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**REASONABLE ACCOMMODATION OF PEOPLE
WITH
DISABILITIES IN THE LABOUR MARKET**

*Dissertation Submitted in Partial Fulfilment of the Requirements for the Degree of
Masters of Laws In the Department of Mercantile Law in the Faculty of Law at the
University of North West (Mafikeng Campus)*

By

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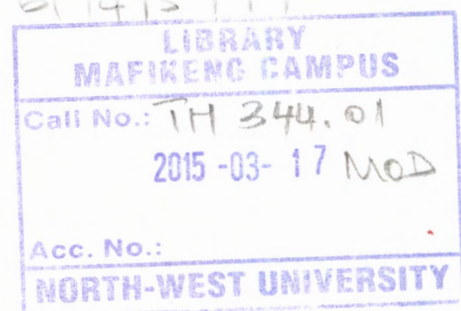


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CHAPTER ONE: INTRODUCTION

It is a fact that throughout the world people with disabilities are perceived as people who are abnormal and also unable to perform duties and other types of jobs as able-bodied employees can, as a result they are subjected to unfair disability discrimination at the workplace. It has been difficult for people with disabilities to access employment and explore their skills because of the society's negative perception towards them.

Until 11 November 1996, the day on which the Labour Relations Act of 1995 came into effect, employers were at liberty to refuse to appoint someone on the basis of, for example gender, race or trade union membership. Applicants for work enjoyed no protection under the 1956 Labour Relations Act, this means that an applicant for work had no legal standing to declare a dispute with a dispute with an employer, even though he or she may have been the victim of unfair discrimination.¹

The concept of disability rights has long been ignored throughout the world. Fortunately a new awareness of disability issues and rights has started to emerge. The Universal Declaration on Human Rights² provides that all human beings are equal before the law and as a result they must be treated equally and it is the duty of every state to ensure that all people are treated equally. This protection by the United Nations means that no one or class of people must be excluded from the society or labour market, and this includes people with disabilities.

South Africa ratified ILO Conventions and incurred obligations through ratification; those ILO Conventions are Convention no 111, the Discrimination (Employment and Occupation) Convention, 1958, ratified in 1997, and Convention no 100, the Equal Remuneration Convention, 1951, ratified in 2000. Conventions are designed to create international obligations for States that ratify them, when a country ratifies an ILO Convention it agrees to two important things, (1) It agrees to implement the Convention, for example, incorporate provisions of the Conventions into an act of Parliament and (2)

¹ Dupper O et al *"Essential Employment Discrimination law"* 1st ed 8 (2004 Juta Cape Town)..

² Article 7 of the Universal Declaration on Human Rights, Adopted on the 10th of December 1948.

It agrees to submit itself to the ILO's supervision of the measures it takes to implement the Convention, meaning it agrees to report on a regular basis.³

In the past, employees who became disabled whilst carrying on their duties were often dismissed for poor work performance or incapacity or forced to resign because they were deemed to be less productive as compared to able-bodied employees who were considered to be productive at the workplace as the result of their physical strength.

Previously employers were not ready and willing to employ and accommodate people with disabilities because they feared economic loss and also doubted their capabilities more so because laws were relaxed regarding the issue of the reasonable accommodation of people with disabilities. Recently in South Africa, we have had major developments in the field of labour law. Several laws were introduced, among others, the Employment Equity Act⁴(EEA) which ensures that there is equality at the workplace, the Skills Development Act⁵(SDA) which aims at bettering the skills of those who lack some necessary skills in order to carry out their duties, and the Promotion of Equality and Prevention of Unfair Discrimination Act⁶(PEPUDA) which provides for measures to facilitate the eradication of unfair discrimination, hate speech and harassment, particularly on the grounds of race, gender and disability.

The problem that people with disabilities encounter on a daily basis at their respective workplaces is that they are unfairly discriminated against as a result of the nature of their disability. The above mentioned laws were introduced with a hope of transforming the old employment system, so as to accommodate various categories of people, including people with disabilities, and also to eliminate unfair discrimination against them at the workplace.

The need to reasonably accommodate people with disabilities in the labour market remains a challenge if not a problem to the employers, however it is incumbent on the employers to comply

³ Dupper O et al "Essential Employment Discrimination Law" 28-29,(2004 Juta Cape Town).

