



UNIVERSITY *of the*
WESTERN CAPE



AN ASSESSMENT OF THE LAWS THAT AIM TO PROTECT EMPLOYEES
AGAINST DISCRIMINATION ON THE GROUND OF DISABILITY: A
COMPARATIVE ANALYSIS

A mini-thesis submitted to the Faculty of Law in partial fulfilment of the requirements of the
Master's degree

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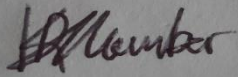
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DECLARATION

I, Kerishnie Delicia November, declare that ‘An assessment of the laws that aim to protect employees against discrimination on the ground of disability: A comparative analysis’ is my own work and that it has not been submitted before any degree or examination in any other university, and that all sources I have used, or quotes have been indicated and acknowledged as complete references.

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Date: 26 October 2023



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ABBREVIATIONS AND ACRONYMS

CCMA	Commission for Conciliation, Mediation and Arbitration
Code of Good Practice DDA	Code of Good Practice: Employment and Occupation; Disability Discrimination Act 1995 of 16 May 2005
Convention 111	International Labour Organisation Discrimination (Employment and Occupation) Convention 111 of 1958
CRPD	Convention on the Rights of Persons with Disabilities
DDA	Disability Discrimination Act 1995
Disability Code	Code of Good Practice: Key Aspects on the Employment of People with Disabilities (GN 1085 in GG 39383 of 7 November 2015)
EEA	Employment Equity Act 55 of 1998
ESA	Employment Services Act 4 of 2014
LRA	Labour Relations Act 66 of 1995
PCP	provision, criteria/criterion, or practice
PEPUDA	Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000
Statutory Code	Equality Act 2010 Statutory Code of Practice Employment of 2011
TAG	Technical Assistance Guidelines on the Employment of Persons with Disabilities
UK	United Kingdom

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ABSTRACT

Subsequent to apartheid in South Africa, laws were enacted to redress the injustices of the past. Section 9 of the Constitution contains the right to equality. Section 9(1) of the Constitution provides that everyone is equal before the law and has the right to equal protection and benefit of the law.¹ No person may unfairly discriminate directly or indirectly against anyone on one or more grounds such as disability.² National legislation must be enacted to assist with the prevention or prohibition of unfair discrimination.³ The inequalities caused by apartheid resulted in a need to develop legislation to address unfair discrimination in the workplace. The Employment Equity Act 55 of 1998 was promulgated to give effect to section 9 of the Constitution. The EEA prohibits unfair discrimination, including the right not to be discriminated against on the ground of disability. Research shows that some employees are subjected to disability discrimination.⁴ The study provides an analysis of the provisions in South Africa that govern discrimination on the ground of disability to determine the extent to which the legislative framework in South Africa protects employees against discrimination on the ground of disability. Furthermore, this study contains a comparison between the laws in South Africa and the laws in the United Kingdom to determine whether South Africa can learn any lessons from the legislative framework governing disability discrimination in the United Kingdom.

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Keywords

Affirmative action, disability, discrimination, equality, employee, employer, Employment Equity Act 55 of 1998, reasonable accommodation, United Kingdom, workplace.

¹ Section 9(1) of the Constitution of the Republic of South Africa, 1996.

² Section 9(4) of the Constitution of the Republic of South Africa, 1996.

³ Section 9(4) of the Constitution of the Republic of South Africa, 1996.

⁴ McKinney EL & Swartz L 'Employment integration barriers: experiences of people with disabilities' (2021) 32(10) *The International Journal of Human Resource Management* 2301.

CHAPTER 1: INTRODUCTION

1.1 INTRODUCTION

South Africa is known for its history of unfair discrimination.⁵ During apartheid persons with disabilities, women and black people were subjected to unfair discrimination and research shows that this is still the case.⁶ Disability discrimination in South Africa has become a pressing concern, not only for the government but also for the general public.⁷ In *Smith v Kit Kat Group (Pty) Ltd* the Labour Court held that:

‘The simple point is that [when] it comes to protection against discrimination in the case of a disability, it is of little relevance what the employee may think about his or her ability to fulfil the obligations and duties of the position. It is about what the employer perceives the disability to cause. Once the employer thinks that because an employee had a disability and this disability impacts on the employee’s ability to do the job, the discrimination protection against [persons with disabilities] must apply.’⁸

The first democratically elected South African government realised the need to redress the injustices caused by the apartheid regime.⁹ This included employment opportunities for persons with disabilities.¹⁰ The desire of the government was to create access to labour markets for all South Africans.¹¹ There was also a need to enact laws to eliminate inequalities and unfair discrimination in the workplace. This gave rise to the inauguration of the Constitution of the Republic of South Africa, 1996. In terms of the Constitution no person may unfairly discriminate directly or indirectly against anyone on one or more grounds such as disability.¹² Section 9(4) of the Constitution states that ‘national legislation must be enacted to prevent or prohibit unfair discrimination’.¹³

⁵ Fourie L & Botes A ‘Disability discrimination in the South African workplace: the case of infertility’ (2018) 22(7) *The International Journal of Human Rights* 920.

⁶ Fourie L & Botes A ‘Disability discrimination in the South African workplace: the case of infertility’ (2018) 22(7) *The International Journal of Human Rights* 920.

⁷ Fourie L & Botes A ‘Disability discrimination in the South African workplace: the case of infertility’ (2018) 22(7) *The International Journal of Human Rights* 920.

⁸ *Smith v Kit Kat Group (Pty) Ltd* (2017) 38 ILJ 483 (LC) para 42.

⁹ Potgieter L, Coetzee M & Ximba T ‘Exploring career advancement challenges people with disabilities in the South African work context’ (2017) 15 *South African Journal of Human Resource Management* 2.

¹⁰ The *White paper on the rights of persons with disabilities* (GN 203 in GG 39792 of 09 March 2016).

¹¹ Nxumalo L ‘Utilising transformational leadership to implement disability laws in the South African workplace’ (2019) 35 *South African Journal on Human Rights* 351.

¹² Section 9(4) of the Constitution of the Republic of South Africa, 1996.

¹³ Section 9(4) of the Constitution of the Republic of South Africa, 1996.

The Employment Equity Act 55 of 1998 (EEA), as amended was promulgated to give effect to section 9(4) of the Constitution. The main objective of the EEA is to achieve equity in the South African workplace.¹⁴

1.2 PROBLEM STATEMENT

Research shows that while discrimination on the grounds of race has received attention, disability discrimination has received less attention, particularly in the workplace.¹⁵ The South African legislature has passed a number of labour laws aimed at reforming the country¹⁶ and ensuring that previously disadvantaged South Africans have equal employment opportunities and fair treatment in the workplace.¹⁷ The EEA was enacted to eliminate unfair discrimination in the workplace which includes unfair discrimination on the ground of disability. Despite the existence of the EEA, research shows that persons with disabilities continue to be unfairly discriminated against in the workplace.¹⁸

1.3 RESEARCH QUESTION

The main question of this research is: To what extent does the South African legislative framework protect employees from disability discrimination?

This study answers the sub-questions below:

- How does the legislative framework governing disability discrimination in South Africa compare to the legislative framework governing disability discrimination in the United Kingdom?

¹⁴ Section 2 of the Employment Equity Act 55 of 1998.

¹⁵ Bam A & Ronnie L 'Inclusion at the workplace: An exploratory study of people with disabilities in South Africa' (2020) 15 *International Journal of Disability Management* 2.

¹⁶ For example, the Broad-Based Black Economic Empowerment Act 53 of 2003, the Labour Relations Act 66 of 1995.

¹⁷ Nxumalo L 'Utilising transformational leadership to implement disability laws in the South African workplace' (2019) 35 *South African Journal on Human Rights* 351.

¹⁸ Bam A & Ronnie L 'Inclusion at the workplace: An exploratory study of people with disabilities in South Africa' (2020) 15 *International Journal of Disability Management* 2, Ebrahim A, Lorenzo T & Kathard H 'Traversing disability: employer's perspectives of disability inclusion' (2022) 2 *Disabilities* 319.

- Should the South African laws governing disability discrimination be amended and/or supplemented?

1.4 AIMS OF THE RESEARCH

While it is acknowledged that other forms of unfair discrimination exist such as on the grounds of race and gender, this research will only focus on disability discrimination. Research shows that there is an increase in the employment of some of the categories of persons who fall within the meaning of people from designated groups, however, this is not the case with persons with disabilities.¹⁹ This is evident from the fact that in 2022 it was reported that 7.9 percent of persons with disabilities are not economically active.²⁰ It is against this backdrop that disability discrimination becomes the focal point of this mini-thesis.

This study compares the legislative frameworks in South Africa and the United Kingdom (UK) that governs discrimination on the ground of disability in the workplace. South Africa and the UK are both members of the International Labour Organisation and has ratified the International Labour Organisation Discrimination (Employment and Occupation) Convention 111 of 1958 (Convention 111).²¹ Both South Africa and the UK promulgated legislation with the aim of prohibiting both direct and indirect discrimination on the ground of disability.²² In South Africa persons with disabilities make up 1 per cent of the workforce, while in the UK the disability employment rate is 23 per cent.²³ The UK and South Africa provide financial assistance in the forms of grants to persons with disabilities. South Africa has a disability grant that provides a person with a disability financial assistance where the individual due to their physical or mental disability are unable to obtain employment to provide for their needs, if certain requirements are met.²⁴ In the UK, an employed and unemployed person with a disability can apply for the personal independence payment that assists with living costs where

¹⁹ Marumoagae MC ‘Disability discrimination and the right of disabled persons to access the labour market’ (2012) 15 *PER/PELJ* 345, this is also evident by the Department of Labour *Commission for Employment Equity* (2021-2022) report.

²⁰ Statistics South Africa ‘Quarterly Labour Force Survey Quarter 4: 2022’ available at <https://www.statssa.gov.za/publications/P0211/P02114thQuarter2022.pdf> (accessed 26 April 2023).

²¹ See paras 2.3.1 & 3.2.1 below.

²² See paras 2.3.2.1.2; 2.3.2.1.3; 3.2.2.1.1 & 3.2.2.1.2 below.

²³ UK Parliament ‘Disabled people in employment’ available at <https://commonslibrary.parliament.uk/research-briefings/cbp-7540/> (accessed on 19 October 2023).

²⁴ Section 9 of the Social Assistance Act 13 of 2004.

the person with a disability either has a long-term physical or mental health condition or disability or the person with a disability experiences difficulty in performing everyday tasks because of the condition.²⁵

During the apartheid era in South Africa persons with disabilities were unfairly discriminated against in the workplace.²⁶ In 1998, the EEA was enacted with the aim of eliminating unfair discrimination in the workplace.²⁷ In the early 1990's, many protestors such as the Disabled People's Direct Action Network demanded that new legislation be enacted to protect people with disabilities in the UK.²⁸ The aforementioned demand was made because legislation at the time only prohibited discrimination against people on the ground of race and gender, however people with disabilities were not afforded such protection.²⁹ The Disability Discrimination Act of 1995 (DDA) was promulgated as a consequence.

The election was made to compare the legislative framework governing disability discrimination in South Africa with that in the UK since the UK has developed a body of statutes governing disability discrimination. The UK has disability specific legislation, such as the DDA. The DDA was repealed and replaced by the Equality Act 2010 in Wales, England, and Scotland, with the exception of Northern Ireland, where the DDA still applies.³⁰ However, everyone that was covered by the DDA is also covered by the Equality Act 2010.³¹ The UK and South Africa have similarities. The focus of the disability framework in the UK is the DDA, Equality Act 2010 and the respective codes.³² In South Africa disability discrimination is governed by the EEA, the Code of Good Practice on the Employment of People with Disabilities (the Disability Code), and the Technical Assistance Guidelines on the Employment of Persons with Disabilities (TAG).

²⁵ Gov.uk 'Personal Independence Payment (PIP) available at <https://www.gov.uk/pip> (accessed 30 January 2023).

²⁶ Fourie L & Botes A 'Disability discrimination in the South African workplace: the case of infertility' (2018) 22(7) *The International Journal of Human Rights* 920.

²⁷ Preamble of the Employment Equity Act 55 of 1998.

²⁸ UK Parliament 'Disability Discrimination Act: 1995 and now' available at <https://lordslibrary.parliament.uk/disability-discrimination-act-1995-and-now/> (accessed on 09 March 2022).

²⁹ UK Parliament 'Disability Discrimination Act: 1995 and now' available at <https://lordslibrary.parliament.uk/disability-discrimination-act-1995-and-now/> (accessed on 09 March 2022).

³⁰ UK Parliament 'Disability Discrimination Act: 1995 and now' available at <https://lordslibrary.parliament.uk/disability-discrimination-act-1995-and-now/> (accessed on 09 March 2022).

³¹ UK Parliament 'Disability Discrimination Act: 1995 and now' available at <https://lordslibrary.parliament.uk/disability-discrimination-act-1995-and-now/> (accessed on 09 March 2022).

³² This is evident by the fact that these are the primary legislation and codes that deal with disability discrimination in the UK.

The Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (PEPUDA), similar to the EEA, was enacted to give effect to the equality clause in the Constitution.³³ PEPUDA was enacted ‘to prevent and prohibit unfair discrimination, promote equality and eliminate unfair discrimination, prevent and prohibit hate speech and provide for matters connected herewith’.³⁴ PEPUDA ‘does not apply to any person to whom and to the extent to which the EEA applies’.³⁵ PEPUDA only covers any person who does not fall within the scope of an employee. The EEA on the other hand applies to all employees and employers³⁶ with the exception of members of the National Defence Force³⁷, the National Intelligence Agency³⁸, and the South African Secret Service³⁹.⁴⁰ These entities are also known as public service entities.⁴¹ The PEPUDA applies to these organisations.⁴² As a result of the aforementioned scope of the application of the respective statutes and the fact that this study only focuses on the position of persons with disabilities in the workplace, this research only focuses on the provisions contained in the EEA.

1.5 SIGNIFICANCE OF THE RESEARCH

This research is important to employers for the following reasons: first, it provides insight to employers on the manners to ‘develop, implement and refine disability equity policies and programmes to suit the needs of workplaces’.⁴³ Secondly, it provides guidance to employers on how training programmes can be used to assist employees with disabilities and advance their careers.⁴⁴ Lastly, it provides employers with insight on the manners in which employers

³³ The Promotion of Equality and Unfair Discrimination Act 4 of 2000.

³⁴ Long title of the Promotion of Equality and Unfair Discrimination Act 4 of 2000.

³⁵ Section 5(3) of the Promotion of Equality and Unfair Discrimination Act of 2000.

³⁶ Section 4(1) of the Employment Equity Act 55 of 1998.

³⁷ This is now known as the South African National Defence Force.

³⁸ This is now known as the Domestic Branch of the State Security Agency.

³⁹ This is now known as the Foreign Branch of the State Security Agency.

⁴⁰ Section 4(3) of the Employment Equity Act 55 of 1998.

⁴¹ Section 1 of the Employment Equity Act 55 of 1998.

⁴² Section 5(1) of the Promotion of Equality and Unfair Discrimination Act 4 of 2000.

⁴³ Item 3.4 of the Code of Good Practice on the Employment of Persons with Disabilities (GN 1085 GG 39383 of 7 November 2015).

⁴⁴ Item 9 & 10 of the Code of Good Practice on the Employment of Persons with Disabilities (GN 1085 GG 39383 of 7 November 2015).

should comply with the duty of employers to provide reasonable accommodation for the needs of persons with disabilities.⁴⁵

This research is also important to employees for two reasons. First, it makes employees aware of the protection that is afforded to them in circumstances where employees are subjected to disability discrimination. Secondly, this research provides information to employees on the manners in which their rights may be exercised.

1.6 LITERATURE REVIEW

According to Basson's research the legitimate attempts by the legislature to ensure equitable representation by employers of persons with disabilities within the workplace has not yielded the results that were hoped for yet.⁴⁶ Basson's research consists of a discussion on legislation such as the Labour Relations Act (LRA), the EEA and the Employment Services Act (ESA). Her research revealed that there should be a human-rights approach to persons with disabilities, that the EEA, as amended, broadens the definition of unfair discrimination⁴⁷ and that the schemes created in terms of the ESA results in inverse consequences for the human-rights model.⁴⁸

Basson's reason for the fact that there should be a human-rights approach to persons with disabilities is that the human rights model is focused on the person with a disability as an individual with the same rights as everyone else.⁴⁹ The EEA plays a significant role when it comes to protecting persons with disabilities since it places emphasis on the individual rather than the disability itself.⁵⁰ The human rights model is symptomatic of a drive toward greater

⁴⁵ Item 6 of the Code of Good Practice on the Employment of Persons with Disabilities (GN 1085 GG 39383 of 7 November 2015).

⁴⁶ Basson Y 'Selected developments in South African labour legislation related to persons with disabilities' (2017) 20 *PER/PELJ* 17.

⁴⁷ Basson Y 'Selected developments in South African labour legislation related to persons with disabilities' (2017) 20 *PER/PELJ* 12.

⁴⁸ Basson Y 'Selected developments in South African labour legislation related to persons with disabilities' (2017) 20 *PER/PELJ* 15.

⁴⁹ Basson Y 'Selected developments in South African labour legislation related to persons with disabilities' (2017) 20 *PER/PELJ* 5.

⁵⁰ Basson Y 'Selected developments in South African labour legislation related to persons with disabilities' (2017) 20 *PER/PELJ* 9.

governmental accountability to ensure that the rights of **persons with disabilities** are realised.⁵¹ Basson provides valuable insight on the development of South African labour legislation related to persons with disabilities. While Basson's research provides valuable insight on the provisions contained in the LRA, EEA, and the ESA, provides information on the financial penalties that exist as well as the developments in the labour legislation in South Africa related to persons with disabilities, this mini-thesis focuses exclusively on the provisions contained in the EEA that are relevant to persons with disabilities to determine the extent to which these provisions protect persons with disabilities from unfair discrimination in the workplace. This mini-thesis contains a comparison between the legal framework in South Africa and the UK governing disability discrimination in the workplace.

Research was conducted by Gresse to 'highlight the need for detailed legislative provisions which should set out what the duty to make reasonable accommodation entails, and to make practical suggestions on how employers can accommodate disabilities in the workplace'.⁵² Gresse explains that notwithstanding the fact that the duty to make reasonable accommodation for persons with disabilities is recognised in South Africa's legislative and policy framework, there is an increase of cases in courts.⁵³ Her focus is on the case of *Jansen v Legal Aid South Africa*, which provides valuable insight into the duty of reasonable accommodation to be made by an employer.⁵⁴ Despite this, it remains just one example and provides a limited view on how courts deal with the duty to reasonably accommodate employees with disabilities. In order to provide a broader view, this mini-thesis contains a discussion of various court judgments to provide a comprehensive view on the manner in which the courts assess the employer's duty to reasonably accommodate employees with disabilities.

Nxumalo argues that there is 'a need for mechanisms and guidelines to assist employers in addressing mental illnesses', such as depression in the workplace.⁵⁵ The purpose of this study was to determine whether labour legislation in South Africa provides adequate protection to

⁵¹ Basson Y 'Selected developments in South African labour legislation related to persons with disabilities' (2017) 20 *PER/PELJ* 5.

⁵² Gresse E 'An analysis of the duty to reasonably accommodate disabled employees: a comment on *Jansen v Legal Aid South Africa*' (2020) 24 *Law Democracy & Development* 112.

⁵³ Gresse E 'An analysis of the duty to reasonably accommodate disabled employees: a comment on *Jansen v Legal Aid South Africa*' (2020) 24 *Law Democracy & Development* 112.

⁵⁴ Gresse E 'An analysis of the duty to reasonably accommodate disabled employees: a comment on *Jansen v Legal Aid South Africa*' (2020) 24 *Law Democracy & Development* 112.

⁵⁵ Nxumalo L 'Does South African labour legislation provide adequate protection for mental illness in the workplace?' (2018) 39 *ILJ* 1437.

persons with mental illnesses in the workplace.⁵⁶ Nxumalo is of the view that given the nature of the impairment, current legislation fails to provide effective protection for employees with mental illness.⁵⁷ As a result, employers will not be able to properly address concerns of mental illness in the workplace.⁵⁸ She claims that employers rely on incapacity procedures to manage mental illness (and other types of disabilities) as a result of this lacuna, oblivious to the fact that disability is not synonymous with incapacity.⁵⁹ The work of Nxumalo is discussed in this mini-thesis to demonstrate how employers use incapacity procedures instead of dealing with the disability at hand. This study differs from the aforementioned study in that court judgments on mental illness are used to determine the reasons for this being the case and whether the situation can be remedied.

Taylor analysed the Australian approach as well as the UK approach to disability discrimination. Taylor argues that it is possibly the different drafting approach of the UK that ‘influenced the way in which the courts have understood and applied the duty’ to make adjustments.⁶⁰ ‘The duty to make adjustments is not a subsection of the provisions prohibiting direct and indirect discrimination, instead it is a separate and distinct obligation’.⁶¹ Furthermore, the UK Equality Act 2010 is detailed in its elaboration of what this duty requires with examples and explanations.⁶² This research differs from the aforementioned in that while it is also comparative in nature it will compare the legislative provisions governing disability discrimination in South Africa to that in the UK.

⁵⁶ Nxumalo L ‘Does South African labour legislation provide adequate protection for mental illness in the workplace?’ (2018) 39 *ILJ* 1437.

⁵⁷ Nxumalo L ‘Does South African labour legislation provide adequate protection for mental illness in the workplace?’ (2018) 39 *ILJ* 1452.

⁵⁸ Nxumalo L ‘Does South African labour legislation provide adequate protection for mental illness in the workplace?’ (2018) 39 *ILJ* 1437.

⁵⁹ Nxumalo L ‘Does South African labour legislation provide adequate protection for mental illness in the workplace?’ (2018) 39 *ILJ* 1437.

⁶⁰ Taylor A ‘Disability discrimination, the duty to make adjustments and the problem of persistent misreading’ (2019) 45 *Monash University Law Review* 479.

⁶¹ Taylor A ‘Disability discrimination, the duty to make adjustments and the problem of persistent misreading’ (2019) 45 *Monash University Law Review* 479.

⁶² Taylor A ‘Disability discrimination, the duty to make adjustments and the problem of persistent misreading’ (2019) 45 *Monash University Law Review* 479.

