, and in Christianson's view, the employer must prove that the employee is unable to perform the essential functions of the job.⁷²¹

⁷¹⁹ Christianson *op cit* 893

⁷²⁰ *Ibid* 890

⁷²¹ *Ibid* 889

CHAPTER 6

CONCLUSION AND RECOMMENDATIONS

This paper approached the concept of disability in the workplace from four angles: the definition of people with disabilities, which was discussed in Chapter 2, discrimination on the basis of disability in terms of the EEA as discussed in Chapter 3, reasonable accommodation of people with disabilities in Chapter 4 and dismissal of employees who have disabilities in Chapter 5. Each of these discussions above hopefully holds lessons for the South African workplace.

Change often begins in the minds of people. If the social approach to disability (as discussed in Chapter 2 above) is adopted with the notion that people with disabilities have potential and that “able-bodied” society needs to change to cater to the needs of disabled people, discrimination against and exclusion of that group from employment and the working environment no longer appears to be justifiable. The UN Convention on the Rights of Persons with Disabilities has endorsed the social model of disability and places a burden on signatory states, including the Republic of South Africa, to do the same. Employers also need to make this change in mindset towards people with disabilities.

Once the mindset is changed, it becomes time to act. The employer, who wishes to differentiate amongst employees or applicants for employment on the basis of disability or some other medical condition in respect of an employment position, must opt for an individual assessment of the person living with the disability or medical condition, rather than a blanket exclusion of such persons from a position. The cases of *Hoffmann v South African Airways* and *IMATU and another v City of Cape Town*, as discussed in Chapter 3 of this paper, have made it clear that individual assessments, rather than blanket employment bans will, in such circumstances, prevent unfair discrimination against a person living with a disability or medical condition.

Reasonable accommodation for people with disabilities is another powerful tool in the hands of an employer to effect changes to an “able-bodied” working environment or an employment position designed for an “able-bodied” person.⁷²² Especially in respect of people with disabilities, reasonable accommodation short of imposing an unjustifiable hardship on the employer, is a multi-faceted mechanism that facilitates equality for people with disabilities in the workplace, guards against an automatically unfair dismissal on the basis of disability⁷²³ and even is a criterion to determine whether an employee with a disability is incapacitated due to ill health or injury.⁷²⁴

⁷²² Ngwena (2005) 538

⁷²³ *Standard Bank v CCMA* 375

⁷²⁴ *Ibid* 378

According to the Labour Court in *Standard Bank v CCMA*, which was discussed in Chapters 4 and 5 of this paper, the disability of an employee does not amount to his or her medical incapacity.⁷²⁵ If these two concepts meant the same, the LRA would not have distinguished between medical incapacity as a valid ground for dismissal and disability as a prohibited reason for dismissal. Employers must appreciate this distinction in terms of the LRA and accordingly not treat an employee or job applicant with a disability as being medically incapacitated, unless it is established that the person is also incapacitated.

⁷²⁵ *Ibid*

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