⁴ 55 of 1998

⁵ 97 of 1998

⁶ 4 of 2000

with the above stated laws in order to reasonably accommodate people with disabilities at the workplace, whether they are applicants or already employed.

1.1 Definitions of Relevant Concepts

In defining people with disabilities, the World Health Organization (WHO) has come up with the following distinction:⁷

- Impairment: “A permanent or transitory psychological, physical, or emotional loss or abnormality or structure or function.”
- Disability: “Any restriction or prevention of the performance of an activity, resulting from impairment, in the manner or with the range considered normal, for a human being.”
- Handicap “A disability that constitutes a disadvantage for a given individual in that it limits or prevents the fulfillment of a role that is normal depending on age, sex, social and cultural factors, for an individual.”

The Employment Equity Act⁸ defines people with disabilities as “people who have a long term recurring physical or mental impairment which substantially limit their prospects of entry into, or advancement in employment.”

The Employment Equity Act Code of Good Practice has come up with the following distinction⁹:

- Impairment may be physical or mental

⁷ Truter L, Doctoral thesis “Disability Discrimination, A Comparative Analysis” Unpublished, submitted at the University of Johannesburg 4.

⁸ Act 55 of 1998, section 1.

⁹ Employment Equity Act 55 of 1998: “Code of Good Practice, Key Aspects on the Employment of People With Disabilities”, Government Gazette No 23702 7-8.

A physical impairment means a partial or total loss of a bodily function or part of a body. It includes sensory impairments such as being deaf, hearing impaired, or visually impaired and any combination of physical or mental impairments,

A mental impairment means a clinically recognised condition or illness that affects a person's thought processes, judgment or emotions.

- Long-term or recurring

A long-term impairment means the impairment has lasted or is likely to persist for at least twelve months,

A recurring impairment is one that is likely to happen again and to be substantially limiting; it includes a constant underlying condition, even if its effects on a person fluctuate.

- Substantially limiting

- "Impairment is substantially limiting if, in its nature, duration or effects, it substantially limits the person's ability to perform the essential functions of the job for which they are being considered."

- In Germany, the book of social code¹⁰, defines disabled persons as "persons whose physical functions, mental capacities or psychological health are likely to deviate for more than six months from the condition which is typical for the respective age and whose participation in the life of society is therefore restricted."

- Unfair discrimination¹¹ means "Discrimination in the use of irrelevant criteria to distinguish between individuals or a group, which has the purpose of an effect of less favourable consequences for members of one group in relation to those of another."

¹⁰ Rehabilitation and Participation of Disabled Persons "Law stated as of 1 may 2003", published by the Federal Ministry of Labour and Social Affairs, at 2.

¹¹ Du plessis JV et al, " *A Practical Guide to Labour Law* " 5th edition 80 (2002 Butterworths Durban).

- Direct discrimination¹² occurs where a person is treated differently because he or she belongs to a particular category and such treatment is to his or her disadvantage.
- Indirect discrimination¹³ occurs “when a seemingly innocent or mental act or requirement has a harmful or prejudicial effect on a person or group identified by a prohibited ground.”
- The Employment Equity Act¹⁴ defines reasonable accommodation as “any modification or adjustment to a job or to the working environment that will enable a person from a designated group to have access to or participate or advance in employment.”
- Designated Group¹⁵ means black people, women and people with disabilities.

In view of the above definitions it seems that there is no much difference with regard to the definition of people with disabilities. According to all these definitions, people with disability must either be mentally or physically impaired, which limits their prospects of entry into employment.

The researcher elects to choose the definition of people with disabilities provided by the Employment Equity Act, the Code of Good Practice, because it seems wide and inclusive especially when it is compared to other definitions. The Employment Equity Act and the Code of Good Practice has gone further to categorise the definition into three elements, namely, those who are physically and mentally impaired, those who have long-term and recurring impairment, and those who are substantially limited from performing their functions, and each category has been explained.

¹² Supra, at 76.

¹³ Albertyn C et al “*Introduction to the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000*”, 1st ed 34(2001 Witwatersrand University Press Johannesburg).

¹⁴ Section 1 Act 55 of 1998.

¹⁵ Supra, section 1.

1.2 Aims and Objectives

The researcher aims to consider the significance of reasonable accommodation of people with disabilities in the public sector and more importantly to analyse the South African laws that provide for reasonable accommodation of people with disabilities in employment places.