1.7 RESEARCH METHODOLOGY

This mini-thesis adopts a literature review that consists of a discussion and analysis of primary and secondary sources. The Constitution is used to determine the way in which the law protects persons with disabilities against unfair discrimination. Legislation is used to determine the way in which the law protects employees against disability discrimination and whether these measures are adequate. Case law is used in order to answer the main research question and will assist in determining the manner in which legislation governing disability discrimination in the workplace is applied. Secondary sources are books and journal articles. Books are used since it contains the views of different authors regarding the research topic. Journal articles are used to analyse the different points of view of different authors on the topic.

1.8 CHAPTER OUTLINE

Chapter 1 contains *inter alia* the research question, the literature review and aims of the study.

Chapter 2 consists of a discussion on the legislative framework governing disability discrimination in South Africa. The chapter contains a discussion on the Constitution, the relevant provisions contained in the EEA governing disability discrimination, as well as the meanings of discrimination and unfairness. It also contains a discussion on the provisions that govern affirmative action and the remedies that are available to employees with disabilities.

Chapter 3 consists of a discussion on the legislative framework governing disability discrimination in the UK. The purpose of this chapter is to determine the manner in which the laws in the UK protect persons with disabilities and whether South Africa can learn from the legal approach in the UK insofar as disability discrimination is concerned.

Chapter 4 contains the conclusion and recommendations.

CHAPTER 2: LAWS GOVERNING DISABILITY DISCRIMINATION IN SOUTH AFRICA

2.1 INTRODUCTION

Some persons with disabilities generally have difficulty exercising their basic social, political, and economic rights and some job applicants and employees are discriminated against on the ground of disability.⁶³ This chapter contains a discussion on the provisions governing discrimination on the ground of disability in South Africa. The chapter contains a discussion on the meaning of ‘disability’, the relevant provisions contained in the Constitution and the EEA. This is done to assess the extent to which the South African legislative framework protects employees against disability discrimination.

2.2 THE MODELS

The medical, economic, charity, professional, social, and the human rights model is discussed below. These models are discussed to explain the approaches to disability that exist.

2.2.1 Medical model

The medical model was the traditional approach to disability and conceived disability as an outcome of a cognitive, physical or sensory deficit.⁶⁴ According to the medical model, persons with disabilities are viewed as more vulnerable and weak members of society who are not able to take care of themselves and therefore, need the assistance of others.⁶⁵ Persons with disabilities receive assistance from medical practitioners to treat their medical conditions.⁶⁶ In

⁶³ Potgieter L, Coetzee M & Ximba T ‘Exploring career advancement challenges people with disabilities in the South African work context’ (2017) 15 *South African Journal of Human Resource Management* 1.

⁶⁴ Ngwena C ‘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* 220.

⁶⁵ Basson Y ‘Selected developments in South African labour legislation related to persons with disabilities’ (2017) 20 *PER/PELJ* 4.

⁶⁶ Basson Y ‘Selected developments in South African labour legislation related to persons with disabilities’ (2017) 20 *PER/PELJ* 4.

terms of the medical model, the treatment provided to an individual and the need for assistance or some form of assistance is crucial.⁶⁷

2.2.2 Economic model

The economic model approaches disability from an economic perspective, focusing on the different disabling effects on the impairment of an individual's capabilities, particularly their labour and employment capabilities.⁶⁸ It assesses the extent to which the impairment affects an individual's productivity and the economic impact of an individual, employer and the state.⁶⁹ The economic model has been criticised because the disability identification is based almost entirely on cost-benefit analysis and neglects to consider other important factors.⁷⁰ This economic focus may contribute to the disempowerment of persons with disabilities as someone who is 'missing parts'.⁷¹

2.2.3 Charity model

The charity model focuses on the stigmatisation of persons with disabilities as self-inflicted victims of their own medical conditions who should be pitied.⁷² Persons with disabilities are therefore recognised as a compassionate element and is linked with the concept of a welfare approach to assist persons with disabilities.⁷³ It focuses on a 'benevolent reaction to the perception that [persons with disabilities] are profoundly unfortunate'.⁷⁴ This model is often considered to depict persons with disabilities as helpless, depressed, and dependent on others

⁶⁷ Basson Y 'Selected developments in South African labour legislation related to persons with disabilities' (2017) 20 *PER/PELJ* 4.

⁶⁸ Retief M & Letsosa R 'Models of disability: A brief overview' (2018) 74 *HTS Theological Studies* 6.

⁶⁹ Amponsah-Bediako K 'Relevance of disability models from the perspective of a developing country: An analysis' (2013) 3(11) *Developing Country Studies* 128.

⁷⁰ Retief M & Letsosa R 'Models of disability: A brief overview' (2018) 74 *HTS Theological Studies* 6.

⁷¹ Retief M & Letsosa R 'Models of disability: A brief overview' (2018) 74 *HTS Theological Studies* 6.

⁷² Retief M & Letsosa R 'Models of disability: A brief overview' (2018) 74 *HTS Theological Studies* 6.

⁷³ Lekganyane GM, Baloyi TV, Mamaleka MM *et al* 'An assessment of disability policies in South Africa and Germany' (2019) 17(4) *Gender & Behaviour* 14573.

⁷⁴ Wells-Jensen S & Zuber A 'Models of disability as models of first contact' (2020) 11(12) *Religions* 4.

for care and protection, helping to perpetuate harmful stereotypes and misconceptions about others.⁷⁵

2.2.4 Professional model

It has been argued that the professional model, which can be considered as a derivative of the medical model, provides a conventional response to disability issues.⁷⁶ According to the professional model, professionals follow a process of identifying and assessing disabilities and their limitations and then takes the necessary steps to enhance the position of persons with disabilities.⁷⁷ The disability is seen as an impairment that limits a person.⁷⁸

2.2.5 Social model

According to the social model, disabilities are social constructs.⁷⁹ Ngwena argued that disability as a social model is conceived in a holistic manner that considers external factors.⁸⁰ It examines the impact that barriers have on persons with disabilities full involvement, inclusion, and acceptability within the mainstream society.⁸¹ The goal is to include rather than exclude persons with disabilities from society as a whole.⁸²

⁷⁵ Retief M & Letsosa R 'Models of disability: A brief overview' (2018) 74 *HTS Theological Studies* 6.

⁷⁶ Amponsah-Bediako K 'Relevance of disability models from the perspective of a developing country: An analysis' (2013) 3(11) *Developing Country Studies* 127.

⁷⁷ Amponsah-Bediako K 'Relevance of disability models from the perspective of a developing country: An analysis' (2013) 3(11) *Developing Country Studies* 127.

⁷⁸ Amponsah-Bediako K 'Relevance of disability models from the perspective of a developing country: An analysis' (2013) 3(11) *Developing Country Studies* 126; Ngwena C 'Deconstructing the definition of disability under the Employment Equity Act: Social Deconstruction' (2006) 22 *SAJHR* 618.

⁷⁹ Ngwena C '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* 219 & 222.

⁸⁰ Ngwena C 'Deconstructing the definition of disability under the Employment Equity Act: Social Deconstruction' (2006) 22 *SAJHR* 631.

⁸¹ The *White paper on the rights of persons with disabilities* (GN 203 in GG 39792 of 09 March 2016).

⁸² The *White paper on the rights of persons with disabilities* (GN 203 in GG 39792 of 09 March 2016).

2.2.6 Human rights model

The human rights approach prioritises the inherent dignity of a person, and provided that it is necessary, the person's medical characteristics.⁸³ It prioritises the individual in all decisions that have an impact on the individual, and, most significantly, it places the major 'problem' outside of the individual and in society.⁸⁴ Therefore, it is important to consider the rights of persons with disabilities and the development of their fundamental rights.⁸⁵ As a result, the focus is on the person with the disability as an individual with the same rights as everyone else. However, there is still a long way to go for people to realise that disability is a human rights issue and not a charitable one.⁸⁶ Therefore, the human rights concept will serve as the foundation for this paper considering the rights of persons with disabilities.

2.3 SOUTH AFRICAN LEGAL FRAMEWORK

This part of the chapter consists of a discussion on the existing legal framework that governs discrimination of employees on the ground of disabilities. It commences with a discussion on the relevant provisions contained in International Conventions and the Constitution, followed by a discussion on the relevant provisions contained in the EEA. The meaning of 'discrimination' and 'unfairness' is discussed, together with the remedies that are available to employees who succeed with unfair discrimination claims. The laws governing affirmative action are discussed thereafter.

⁸³ Degener T 'Disability in a Human Rights Context' (2016) 5(3) *Laws* 3.

⁸⁴ Degener T 'Disability in a Human Rights Context' (2016) 5(3) *Laws* 8.

⁸⁵ Basson Y 'Selected developments in South African labour legislation related to persons with disabilities' (2017) 20 *PER/PELJ* 5.

⁸⁶ Shakespeare T, Mugeere A et al 'Success in Africa: People with disabilities share their stories' (2019) 8 *African Journal of Disability* 2.

2.3.1 THE INTERNATIONAL CONVENTIONS

The Convention on the Rights of Persons with Disabilities (CRPD) was ratified by South Africa in 2007, and sets out the international human rights standards for persons with disabilities.⁸⁷ The South African government is legally required to implement the determinations of the CRPD and must therefore comply with international labour law. States Parties⁸⁸ to the CRPD are required to reaffirm ‘the universality, indivisibility, interdependence and interrelatedness of all human rights and fundamental freedoms and the need for persons with disabilities to be guaranteed their full enjoyment without discrimination’.⁸⁹ States Parties are required to recognise that discriminating against a person based on their disability constitutes a violation of the inherent dignity and worth of a human being.⁹⁰ The purpose of the CRPD ‘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’.⁹¹ The CRPD defines persons with disabilities as ‘those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others’.⁹² The CRPD defines discrimination on the ground of disability as:

‘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.’⁹³

Article 4(1) of the CRPD provides that States Parties should ‘undertake to ensure and promote the full reali[s]ation of all human rights and fundamental freedoms for all persons with disabilities without discrimination of any kind on the basis of disability’.⁹⁴ State Parties are

⁸⁷ South African Human Rights Commission ‘SA needs an independent monitoring framework to implement rights of persons with disabilities’ available at <https://www.sahrc.org.za/index.php/sahrc-media/opinion-pieces/item/2320-sa-needs-an-independent-monitoring-framework-to-implement-rights-of-persons-with-disabilities>. (accessed on 14 March 2022)

⁸⁸ States Parties are countries that has ratified or acceded to a particular treaty such as the CRPD and is therefore legally bound by the provisions therein.

⁸⁹ The Preamble of the UN Convention on the Rights of Persons with Disabilities of 2007.

⁹⁰ The Preamble of the UN Convention on the Rights of Persons with Disabilities of 2007.

⁹¹ Article 1 of the UN Convention on the Rights of Persons with Disabilities of 2007.

⁹² Article 1 of the UN Convention on the Rights of Persons with Disabilities of 2007.

⁹³ Article 2 of the UN Convention on the Rights of Persons with Disabilities of 2007.

⁹⁴ Article 4(1) of the UN Convention on the Rights of Persons with Disabilities of 2007.

required to eliminate disability discrimination by any private enterprise, person or organisation.⁹⁵ In addition, laws, regulations, practices or customs that constitute disability discrimination should be modified or abolished.⁹⁶ The human rights of all persons with disabilities should be promoted in policies and programmes such as training.⁹⁷ State Parties should not engage in any conduct that is inconsistent with that of the CRPD.⁹⁸

There is an obligation on States Parties to ‘prohibit all discrimination on the basis of disability and guarantee to persons with disabilities equal and effective legal protection against discrimination on all grounds’.⁹⁹ In the employment context, States Parties are required to ‘recognise the right of persons with disabilities, on an equal basis with others which includes the right to the opportunity to gain a living by work freely chosen or accepted in a labour market and work environment that is open, inclusive and accessible to persons with disabilities’.¹⁰⁰ State Parties are also under an obligation to promote and safeguard the right to work for individuals who have acquired a disability during employment.¹⁰¹ State Parties are required to take the necessary appropriate steps through legislation to promote career advancement and employment opportunities to persons with disabilities.¹⁰² Amongst other things, it should include the prohibition of disability discrimination in all the stages of the employment process such as obtaining, finding and maintaining employment and return-to-work.¹⁰³ Persons with disabilities should be able to have effective access to training, programmes, vocational and professional rehabilitation, reasonable accommodation, retention and return-to-work.¹⁰⁴ State Parties should also promote the fact that persons with disabilities can obtain work experience in an open labour market.¹⁰⁵

⁹⁵ Article 4(1)(e) of the UN Convention on the Rights of Persons with Disabilities of 2007.

⁹⁶ Article 4(1)(b) of the UN Convention on the Rights of Persons with Disabilities of 2007.

⁹⁷ Article 4(1)(c) of the UN Convention on the Rights of Persons with Disabilities of 2007.

⁹⁸ Article 4(1)(d) of the UN Convention on the Rights of Persons with Disabilities of 2007.

⁹⁹ Article 5(2) of the UN Convention on the Rights of Persons with Disabilities of 2007.

¹⁰⁰ Article 27(1) of the UN Convention on the Rights of Persons with Disabilities of 2007.

¹⁰¹ Article 27(1) of the UN Convention on the Rights of Persons with Disabilities of 2007.

¹⁰² Article 27(1)(e) of the UN Convention on the Rights of Persons with Disabilities of 2007.

¹⁰³ Article 27(1)(e) of the UN Convention on the Rights of Persons with Disabilities of 2007.

¹⁰⁴ Article 27(1)(d), (h), (i) & (k) of the UN Convention on the Rights of Persons with Disabilities of 2007.

¹⁰⁵ Article 27(1)(j) of the UN Convention on the Rights of Persons with Disabilities of 2007.

2.3.2 CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA, 1996

Section 9 of the Constitution states that:

‘no person or the state may unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.’¹⁰⁶

The Constitution provides protection to persons with disabilities. This is evident from the fact that the Constitution explicitly prohibits discrimination on the ground of disability and from section 9(4) of Constitution, which provides that national legislation must be enacted to prohibit or prevent unfair discrimination.¹⁰⁷ As a result of section 9(4) of the Constitution, the Employment Equity Act 55 of 1998 was enacted.

2.3.3 THE EMPLOYMENT EQUITY ACT 55 of 1998

The main purpose of the EEA is to achieve equity in the workplace. To achieve workplace equity, the EEA aims the following:

‘(a) promoting equal opportunity and fair treatment in employment through the elimination of unfair discrimination; and (b) implementing affirmative action measures to redress the disadvantages in employment experienced by designated groups, in order to ensure their equitable representation in all occupational categories in the workplace.’¹⁰⁸

The EEA states that people with disabilities, black people and women fall within the meaning of people from designated groups.¹⁰⁹ Chapter 2 of the EEA contains the provisions governing the elimination and prohibition of unfair discrimination. Chapter 3 of the EEA contains the provisions governing affirmative action. Chapter 2 applies to all employees and to all

¹⁰⁶ Section 9(3)-(4) of the Constitution of the Republic of South Africa, 1996.

¹⁰⁷ Section 9(4) of the Constitution of the Republic of South Africa, 1996.

¹⁰⁸ Section 2 of the Employment Equity Act 55 of 1998.

¹⁰⁹ Section 1 of the Employment Equity Act 55 of 1998. Section (1) of the Employment Equity Amendment Act 47 of 2013 states that designated groups are people with disabilities, black people and women who ‘(a) are citizens of the Republic of South Africa by birth or descent; or (b) became citizens of the Republic of South Africa by naturalisation— (i) before 27 April 1994; or (ii) after 26 April 1994 and who would have been entitled to acquire citizenship by naturalisation prior to that date but who were precluded by apartheid policies.’

employers¹¹⁰ with the exception of members of the National Defence Force, the National Intelligence Agency, and the South African Secret Service.¹¹¹ Chapter 3 of the EEA only applies to designated employers and people from designated groups.¹¹² A designated employer is an employer who:

‘employs 50 or more employees; a municipality; an organ of state [excluding the exceptions]; or an employer bound by a collective agreement which appoints it as a designated employer’.¹¹³

The EEA should be interpreted in manner that is in compliance with the Constitution¹¹⁴ to give effect to its purpose¹¹⁵ by considering any relevant Code of Good Practice that is issued in terms of the EEA or any other employment law,¹¹⁶ and in compliance with the international law obligations of the Republic of South Africa, in particular the obligations that are contained in Convention 111.¹¹⁷

The laws governing the elimination of unfair discrimination against persons with disabilities and affirmative action are discussed below.

2.3.3.1 ELIMINATION OF UNFAIR DISCRIMINATION

Section 5 of the EEA deals with the elimination of unfair discrimination. It states:

‘Every employer must take steps to promote equal opportunity in the workplace by eliminating unfair discrimination in any employment policy or practice.’¹¹⁸

The EEA states that:

‘no person may unfairly discriminate, directly or indirectly, against an employee, in any employment policy or practice, on one or more grounds, including race, gender, sex, pregnancy, marital status, family responsibility, ethnic or social origin, colour, sexual orientation, age,

¹¹⁰ Section 4(1) of the Employment Equity Act 55 of 1998.

¹¹¹ Section 4(3) of the Employment Equity Act 55 of 1998.

¹¹² Section 12 of the Employment Equity Act 55 of 1998.

¹¹³ Section 1 of the Employment Equity Amendment Act 4 of 2022.

¹¹⁴ Section 3(a) of the Employment Equity Act 55 of 1998.

¹¹⁵ Section 3(b) of the Employment Equity Act 55 of 1998.

¹¹⁶ Section 3(c) of the Employment Equity Act 55 of 1998.

¹¹⁷ Section 3(d) of the Employment Equity Act 55 of 1998.

¹¹⁸ Section 5 of the Employment Equity Act 55 of 1998.

disability, religion, HIV status, conscience, belief, political opinion, culture, language, and birth, or on any other arbitrary ground.’¹¹⁹

The grounds that are specifically mentioned in section 6(1), are known as listed grounds. The wording of ‘or on any other arbitrary ground’ refers to a ground that is ‘relied upon that must be analogous to a listed ground of discrimination as in section 6(1), in the sense that it has the potential to impair upon human dignity in a comparable manner or have a similar serious consequence’.¹²⁰ The EEA was amended and includes that a ‘difference in the terms and conditions of employment between employees of the same employer performing the same or substantially the same work or work of equal value that is directly or indirectly based on any one or more of the grounds listed in section 6(1) is unfair discrimination’.¹²¹ There are now consequences for treating employees differently that perform the same work as those who are not disabled as a result of their disability.¹²²

Employees are protected in terms of section 6 of the EEA, because it prohibits any person from unfairly discriminating, either directly or indirectly against an employee on the ground of disability in any employment practice or policy. To establish the presence of unfair discrimination, the first step is to determine whether discrimination is present. The second step is to determine whether the discrimination is unfair. The meaning of ‘discrimination’ and ‘unfairness’ is discussed below.

2.3.3.1.1 Defining the concept discrimination

Convention 111 provides a definition of discrimination whereas the Constitution and EEA does not. The term discrimination includes ‘any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction, or social origin’.¹²³ The distinction, exclusion or preference ‘must have an effect of nullifying or impairing equality of opportunity or treatment in employment or occupation’.¹²⁴

¹¹⁹ Section 6(1) of the Employment Equity Amendment Act 47 of 2013.

¹²⁰ *Naidoo v Parliament of the Republic of South Africa* [2019] 3 BLLR 291 (LC) para 15.

¹²¹ Section 6(4) of the Employment Equity Amendment Act 47 of 2013.

¹²² According to the section 27(2) of the Employment Equity Act 47 of 2013, a designated employer must take measures to progressively reduce income differentials if such unfair discrimination has been identified.

¹²³ Article 1(1) of the International Labour Organisation Discrimination (Employment and Occupation) Convention 111 of 1958.

¹²⁴ Article 1(1) of the International Labour Organisation Discrimination (Employment and Occupation) Convention 111 of 1958.

The objective of preventing unfair discrimination would be subverted if a complainant had to prove that they were unfairly discriminated against and that the unfair discrimination was intentional.¹²⁵ Therefore, the perpetrator's intention is irrelevant in determining whether there was discrimination. 'People with disabilities' can be defined as 'people who have a long-term or recurring physical, mental, intellectual or sensory impairment which, in interaction with various barriers, may substantially limit their prospects of entry into, or advancement in, employment'.¹²⁶ Ngwena argues that long term or recurring indicates that protection is only provided to those persons with disabilities that are more permanent or lasting, or more 'enduring enough to cause them to experience real or significant obstacles in entering or advancing in employment'.¹²⁷ In *Smith v Kit Kat Group (Pty) Ltd* (2017) 38 ILJ 483 (LC), the applicant suffered a loss of a part of his body (disfigurement of facial features) and clear speech impairment, consequently resulting in his condition being permanent and being classified as a person with a disability.¹²⁸ The employee was a person who had a physical impairment which was long term or recurring. The Labour Court held that the injuries that the employee suffered and the effect thereof left the applicant with a disability and worthy of protection in terms of the EEA.¹²⁹ Discrimination can be direct or indirect.

2.3.3.1.2 Direct discrimination

Direct discrimination 'occurs when adverse action is taken against people precisely because they possess one of the characteristics listed in section 6 of the EEA, or comparable attributes'.¹³⁰ Direct discrimination does not have to be intentional.¹³¹

In the case of *McMahon v BDFM Publishers (Pty) Ltd*, the applicant was shot during a car hijacking on her way home from work, resulting in the applicant being paralysed from the waist

¹²⁵ *City Council of Pretoria v Walker* (CCT8/97) [1998] ZACC 1 para 43.

¹²⁶ Section 1(c) of the Employment Equity Amendment Act 4 of 2022.

¹²⁷ Ngwena C '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* 228.

¹²⁸ *Smith v Kit Kat Group (Pty) Ltd* (2017) 38 ILJ 483 (LC) para 40.

¹²⁹ *Smith v Kit Kat Group (Pty) Ltd* (2017) 38 ILJ 483 (LC) para 38. The Labour Court reached this conclusion by relying on the scope of protection for persons with disabilities in terms of the Disability Code.

¹³⁰ Grogan J *Workplace Law* 13 ed (2020) 78.

¹³¹ Du Toit D et al *Labour Relations Law: A Comprehensive Guide* 6 ed (2015) 668.

down and being placed in a wheelchair.¹³² The applicant returned to work for three hours a day, however it was stated that the employee should work until 17h00.¹³³ The applicant then requested to work from home however only for a portion of her working day which was denied due to security issues.¹³⁴ There were a number of other employees that were working from home on a full-time basis and the applicant alleged discrimination on the ground of her disability.¹³⁵ The applicant alleged that the respondent discriminated against her on the ground of disability in respect of remuneration increases, pressure to return to work, pressure to return to return to work on a full-time basis under a threat of financial penalty if she did not and by failing to reasonably accommodate her as a result of her disability.¹³⁶ The applicant argued that the respondent failed to comply with its duty of reasonable accommodation and ensuring the necessary adjustments were made for the applicant to work from home for a portion of her working day to enable her working in its employment and retaining her employment.¹³⁷ The respondent argued that this was not the case and that its statutory obligation was fulfilled namely, consultation with the employee and a phased return to work.¹³⁸ The respondent further argued that allowing the applicant to work from home for a portion of her working day would impose an unjustifiable hardship on the business, but the Labour Court argued that this argument had no basis.¹³⁹ The Labour Court held that the respondent failed to accommodate the needs of the applicant and expected the applicant to perform the same duties that the abled bodied employees could do.¹⁴⁰ The Labour Court held that if the applicant did not have a disability she would have received an annual salary increase.¹⁴¹ The applicant successfully proved a causal link between the differentiation and her disability.¹⁴² The Labour Court was satisfied that the applicant proved that she was unfairly discriminated against on grounds of her disability.¹⁴³

¹³² *McMahon v BDFM Publishers (Pty) Ltd* (PS53/17) [2019] ZAECPEHC 43 (5 July 2019) para 1.

¹³³ *McMahon v BDFM Publishers (Pty) Ltd* (PS53/17) [2019] ZAECPEHC 43 (5 July 2019) para 18.

¹³⁴ *McMahon v BDFM Publishers (Pty) Ltd* (PS53/17) [2019] ZAECPEHC 43 (5 July 2019) para 19.

¹³⁵ *McMahon v BDFM Publishers (Pty) Ltd* (PS53/17) [2019] ZAECPEHC 43 (5 July 2019) para 19.

¹³⁶ *McMahon v BDFM Publishers (Pty) Ltd* (PS53/17) [2019] ZAECPEHC 43 (5 July 2019) para 5.

¹³⁷ *McMahon v BDFM Publishers (Pty) Ltd* (PS53/17) [2019] ZAECPEHC 43 (5 July 2019) para 20.

¹³⁸ *McMahon v BDFM Publishers (Pty) Ltd* (PS53/17) [2019] ZAECPEHC 43 (5 July 2019) para 23.

¹³⁹ *McMahon v BDFM Publishers (Pty) Ltd* (PS53/17) [2019] ZAECPEHC 43 (5 July 2019) para 25.

¹⁴⁰ *McMahon v BDFM Publishers (Pty) Ltd* (PS53/17) [2019] ZAECPEHC 43 (5 July 2019) para 27.

¹⁴¹ *McMahon v BDFM Publishers (Pty) Ltd* (PS53/17) [2019] ZAECPEHC 43 (5 July 2019) para 14.

¹⁴² *McMahon v BDFM Publishers (Pty) Ltd* (PS53/17) [2019] ZAECPEHC 43 (5 July 2019) para 14.

¹⁴³ *McMahon v BDFM Publishers (Pty) Ltd* (PS53/17) [2019] ZAECPEHC 43 (5 July 2019) para 27.

The meaning of direct discrimination protects persons with disabilities. This means that if an employee proves that he or she has been directly discriminated against on the ground of disability by their employer, the employer's reasons for doing so will not be considered.

2.3.3.1.3 Indirect discrimination

The Labour Court has held that indirect discrimination 'occurs when an employer utilises an employment practice that is apparently neutral, but disproportionately affects members of disadvantaged groups in circumstances where it is not justifiable'.¹⁴⁴ Claims of indirect discrimination are not frequently made, because the litigation of such claims are difficult and time-consuming.¹⁴⁵ In *Social Justice Coalition and Others v Minister of Police and Others*, the South African Police Service's system to allocate police human resources unfairly discriminated against poor and black people on the basis of poverty and race.¹⁴⁶ The applicants held that the method of human resource allocation failed to consider that the environmental, social and economic factors were more beneficial to formal areas and historically white areas and less beneficial to informal areas.¹⁴⁷ As a result, the police human resource allocation was skewed and only in favour of privileged and white areas.¹⁴⁸ The Equality Court found that although the theoretical human resource requirement policy was focused on allocating resources on a racially neutral basis, the policy indirectly discriminated against poor and black people on the ground of poverty and race because predominately black areas received inferior services compared to white areas.¹⁴⁹ This case is based on the PEPUDA but it demonstrates how courts deal with alleged claims of indirect discrimination.

Similar to the case with direct discrimination, persons with disabilities are protected by the meaning of indirect discrimination. If an employee proves that he or she has been indirectly discriminated against on the ground of disability, the employer's reasons for doing so will not be considered.

¹⁴⁴ *Police and Prison Rights Union and Others v Department of Correctional Services and Another* (C544/2007) [2010] ZALC 68 para 123.

¹⁴⁵ du Plessis MC *Access to work for disabled persons in South Africa: A rights critique* (2017) 101.

¹⁴⁶ *Social Justice Coalition and Others v Minister of Police and Others* 2019 (4) SA 82 (WCC) para 94.

¹⁴⁷ *Social Justice Coalition and Others v Minister of Police and Others* 2019 (4) SA 82 (WCC) para 51 & 75.

¹⁴⁸ *Social Justice Coalition and Others v Minister of Police and Others* 2019 (4) SA 82 (WCC) para 75.

¹⁴⁹ *Social Justice Coalition and Others v Minister of Police and Others* 2019 (4) SA 82 (WCC) para 76.

2.3.3.1.4 Unfairness

If discrimination is alleged on a ground that is listed in section 6(1), ‘the employer against whom the allegation is made must prove, on a balance of probabilities, that such discrimination firstly, did not take place as alleged or secondly that such discrimination is rational and not unfair and otherwise justifiable’.¹⁵⁰ However, if the alleged discrimination is based ‘on an arbitrary ground, the complainant must prove, on a balance of probabilities, that the conduct complained of is not rational, the conduct complained of amounts to discrimination and that the discrimination is unfair’.¹⁵¹ In *Solidarity & Others v Department of Correctional Services & Others (Police & Prisons Civil Rights Union & Another as Amici Curiae)*, the Department of Correctional Services adopted an employment equity plan that set out numerical targets that had to be achieved over a five-year period.¹⁵² The Department of Correctional Services advertised certain positions, which the applicants applied for, and some were recommended however not appointed.¹⁵³ The reasons for the appointments being denied was due to overrepresentation of women and coloured males in the relevant occupational levels.¹⁵⁴ The applicants relied on section 6(1) of the EEA and claimed that the refusal of appointment constituted unfair discrimination.¹⁵⁵ The Constitutional Court held that:

‘[o]ne cannot “prove, on a balance of probabilities”, that anything is “rational and not unfair or is otherwise justifiable”, because it is only a fact that can be proved. Whether conduct is rational or fair or justifiable is not a question of fact but a value judgment. I shall take section 11(1)(b) to require that the employer must show that the discrimination was rational and not unfair or is otherwise justifiable. Since the Department’s understanding that Coloured people and women were overrepresented in the relevant occupational levels had no lawful basis, the Department has failed to show that the discrimination was rational and not unfair or was otherwise justifiable. In the circumstances, the conclusion is inescapable that the Department’s decisions in refusing to appoint the Coloured and female individual applicants constituted acts of unfair discrimination.’¹⁵⁶

¹⁵⁰ Section 11(1) of the Employment Equity Amendment Act 47 of 2013.

¹⁵¹ Section 11(2) of the Employment Equity Amendment Act 47 of 2013.

¹⁵² *Solidarity & Others v Department of Correctional Services & Others (Police & Prisons Civil Rights Union & Another as Amici Curiae)* (2016) 37 ILJ 1995 (CC) para 4-5.

¹⁵³ *Solidarity & Others v Department of Correctional Services & Others (Police & Prisons Civil Rights Union & Another as Amici Curiae)* (2016) 37 ILJ 1995 (CC) para 6.

¹⁵⁴ *Solidarity & Others v Department of Correctional Services & Others (Police & Prisons Civil Rights Union & Another as Amici Curiae)* (2016) 37 ILJ 1995 (CC) para 6.

¹⁵⁵ *Solidarity & Others v Department of Correctional Services & Others (Police & Prisons Civil Rights Union & Another as Amici Curiae)* (2016) 37 ILJ 1995 (CC) para 65.

¹⁵⁶ *Solidarity & Others v Department of Correctional Services & Others (Police & Prisons Civil Rights Union & Another as Amici Curiae)* (2016) 37 ILJ 1995 (CC) para 82.

In *Wildschutt v Witzenberg Municipality and another*, the applicant was allegedly told to apply for a position in the municipality as a person with a disability, however he was unsuccessful.¹⁵⁷ The applicant alleged that he applied for the position as a person with a disability, because he was encouraged by the respondent's employment equity profile that reflected a shortage of persons with disabilities and as a result of a statement that appeared in the advertisement in respect of the position.¹⁵⁸ The applicant argued that he would have been appointed if the municipality processed his application for the job in accordance with the EEA.¹⁵⁹ The applicant stated that the EEA is based on law and not the re-appointment policy of the respondent and since the municipality supported and recognised his disability status, the provisions of the EEA should have been implemented by giving the applicant preferential treatment.¹⁶⁰ The applicant alleged that the Disability Code was there to determine if he was suitably qualified for the job and not whether he was the best candidate as the municipality did.¹⁶¹ The municipality argued that the applicant was given a fair opportunity against the other candidates and that there was never any unfair discrimination.¹⁶² The Commission for Conciliation, Mediation and Arbitration (CCMA) held that:

'The EEA prohibits an employer [from] unfairly [discriminating] directly or indirectly against an employee on various grounds including disability and political opinion as alleged in this case. When a person alleges disability and political opinion, being "listed" grounds of discrimination, the starting point in order to succeed with this claim under the EEA is that the evidence must show that the employee is subjected to either direct or indirect acts of unfair discrimination in order to determine whether there was a distinction drawn between who is alleging discrimination and other employees in the same circumstance as the applicant. The reason given by the applicant must then be shown to be the reason for the differential treatment and that it amounts to discrimination as the application of this factor serves no other purpose but to differentiate, there is no reasonable or legal justification for utilising this factor, it is morally offensive and has the potential to impair the fundamental human dignity of the applicant as human beings or to affect them adversely in a comparably serious manner.'¹⁶³

The evidence that was provided only showed that he was supposed to be appointed because the applicant had a disability that suggested an entitlement due to his disability and did not show

¹⁵⁷ *Wildschutt v Witzenberg Municipality and another* [2017] 3 BALR 351 (CCMA) para 7-8.

¹⁵⁸ *Wildschutt v Witzenberg Municipality and another* [2017] 3 BALR 351 (CCMA) para 8.

¹⁵⁹ *Wildschutt v Witzenberg Municipality and another* [2017] 3 BALR 351 (CCMA) para 9.

¹⁶⁰ *Wildschutt v Witzenberg Municipality and another* [2017] 3 BALR 351 (CCMA) para 12.

¹⁶¹ *Wildschutt v Witzenberg Municipality and another* [2017] 3 BALR 351 (CCMA) para 13.

¹⁶² *Wildschutt v Witzenberg Municipality and another* [2017] 3 BALR 351 (CCMA) para 22.

¹⁶³ *Wildschutt v Witzenberg Municipality and another* [2017] 3 BALR 351 (CCMA) para 25.

that he was not appointed because of his disability.¹⁶⁴ The municipality provided evidence that the applicant was not discriminated against due to his disability.¹⁶⁵ In fact, the disability of the applicant was considered (he did an oral assessment instead of a written assessment).¹⁶⁶ The appellant was not appointed because he was not a suitable candidate.¹⁶⁷ The municipality successfully showed that there was no discrimination and the applicant failed in his claim to show that there was disability discrimination.¹⁶⁸

Persons with disabilities are protected by the provisions in the EEA. Where an employee institutes a claim of unfair discrimination on the ground of disability, the onus is on the employer to prove that this is not the case. Inherent requirements of the job and affirmative action are two defences that employers may raise in response to a claim of unfair discrimination.

2.3.3.2 DEFENCES THAT MAY BE RAISED BY AN EMPLOYER

It is evident from the contents of section 6 of the EEA that an employer may raise two defences, namely inherent requirements of the job and affirmative action measures, to show that the discrimination against an employee was not unfair.

2.3.3.2.1 Inherent requirements of the job

It is not unfair discrimination ‘to distinguish, exclude or prefer any person on the basis of an inherent requirements of a job’.¹⁶⁹ An employer can show that his actions against the employee was not unfair due to the inherent requirements of the job. The term ‘inherent requirement’ is not defined by the EEA. The Disability Code refers to ‘inherent requirements of the job’ ‘as those requirements the employer stipulates as necessary for a person to be appointed to the job, and are necessary in order to enable an employee to perform the essential functions of the

¹⁶⁴ *Wildschutt v Witzenberg Municipality and another* [2017] 3 BALR 351 (CCMA) para 28.

¹⁶⁵ *Wildschutt v Witzenberg Municipality and another* [2017] 3 BALR 351 (CCMA) para 35.

¹⁶⁶ *Wildschutt v Witzenberg Municipality and another* [2017] 3 BALR 351 (CCMA) para 29.

¹⁶⁷ *Wildschutt v Witzenberg Municipality and another* [2017] 3 BALR 351 (CCMA) para 29.

¹⁶⁸ *Wildschutt v Witzenberg Municipality and another* [2017] 3 BALR 351 (CCMA) para 30.

¹⁶⁹ Section 6(2)(b) of the Employment Equity Act 55 of 1998.

job'.¹⁷⁰ The Disability Code does not state what constitutes the essential functions of the job, however states that 'an employer may not include criteria that [are] not necessary to perform the essential functions of the job, because selection based on non-essential functions may unfairly exclude persons with disabilities'.¹⁷¹

In *Damons v City of Cape Town*, Mr Damons (applicant) was permanently injured while on duty as a firefighter because the City of Cape Town (respondent) during a fire drill ignored certain safety measures.¹⁷² This injury resulted in the applicant's permanent disability.¹⁷³ An incapacity assessment was done to determine the extent and nature of the incapacity as well as whether it is possible to adapt the work conditions to accommodate the disability.¹⁷⁴ As a result of the incapacity assessment, the applicant was transferred to a more administrative and educational unit, while retaining the status as a firefighter and salary level.¹⁷⁵ After years of not being promoted, the applicant applied for a senior firefighter position and asked the respondent to relax the physical fitness requirement in the policy.¹⁷⁶ Conciliation was unsuccessful and the applicant instituted an unfair discrimination claim in the Labour Court claiming that the respondent's policy precluded him from advancing to a senior firefighter position and also discriminates against the applicant on the ground of disability in terms of section 6 of the EEA.¹⁷⁷ The respondent raised the defence of an inherent requirement of the job as far as the physical requirement is concerned.¹⁷⁸ The respondent also stated that there was no blanket ban in the policy to exclude the applicant and that the applicant was excluded on an individual basis because he could not pass the physical assessment requirement.¹⁷⁹ According to the Labour Court, applying the policy to the applicant prohibited him from advancing due to his disability and constituted unfair discrimination under section 6(1) of the EEA.¹⁸⁰ The Labour Appeal Court held that the applicant was a person with a disability because 'the injury constitutes a disability for the purposes of the EEA, in that it is a long term physical impairment which

¹⁷⁰ Item 7.1.2 of the Code of Good Practice on the Employment of Persons with Disabilities (GN 1085 in GG 39383 of 7 November 2015).

¹⁷¹ Item 7.1.6 of the Code of Good Practice on the Employment of Persons with Disabilities (GN 1085 in GG 39383 of 7 November 2015).

¹⁷² *Damons v City of Cape Town* [2022] 7 BLLR 585 (CC) para 1.

¹⁷³ *Damons v City of Cape Town* [2022] 7 BLLR 585 (CC) para 2.

¹⁷⁴ *Damons v City of Cape Town* [2022] 7 BLLR 585 (CC) para 4.

¹⁷⁵ *Damons v City of Cape Town* [2022] 7 BLLR 585 (CC) para 5.

¹⁷⁶ *Damons v City of Cape Town* [2022] 7 BLLR 585 (CC) para 6.

¹⁷⁷ *South African Municipal Workers Union obo Damons v City of Cape Town* [2018] 8 BLLR 829 (LC) para 1.

¹⁷⁸ *South African Municipal Workers Union obo Damons v City of Cape Town* [2018] 8 BLLR 829 (LC) para 14.

¹⁷⁹ *South African Municipal Workers Union obo Damons v City of Cape Town* [2018] 8 BLLR 829 (LC) para 14 & 15.

¹⁸⁰ *South African Municipal Workers Union obo Damons v City of Cape Town* [2018] 8 BLLR 829 (LC) para 23.

resulted in his inability to perform the duties of an active firefighter'.¹⁸¹ The Labour Appeal Court had to determine whether an employee with a disability was subjected to unfair discrimination directly or indirectly as a result of an employment policy which was in breach of section 6(1) of the EEA.¹⁸² The Labour Appeal Court also relied on the Disability Code in its decision, stating that the applicant could not fulfil the essential functions of an active firefighter and that it would not be in the public's interest to have a firefighter that is unable to control a fire outbreak.¹⁸³ The Labour Appeal Court therefore held that there was no claim of unfair discrimination in terms of section 6(1) of the EEA and set aside the decision of the Labour Court.¹⁸⁴ The matter was taken to the Constitutional Court where it was held in the minority judgement that the Constitutional Court was required to determine whether the respondent unfairly discriminated against the applicant on the grounds of his disability and whether the respondent has a duty to reasonably accommodate the applicant.¹⁸⁵ The respondent argued that it did not have a duty to reasonably accommodate the applicant because of the defence of inherent requirements of a job.¹⁸⁶ In the minority judgement it was held that reasonable accommodation was a means to promote substantive equality and to eliminate and prohibit discrimination and therefore failing to provide reasonable accommodation would undermine these objectives and would constitute unfair discrimination.¹⁸⁷ Pillay AJ in the minority judgment held:

'In my view, the respondent's refusal to reasonably accommodate the applicant is discrimination. The discrimination is direct, unfair and automatic because it is on the ground of disability. The onus to prove that the discrimination on a specified ground is not unfair rests on the respondent. The inherent requirement of a job defence is justification for not employing the applicant as an operational firefighter. It is not justification for refusing to reasonably accommodate the applicant in non-operational functions with prospects for advancement. Consequently, the respondent is in breach of sections 5 and 6(1) of the EEA in that its refusal to reasonably accommodate the applicant in a job, with prospects for advancement, for which physical fitness is not required, amounts to unfair and unjustifiable discrimination of the applicant as a person with disabilities.'¹⁸⁸

¹⁸¹ *City of Cape Town v SA Municipal Workers Union obo Damons* [2020] 9 BLLR 875 (LAC) para 1.

¹⁸² *City of Cape Town v SA Municipal Workers Union obo Damons* [2020] 9 BLLR 875 (LAC) para 1.

¹⁸³ *City of Cape Town v SA Municipal Workers Union obo Damons* [2020] 9 BLLR 875 (LAC) para 18.

¹⁸⁴ *City of Cape Town v SA Municipal Workers Union obo Damons* [2020] 9 BLLR 875 (LAC) para 19.

¹⁸⁵ *Damons v City of Cape Town* [2022] 7 BLLR 585 (CC) para 34.

¹⁸⁶ *Damons v City of Cape Town* [2022] 7 BLLR 585 (CC) para 34.

¹⁸⁷ *Damons v City of Cape Town* [2022] 7 BLLR 585 (CC) para 82.

¹⁸⁸ *Damons v City of Cape Town* [2022] 7 BLLR 585 (CC) para 105.

In the majority judgment it was held that the applicant requested that the physical fitness requirement in the policy to be waived in order to advance to a senior firefighter position without meeting the requirement.¹⁸⁹ The applicant further argued that the policy unfairly discriminated against persons with disabilities.¹⁹⁰ The respondent primarily relied on section 6(2)(b) of the EEA which states that distinguishing, preferring or excluding any person on the basis on the inherent requirement of the job (in the case, a senior firefighter position) is not unfair discrimination.¹⁹¹ It was crystal clear that the issue before the court was the physical fitness requirement in the policy and whether the respondent's application of the policy to the applicant constituted unfair discrimination and nothing more.¹⁹² It held that the Labour Court, Labour Appeal Court and the minority judgment was correct in stating that section 6(2)(b) of the EEA provides a complete defence to the claim of unfair discrimination and the matter should have ended at the Labour Appeal Court.¹⁹³ Majiedt J in the majority judgment did not agree with the reasoning of the duty of reasonable accommodation in the minority judgment. According to the majority judgment, the Disability Code mandates employers to provide reasonable accommodations for the needs of employees with disabilities and that the objective of the reasonable accommodations are to lessen the effect of the employee's impairment of the person's capacity to perform the essential functions of the job.¹⁹⁴ The duty of reasonable accommodation only apply where the employee will be able to fulfil the 'inherent requirements of the job'.¹⁹⁵ If more accommodation is needed, it would no longer be reasonable because it requires an employer to provide employment to someone who cannot execute 'the inherent requirements of the job'.¹⁹⁶ Majiedt J therefore held that:

'In this case, it is common cause that the applicant cannot meet the inherent requirements of the job of a senior firefighter. It is also not contested that no amount of reasonable accommodation will enable the applicant to meet the inherent requirement of physical fitness for a senior firefighter. Section 6(2)(a) would not avail the applicant since, at most, it would require the respondent to reasonably accommodate him. In the present instance, once the respondent has

¹⁸⁹ *Damons v City of Cape Town* [2022] 7 BLLR 585 (CC) para 125.

¹⁹⁰ *Damons v City of Cape Town* [2022] 7 BLLR 585 (CC) para 124.

¹⁹¹ *Damons v City of Cape Town* [2022] 7 BLLR 585 (CC) para 127.

¹⁹² *Damons v City of Cape Town* [2022] 7 BLLR 585 (CC) para 131.

¹⁹³ *Damons v City of Cape Town* [2022] 7 BLLR 585 (CC) para 139.

¹⁹⁴ *Damons v City of Cape Town* [2022] 7 BLLR 585 (CC) para 141.

¹⁹⁵ *Damons v City of Cape Town* [2022] 7 BLLR 585 (CC) para 141.

¹⁹⁶ *Damons v City of Cape Town* [2022] 7 BLLR 585 (CC) para 141.

successfully raised the defense that physical fitness is an inherent requirement of the post of a senior firefighter, the question of reasonable accommodation falls away.¹⁹⁷

The aforementioned case is an example of a situation in which the employer raised an inherent requirement of the job as a defence and showed that the duty of reasonable accommodation only arises if the reasonable accommodation would allow a person with a disability to do the essential functions of a job.

2.3.3.2.2 Affirmative action measures

Designated employers have a duty to implement affirmative action measures for people from designated groups to achieve employment equity and affirmative action may be raised as a defence.¹⁹⁸

Affirmative action measures are defined as measures that ‘are designed to ensure that suitably qualified people from designated groups have equal employment opportunities and are equitably represented in all occupational levels in the workforce of a designated employer’.¹⁹⁹

Section 15(2) of the EEA states that affirmative action measures must include:

- ‘(a) measures to identify and eliminate employment barriers, including unfair discrimination, which adversely affect people from designated groups;
- (b) measures designed to further diversity in the workplace based on equal dignity and respect of all people;
- (c) making reasonable accommodation for people from designated groups in order to ensure that they enjoy equal opportunities and are equitably represented in the workforce of a designated employer;
- (d) subject to subsection (3), measures to
- (i) ensure the equitable representation of suitably qualified people from designated groups in all occupational categories and levels in the workforce; and

¹⁹⁷ *Damons v City of Cape Town* [2022] 7 BLLR 585 (CC) para 142.

¹⁹⁸ Section 13(1) of the Employment Equity Act 55 of 1998.

¹⁹⁹ Section 15(1) of the Employment Equity Amendment Act of 47 of 2013.

(ii) retain and develop people from designated groups and to implement appropriate training measures, including measures in terms of an Act of Parliament providing for skills development.²⁰⁰

Each of these affirmative action measures will be discussed in detail below.

2.3.3.2.2.1.1 Measures to identify and eliminate employment barriers

The term ‘employment barriers’ is not defined in the EEA. However, it is submitted that it includes ‘any criterion that is used in the context of an employment policy or practice, or any aspect of the physical or psychological working environment which presents an unfair or unreasonable obstacle to the employment or advancement of people with disabilities’.²⁰¹ Employment barriers are identified during the consultation process that takes place between the employees and designated employer.²⁰² Employment barriers ‘may include barriers that contribute to the underrepresentation or underutilisation of employees from designated groups,²⁰³ barriers that may contribute to the lack of affirmation of diversity in the workplace,²⁰⁴ or other employment conditions that may adversely affect designated groups’.²⁰⁵ The designated employer is required to eliminate employment barriers that are identified.²⁰⁶

Research shows that persons with disabilities face barriers that limit their ability to participate in economic activities.²⁰⁷ These barriers include a lack of skills due to a lack of basic education

²⁰⁰ Section 15(2) of the Employment Equity Act 55 of 1998.

²⁰¹ Du Toit D et al *Labour Relations Law: A Comprehensive Guide* 6 ed (2015) 749.

²⁰² This is required by section 16 and 19 of the Employment Equity Amendment Act 47 of 2013.

²⁰³ Item 6.1.3.1(b)(i) Code of Good Practice: Preparation, Implementation and Monitoring of Employment Equity Plans GN 424 in GG 40840 of 12 May 2017.

²⁰⁴ Item 6.1.3.1(b)(ii) Code of Good Practice: Preparation, Implementation and Monitoring of Employment Equity Plans GN 424 in GG 40840 of 12 May 2017.

²⁰⁵ Item 6.1.3.1(b)(iii) Code of Good Practice: Preparation, Implementation and Monitoring of Employment Equity Plans GN 424 in GG 40840 of 12 May 2017.

²⁰⁶ Section 15(2)(a) of the Employment Equity Act 55 of 1998.

²⁰⁷ Tinta N, Steyn H & Vermaas J ‘Barriers experienced by people with disabilities participating in income-generating activities. A case of a sheltered workshop in Bloemfontein, South Africa’ (2020) 9 *African Journal of Disability* 1.

or quality of training received were poor²⁰⁸, a lack of application and monitoring of the EEA and a lack of funds for skills training and for reasonable accommodation.²⁰⁹

2.3.3.2.2.1.2 Measures designed to further diversity in the workplace

Diversity is not defined by the EEA. However, diversity is the range of human differences, including but not limited to ethnicity, race, sexual orientation, age, social class, physical ability, or attributes, gender, gender identity, religious or ethical values system, national origin, and political beliefs.²¹⁰ In *City of Tshwane Metropolitan Municipality v Afriforum* the Constitutional Court held:

‘All of us must embrace and internalise the constitutional reality that this country belongs to all of us who live in it. Diversity thus ought to highlight the need for unity rather than reinforce the inclination to stand aloof and be separatist. An appreciation of the value-addition or special contribution of diversity, as in other countries, should strengthen our collective resolve to unite and tap into the special skills and experiences of all diverse groups in this country, for the betterment of all.’²¹¹

There are many benefits of diversity. Diversity boosts creativity and problem solving, promotes inclusivity and enhances performance.²¹² A study conducted revealed that employees appreciate circumstances where they form part of a diverse workforce and that diversity enhances not only innovation but productivity.²¹³ The study also revealed that 75 per cent of employees felt that ‘affirmative action is a positive measure that supports diversity’.²¹⁴ A

²⁰⁸ Tinta N, Steyn H & Vermaas J ‘Barriers experienced by people with disabilities participating in income-generating activities. A case of a sheltered workshop in Bloemfontein, South Africa’ (2020) 9 *African Journal of Disability* 6.

²⁰⁹ Tinta N, Steyn H & Vermaas J ‘Barriers experienced by people with disabilities participating in income-generating activities. A case of a sheltered workshop in Bloemfontein, South Africa’ (2020) 9 *African Journal of Disability* 2.

²¹⁰ Ferris State University ‘Diversity and Inclusion Definitions’ available at <https://www.ferris.edu/administration/president/DiversityOffice/Definitions.htm> (accessed on 1 May 2021).

²¹¹ *City of Tshwane Metropolitan Municipality v Afriforum* 2016 (9) BCLR 1133 (CC) para 7.

²¹² Mazibuko JV & Govender KK ‘Exploring workplace diversity and organisational effectiveness: A South African exploratory case study’ (2017) 15(0) *South African Journal of Human Resource Management* 865-868.

²¹³ Mazibuko JV & Govender KK ‘Exploring workplace diversity and organisational effectiveness: A South African exploratory case study’ (2017) 15(0) *South African Journal of Human Resource Management* 868.

²¹⁴ Mazibuko JV and Govender KK ‘Exploring workplace diversity and organisational effectiveness: A South African exploratory case study’ (2017) 15(0) *South African Journal of Human Resource Management* 870.

designated employer is obligated to implement affirmative action measures that are designed to further diversity in the workplace, which includes persons with disabilities.

2.3.3.2.2.1.3 Making reasonable accommodation for people from designated groups

Ngwena states that the concept of reasonable accommodation goes beyond eliminating barriers for persons with disabilities and is more about adopting proactive measures to adjust, modify or adopt the workplace environment, practices, structures or policies to make entry, advancement or employment for persons with disabilities easier.²¹⁵ Reasonable accommodation means ‘any modification or adjustment to a job or to the working environment that will enable a person from a designated group to have access to, or participate, or advance in employment’.²¹⁶ The Disability Code is only a guideline and creates no obligations or rights, but courts and tribunals must consult the Disability Code to apply and interpret the EEA.²¹⁷ The Disability Code should be used by employers to establish, implement and modify disability equity policies and programmes to meet workplace demands.²¹⁸ Employers are not allowed to retain employees with disabilities under less favourable terms and conditions than employees doing the same work, for disability-related reasons.²¹⁹ The scope of protection for persons with disabilities focuses on the impact of disability on the person in relation to the working environment.²²⁰ The Disability Code therefore approaches disability as a social construct.

Employers should ‘reasonably accommodate the needs of persons with disabilities’ in order ‘to reduce the impact of the impairment of the person’s capacity to fulfil the essential functions of a job’.²²¹ Therefore, employers are required to assess and adopt cost and qualitative measures that are in line with the removal of barriers to job performance and to gain equal access to

²¹⁵ Ngwena C ‘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* 179.

²¹⁶ Section 1 of the Employment Equity Act 55 of 1998.

²¹⁷ Item 3.1 of the Code of Good Practice on the Employment of Persons with Disabilities (GN 1085 in GG 39383 of 7 November 2015).

²¹⁸ Item 3.4 of the Code of Good Practice on the Employment of Persons with Disabilities (GN 1085 in GG 39383 of 7 November 2015).

²¹⁹ Item 7.5.1 (b) of the Code of Good Practice on the Employment of Persons with Disabilities (GN 1085 in GG 39383 of 7 November 2015).

²²⁰ Item 5.3 of the Code of Good Practice on the Employment of Persons with Disabilities (GN 1085 in GG 39383 of 7 November 2015).

²²¹ Item 6.1 of the Code of Good Practice on the Employment of Persons with Disabilities (GN 1085 in GG 39383 of 7 November 2015).

employment benefits and opportunities.²²² However, only job applicants and employees with disabilities who are suitably qualified for the position are subject to the reasonable accommodation requirements.²²³ The employee with a disability is only required to be reasonably accommodated if he or she voluntarily discloses the disability²²⁴ to the employer or that the disability is reasonably self-evident to the employer.²²⁵

The Disability Code states that reasonable accommodation includes but is not limited to:

‘adapting existing facilities to make them accessible, adapting existing equipment or acquiring new equipment such as computer hard or software, re-organising workstations, changing training and assessment materials and systems, restructuring jobs so that non-essential functions are re-assigned, adjusting working time and leave, and providing specialised supervision, training, and support in the workplace’.²²⁶

The Disability Code does not provide examples of each type of reasonable accommodation. However, the specific accommodation may vary depending on the individual, the nature and degree of the impairment and the impact it has not only on the person but the job and workplace as well.²²⁷ The employer may reasonably accommodate the employee either temporarily or permanently depending on the extent and nature of the disability.²²⁸ An employer is not compelled to accommodate employees with disabilities if doing so would cause ‘unjustifiable hardship’ on the employer’s business.²²⁹ Where an employer fails to comply with the Disability Code, the employer cannot be held accountable in any legal proceedings rather, the Disability Code exists to provide guidance to employers on how to identify and manage disability in the

²²² Item 6.2 of the Code of Good Practice on the Employment of Persons with Disabilities (GN 1085 in GG 39383 of 7 November 2015).

²²³ Item 6.3 of the Code of Good Practice on the Employment of Persons with Disabilities (GN 1085 in GG 39383 of 7 November 2015).

²²⁴ A new employee who wishes to disclose their disability, must do so according to the declaration by employee form. This is also known as the EEA1 form and can be found in the Employment Equity Regulations (GN 998 in GG 41932 of 21 September 2018).

²²⁵ Item 6.4 of the Code of Good Practice on the Employment of Persons with Disabilities (GN 1085 in GG 39383 of 7 November 2015).

²²⁶ Item 6.9 of the Code of Good Practice on the Employment of Persons with Disabilities (GN 1085 in GG 39383 of 7 November 2015).

²²⁷ Item 6.7 of the Code of Good Practice on the Employment of Persons with Disabilities (GN 1085 in GG 39383 of 7 November 2015).

²²⁸ Item 6.8 of the Code of Good Practice on the Employment of Persons with Disabilities (GN 1085 in GG 39383 of 7 November 2015).

²²⁹ Item 6.11 of the Code of Good Practice on the Employment of Persons with Disabilities (GN 1085 in GG 39383 of 7 November 2015).

workplace.²³⁰ Employers are required to take measures to ensure that persons with disabilities are not subjected to unfair discrimination at the workplace.

The TAG were published in addition to the Disability Code. The purpose of TAG is to supplement the Disability Code and to assist with the practical implementation of the relevant provisions of the EEA that relates to the employment of persons with disabilities in the workplace.²³¹ It expanded on the Disability Code by providing employees, employers and trade union practical examples and guidelines on how to promote fair treatment, diversity and equality in the workplace by eliminating unfair discrimination.²³²

TAG describes reasonable accommodation as consisting of three interrelated factors that include first, accommodation that should remove the barriers to performing the job, second, it should allow the person with the disability to enjoy equal access to the benefits and opportunities of employment, and lastly, employers should operate in a cost-effective manner in order to achieve the above criteria.²³³ Where a person cannot fulfil the essential functions of the job even with reasonable accommodation, the employer is not compelled to employ the individual.²³⁴ An employer may be required to reallocate non-essential, marginal job functions in order to restructure the job, but this only applies where an applicant or an employee with a disability is able to execute the essential functions of the job with or without reasonable accommodation.²³⁵ Unless it results in an unjustifiable hardship (action that requires significant or considerable difficulty or expense) for the employer's operational budget, employers have a

²³⁰ Cole EC & Van der Walt A 'The effect of labour legislation in the promotion and integration of persons with disabilities in the labour market' (2014) *Obiter* 522.

²³¹ Department of Labour 'Technical Assistance Guidelines on the Employment of Persons with Disabilities' (2017) available at <https://www.sun.ac.za/english/human-resources/Documents/HR%20WEB%20-%20MHB%20WEB/EMPLOYMENT%20EQUITY/2020/Technical%20Assistance%20Guidelines%20Disabilitie s.pdf> (accessed on 14 November 2021).

²³² Department of Labour 'Technical Assistance Guidelines on the Employment of Persons with Disabilities' (2017) available at <https://www.sun.ac.za/english/human-resources/Documents/HR%20WEB%20-%20MHB%20WEB/EMPLOYMENT%20EQUITY/2020/Technical%20Assistance%20Guidelines%20Disabilitie s.pdf> (accessed on 14 November 2021).

²³³ Item 6.2 of Department of Labour 'Technical Assistance Guidelines on the Employment of Persons with Disabilities' (2017) available at <https://www.sun.ac.za/english/human-resources/Documents/HR%20WEB%20-%20MHB%20WEB/EMPLOYMENT%20EQUITY/2020/Technical%20Assistance%20Guidelines%20Disabilitie s.pdf> (accessed on 14 November 2021).

²³⁴ Item 6.2 of Department of Labour 'Technical Assistance Guidelines on the Employment of Persons with Disabilities' (2017) available at <https://www.sun.ac.za/english/human-resources/Documents/HR%20WEB%20-%20MHB%20WEB/EMPLOYMENT%20EQUITY/2020/Technical%20Assistance%20Guidelines%20Disabilitie s.pdf> (accessed on 14 November 2021).

²³⁵ Item 6.2 of Department of Labour 'Technical Assistance Guidelines on the Employment of Persons with Disabilities' (2017) available at <https://www.sun.ac.za/english/human-resources/Documents/HR%20WEB%20-%20MHB%20WEB/EMPLOYMENT%20EQUITY/2020/Technical%20Assistance%20Guidelines%20Disabilitie s.pdf> (accessed on 14 November 2021).

responsibility to pay for the reasonable accommodation.²³⁶ The TAG is sufficient for employers to understand their obligations towards persons with disabilities in the workplace.

In *Smith v Kit Kat Group*, it was established that the respondent should have consulted with the applicant on ways to reasonably accommodate him, which the respondent failed to do and the Labour Court emphasised how important this engagement is for employers and employees.²³⁷ The Labour Court was required to determine whether the employer making reasonable accommodation for the employee would cause any unjustifiable hardship to the employer if the employer allowed the employee to return to work.²³⁸ The Labour Court held that there was no unjustifiable hardship to the employer if the employee returned to work because no one was employed to fill the employee's position or duties and therefore would not have caused any disruption to the employer's business.²³⁹ The refusal of the respondent to allow the applicant to return to work caused a substantial hardship for the applicant.²⁴⁰ The Labour Court held that the respondent unfairly discriminated against the applicant on the ground of disability.²⁴¹ This case offers guidelines to all employers on how to reasonably accommodate persons with disabilities.²⁴² The aforementioned case highlights the protection that is afforded to persons with disabilities against unfair discrimination in terms of the EEA, the employment barriers to retain persons with disabilities within employment, and the measures which must be taken to eliminate such barriers.²⁴³ The case also further highlighted that disability should be defined within the context of employment barriers which prevent the accommodation of employees with disabilities.²⁴⁴ It was further stated that reasonable accommodation 'focuses on finding alternatives to overcoming the socio-economic barriers which society has placed on disabled employees'.²⁴⁵

²³⁶ Item 6.14.2 of Department of Labour 'Technical Assistance Guidelines on the Employment of Persons with Disabilities' (2017) available at <https://www.sun.ac.za/english/human-resources/Documents/HR%20WEB%20-%20MHB%20WEB/EMPLOYMENT%20EQUITY/2020/Technical%20Assistance%20Guidelines%20Disabilitie s.pdf> (accessed on 14 November 2021).

²³⁷ *Smith v Kit Kat Group (Pty) Ltd* (2017) 38 ILJ 483 (LC) para 59.

²³⁸ *Smith v Kit Kat Group (Pty) Ltd* (2017) 38 ILJ 483 (LC) para 62.

²³⁹ *Smith v Kit Kat Group (Pty) Ltd* (2017) 38 ILJ 483 (LC) para 63.

²⁴⁰ *Smith v Kit Kat Group (Pty) Ltd* (2017) 38 ILJ 483 (LC) para 64.

²⁴¹ *Smith v Kit Kat Group (Pty) Ltd* (2017) 38 ILJ 483 (LC) para 86.

²⁴² Behari A 'Disability and workplace discrimination: *Smith v Kit Kat Group (Pty) Ltd* (2017) 38 ILJ 483 (LC)' (2017) 38 ILJ 2233.

²⁴³ Behari A 'Disability and workplace discrimination: *Smith v Kit Kat Group (Pty) Ltd* (2017) 38 ILJ 483 (LC)' (2017) 38 ILJ 2240.

²⁴⁴ Behari A 'Disability and workplace discrimination: *Smith v Kit Kat Group (Pty) Ltd* (2017) 38 ILJ 483 (LC)' (2017) 38 ILJ 2235.

²⁴⁵ Behari A 'Disability and workplace discrimination: *Smith v Kit Kat Group (Pty) Ltd* (2017) 38 ILJ 483 (LC)' (2017) 38 ILJ 2238.

In the case of *Jansen v Legal Aid South Africa*, the Labour Court had the chance to make an authoritative proclamation on the significance of an employer's duty to reasonably accommodate employees with disabilities.²⁴⁶ Although the Labour Court did establish the importance of the duty of reasonable accommodation, it failed to consider the Disability Code and TAG. After receiving a major depression diagnosis, Jansen was dismissed from work, where he alleged his dismissal was because of his disability.²⁴⁷ At the time of the dismissal the respondent was aware that the applicant had a mental condition and therefore he knew that Jansen was a person with a disability.²⁴⁸ As a result of this, the Labour Court held that the respondent had an obligation to reasonably accommodate Jansen, which the employer failed to do and unfairly discriminated against the applicant based on its policy as defined in the EEA.²⁴⁹ Gresse argues that even though this case shows that employers should not unfairly discriminate against employees with disabilities the Labour Court could have done more.²⁵⁰ Gresse argues that first, neither the employer nor the Labour Court looked into whether or not accommodating Jansen would result in unjustifiable hardship.²⁵¹ Secondly, the Labour Court should have suggested ways in which the employer could reasonably have accommodated Jansen, such as:

‘reorganising Jansen’s work duties by temporarily delegating his non-essential duties, allowing for more flexible leave arrangements and working hours, transferring him to a different branch of the organisation; obtaining the assistance of experts to advise on both a medical and occupational level; and establishing a fund to assist with the reasonable accommodation of employees could have been made’.²⁵²

However, in 2020, the employer appealed against the Labour Court judgment.²⁵³ The Labour Appeal Court held that Jansen’s evidence showed that he suffered from depression, that he was taking anti-depressants and that his personal and working life was fraught.²⁵⁴ Jansen however, failed to adduce cogent evidence showing that his acts of misconduct (absenteeism) was caused

²⁴⁶ Gresse E ‘An analysis of the duty to reasonably accommodate disabled employees: a comment on *Jansen v Legal Aid South Africa*’ (2020) 24 *Law, Democracy and Development* 110.

²⁴⁷ *Jansen v Legal Aid South Africa* (C678/14) [2018] ZALCCT 17 (16 May 2018) para 9-10 & 39.

²⁴⁸ *Jansen v Legal Aid South Africa* (C678/14) [2018] ZALCCT 17 (16 May 2018) para 43.

²⁴⁹ *Jansen v Legal Aid South Africa* (C678/14) [2018] ZALCCT 17 (16 May 2018) para 43.

²⁵⁰ Gresse E ‘An analysis of the duty to reasonably accommodate disabled employees: a comment on *Jansen v Legal Aid South Africa*’ (2020) 24 *Law, Democracy and Development* 126.

²⁵¹ Gresse E ‘An analysis of the duty to reasonably accommodate disabled employees: a comment on *Jansen v Legal Aid South Africa*’ (2020) 24 *Law, Democracy and Development* 120.

²⁵² Gresse E ‘An analysis of the duty to reasonably accommodate disabled employees: a comment on *Jansen v Legal Aid South Africa*’ (2020) 24 *Law, Democracy and Development* 126.

²⁵³ *Legal Aid SA v Jansen* 2020 41 ILJ 2580 (LAC) para 1.

²⁵⁴ *Legal Aid SA v Jansen* 2020 41 ILJ 2580 (LAC) para 45.

by his depression.²⁵⁵ Jansen was reasonably functional and could still carry out his duties, however he was required to take sick leave but did not inform the employer of his absenteeism.²⁵⁶ The Labour Appeal Court judgment focused predominantly on dismissals in terms of the LRA, however held that Jansen did not show on a balance of probabilities that the employer discriminated against him on a prohibited ground under the EEA.²⁵⁷ Jansen was disciplined due to his misconduct and not his depression, hence the Labour Court's decision was set aside.²⁵⁸

The aforementioned judgments illustrate how important it is for the courts and employers to take the Disability Code and TAG into consideration. It is recommended that the Disability Code become binding.

2.3.3.2.2.1.4 Measures to ensure equitable representation of people from designated groups

Designated employers should implement affirmative action measures that 'ensure equitable representation of suitably qualified people from designated groups in all occupational levels in the workforce'.²⁵⁹ Affirmative action is limited to giving preferential treatment to suitably qualified persons from designated groups.²⁶⁰ A person may be suitably qualified for a job as a result of 'any one of, or any combination of that person's formal qualifications, prior learning, relevant experience or capacity to acquire, within a reasonable time, the ability to do the job'.²⁶¹

All the factors (listed above) must be considered by the employer when deciding whether a person is suitably qualified and must 'determine whether that person has the ability to do the job in terms of any of, or any combination of those factors'.²⁶² The employer when making this 'determination may not unfairly discriminate against a person solely on the grounds of that person's lack of relevant experience'.²⁶³ It is noted that this prohibition only applies if the

²⁵⁵ *Legal Aid SA v Jansen* 2020 41 ILJ 2580 (LAC) para 45.

²⁵⁶ *Legal Aid SA v Jansen* 2020 41 ILJ 2580 (LAC) para 46.

²⁵⁷ *Legal Aid SA v Jansen* 2020 41 ILJ 2580 (LAC) para 49.

²⁵⁸ *Legal Aid SA v Jansen* 2020 41 ILJ 2580 (LAC) para 47 & 53.

²⁵⁹ Section 15(2)(d)(i) of the Employment Equity Act 55 of 1998.

²⁶⁰ Du Toit D et al *Labour Relations Law: A Comprehensive Guide* 6 ed (2015) 743.

²⁶¹ Section 20(3) of the Employment Equity Act 55 of 1998.

²⁶² Section 20(4) of the Employment Equity Act 55 of 1998.

²⁶³ Section 20(5) of the Employment Equity Act 55 of 1998.

reason that the person was not appointed was lack of experience and nothing else. The recent amendments to the EEA allow the Minister of Employment and Labour to identify economic sectors and set numerical goals for any of the national economic sectors after consultation with the relevant sectors.²⁶⁴ The purpose of this new amendment is to ensure equitable representation of suitably qualified people from designated groups in all occupational levels in the workplace.²⁶⁵ The Minister of Employment and Labour may set different numerical goals for different occupational levels.²⁶⁶

There is a low representation of persons with disabilities in top management, with the latest percentage in 2020 being 1.6 per cent.²⁶⁷ Statistics also show that the representation of persons with disabilities in senior management remains low in 2021 with the present percentage being 1.3 per cent.²⁶⁸ This is extremely worrisome because it portrays an assumption that persons with disabilities are incapable of occupying top or senior management positions. However, the representation of persons with disabilities (professionally qualified) have increased slightly from 1.1 per cent in 2020 to 1.2 per cent in 2021.²⁶⁹ The representation of persons with disabilities in skilled levels remained low (1.2 per cent) from 2019-2021.²⁷⁰ However, the representation of persons with disabilities in semi-skilled levels have slightly increased from 1.1 per cent in 2020 to 1.3 per cent in 2021.²⁷¹ The representation of persons with disabilities at the unskilled occupational level has remained low at around 1.2 per cent, over the past three years.²⁷² The representation of persons with disabilities within the public sector has been noticeably higher in most occupational levels with the exception of a slight increase of semi-skilled and unskilled occupational levels in the private sector.²⁷³ The efforts of employers to include persons with the disabilities in the workplace are not going unnoticed. However, these statistics show that despite the measure to ensure equitable representation from designated groups, persons with disabilities are not equitably represented in the workplace.

²⁶⁴ Section 15A(1)-(2) of the Employment Equity Amendment Act 4 of 2022.

²⁶⁵ Section 15A(2) of the Employment Equity Amendment Act 4 of 2022.

²⁶⁶ Section 15A(3)-(4) of the Employment Equity Amendment Act 4 of 2022. Insofar as the process is concerned a draft of the Employment Equity Act: Regulations 2023 has been published for public comment. The final version of the regulations has not yet been published.

²⁶⁷ Department of Labour *Commission for Employment Equity (2021-2022)* 25.

²⁶⁸ Department of Labour *Commission for Employment Equity (2021-2022)* 29.

²⁶⁹ Department of Labour *Commission for Employment Equity (2021-2022)* 33.

²⁷⁰ Department of Labour *Commission for Employment Equity (2021-2022)* 37.

²⁷¹ Department of Labour *Commission for Employment Equity (2021-2022)* 41.

²⁷² Department of Labour *Commission for Employment Equity (2021-2022)* 45.

²⁷³ Department of Labour *Commission for Employment Equity (2021-2022)* 55, 57, 60, 62, 64 & 66.

2.3.3.2.2.1.5 Measures to retain and develop people from designated groups

In order to achieve and maintain the numerical goals measures should be taken to retain employees from designated groups.²⁷⁴ Employers may consider identifying existing patterns in their workplaces with regard to the reasons for employees leaving the workplace since it will allow employers to develop appropriate strategies for retaining employees from designated groups.²⁷⁵ In circumstances where employees become disabled at the place of employment, where it is reasonable to do so such employees should be reintegrated into the workforce when they are able to return to work.²⁷⁶ Employers should strive to limit the effect of the disability on their employees.²⁷⁷ The employer should consult with the employee to determine whether the disability may be reasonably accommodated.²⁷⁸ This may require ‘vocational rehabilitation, transitional work programmes and where appropriate temporary or permanent flexible working hours’.²⁷⁹

Employers should ensure that there are measures not only to retain employees from designated groups, but also to develop people from designated groups. Development refers to skills development that provide equitable training.²⁸⁰ The identification of training and development needs can assist an employee to perform effectively in his or her position or to develop in a different position.²⁸¹ Development opportunities can help retain employees, particularly where this is connected to career development.²⁸²

²⁷⁴ Item 18 of the Code of Good Practice on the Integration of Employment Equity into Human Resource Policies and Practices (GN1358 in GG 27866 of 4 August 2005).

²⁷⁵ Item 18.1.1 of the Code of Good Practice on the Integration of Employment Equity into Human Resource Policies and Practices (GN1358 in GG 27866 of 4 August 2005).

²⁷⁶ Item 11.1 of the Code of Good Practice on the Employment of Persons with Disabilities (GN 1085 in GG 39383 of 7 November 2015).

²⁷⁷ Item 11.1 of the Code of Good Practice on the Employment of Persons with Disabilities (GN 1085 in GG 39383 of 7 November 2015).

²⁷⁸ Item 11.2 of the Code of Good Practice on the Employment of Persons with Disabilities (GN 1085 in GG 39383 of 7 November 2015).

²⁷⁹ Item 11.3 of the Code of Good Practice on the Employment of Persons with Disabilities (GN 1085 in GG 39383 of 7 November 2015).

²⁸⁰ Item 18.2.3 of the Code of Good Practice on the Integration of Employment Equity into Human Resource Policies and Practices (GN1358 in GG 27866 of 4 August 2005).

²⁸¹ Item 14.4.3 of the Code of Good Practice on the Employment of Persons with Disabilities (GN 1085 in GG 39383 of 7 November 2015).

²⁸² Item 18.2.3 of the Code of Good Practice on the Integration of Employment Equity into Human Resource Policies and Practices (GN1358 in GG 27866 of 4 August 2005).

However, employers should not be required to employ or retain a person who is unable to perform the duties of a particular job solely because the person has a disability.²⁸³ Authors are of the view that ‘it is inarguable that any appointment or retention should be based on merit, or at least based on the assurance that a person with disability if hired should be capable of being trained and developed to adequately perform the tasks of the specified job’.²⁸⁴ Where persons with disabilities are employed by a designated employer, there is an obligation on the employer to develop them. The designated employer is placed under an obligation to put measures in place/retention strategies to retain employees that have disabilities.

Since all the forms of affirmative action measures should only be implemented by designated employers, the affirmative action measures discussed above only protects persons with disabilities who are employed by designated employers. Where an employee with a disability is not employed by an employer that falls in the meaning of a designated employer, such an employee may not always be protected by affirmative action. It is thus recommended that the meaning of a designated employer be extended so that more employees with a disability are protected.

2.4 PROCEDURAL OBLIGATIONS OF DESIGNATED EMPLOYERS

The specific duties that the designated employers are required to comply with are set out in section 13(2) of the EEA. The specific duties include consulting with employees²⁸⁵ conducting an analysis,²⁸⁶ preparing an employment equity plan,²⁸⁷ and reporting to the Director-General on progress made in implementing its employment equity plan.²⁸⁸

²⁸³ Ibekwa CS & Aduma OC ‘Legislating disability integration in employment: comparing legal solutions from Nigeria, South Africa and the United States of America’ (2019) 1(2) *International Journal of Comparative Law and Legal Philosophy* 99.

²⁸⁴ Ibekwa CS & Aduma OC ‘Legislating disability integration in employment: comparing legal solutions from Nigeria, South Africa and the United States of America’ (2019) 1(2) *International Journal of Comparative Law and Legal Philosophy* 99.

²⁸⁵ Section 13(2)(a) of the Employment Equity Act 55 of 1998.

²⁸⁶ Section 13(2)(b) of the Employment Equity Act 55 of 1998.

²⁸⁷ Section 13(2)(c) of the Employment Equity Act 55 of 1998.

²⁸⁸ Section 13(2)(d) of the Employment Equity Act 55 of 1998.

2.4.1 Consultation with employees

It is required of the designated employer to ‘consult and attempt to reach an agreement with a representative trade union representing members at the workplace’.²⁸⁹ It is important to note that ‘the success of employment equity depends largely on the efficacy of the consultation process’.²⁹⁰ The employer should consult with employees from both designated and non-designated groups and employees should be aware of the processes to be followed by the employer and the advantages thereof.²⁹¹ The consultation should include:

‘a reasonable opportunity for employee representatives to meet with the employer, an opportunity for both the employer and employee to provide feedback to their respective constituencies, the request, receipt and consideration of relevant information and the allocation of adequate time for each of the steps to be completed’.²⁹²

The EEA requires employers to consult with employees and provides details on the consultation process. The consultation process provides the employer and employee with an opportunity to provide feedback. However, there is uncertainty with regard to when the employee should provide this feedback. People from designated groups are included in the consultation process as is the case with people from non-designated groups and therefore this provision applies to persons with disabilities.

2.4.2 Conducting an analysis

Section 19(1) of the EEA states that a designated employer is required to collect information and conduct an analysis of ‘its employment policies, practices, procedures, and the working environment, in order to identify employment barriers which adversely affect people from designated groups’.²⁹³

²⁸⁹ Section 16(1)(a) of the Employment Equity Amendment Act 4 of 2022.

²⁹⁰ Item 5.3.14 of the Code of Good Practice on the Integration of Employment Equity into Human Resource Policies and Practices (GN1358 in GG27866 of 4 August 2005).

²⁹¹ Item 6.1.2.2 Code of Good Practice: Preparation, Implementation and Monitoring of Employment Equity Plans (GN 424 in GG 40840 of 12 May 2017).

²⁹² Item 6.1.2.6 Code of Good Practice: Preparation, Implementation and Monitoring of Employment Equity Plans (GN 424 in GG 40840 of 12 May 2017).

²⁹³ Section 19(1) of the Employment Equity Act 55 of 1998.

The purpose of conducting an analysis is:

- ‘a) to determine the extent of under-representation of employees i.e. both permanent and temporary workers from the designated groups in the different occupational levels of the employer's workforce in terms of race, gender, and disability.
- b) to assess all employment policies, practices, procedures, and the working environment so as to-
 - (i) identify any barriers that may contribute to the underrepresentation or under-utilisation of employees from the designated groups;
 - (ii) identify any barriers or factors that may contribute to the lack of affirmation of diversity in the workplace;
 - (iii) identify other employment conditions that may adversely affect designated groups; and
 - (iv) identify practices or factors that positively promote employment equity and diversity in the workplace including reasonable accommodation.²⁹⁴

The designated employer is required to identify employment barriers which adversely affect people from designated groups, which include people with disabilities.²⁹⁵ The employment barriers identified may include disability discrimination.²⁹⁶ The identified employment barriers should be eliminated to protect people with disabilities.²⁹⁷ The designated employer is also required to determine the degree of underrepresentation of designated groups which includes people with disabilities.²⁹⁸ This will provide the opportunity for persons with disabilities to enter the labour market where such persons are underrepresented.

2.4.3 Preparing an employment equity plan

The employment equity plan is a ‘designated employer’s implementation programme to achieve equitable representation and fair treatment of the designated groups such as people with disabilities in the workplace across all occupational levels’.²⁹⁹ The employment equity

²⁹⁴ Item 6.1.3.1 Code of Good Practice: Preparation, Implementation and Monitoring of Employment Equity Plans (GN 424 in GG 40840 of 12 May 2017).

²⁹⁵ Section 15(2) of the Employment Equity Act 55 of 1998.

²⁹⁶ This is evident from sections, 5, 6, 15(2)(a) and section 19 of the Employment Equity Act 55 of 1998.

²⁹⁷ Section 5 of the Employment Equity Act 55 of 1998.

²⁹⁸ Section 19(2) of the Employment Equity Amendment Act 47 of 2013.

²⁹⁹ Item 4.1 of the Code of Good Practice: Preparation, Implementation and Monitoring of Employment Equity Plans (GN 424 in GG 40840 of 12 May 2017).

plan exists to address the barriers to fair employment practices, such as the access and treatment in the employer's policies, the procedures identified in consultation and the employment equity analysis process.³⁰⁰ The purpose of preparing and implementing an employment equity plan is to 'achieve reasonable progress towards employment equity in that employer's workforce'.³⁰¹ The employment equity plan should contain annual targets and the implementation of affirmative action measures.³⁰² In addition, if there is underrepresentation, the numerical goals, timeframes and strategies to achieve equitable representation should be identified.³⁰³

Where the employer includes persons with disabilities in their employment equity plan, the employer is under an obligation to implement the adopted employment equity plan, since the Department of Employment and Labour monitors and penalises employers that fail to do so.³⁰⁴ There are no processes in place to ensure that persons with disabilities participate in the planning process and as a result, they are frequently excluded.³⁰⁵ Research shows that once businesses give a justification for non-compliance, the department fails to thoroughly investigate that justification.³⁰⁶

2.4.4 Reporting to the Director-General

The last duty the designated employer is required to comply with is to report to the Director-General. The report must be submitted on the prescribed date in the prescribed manner to the Director-General once a year.³⁰⁷ If an employer is unable to submit a report to the Director-General within the prescribed period and manner, he or she must notify the Director-General in writing giving reasons for its inability to do so.³⁰⁸ If the employer fails to submit a report,

³⁰⁰ Item 4.2 of the Code of Good Practice: Preparation, Implementation and Monitoring of Employment Equity Plans (GN 424 in GG 40840 of 12 May 2017).

³⁰¹ Section 20(1) of the Employment Equity Act 55 of 1998.

³⁰² Section 20(2)(a)-(b) of the Employment Equity Act 55 of 1998.

³⁰³ Section 20(2)(c) of the Employment Equity Amendment Act 47 of 2013.

³⁰⁴ Nxumalo L 'Utilising transformational leadership to implement disability laws in the South African workplace' (2019) 35(4) *South African Journal on Human Rights* 363.

³⁰⁵ Nxumalo L 'Utilising transformational leadership to implement disability laws in the South African workplace' (2019) 35(4) *South African Journal on Human Rights* 363.

³⁰⁶ Nxumalo L 'Utilising transformational leadership to implement disability laws in the South African workplace' (2019) 35(4) *South African Journal on Human Rights* 363.

³⁰⁷ Section 21(1) of the Employment Equity Amendment Act 4 of 2022.

³⁰⁸ Section 21(4A) of the Employment Equity Amendment Act 4 of 2022.

fails to give reasons or give reasons that are false or invalid, the Director-General may apply to the Labour Court to impose a fine.³⁰⁹

Persons with disabilities are protected because designated employers are required to report to the Director-General. This requirement allows the Director-General to review the information provided by the designated employer, which includes the measures that have been taken.³¹⁰ In this way there is reassurance that these issues will be addressed.

However, the fact that these procedural duties only apply to designated employers means that it is only persons with disabilities who are employed by a designated employer that are protected. This means that persons with disabilities that are not employed by designated employers will not always be protected by the procedural obligations. It is recommended that the meaning of a designated employer be extended so that more employers are included in the meaning of designated employers. The aim of this recommendation is to assist in ensuring that more employees with disabilities benefit from the procedural obligations.

2.5 REMEDIES FOR UNFAIR DISCRIMINATION

The EEA authorises the Labour Court to provide the employee with a just and equitable remedy where an employee experiences unfair discrimination.³¹¹ The remedies include:

‘payment of compensation or damages by the employer to that employee, an order that an employer must take steps to prevent same discrimination or a similar future occurrences of unfair discrimination, an order that a non-designated employer must comply with the EEA affirmative action provisions as if it were a designated employer, an order for the removal of an employer’s name from the register of employers who have filed employment equity reports with the Director-General of the Department of Labour in terms of section 41 of the EEA and the publication of the Court’s order’.³¹²

³⁰⁹ Section 21(4B) of the Employment Equity Amendment Act 47 of 2013.

³¹⁰ Section 21 of the Employment Equity Amendment Act 47 of 2013 and Item 8 of Code of Good Practice: Preparation, Implementation and Monitoring of Employment Equity Plans (GN 424 in GG 40840 of 12 May 2017).

³¹¹ Section 50(2) of the Employment Equity Act 55 of 1998.

³¹² Section 50(2)(a)-(f) of the Employment Equity Act 55 of 1998.

As a result of these provisions contained in the EEA, persons with disabilities are protected in circumstances where such persons are successful with unfair discrimination claims which have been instituted against the employer.

2.6 CONCLUSION

The main purpose of this chapter is to determine the extent to which the South African legislative framework protects employees against disability discrimination. Chapter 2 of the EEA contains provisions prohibiting unfair discrimination and applies to all employees (including employees with disabilities) and employers. Unfair discrimination is prohibited on grounds such as disability. Persons with disabilities are protected against unfair discrimination because of the provisions contained in the EEA that requires employers to take steps to eliminate unfair discrimination in the workplace and to promote equal opportunities in the workplace.

The meaning of indirect discrimination protects persons with disabilities in the same manner as direct discrimination. Where an employee can prove that an employer has unfairly discriminated against them on the ground of disability, the employer's reasons for doing so will not be considered.

When an employee institutes a claim of unfair discrimination against an employer on the basis of the grounds listed in section 6(1) of the EEA, the onus is on the employer to 'prove, on a balance of probabilities', that the alleged discrimination did not occur, or the discrimination 'was rational, not unfair, or is otherwise justifiable'. Persons with disabilities are protected by the fact that the onus is on the employer where such an employee institutes a claim of unfair discrimination against the employer on the ground of disability. Once discrimination has been established, the onus is on the employer to prove that this is not the case. Employees with disabilities are also protected as a result of the remedies which the EEA makes provision for that are available to employees where their unfair discrimination claims are successful. An order for payment of compensation or damages may be awarded if the unfair discrimination claim is successful. This means that persons with disabilities are protected by virtue of the remedies available to them in terms of the EEA.

According to the EEA, affirmative action measures are only required to be implemented by designated employers. Employees with disabilities are only protected by the law governing affirmative action where their employers fall within the meaning of a designated employer. Employees with disabilities who are employed by a designated employer are protected, because a designated employer is required to ensure that employment barriers are identified and eliminated, measures are implemented that would further diversity in the workplace and that the duty to make reasonable accommodation for people from designated groups are complied with. Employers should consider the Disability Code and the TAG guidelines when employing persons with disabilities as well as the importance of reasonable accommodation. It also assists courts in determining whether unfair discrimination took place and whether the employer complied with its duty to make reasonable accommodations. The Disability Code and the TAG provides protection to persons with disabilities since it assists with the practical implementation of the EEA, enabling them to better understand their rights. However, employers are not required to comply with the content of the Disability Code and the TAG because it does not impose any legal obligations. Designated employers must also ensure that people from designated groups are retained, developed and equally represented in the workplace insofar as the set numerical goals and targets are concerned.³¹³ Since non-designated employers have no obligation to retain and develop people from designated groups, it is recommended that the scope of the meaning of designated employer be extended.

The EEA sets out specific duties that designated employers are obliged to comply with. The specific duties include consultation with employees, the preparation of an employment equity plan, submitting reports to the Director-General and conducting an analysis. It is worth noting that these specific duties only apply to designated employers, and therefore only persons with disabilities that are employed by designated employers will be protected by these duties.

The next chapter contains a discussion on the UK laws governing disability discrimination.

³¹³ See para 2.3.2.2.1.5; Item 18 of the Code of Good Practice on the Integration of Employment Equity into Human Resource Policies and Practices (GN1358 in GG 27866 of 4 August 2005).

CHAPTER 3: LAWS GOVERNING DISABILITY DISCRIMINATION IN THE UNITED KINGDOM

3.1 INTRODUCTION

The UK continues to be one of the most progressive legal systems in dealing with workplace disabilities.³¹⁴ The legislative framework governing disability discrimination in the UK is discussed in this chapter. The purpose of this chapter is to compare the extent to which persons with disabilities are protected against unfair discrimination in workplaces in South Africa and the UK. The aim is to determine whether South Africa can learn from the UK when it comes to addressing the issue of disability discrimination in the workplace. This chapter contains a discussion on the UK provisions governing disability discrimination. It contains a discussion on the meaning of ‘disability’, the relevant provisions contained in the DDA and the Equality Act 2010.

3.2 LEGAL FRAMEWORK IN THE UNITED KINGDOM

This part of the chapter contains a discussion on the legal framework governing disability discrimination in the UK. The International Conventions, the Constitution and the relevant legislation such as the DDA (Northern Ireland) and the Equality Act 2010 (Wales, England and Scotland) is discussed below.

3.2.1 INTERNATIONAL CONVENTIONS

The UK similar to South Africa ratified the CRPD.³¹⁵ As a result of the CRPD being discussed in the previous chapter, the relevant content will not be repeated, save to state that the content of the CRPD that applies to South Africa also applies to the UK.

³¹⁴ Welgemoed B & Huysamen E ‘Workplace protection of employees suffering from depression: A South African perspective’ (2019) 40 *ILJ* 54.

³¹⁵ See para 2.3.1 above.

3.2.2 THE CONSTITUTION

The Constitution of the UK is different from the Constitution of the Republic of South Africa, in a sense that it is uncodified. The Constitution in the UK is largely written; however its contents appear in different documents and is not codified in one single document.³¹⁶ There was an attempt by the Institute for Public Policy Research to formalise a written Constitution.

There is a provision that states that:

‘19.1 Everyone has the right to recognition as a person before the law.

19.2 All persons are entitled without any discrimination to the equal protection of the law.

19.3 The equal protection of the law and the enjoyment of the rights and freedoms set out in this Bill of Rights shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth, homosexuality, disability, age, or other status.’³¹⁷

Although, this is just a drafted Constitution, these provisions are displayed in both the DDA and the Equality Act 2010. The CRPD provisions also appear in UK legislation to protect persons with disabilities.

3.2.3 THE DISABILITY DISCRIMINATION ACT 1995 AND THE EQUALITY ACT 2010

The DDA was promulgated with the purpose of making it ‘unlawful to discriminate against a [person with a disability] in connection with employment, the provisions of goods, facilities, and services or the disposal or management of [persons with disabilities], and to establish a National Disability Council’.³¹⁸ A person has a disability for the purposes of the DDA in circumstances where a person has a ‘physical or mental impairment which has a substantial and long-term adverse effect on his or her ability to carry out normal day-to-day activities’.³¹⁹

³¹⁶ University College London ‘What is the UK Constitution?’ available at <https://www.ucl.ac.uk/constitution-unit/explainers/what-uk-constitution> (accessed on 28 March 2022).

³¹⁷Institute for Public Policy Research ‘The Constitution of the United Kingdom’ available at https://www.ippr.org/files/images/media/files/publication/2014/01/the-constitution-of-the-united-kingdom_1991-2014_1420.pdf (accessed on 28 March 2022).

³¹⁸ Preamble of the Disability Discrimination Act 1995.

³¹⁹ Section 1(1) of the Disability Discrimination Act 1995.

Persons who no longer have a disability are still protected in terms of the DDA.³²⁰ According to section 4 of the DDA:

- ‘(1) [i]t is unlawful for an employer to discriminate against a [person with a disability] –
- (a) in the arrangements which he makes for the purpose of determining to whom he should offer employment;
 - (b) in the terms on which he offers that person employment; or
 - (c) by refusing to offer, or deliberately not offering, him employment.’³²¹

It is also:

‘unlawful for an employer to discriminate against a [person with a disability] whom he employs in the terms of employment which he affords him, in the opportunities which he affords him for promotion, a transfer, training or receiving any other benefit, by refusing to afford him, or deliberately not affording him, any such opportunity, or by dismissing him or subjecting him to any other detriment’.³²²

This provision prohibits disability discrimination at any stage of the employment process, from recruitment to dismissal.³²³ These are the circumstances where actions against an employee are regarded as unlawful discrimination on the ground of disability. To determine whether a person with a disability has been discriminated against, it is necessary to determine whether the person is indeed a person with a disability as defined by the DDA. The onus rests on the applicant to prove that he or she has a disability.³²⁴ In the case of *Leah Beattie v Chief Constable of the Police Service of Northern Ireland*, the Industrial Tribunal considered four conditions for the definition of disability which included, whether the claimant had a physical impairment, whether the physical impairment had an adverse effect on the day-to-day activities of the claimant, whether this impact was substantial in a sense that is more than minor/trivial and whether the claimant’s condition was long-term, 12 months or more.³²⁵

³²⁰ Paragraph 3.5 and Appendix B of the Code of Good Practice: Employment and Occupation; Disability Discrimination Act 1995 of 16 May 2005.

³²¹ Section 4(1) of the Disability Discrimination Act 1995 (Amendment) Regulations (Northern Ireland) 2004.

³²² Section 4(2) of the Disability Discrimination Act 1995 (Amendment) Regulations (Northern Ireland) 2004.

³²³ This is evident by section 4 of the Disability Discrimination Act 1995 (Amendment) Regulations (Northern Ireland) 2004.

³²⁴ Disability Rights Commission ‘Monitoring the Disability Discrimination Act 1995 (Phase 2)’ available at <https://webarchive.nationalarchives.gov.uk/ukgwa/20130128102031/http://www.dwp.gov.uk/asd/asd5/IH91.pdf> (accessed on 27 May 2022)

³²⁵ *Leah Beattie v Chief Constable of the Police Service of Northern Ireland* [2023] 10231/21IT para 29.

The Equality Act 2010 was enacted 'to reform and harmonise equality law and restate the greater part of the enactments relating to discrimination and harassment related to certain personal characteristics' such as disability.³²⁶ The Equality Act 2010 provides the same definition of a person with a disability as the DDA.³²⁷ The content of the provision governing unlawful discrimination in section 39 of the Equality Act 2010³²⁸ is similar to that of section 4 of the DDA. The only difference is that the DDA refers particularly to persons with disabilities and the Equality Act 2010 refers to a person with a protected characteristic which includes disability.

The Equality Act 2010 also applies to persons who had a disabilities in the same manner it applies to persons who has disabilities.³²⁹ To determine whether a person with a disability has been discriminated against, it is necessary to determine whether the person is a person with a disability. In the case of *Aderemi v London South and Eastern Railway*, the Employment Appeal Tribunal held that:

'It is clear first from the definition in section 6(1)(b) of the Equality Act 2010, that what a Tribunal has to consider is [the] adverse effect, and that it is an adverse effect not upon his carrying out normal day-to-day activities but upon his ability to do so. Because the effect is adverse, the focus of a Tribunal must necessarily be upon that which a Claimant maintains he cannot do as a result of his physical or mental impairment. Once he has established that there is an effect, that it is adverse, that it is an effect upon his ability, that is to carry out normal day-to-day activities, a Tribunal has then to assess whether that is or is not substantial. Here, however, it has to bear in mind the definition of substantial which is contained in section 212(1) of the Act. It means more than minor or trivial. In other words, the Act itself does not create a spectrum running smoothly from those matters which are clearly of substantial effect to those matters which are clearly trivial but provides for a bifurcation: unless a matter can be classified as within the heading "trivial" or "insubstantial", it must be treated as substantial.'³³⁰

The *Aderemi* case focuses on what the claimant alleges he or she cannot do by virtue of the mental or physical impairment. The Employment Tribunal will then be required to assess whether this is substantial or not.

³²⁶ Preamble of the Equality Act 2010.

³²⁷ Section 6(1) of the Equality Act 2010.

³²⁸ Section 39 of the Equality Act 2010.

³²⁹ Section 6(4) of the Equality Act 2010.

³³⁰ *Aderemi v London South and Eastern Railway* [2012] UKEAT 0316_12_0612 para 14.

In South Africa, the EEA contains the meaning of ‘people with disabilities’.³³¹ In the UK, depending on the area the DDA or the Equality Act 2010 should be referred to in order to obtain the meaning of disability. The DDA and the Equality Act 2010 refer to unlawful discrimination whereas the EEA refers to unfair discrimination. The meaning of disability in the DDA and the Equality Act 2010 are similar. It is noteworthy that the Equality Act 2010 also includes intellectual or sensory impairments.³³² However, in the UK the definition is broader than that of the EEA since in the UK the meaning includes both past and actual physical and mental impairment. The DDA and Equality Act 2010 applies to a person who had a disability the same way it applies to a person who has a disability. It is therefore recommended that as far as the definition of a person with a disability is concerned, the meaning of disability in the EEA should be extended to include those who had a disability.

3.2.3.1 Defining the concept of discrimination

The DDA states that discrimination takes place when an employer treats a person with a disability less favourably than what he or she would treat someone to whom the reason does not/would not apply.³³³ The employer’s failure to show that the alleged treatment can be justified also amount to discrimination.³³⁴ This reason is based on the person’s disability. An employer’s failure to adhere with the duty to make reasonable adjustments amounts to discrimination.³³⁵

The Equality Act 2010 also defines ‘discrimination arising from disability’ and does not merely provide a general meaning of discrimination. The Equality Act 2010 defines ‘discrimination arising from disability’ as a circumstance where the employer treats a person with a disability unfavourably because of something arising in consequences of the person’s disability and the person fails to show that the treatment is a ‘proportionate means of achieving a legitimate aim’.³³⁶ However, this does not apply where the employer was not aware of the person’s disability or could not have reasonably been expected to be aware of the disability.³³⁷ The

³³¹ See para 2.3.3.1.1 above.

³³² Appendix 1 and Paragraph 2.12 of the Equality Act 2010 Statutory Code of Practice Employment of 2011.

³³³ Section 3A(1)(a) of the Disability Discrimination Act 1995 (Amendment) Regulations (Northern Ireland) 2004.

³³⁴ Section 3A(1)(b) of the Disability Discrimination Act 1995 (Amendment) Regulations (Northern Ireland) 2004.

³³⁵ Section 3A(2) of the Disability Discrimination Act 1995 (Amendment) Regulations (Northern Ireland) 2004.

³³⁶ Section 15(1) of the Equality Act 2010.

³³⁷ Section 15(2) of the Equality Act 2010.

Equality Act 2010 also deals with prohibited conduct which includes discrimination. The prohibited conduct may include direct discrimination, indirect discrimination, combined discrimination³³⁸, and discrimination arising from disability.

The Equality and Human Rights Commission published a Statutory Code of Practice (Statutory Code) to provide a comprehensive, authoritative, and technical guide to the content of the Equality Act 2010³³⁹ which imposes no legal obligations.³⁴⁰ The Statutory Code provides an example of what discrimination arising from disability would entail:

‘An employer dismisses a worker because she has had three months’ sick leave. The employer is aware that the worker has multiple sclerosis and most of her sick leave is disability-related. The employer’s decision to dismiss is not because of the worker’s disability itself. However, the worker has been treated unfavourably because of something arising in consequence of her disability (namely, the need to take a period of disability-related sick leave)’.³⁴¹

The Statutory Code states that it is not necessary to compare the treatment of a person with a disability to that of another person.³⁴² There must be a relation between what caused the unfavourable treatment and the person’s disability.³⁴³

In South Africa the Convention 111 should be used to determine the meaning of discrimination.³⁴⁴ In the UK, both the DDA and the Equality Act 2010 provide a definition of discrimination which makes specific reference to disability discrimination. It is recommended that the EEA not only include a definition of discrimination but specifically include a definition of disability discrimination. Direct and indirect discrimination is discussed below.

3.2.3.1.1 Direct discrimination

The DDA defines direct discrimination in the context of disability as a circumstance in which by virtue of the person’s disability,:

³³⁸ Section 14(1) of the Equality Act 2010, ‘a person (A) discriminates against another (B) if, because of a combination of two relevant protected characteristics, A treats B less favourably than A treats or would treat a person who does not share either of those characteristics.’

³³⁹ Foreword of the Equality Act 2010 Statutory Code of Practice Employment of 2011.

³⁴⁰ Paragraph 1.13 of the Equality Act 2010 Statutory Code of Practice Employment of 2011.

³⁴¹ Paragraph 5.3 of the Equality Act 2010 Statutory Code of Practice Employment of 2011.

³⁴² Paragraph 5.6 of the Equality Act 2010 Statutory Code of Practice Employment of 2011.

³⁴³ Paragraph 5.8 of the Equality Act 2010 Statutory Code of Practice Employment of 2011.

³⁴⁴ See para 2.3.3.1.1 above.

‘the person treats the [person with a disability] less favourably than he or she treats or would treat a person not having that particular disability whose relevant circumstances, including his abilities, are essentially the same as, or not materially different from, those of the [person with a disability].’³⁴⁵

A person with a disability experiences direct discrimination under the DDA if the person receives unfavourable treatment as a result of the person’s disability. In *Essop and others (Appellants) v Home Office (UK Border Agency) (Respondent) Naeem (Appellant) v Secretary of State for Justice (Respondent)*³⁴⁶, the Supreme Court held that ‘direct discrimination is comparatively simple: it is treating one person less favourably than you would treat another person, because of a particular protected characteristic that the former has’.³⁴⁷ Furthermore, ‘the characteristic has to be the reason for the treatment’.³⁴⁸ This may not always be evident and it will be necessary to investigate the reasons for the less favourable treatment and other times, it will be obvious, such as when the characteristic is the criterion used for the less favourable treatment.³⁴⁹

In terms of the Equality Act 2010, direct discrimination takes place ‘when a person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others’.³⁵⁰ The Equality Act 2010 further states that where ‘the protected characteristic is disability, and B is not a [person with a disability], A does not discriminate against B only because A treats or would treat [persons with disabilities] more favourably than A treats B’.³⁵¹ Direct discrimination is unlawful, regardless of the employer’s motive or intent, and regardless of whether the less favourable treatment of the employee is intentional or unintentional.³⁵² In order to determine whether an employer has treated B less favourably than others, ‘a comparison should be made with how the employer has treated other workers or would have treated them in similar circumstances’.³⁵³ If it is found that ‘the

³⁴⁵ Section 3A(5) of the Disability Discrimination Act 1995 (Amendment) Regulations (Northern Ireland) 2004.

³⁴⁶ *Essop and others (Appellants) v Home Office (UK Border Agency) (Respondent) Naeem (Appellant) v Secretary of State for Justice (Respondent)* [2017] UKSC 27.

³⁴⁷ *Essop and others (Appellants) v Home Office (UK Border Agency) (Respondent) Naeem (Appellant) v Secretary of State for Justice (Respondent)* [2017] UKSC 27 para 1.

³⁴⁸ *Essop and others (Appellants) v Home Office (UK Border Agency) (Respondent) Naeem (Appellant) v Secretary of State for Justice (Respondent)* [2017] UKSC 27 para 17.

³⁴⁹ *Essop and others (Appellants) v Home Office (UK Border Agency) (Respondent) Naeem (Appellant) v Secretary of State for Justice (Respondent)* [2017] UKSC 27 para 17.

³⁵⁰ Section 13(1) of the Equality Act 2010.

³⁵¹ Section 13(3) of the Equality Act 2010, paragraph 3.3 of the Equality Act 2010 Statutory Code of Practice Employment of 2011.

³⁵² Paragraph 3.14 of the Equality Act 2010 Statutory Code of Practice Employment of 2011.

³⁵³ Paragraph 3.4 of the Equality Act 2010 Statutory Code of Practice Employment of 2011.

employer's treatment of the worker puts the worker at a clear disadvantage compared to other workers, there is a likelihood that less favourable treatment took place'.³⁵⁴ Under these circumstances, the employee does not have to actually suffer an economic or another type of disadvantage for the treatment to be less favourable.³⁵⁵ It will suffice if the employee can reasonably assert that they did not want to be treated differently from the manner in which the employer treated or would have treated another person.³⁵⁶

In South Africa, when an adverse action is taken against a person with a disability because of their disability this would amount to direct discrimination.³⁵⁷ In South Africa case law should be referred to determine the meaning of direct discrimination.³⁵⁸ Although the wording differs in the DDA and the Equality Act 2010, in both jurisdictions discrimination constitutes direct discrimination as far as disability discrimination is concerned where a person with a disability is treated differently from others as a result of the disability. The level of protection for persons with disabilities in South Africa and the UK is the same as far as the meaning of direct discrimination is concerned.

3.2.3.1.2 Indirect discrimination

The DDA does not explicitly refer to indirect discrimination and as a consequence does not contain a meaning of indirect discrimination. At first glance, the lack of a definition of indirect discrimination in the DDA seems to be a lacuna. However, the General Framework Directive for Equal Treatment in Employment and Occupation states that:

‘(b) indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice [PCP] would put persons having a particular religion or belief, a particular disability, a particular age, or a particular sexual orientation at a particular disadvantage compared with other persons unless:

(i) that [PCP] is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary, or

³⁵⁴ Paragraph 3.4 of the Equality Act 2010 Statutory Code of Practice Employment of 2011.

³⁵⁵ Paragraph 3.5 of the Equality Act 2010 Statutory Code of Practice Employment of 2011.

³⁵⁶ Paragraph 3.5 of the Equality Act 2010 Statutory Code of Practice Employment of 2011.

³⁵⁷ See para 2.3.3.1.2 above.

³⁵⁸ See para 2.3.3.1.2 above.

(ii) as regards persons with a particular disability, the employer or any person or organisation to whom this Directive applies, is obliged, under national legislation, to take appropriate measures in line with the principles contained in Article 5 in order to eliminate disadvantages entailed by such provision, criterion, or practice.³⁵⁹

Recruitment processes that require presentation skills, for example, can indirectly discriminate against stuttering applicants, especially when presentation skills has nothing to do with the work.³⁶⁰

Unlike the DDA and EEA, the Equality Act 2010 contains a meaning of indirect discrimination. Indirect discrimination takes place ‘where a person (A) discriminates against another (B) where A applies a [PCP] which is discriminatory to B in relation to a relevant protected characteristic of B’s’.³⁶¹ Indirect discrimination is regarded as unlawful even where the PCP has an unintentional discriminatory effect unless it is objectively justified.³⁶²

In the context of a relevant protected characteristic of B, a PCP is discriminatory if;

‘(a) A applies, or would apply, it to persons with whom B does not share the characteristic, (b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it, (c) it puts, or would put, B at that disadvantage, and (d) A cannot show it to be a proportionate means of achieving a legitimate aim’.³⁶³

In terms of indirect discrimination, the employer can also justify the PCP by producing evidence that it is ‘a proportionate means of achieving a legitimate aim’. The Statutory Code states that this justification should be considered in two stages: ‘(1) is the aim of the PCP legal and non-discriminatory and one that represents a real, objective consideration? and (2) if the aim is legitimate, is the means of achieving it proportionate, that is appropriate and necessary in all circumstances?’³⁶⁴

The Equality Act 2010 does not provide a meaning of the terms PCP. However, it should be broadly interpreted to cover arrangements, conditions, criteria, prerequisites, practices,

³⁵⁹ Article 2.2(b) of the Council Directive 2000/78/EC of 27 November 2000: Establishing a General Framework for Equal Treatment in Employment and Occupation.

³⁶⁰ Conte C *The UN Convention on the Rights of Persons with Disabilities and the European Union: The Impact on Law and Governance* (2022) 61.

³⁶¹ Section 19(1) of the Equality Act 2010.

³⁶² Paragraph 4.24 of the Equality Act 2010 Statutory Code of Practice Employment of 2011.

³⁶³ Section 19(2) of the Equality Act 2010.

³⁶⁴ Paragraph 4.27 of the Equality Act 2010 Statutory Code of Practice Employment of 2011.

qualifications, provisions, formal or informal policies practices and rules.³⁶⁵ The words ‘would put’³⁶⁶ allows a claimant (bears the onus of proof to show that they would experience disadvantage)³⁶⁷ to dispute a PCP that have not yet been implemented but would have a discriminatory effect if they were.³⁶⁸ Indirect discrimination is not simple because ‘it is meant to avoid rules and practices which are not directed at or against people with a particular protected characteristic but have the effect of putting them at a disadvantage.’³⁶⁹

There is no definition of indirect discrimination in the DDA and EEA. However, the meaning of indirect discrimination which may be obtained from case law³⁷⁰ and which is used in circumstances where the provisions contained in the DDA and the EEA are applied is similar. In both jurisdictions, indirect discrimination takes place in circumstances where there is a neutral provision or criterion that has a disproportionate effect of putting persons with disabilities at a disadvantage. The Equality Act 2010 contains a meaning of indirect discrimination. In the EEA the complainant can challenge a PCP that has a discriminatory effect. This means that the employer has already implemented the PCP. The Equality Act 2010 however, enables a complainant to challenge a PCP that has not yet been implemented by the employer, but which would have a discriminatory effect if it were. For this reason, persons with disabilities are protected more in the UK than in South Africa as far as indirect discrimination is concerned. It is recommended that the EEA be amended to include not only the definition of indirect discrimination but also to include extra protection to persons with disabilities by allowing them to challenge an employer’s PCP that has not been utilised yet but that would have a discriminatory effect on the employee if it were. The Code of Good Practice: Employment and Occupation; Disability Discrimination Act 1995 of 16 May 2005 (Code of Good Practice DDA) and the Statutory Code in the UK also contains an explanation of what each provision in both the DDA and the Equality Act 2010 entails which includes specific examples. It is therefore recommended that this be done in South Africa as well.

³⁶⁵ Paragraph 4.5 of the Equality Act 2010 Statutory Code of Practice Employment of 2011.

³⁶⁶ The words ‘would put’ appear in section 19(2)(b) of the Equality Act 2010.

³⁶⁷ Includes a denial of an opportunity or choice, deterrence, rejection, or exclusion.

³⁶⁸ Paragraph 4.7 of the Equality Act 2010 Statutory Code of Practice Employment of 2011.

³⁶⁹ *Essop and others (Appellants) v Home Office (UK Border Agency) (Respondent) Naeem (Appellant) v Secretary of State for Justice (Respondent)* [2017] UKSC 27 para 1.

³⁷⁰ *Police and Prison Rights Union and Others v Department of Correctional Services and Another* (C544/2007) [2010] ZALC 68 para 123, the Labour Court states that indirect discrimination ‘occurs when an employer utilises an employment practice that is apparently neutral, but disproportionately affects members of disadvantaged groups in circumstances where it is not justifiable’.

3.2.3.1.3 What amounts to unlawful discrimination?

In terms of the DDA, the onus of proof rests on the person who raises a claim of unlawful discrimination.³⁷¹ The person must show on a balance of probabilities that unlawful discrimination has occurred in order to succeed with a claim in an industrial tribunal.³⁷² Section 17A(1B) of the DDA states that:

‘where, on the hearing of a complaint under subsection (1), the complainant proves facts from which the tribunal could, apart from this subsection, conclude in the absence of an adequate explanation that the respondent has acted in a way which is unlawful in this [p]art, the tribunal shall uphold the complaint unless the respondent proves that he did not so act’.³⁷³

The onus shifts from the complainant to the respondent when the complainant has shown that unlawful discrimination has taken place; however the shifting of the onus creates confusion.³⁷⁴ This has happened in a number of cases. However, in *Sean Fitzsimons v Disability Action, Northern Ireland*, the Industrial Tribunal held that there is a two-stage test for the onus of proof.³⁷⁵ The claimant must provide evidence that allows the industrial tribunal to draw the conclusion that the respondent engaged in an act of unlawful discrimination.³⁷⁶ The onus of proof will therefore be on the respondent to prove on a balance of probabilities, that the treatment of the claimant by the respondent did not constitute unlawful discrimination.³⁷⁷ In the event that the industrial tribunal determines that the respondent did not prove on a balance of probabilities that it did not commit an act of unlawful discrimination, it must uphold the claimant’s claim.³⁷⁸ Where the industrial tribunal accepts the respondent’s coherent and adequate explanation for the treatment, the respondent would have discharged his or her onus of proof, then the claimant’s claim of discrimination would fail.³⁷⁹

In terms of the Equality Act 2010, the employee (claimant) that alleges that he or she has experienced an unlawful act must provide evidence that the Employment Tribunal can use to

³⁷¹ Section 17A(1B) of the Disability Discrimination Act 1995 (Amendment) Regulations (Northern Ireland) 2004.

³⁷² Paragraph 4.41 of the Code of Good Practice: Employment and Occupation; Disability Discrimination Act 1995 of 16 May 2005.

³⁷³ Section 17A(1B) of the Disability Discrimination Act 1995 (Amendment) Regulations (Northern Ireland) 2004.

³⁷⁴ *Project Management Institute v Ms S Latif* UKEAT/0028/07CEA para 45.

³⁷⁵ *Sean Fitzsimons v Disability Action, Northern Ireland* [2023] NIIT26215/21 para 59.

³⁷⁶ *Sean Fitzsimons v Disability Action, Northern Ireland* [2023] NIIT26215/21 para 58.

³⁷⁷ *Sean Fitzsimons v Disability Action, Northern Ireland* [2023] NIIT26215/21 para 58.

³⁷⁸ *Sean Fitzsimons v Disability Action, Northern Ireland* [2023] NIIT26215/21 para 58.

³⁷⁹ *Sean Fitzsimons v Disability Action, Northern Ireland* [2023] NIIT26215/21 para 59.

draw an inference or decide that the alleged unlawful act did occur.³⁸⁰ Upon hearing all of the evidence, the tribunal will decide whether the onus of proof shifts to the respondent (employer) or not.³⁸¹ If the burden of proof shifts, the respondent will have to establish on a balance of probabilities, that he or she did not act unlawfully.³⁸² The onus in the UK is different from the onus in the EEA. This is so, because in the UK an employee who asserts a claim of unlawful discrimination bears the onus of proof however this onus of proof shifts to the employer if the employee has successfully proved a prima facie case of discrimination. In terms of the Equality Act 2010 the discretion rests on the Employment Tribunal to establish if the burden of proof shifts. In South Africa where discrimination is alleged on a listed ground, it is presumed to be unfair and where unfair discrimination claim is alleged on a listed ground such as disability the onus is on the employer.³⁸³ The shifting of the onus in the UK has proven to be confusing. As far as the onus of proof is concerned, the law in South Africa has proved to provide more protection to persons with disabilities since an allegation of discrimination on a listed ground results in a presumption of unfairness and since the onus is on the employer.

3.4 DEFENCES THAT MAY BE RAISED BY AN EMPLOYER

The defences that may be raised by an employer include positive action measures, reasonable adjustments and occupational requirements.

3.4.1 Occupational requirements

The DDA does not make explicit provision for occupational requirements. The Code of Good Practice DDA states that an employer may reject an applicant with a disability, if the reason the person is rejected is not because of his disability, but due to the lack of a qualification.³⁸⁴

³⁸⁰ Paragraph 15.32 of the Equality Act 2010 Statutory Code of Practice Employment of 2011.

³⁸¹ Paragraph 15.33 of the Equality Act 2010 Statutory Code of Practice Employment of 2011.

³⁸² Paragraph 15.34 of the Equality Act 2010 Statutory Code of Practice Employment of 2011.

³⁸³ See para 2.3.3.1.4 above.

³⁸⁴ Paragraph 7.10 of the Code of Good Practice: Employment and Occupation; Disability Discrimination Act 1995 of 16 May 2005.

The employer should show that the type of qualification is relevant and significant to the job and no reasonable adjustment would be able to change this fact.³⁸⁵

An employer may raise occupational requirements as a defence against a claim of unlawful discrimination in terms of the Equality Act 2010. There are circumstances where it is legal for an employer to have a requirement that a person should have a particular protected characteristic.³⁸⁶ This is only possible, where the employer can show that, considering the context or nature of the work in question; ‘the requirement is an occupational requirement, the applicant of the requirement is a proportionate means of achieving a legitimate aim, the applicant or worker does not meet the requirement or the employer has reasonable grounds for not being satisfied to that the applicant or worker meets the requirement’.³⁸⁷ The occupational ‘requirement must not be a sham or pretext and there must be a link between the requirement and the job’.³⁸⁸

As far as the defence of inherent/occupational requirements of a job is concerned, the EEA and the Equality Act 2010 contains such a defence that may be raised by an employer, while the DDA does not contain a specific provision governing occupational requirements. It is the Code of Good Practice DDA that refers to this type of justification. In South Africa, distinguishing, excluding or preferring a person on the basis of an inherent requirement of a job does not constitute unfair discrimination. In such a case an employer should show that the actions taken against the employee with a disability did not constitute unfair discrimination because of an inherent requirement of the job. For this reason, persons with disabilities are more protected in South Africa than those in the UK.

3.4.1 Positive action measures

The DDA does not make mention of affirmative action measures. However, the Equality Act 2010 contains positive action provisions. In the recruitment and promotion context, it is not unlawful for an employer to recruit or promote a candidate where the employer reasonably

³⁸⁵ Paragraph 7.10 of the Code of Good Practice: Employment and Occupation; Disability Discrimination Act 1995 of 16 May 2005.

³⁸⁶ Paragraph 1(1) of Schedule 9 of the Equality Act 2010. For example, a requirement that the job applicant is a person with a disability.

³⁸⁷ Paragraph 1(a)-(c) of Schedule 9 of the Equality Act 2010.

³⁸⁸ Paragraph 13.7 of the Equality Act 2010 Statutory Code of Practice Employment of 2011.

believes that the ‘candidate has a protected characteristic and suffers a disadvantage connected to that characteristic or the participation in activities of candidates with that protected characteristic is disproportionately low’.³⁸⁹ Participation being disproportionately low can refer to the ‘proportion of people with that protected characteristic nationally, locally or in the workforce’.³⁹⁰ Positive action is lawful if it is taken with the ‘aim of enabling or encouraging persons who share the protected characteristic overcome or minimise that disadvantage, or participate in that activity’³⁹¹ and is within the limitations of the Equality Act 2010.³⁹²

Positive action is voluntary, however as a ‘matter of good business practice’, both private and public sector employers may decide to implement positive action measures to mitigate the disadvantage experienced by groups who share a protected characteristics in the labour market.³⁹³ If positive action is taken by an employer because the employer reasonably believes that one of the statutory conditions applies, there should be some indication or evidence that this is the case.³⁹⁴ There is no requirement that there should be complex statistical information or research.³⁹⁵ It might be as simple as an employer reviewing employee profiles, contacting other similar companies in the same region or sector, examining national statistics, providing a local or national picture of the employment situation for groups that share a protected characteristic, or consultation with employees and trade unions can be used as qualitative evidence.³⁹⁶ Disadvantage refers to a lack of opportunities and choice, employment barriers, exclusion and rejection.³⁹⁷ In some instances the disadvantage is obvious. For instance, the disadvantage may be obvious when there are social, economic, or legal barriers or impediments that make it difficult for people of a particular protected group to access or advance in a sector, trade, an occupation or workplace.³⁹⁸

Overcoming or minimising the disadvantage could entail identifying any potential causes of disadvantage through monitoring, consultation or a review of policies and practices and then aiming advertisement towards the specific disadvantaged groups.³⁹⁹ The impact of the action

³⁸⁹ Section 159(1) of the Equality Act 2010.

³⁹⁰ Paragraph 12.22 of the Equality Act 2010 Statutory Code of Practice Employment of 2011.

³⁹¹ Section 159(2) of the Equality Act 2010.

³⁹² Paragraph 12.6 of the Equality Act 2010 Statutory Code of Practice Employment of 2011.

³⁹³ Paragraph 12.9 of the Equality Act 2010 Statutory Code of Practice Employment of 2011.

³⁹⁴ Paragraph 12.14 of the Equality Act 2010 Statutory Code of Practice Employment of 2011.

³⁹⁵ Paragraph 12.14 of the Equality Act 2010 Statutory Code of Practice Employment of 2011.

³⁹⁶ Paragraph 12.14 of the Equality Act 2010 Statutory Code of Practice Employment of 2011.

³⁹⁷ Paragraph 12.15 of the Equality Act 2010 Statutory Code of Practice Employment of 2011.

³⁹⁸ Paragraph 12.16 of the Equality Act 2010 Statutory Code of Practice Employment of 2011.

³⁹⁹ Paragraph 12.17 of the Equality Act 2010 Statutory Code of Practice Employment of 2011.

on other protected groups, as well as their proportionate disadvantage, participation or need of these groups should be assessed against the extent to which the need differs, the low level of participation of the particular activity and the seriousness of the relevant disadvantage.⁴⁰⁰ The employer should

‘determine whether the action is an appropriate way to achieve the stated aim and if so, is the proposed action [reasonably] necessary to achieve the stated aim, that is, in all circumstances, would it be possible to achieve the stated aim as effectively by other actions that are less likely to result in less favourable treatment of others’.⁴⁰¹

If the positive action continues without being reviewed for an extended period of time, it may no longer be proportional since the positive action may already have resolved the situation and may be unlawful.⁴⁰² As a result, when implementing positive action provisions, employers should specify that the action would be taken only for the duration that the relevant conditions exists and not indefinitely.⁴⁰³ The employer should ‘monitor the impact of their actions and review their progress toward their aim’.⁴⁰⁴ Employers should consider taking positive action measures such as the development of an action plan which consists of evidence of the disadvantage, the disproportionate low levels of participation or particular needs, analysing the clauses, the desired outcomes and how it will be achieved, assessing the proportionality of the proposed action, how the employer will achieve all its aims with measurable indicators of progress towards the aims and a timeline, how consultation with relevant parties will take place, time period of programme and a review period to assess the progress of these measure to ensure it remains proportionate.⁴⁰⁵

The Equality Act 2010 and the Statutory Code make provision for positive action measures that an employer can take to ensure participation of persons with disabilities in the labour market. The DDA contains no provisions relating to affirmative action/positive action. The positive action provisions in the Equality Act 2010 only apply where an employer chooses to make use of the provision. There is no duty on the employer to eliminate the suffering of a disadvantage or address underrepresentation of persons with disabilities in the workforce. In South Africa, there is only a duty on designated employers to promote employment equity in

⁴⁰⁰ Paragraph 12.27 of the Equality Act 2010 Statutory Code of Practice Employment of 2011.

⁴⁰¹ Paragraph 12.28 of the Equality Act 2010 Statutory Code of Practice Employment of 2011.

⁴⁰² Paragraph 12.30 of the Equality Act 2010 Statutory Code of Practice Employment of 2011.

⁴⁰³ Paragraph 12.31 of the Equality Act 2010 Statutory Code of Practice Employment of 2011.

⁴⁰⁴ Paragraph 12.31 of the Equality Act 2010 Statutory Code of Practice Employment of 2011.

⁴⁰⁵ Paragraph 12.36 of the Equality Act 2010 Statutory Code of Practice Employment of 2011.

the workplace.⁴⁰⁶ Since South Africa makes it a requirement for designated employers to implement specific affirmative action measures South Africa protects persons with disabilities more than the UK in this regard.

3.4.1.1 Reasonable adjustments

The DDA allows the employer to raise a defence against alleged unlawful discrimination on the ground of disability. It states that treatment may be justified, 'but only if, the reason for it is both material to the circumstances of the particular case and substantial'.⁴⁰⁷ This is an objective test where 'material' indicates that there must be a 'reasonably strong connection between the reason given for the treatment and the circumstances of the particular case' and 'substantial' indicates that the reason must have substance and be of real weight.⁴⁰⁸ However, treatment cannot be justified if it amounts to direct discrimination falling within section 3A(5).⁴⁰⁹

Where an employer fails to adhere to the duty to make reasonable adjustments, the employer's treatment against the person with a disability cannot be justified, unless the treatment would have been justified even if the employer applied with the duty.⁴¹⁰ Where the reasonable adjustment 'would have made a difference to the reason that is being used to justify the treatment, then the less favourable treatment cannot be justified'.⁴¹¹

The DDA places an obligation on employers to make reasonable adjustments. It states that where an employer's PCP or any physical feature of its premises places a person with a disability at a substantial disadvantage compared to a person that does not have a disability, the employer is required to take reasonable steps to prevent the PCP or physical feature from having that effect.⁴¹² In the context of a PCP for determining who should be offered employment, 'the [person with a disability] concerned' refers to any person with a disability

⁴⁰⁶ See para 2.3.3.2.2.1.4 above.

⁴⁰⁷ Section 3A(3) of the Disability Discrimination Act 1995 (Amendment) Regulations (Northern Ireland) 2004.

⁴⁰⁸ Paragraph 6.3 of the Code of Good Practice: Employment and Occupation; Disability Discrimination Act 1995 of 16 May 2005.

⁴⁰⁹ Section 3A(4) of the Disability Discrimination Act 1995 (Amendment) Regulations (Northern Ireland) 2004.

⁴¹⁰ Section 3A(6) of the Disability Discrimination Act 1995 (Amendment) Regulations (Northern Ireland) 2004.

⁴¹¹ Paragraph 6.5 of the Code of Good Practice: Employment and Occupation; Disability Discrimination Act 1995 of 16 May 2005.

⁴¹² Section 4A(1) of the Disability Discrimination Act 1995 (Amendment) Regulations (Northern Ireland) 2004.

who is, or has informed the employer that he or she may be an employee⁴¹³ or applicant for that employment.⁴¹⁴ Where an employer could not reasonably be expected to know that the applicant is a person with a disability or has a disability and is likely to be affected, there is no duty to make reasonable adjustments.⁴¹⁵

In order to determine whether it was reasonable for the employer to take a particular step to comply with a duty to make reasonable adjustments, particular considerations will be considered such as:

‘the extent to which taking the step would prevent the effect in relation to which the duty is imposed, the extent to which it is practicable for the employer to take the step, the financial and other costs which would be incurred by the employer in taking the step and the extent to which taking it would disrupt any of his activities, the extent of the employer’s financial and other resources, the availability to the employer of financial or other assistance with respect to taking the step, the nature of his activities and the size of his undertaking, and where the step would be taken in relation to a private household, the extent to which taking it would disrupt that household or disturb any person residing there.’⁴¹⁶

The DDA sets out several examples of reasonable steps an employer may take, such as:

‘making adjustments to premises, allocating some of the [person with a disability’s] duties to another person, transferring him to fill an existing vacancy, altering his hours of working or training, assigning him to a different place of work or training, allowing him to be absent during working or training hours for rehabilitation, assessment or treatment, giving, or arranging for, training or mentoring (whether for the [person with a disability] or any other person), acquiring or modifying equipment, modifying instructions or reference manuals, modifying procedures for testing or assessment, providing a reader or interpreter or providing supervision or other support’.⁴¹⁷

The employer should consult the person with a disability to reach an agreement with regard to any proposed adjustments before they are made and these adjustment/s should be implemented in a timely manner.⁴¹⁸ The Code of Good Practice DDA was published to explain how ‘[persons with disabilities] are protected by the DDA if they are in employment, if they are seeking

⁴¹³ Section 4A(2)(b) of the Disability Discrimination Act 1995 (Amendment) Regulations (Northern Ireland) 2004.

⁴¹⁴ Section 4A(2)(a) of the Disability Discrimination Act 1995 (Amendment) Regulations (Northern Ireland) 2004.

⁴¹⁵ Section 4A(3) of the Disability Discrimination Act 1995 (Amendment) Regulations (Northern Ireland) 2004.

⁴¹⁶ Section 18B(1) of the Disability Discrimination Act 1995 (Amendment) Regulations (Northern Ireland) 2004.

⁴¹⁷ Section 18B(2) of the Disability Discrimination Act 1995 (Amendment) Regulations (Northern Ireland) 2004.

⁴¹⁸ Paragraph 5.18 of the Code of Good Practice: Employment and Occupation; Disability Discrimination Act 1995 of 16 May 2005.

employment, or if they are involved in a range of occupations'.⁴¹⁹ However, the Code of Good Practice DDA does not serve as an authoritative statement of the law and does not impose any legal obligations.⁴²⁰ It might be reasonable for an employer to take steps that are not mentioned in the DDA, such as:

'conducting a proper assessment of what reasonable adjustments may be required, permitting flexible working, allowing [an employee with a disability] to take a period of disability leave, participating in supported employment schemes provided by the Government, employing a support worker to assist [an employee with a disability], modifying disciplinary or grievance procedures, adjusting redundancy selection criteria and modifying performance-related pay arrangements'.⁴²¹

In *McLaughlin v Charles Hurst Limited*, the claimant was suspended without any explanation and the claimant alleged that she was discriminated against on the ground of disability (she suffered from depression) and discrimination by way of the respondent's failure to comply with the duty to make reasonable adjustments.⁴²² The Industrial Tribunals Northern Ireland held that the employer 'showed a lack of awareness bordering on abysmal ignorance of the provisions of the DDA and the obligations which an employer has under that legislation and a lack of awareness of its practical applications'.⁴²³ The claimant was working an average of 47.8 hours per week and a general practitioner was approached who advised that her condition was moderate to severe.⁴²⁴ The claimant requested reduced working hours *via* flexible working form application however the discussion around the application was more about the outset of reduced working hours on the business with no discussion on the claimant's disability or the concept of reasonable adjustments.⁴²⁵ An occupational health adviser suggested that the claimant's work hours be reduced to 40 hours per week, this is something the respondent should have considered.⁴²⁶ The Industrial Tribunal held that if the request for reduced hours were dealt with in an appropriate manner, the claimant would have received the reduced hours.⁴²⁷ However, the application was dealt with on the needs of the business rather than the needs of

⁴¹⁹ Foreword of the Code of Good Practice: Employment and Occupation; Disability Discrimination Act 1995 of 16 May 2005.

⁴²⁰ Paragraph 1.6 of the Code of Good Practice: Employment and Occupation; Disability Discrimination Act 1995 of 16 May 2005.

⁴²¹ Paragraph 5.20 of the Code of Good Practice: Employment and Occupation; Disability Discrimination Act 1995 of 16 May 2005.

⁴²² *McLaughlin v Charles Hurst Limited* [2016] NIIT 00083_15IT para 1.

⁴²³ *McLaughlin v Charles Hurst Limited* [2016] NIIT 00083_15IT para 2.

⁴²⁴ *McLaughlin v Charles Hurst Limited* [2016] NIIT 00083_15IT para 3.

⁴²⁵ *McLaughlin v Charles Hurst Limited* [2016] NIIT 00083_15IT para 6-7.

⁴²⁶ *McLaughlin v Charles Hurst Limited* [2016] NIIT 00083_15IT para 11.

⁴²⁷ *McLaughlin v Charles Hurst Limited* [2016] NIIT 00083_15IT para 28.

the claimant.⁴²⁸ The employer should have focused on the concept of ‘reasonable adjustments’ and should have taken a more proactive approach to the matter.⁴²⁹ For this reason, the respondent failed to comply with the duty of reasonable adjustments. It should not go unnoticed that although employers may have to make reasonable adjustments, there has been no anticipatory duty (a requirement where public entities and service providers must continuously identify any potential disadvantage related to disability, and to take reasonable steps to eliminate or avoid that disadvantage because a failure to do so would result in unlawful discrimination)⁴³⁰ to make these reasonable adjustments under the DDA.⁴³¹

In terms of the Equality Act 2010, a failure on the part of an employer to comply with the duty to make reasonable adjustments, constitutes disability discrimination.⁴³² There are three requirements for the duty to make reasonable adjustments.⁴³³ The first requirement is that an employer should take reasonable measures that are necessary to avoid a disadvantage where an employer’s PCP substantially disadvantages a person with a disability when compared to a non-disabled person.⁴³⁴ The second requirement is that when a physical feature substantially disadvantages a person with a disability when compared to a non-disabled person, it is necessary for the employer to take reasonable measures to avoid the disadvantage.⁴³⁵ The third requirement is that when an auxiliary aid⁴³⁶ were not provided and it substantially disadvantages a person with a disability, the employer should take reasonable measures to provide the auxiliary aid.⁴³⁷

Where access to information is required by an employee or applicant with a disability, the information should be provided in an accessible format (such as documents in braille).⁴³⁸ As far as physical features are concerned, steps or stairways can be removed, altered, or be avoided by installing a lift.⁴³⁹ The Equality Act 2010 does not stipulate which factors should be

⁴²⁸ *McLaughlin v Charles Hurst Limited* [2016] NIIT 00083_15IT para 28.

⁴²⁹ *McLaughlin v Charles Hurst Limited* [2016] NIIT 00083_15IT para 28.

⁴³⁰ Lawson A & Orchard M ‘The anticipatory reasonable adjustment duty: removing the blockages?’ (2021) 80(2) *Cambridge Law Journal* 308.

⁴³¹ Lawson A & Orchard M ‘The anticipatory reasonable adjustment duty: removing the blockages?’ (2021) 80(2) *Cambridge Law Journal* 312.

⁴³² Section 21(2) of the Equality Act 2010, paragraph 6.30 of the Equality Act 2010 Statutory Code of Practice Employment of 2011.

⁴³³ Section 20(2) of the Equality Act 2010.

⁴³⁴ Section 20(3) of the Equality Act 2010.

⁴³⁵ Section 20(4) of the Equality Act 2010.

⁴³⁶ Examples of auxiliary aids include adapted keyboards or text to speech software.

⁴³⁷ Section 20(5) of the Equality Act 2010.

⁴³⁸ Section 20(6) of the Equality Act 2010.

⁴³⁹ Section 20(9) of the Equality Act 2010.

considered when it comes to taking reasonable steps, but the circumstances of each individual case will determine what is reasonable.⁴⁴⁰ Certain factors should be considered to determine whether steps taken by an employer are reasonable. These factors⁴⁴¹ are similar to that of the DDA and will therefore not be repeated.

Any step or action that an employer may be required to take, is subject to a reasonableness criteria, i.e. an objective standard and the circumstances of that specific case.⁴⁴² It has been argued that the duty on employers to make reasonable adjustments has a reactive nature that is based on a person with a disability as a singular being placed at a substantial disadvantage which is inconsistent with an anticipatory approach.⁴⁴³ Although the Equality Act 2010 has been criticised by Lawson and Orchard, it does have a positive impact on the treatment of people with disabilities.⁴⁴⁴ Taylor argues that it is impressive that the duty to make reasonable adjustments is not merely a subsection of the provisions that prohibits direct and indirect discrimination but that it is treated as a separate and distinct obligation that is very detailed in its elaboration.⁴⁴⁵

The Equality Act 2010 and the Statutory Code⁴⁴⁶ provide similar reasonable adjustments as the DDA and the Code of Good Practice DDA. As a result, the relevant content will not be repeated. The Equality Act 2010 makes provision for employers to raise a defence against a claim of unlawful discrimination on any of the protected characteristics including on the ground of disability.⁴⁴⁷ In the event of ‘discrimination arising from disability’, the employer can show that the alleged unfavourable treatment is a ‘proportionate means of achieving a legitimate aim’.⁴⁴⁸ The Equality Act 2010 does not define the concept ‘a legitimate aim’. However, ‘the aim of the PCP should be legal, should not be discriminatory in itself, and must represent a

⁴⁴⁰ Paragraph 6.23 of the Equality Act 2010 Statutory Code of Practice Employment of 2011.

⁴⁴¹ Paragraph 6.28 of the Equality Act 2010 Statutory Code of Practice Employment of 2011.

⁴⁴² Paragraph 6.29 of the Equality Act 2010 Statutory Code of Practice Employment of 2011.

⁴⁴³ Lawson A & Orchard M ‘The anticipatory reasonable adjustment duty: removing the blockages?’ (2021) 80(2) *Cambridge Law Journal* 313.

⁴⁴⁴ Taylor A ‘Disability discrimination, the duty to make adjustments and the problem of persistent misreading; (2019) 45(2) *Monash University Law Review* 481.

⁴⁴⁵ Taylor A ‘Disability discrimination, the duty to make adjustments and the problem of persistent misreading; (2019) 45(2) *Monash University Law Review* 479.

⁴⁴⁶ Paragraph 6.33 of the Equality Act 2010 Statutory Code of Practice Employment of 2011.

⁴⁴⁷ Section 15(1)(b) of the Equality Act 2010.

⁴⁴⁸ Paragraph 5.11 of the Equality Act 2010 Statutory Code of Practice Employment of 2011.

real, objective consideration'.⁴⁴⁹ It is therefore on the employer to justify the treatment by providing evidence to support their assertion.⁴⁵⁰

In the case of *Mrs I Shah v TIAA Ltd*, the main issue in the claim of discrimination was whether the treatment of the claimant was a 'proportionate means of achieving a legitimate aim'.⁴⁵¹ The claimant due to backpain was unable to travel to client sites in terms of the PCP set out by the respondent.⁴⁵² The respondent did look at reasonable adjustments however due to the nature of work, the claimant could not work from home.⁴⁵³ As a result of her role she was expected to see clients and clients expected to witness the personnel performing the service that they outsourced.⁴⁵⁴ It was established that the PCP did put persons with disabilities that had back problems (including the claimant) at a particular disadvantage.⁴⁵⁵ However, the respondent was able to show that the PCP 'was a proportionate means of achieving legitimate aims'.⁴⁵⁶ The legitimate aims were for Senior Audit Managers to be able to meet the requirements of their roles while also achieving productivity levels that financed their roles and the claimant could not achieve these aims if she did not travel to client sites and did not meet a large percentage of their chargeable days targets.⁴⁵⁷ The respondent successfully used the defence of justification by showing that the PCP was a proportionate means of achieving a legitimate aim.

The Equality Act 2010 contains provisions governing positive action measures, whereas the DDA does not. In South Africa, the EEA places an obligation on designated employers to implement affirmative action measures and more types of affirmative action measures have been enacted in terms of the EEA than is the case in terms of the Equality Act 2010. The Equality Act 2010 only makes provision for positive action measures to assist persons with disabilities who are underrepresented or disadvantaged in the workplace. As far as positive action measures in the UK was concerned, the provisions are voluntary. As a result, persons with disabilities in the UK will only be protected by these provisions if the employer chooses to implement them. In South Africa, only designated employers are under a duty to implement affirmative action measures for people from designated groups (persons with disabilities) to

⁴⁴⁹ Paragraph 4.28 of the Equality Act 2010 Statutory Code of Practice Employment of 2011.

⁴⁵⁰ Paragraph 5.12 of the Equality Act 2010 Statutory Code of Practice Employment of 2011.

⁴⁵¹ *Mrs I Shah v TIAA Ltd* 2207165/2017 para 2.

⁴⁵² *Mrs I Shah v TIAA Ltd* 2207165/2017 para 2.

⁴⁵³ *Mrs I Shah v TIAA Ltd* 2207165/2017 para 36.

⁴⁵⁴ *Mrs I Shah v TIAA Ltd* 2207165/2017 para 52.

⁴⁵⁵ *Mrs I Shah v TIAA Ltd* 2207165/2017 para 62.

⁴⁵⁶ *Mrs I Shah v TIAA Ltd* 2207165/2017 para 62.

⁴⁵⁷ *Mrs I Shah v TIAA Ltd* 2207165/2017 para 62.

achieve employment equity. This means that employees with disabilities that are not employed by a designated employer will not be protected by the affirmative action provisions in the EEA. Both the Equality Act 2010 and EEA make provision for the duty to make reasonable adjustments/accommodations. Both jurisdictions provide equal protection to persons with disabilities in terms of the duty of reasonable accommodations/adjustments.

3.5 REMEDIES FOR UNLAWFUL DISCRIMINATION

Any person may lodge a complaint (within three months of the date of the incident)⁴⁵⁸ with an industrial tribunal that a person has discriminated against him or her.⁴⁵⁹ The DDA states that where an ‘industrial tribunal finds that a complaint presented to it under this section is well-founded, steps shall be taken by the industrial tribunal that are just and equitable’.⁴⁶⁰ These steps include:

- ‘(a) making a declaration as to the rights of the complainant and the respondent in relation to the matters to which the complaint relates;
- (b) ordering the respondent to pay compensation to the complainant; or
- (c) recommending that the respondent take, within a specified period, action appearing to the tribunal to be reasonable, in all the circumstances of the case, for the purpose of obviating or reducing the adverse effect on the complainant of any matter to which the complainant rates.’⁴⁶¹

If the industrial tribunal orders compensation, the amount must be determined by using the same principles that are applicable to the calculation of damages in tort⁴⁶² claims for breach of a statutory duty.⁴⁶³ Compensation may include compensation for injury to feelings⁴⁶⁴ and may be awarded in addition to other compensation.⁴⁶⁵ If the respondent fails to comply with the

⁴⁵⁸ Paragraph 13.11 of the Code of Good Practice: Employment and Occupation; Disability Discrimination Act 1995 of 16 May 2005.

⁴⁵⁹ Section 17A(1)(a) of the Disability Discrimination Act 1995 (Amendment) Regulations (Northern Ireland) 2004.

⁴⁶⁰ Section 17A(2) of the Disability Discrimination Act 1995.

⁴⁶¹ Section 17A(2) of the Disability Discrimination Act 1995.

⁴⁶² The claim in tort is to award damages to the injured party to put that injured party in the same position as they would have been in if the tort had not occurred.

⁴⁶³ Section 17A(3) of the Disability Discrimination Act 1995 (Amendment) Regulations (Northern Ireland) 2004.

⁴⁶⁴ Section 17A(4) of the Disability Discrimination Act 1995 (Amendment) Regulations (Northern Ireland) 2004.

⁴⁶⁵ Paragraph 13.15 of the Code of Good Practice: Employment and Occupation; Disability Discrimination Act 1995 of 16 May 2005.

industrial tribunal's recommendation without a reasonable justification, the industrial tribunal may, if it is just and equitable to do so, increase the amount of compensation.⁴⁶⁶

A number of remedies are contained in the Equality Act 2010 for unlawful discrimination cases. In these instances, a tribunal may;

‘(a) make a declaration as to the rights of the complainant and respondent in relation to the matters to which the proceedings relate, (b) order the respondent to pay compensation to the complainant or (c) make an appropriate recommendation’.⁴⁶⁷

‘An appropriate recommendation’ is defined as a recommendation that a respondent should take specific actions within a specific timeframe with the intention of reducing or eliminating the adverse effects on any procedural matter on the complainant or any other person.⁴⁶⁸ In the event that the respondent fails to comply with the appropriate recommendation without any reasonable justification, the amount of compensation may be increased or an order of compensation may be awarded where one was not made.⁴⁶⁹ A tribunal may also make an award of damages that may include compensation for injured feelings.⁴⁷⁰ The tribunal may make the following award of compensation: future or past loss of earnings which may include losses for ‘career damage’ or stigmas for bringing a claim, psychological or physical personal injury, any other financial loss, punitive or exemplary damages or aggravated damages.⁴⁷¹

Insofar as compensation and preventing the same discrimination and adverse effects are concerned both these remedies are found in the DDA and the Equality Act 2010 and the EEA. The EEA contains more remedies than the DDA and the Equality Act 2010. The EEA provisions do not contain the ‘declaration of the rights of the complainant and respondent in relation to the matters to which the proceedings relate’ as a remedy.

⁴⁶⁶ Section 17A(5) of the Disability Discrimination Act 1995.

⁴⁶⁷ Section 124(2)(a)-(c) of the Equality Act 2010.

⁴⁶⁸ Section 124(3) of the Equality Act 2010.

⁴⁶⁹ Section 124(7) of the Equality Act 2010.

⁴⁷⁰ Section 119(4) of the Equality Act 2010.

⁴⁷¹ Paragraph 15.40 of the Equality Act 2010 Statutory Code of Practice Employment of 2011.

3.6 CONCLUSION

The main purpose of this chapter is to compare the legislative framework governing disability discrimination in South Africa to that in the UK. The definition of disability is broader in the DDA and the Equality Act 2010 than the EEA in the sense that the meaning of disability in the DDA and the Equality Act 2010 covers past and actual physical and mental impairment which includes intellectual or sensory impairment. The DDA and the Equality Act 2010 covers both persons who has or had disabilities. In terms of the EEA the meaning of ‘people with disabilities’ focuses on actual mental, physical, sensory or intellectual impairment.

Both the DDA and the Equality Act 2010 contains a meaning of disability discrimination, where a person with a disability is treated less favourably than others because of their disability. Neither the Constitution of the Republic of South Africa nor the EEA provides a definition of discrimination. In South Africa, the general meaning of discrimination in the Convention 111 should be used. The EEA in South Africa also fails to provide a meaning of disability discrimination as is the case in the DDA and the Equality Act 2010. South African case law should be referred to in order to obtain the meaning of direct discrimination. The DDA and the Equality Act 2010 contain a definition of direct discrimination. Although the wording of the definition of direct discrimination used in South Africa differs from that in the UK, in both jurisdictions direct discrimination as far disability discrimination is concerned is where a person with a disability is treated differently from others because of their disability. As far as the definition of indirect discrimination is concerned both the DDA and the EEA does not contain such a meaning and for this reason the meaning of indirect discrimination in case law should be used. The case law in which the DDA and the EEA has been applied states that indirect discrimination takes place where the application of a neutral provision or criterion has a disproportionate effect of placing persons with disabilities at a disadvantage. The Equality Act 2010 contains a specific provision governing indirect discrimination. The Equality Act 2010 allows a complainant to challenge a PCP that the employer has not yet implemented but would have a discriminatory effect if it did, whereas the DDA and EEA do not. Therefore, as far as indirect discrimination is concerned, persons with disabilities are more protected in the UK.

The employee who institutes a claim of unlawful discrimination bears the onus of proof under the DDA and the Equality Act 2010. It is within the discretion of the Employment Tribunal to

decide whether the onus shifts to the employer. In South Africa, where an employee institutes a legal action against an employer for unfair discrimination based on one of the grounds listed in section 6(1) of the EEA, 'the employer against whom the allegation is made must prove, on a balance of probabilities, that such discrimination firstly, did not take place as alleged or secondly that such discrimination is rational and not unfair and otherwise justifiable'. Once discrimination has been established, the onus is on the employer. For this reason, South Africa provides more protection to persons with disabilities in terms of the onus.

The DDA does not contain provisions governing positive action measures. The Equality Act 2010 makes provision for positive action measures however there is no obligation on employers to implement these provisions. The EEA provisions governing affirmative action only apply to designated employers, however since South Africa places an obligation on designated employers to implement specific affirmative action measures South Africa still protects persons with disabilities more than the UK.

The DDA, Equality Act 2010 and EEA make provision for remedies against unlawful/unfair discrimination that includes compensation and steps to prevent the same discrimination or adverse effect. The EEA does not have 'the declarations of the rights of the complainant and respondent in relation to the matter to which the complaint relates' as a remedy. Despite this, EEA provides more protection for persons with disabilities in South Africa.

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CHAPTER 4: CONCLUSION AND RECOMMENDATIONS

4.1 INTRODUCTION

The purpose of this mini-thesis is to determine the extent to which the legislative framework in South Africa protects employees against disability discrimination. It also includes a discussion on the manners in which the legislative framework governing disability discrimination in South Africa compares to the legislative framework governing disability discrimination in the UK. This chapter contains concluding remarks on the extent to which the South African legislative framework protects employees against disability discrimination and also contains a discussion on whether the South African laws governing disability discrimination should be amended and/or supplemented.

4.2 THE LEGISLATIVE FRAMEWORK GOVERNING DISABILITY DISCRIMINATION IN SOUTH AFRICA AND UNITED KINGDOM

The Constitution of the Republic of South Africa contains the right to equality, which includes the right not to be discriminated against on the ground of disability, either directly or indirectly. The EEA has been enacted to give effect to the right to equality in the South African Constitution. The UK Constitution is extensively written, yet its contents occur in several documents and not codified into one single document. As far as the definition of disability is concerned, both the DDA and the Equality Act 2010 contain the same definition. In South Africa, ‘people with disabilities’ are defined as ‘people who have a long-term or recurring physical, mental, intellectual or sensory impairment which, in interaction with various barriers, may substantially limit their prospects of entry into, or advancement in, employment’.⁴⁷² The definition contained in the EEA covers actual physical, mental, intellectual or sensory impairment of a person.⁴⁷³ However, the definition of disability in the DDA and Equality Act 2010 is broader than the EEA in the sense that it covers past⁴⁷⁴ and actual physical and mental impairment. The laws governing disability discrimination in the UK applies to persons who

⁴⁷² See para 2.3.3.1.1 above.

⁴⁷³ See para 2.3.3.1.1 above.

⁴⁷⁴ See para 3.2.3 above.

had disabilities the same way it applies to persons who have disabilities.⁴⁷⁵ For this reason, it is recommended that the definition of ‘people with disabilities’ in the EEA be extended to include employees who had a disability. In terms of the Equality Act 2010 an employer is prohibited from unlawfully discriminating against an employee on any protected characteristic such as disability. The DDA does not refer to protected characteristics/listed grounds, because the act solely governs disability discrimination. The EEA states that ‘no person may directly or indirectly discriminate against an employee, in any employment policy or practice on one or more grounds’⁴⁷⁶ such as disability. These are known as listed grounds in section 6(1) of the EEA. Employees with a disability are protected as a result of the enactment of section 6 of the EEA.

There is no meaning of discrimination in the EEA. As a result of this, the general definition in the Convention 111 should be used in South Africa. Disability discrimination in the UK is defined by the DDA and the Equality Act 2010 as the practice of treating persons with disabilities less favourably than other people because of their disability.⁴⁷⁷

In order to understand the notion of direct discrimination, South African case law should be consulted. In the UK, direct discrimination is defined in both the DDA and the Equality Act 2010 and refers to a circumstance where a person with a disability is treated less favourably because of their disability.⁴⁷⁸ In the UK and South Africa direct discrimination on the ground of disability takes place when a person with a disability is treated differently from other people because of their disability. Employees with a disability in South Africa and the UK are equally protected as far as direct discrimination is concerned. The definition of indirect discrimination provided by case law should be used because the DDA and the EEA does not provide a definition of the term. According to case law indirect discrimination takes place when a neutral provision or criterion is applied and it results in people with disabilities to be disproportionately disadvantaged.⁴⁷⁹ While the DDA and EEA does not contain a provision to challenge a PCP that the employer has not yet implemented but would have a discriminatory effect if it did, the Equality Act 2010 does. As a result, persons with disabilities are more protected in the UK against indirect discrimination.

⁴⁷⁵ See para 3.2.3 above.

⁴⁷⁶ See para 2.3.3.1 above.

⁴⁷⁷ See para 3.2.3.1 above.

⁴⁷⁸ See para 3.2.3.1.1 above.

⁴⁷⁹ *Police and Prison Rights Union and Others v Department of Correctional Services and Another* (C544/2007) [2010] ZALC 68 para 123.

According to the EEA where discrimination is alleged on a listed ground such as on the ground of disability, an employer must prove on a balance of probabilities that the alleged discrimination did not occur or that the alleged discrimination is rational, not unfair, and otherwise justifiable.⁴⁸⁰ In the UK, the claimant must prove a prima facie case of discrimination. The onus rests on the respondent to prove that the alleged discrimination did not occur or that the respondent did not act unlawfully.⁴⁸¹ There has been confusion with regard to when the onus of proof shifts from the claimant to the respondent in the UK because it is at the discretion of the industrial tribunal after all the evidence had been presented.⁴⁸² As a result, the EEA is much clearer than the UK when it comes to the onus of proof. Employees in South Africa are more protected against disability discrimination than what is the case in the UK because an allegation of discrimination on a listed ground results in a presumption of unfairness and since the onus in the case of disability discrimination cases is on the employer.

In South Africa, the EEA imposes an obligation on designated employers to implement affirmative action measures. Affirmative action measures only apply to designated employers, however in the UK there is no such obligation on employers since implementing positive action measures is voluntary. For this reason, employees with disabilities in South Africa are more protected than those in the UK in this regard.

In South Africa, the EEA provides for four just and equitable remedies in the event that the unfair discrimination claim is successful. These remedies are available to persons with disabilities. South Africa and the UK provide for the payment of compensation and preventing the same discrimination from occurring in the future. The EEA also makes provision for remedies relating to ‘an order that a non-designated employer must comply with the EEA affirmative action provisions as if it were a designated employer, an order for the removal of an employer’s name from the register of employers who have filed employment equity reports with the Director-General of the Department of Labour in terms of section 41 of the EEA and the publication of the Court’s order’.⁴⁸³ These remedies are not applicable in the UK. The EEA provides more protection to ‘people with disabilities’ in South Africa than the UK as far as remedies are concerned. This is so, because the remedies included allow the courts to order that a non-designated employer comply with the designated employer provisions in the EEA.

⁴⁸⁰ See para 2.3.3.1.4 above.

⁴⁸¹ See para 3.2.3.1.3 above.

⁴⁸² See para 3.2.3.1.3 above.

⁴⁸³ See para 2.5 above.

This means that the non-designated employer will be obligated to implement affirmative action measures and therefore employees with disabilities that are not employed by a designated employer will be protected by the affirmative action provisions.

The EEA, DDA and the Equality Act 2010 contain provisions that govern the duty to make reasonable accommodation/adjustments. In South Africa, the Disability Code and the TAG provide guidance to employers with regard to the duty to make reasonable accommodation, however does not place any obligations on employers and for this reason employers cannot be held liable in legal proceedings where the provisions in the Disability Code and TAG are not complied with.⁴⁸⁴ The DDA uses the Code of Good Practice DDA as a guideline and the Equality Act 2010 uses the Statutory Code as a guideline, which does not create any legal obligations on employers and therefore where employers fail to apply these Codes they cannot be held legally accountable.⁴⁸⁵ The Code of Good Practice DDA and the Statutory Code in the UK contain information on the types of adjustments that are reasonable. It also provides detailed examples of the reasonable adjustments an employer may make. One of the examples contained in the Statutory Code suggests that providing information in accessible formats include instructions and manuals be modified and produced in braille, audio tape or orally with individual demonstration for people with learning disabilities.⁴⁸⁶ As a result, the UK's duty of reasonable adjustments provide more guidance on the duty of reasonable adjustments/accommodations than in South Africa.

4.3 RECOMMENDATIONS

The definition of disability in the EEA should include not only actual physical, mental, intellectual or sensory impairment but also past physical, mental, intellectual or sensory impairment as is the case in the UK. The meaning of disability contained in the EEA should thus be amended to this effect. It is recommended that the meaning of disability discrimination be inserted in the EEA.

It is recommended that the meaning of indirect discrimination be inserted in the EEA. Additionally, extra protection to people with disabilities should be provided for in the EEA that

⁴⁸⁴ See para 2.3.3.2.2.1.3 above.

⁴⁸⁵ See paras 3.4.1.1 and 3.2.3.1 above.

⁴⁸⁶ See para 3.4.1.1 above.

would allow people with disabilities to challenge an employer's PCP that has not been utilised yet but that would have a discriminatory effect on the employee if it were. The affirmative action measures and the procedural obligations provisions in the EEA should only be implemented by designated employers. As a result persons with disabilities will not be protected by the provisions governing affirmative action if they are not employed by a designated employer. It is therefore recommended that the meaning of designated employers be extended so that more people with disabilities are protected in the workplace. The Disability Code is important because it contains guidelines on the protection of persons of disabilities against unfair discrimination. The Disability Code should be binding on employers. In this way employers will be obligated to follow the rules set out in the Disability Code.

The Codes in South Africa includes examples of the types of reasonable accommodations that can be made however fails to provide information on the specific kinds of reasonable accommodation that may be provided in respect of specific forms of disabilities. The Codes in the UK are detailed in that it provides guidance on a number of possible scenarios that could take place. This includes ensuring that where the disability of an employee involves vertigo such an employee should not go onto the roof of an open building, that furniture be moved, that a ramp be provided for a person in a wheelchair or that doorways be widened. The Codes in the UK contain explanations of the meaning of certain provisions contained in the DDA and the Equality Act 2010 as well as what the relevant provisions entail. It is therefore recommended that the Disability Code be supplemented to include explanations of the meaning of certain provisions contained in the EEA and what the relevant provisions entail.

It is also recommended that specialised disability legislation should be enacted to address disability protection within the workplace. A lesson learnt from the UK is that specific disability legislation similar to the DDA should be drafted. Workplaces are encouraged to strive to ensure ongoing improvement in their efforts to attract, appoint, retain and ensure that employees with disabilities are protected from unfair discrimination.

[30 742 words]

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