The researcher aims further to examine how people with disabilities are reasonably accommodated in the labour market. Focus will also be placed on their previous position or background before the advent of the new era of democracy. This examination will necessitate some changes or adjustment at the workplace in order to accommodate people with disabilities.

This dissertation will establish whether or not it is necessary to take further active steps in combating employment barriers and employment discrimination against people with disabilities.

1.3 Purpose of this Study

Unfair disability discrimination is continuously practiced in many ways in employment places. Employers normally make it difficult for people with disabilities to be employed by listing unfavourable requirements for a particular job and this is also a contributing factor to the unemployment of people with disabilities. People with disabilities for a very long time have been regarded as the objects of pity and a burden to the society. This perception has negatively impacted on their lives, capabilities and skills. As a result of this they have been ostracised from employment places.

It has been a great concern throughout the world that people with disabilities are excluded from employment places, and in the event they become employed conditions are normally unfavourable for them. Little is done to ease their problems that they encounter at their various employment places. The rights of people with disabilities are protected by the Constitution.¹⁶ Government departments and state bodies have an obligation to make certain that in each line function, concrete

¹⁶ 108 of 1996. Hereafter referred to as the 'final' Constitution of the Republic of South Africa.

steps are taken to ensure that people with disabilities are able to access the same fundamental rights as any other South Africa citizen¹⁷. The government realised a need for bringing equality and stability in employment places and introduced various labour law statutes such as the Labour Relations Act 66 of 1995, Employment Equity Act 55 of 1998 and policies to ensure that rights of people with disabilities are protected.

This dissertation serves to expound the need to reasonably accommodate people with disabilities in the workplace. At the end of this dissertation, the researcher will come up with an informed position or conclusion with regard to the reasonable accommodation of people with disabilities. The researcher will go further to state recommendations, which will be used as a guiding tool in reasonably accommodating people with disabilities in employment places.

1.4 Limitation of this Research

The researcher in examining as to whether people with disabilities are reasonably accommodated in the labour market will limit his scope of research to the public sector only more so because of the government's obligation to accommodate this class of people in the labour market, however, were necessary reference will be made to the private sector for comparative perspective and elucidation of issues.

The government has been advocating reasonable accommodation of this class of people in the labour market, as it is contained in various labour law statutes and policies. These labour laws and policies have been introduced to ensure that equality and stability prevail among all the employees, including people with disabilities. The government in its endeavours of promoting the rights of people with disabilities within employment places has pleaded with the government departments and state bodies to take concrete steps to ensure that people with disabilities access employment.¹⁸

¹⁷ White Paper on Integrated National Disability Strategy Paper 5(November 1997).

¹⁸ Supra.

This dissertation will ascertain as to whether the government is in compliance with its campaign of eliminating all employment barriers experienced by people with disabilities. The researcher will focus on relevant domestic laws and government policies dealing with the accommodation of people with disabilities in the labour market, among others, the Constitution of the Republic of South Africa¹⁹, the Employment Equity Act,²⁰ the Labour Relations Act,²¹ the Promotion of Equality and Prevention of Unfair Discrimination Act²² and the Skills Development Act.²³

1.5 Research Methodology for this Study

The research method that the researcher will employ in this study is mainly the analytical research method, supplemented by the comparative perspectives of the issues to be discussed. This study will be largely informed by literature sources, such as academic books, publications, articles, journals, case law and other related information. Presently research is revolutionised and enhanced by the availability of information from the Internet. The researcher will therefore use information from the Internet, more so because the Internet as research tool makes it easier to obtain updated and relevant information. Government policies will also play a pivotal role in this dissertation.

The data which was collected during the researcher's visit to Germany will also be used for purpose of comparative analysis. This is inspired by the fact that there is an agreement for an exchange programme between the University of Johannesburg (Johannesburg) and North-West University (Mafikeng campus) as well as J. W Goethe University (Germany) and *Max Planck-Institut Fur Auslandisches und Internationales Sozialrecht*(Munich).

¹⁹ 108 of 1996.

²⁰ 55 of 1998.

²¹ 66 of 1995.

²² 4 of 2000.

²³ 97 of 1998.

CHAPTER TWO: LEGAL AND CONSTITUTIONAL FRAMEWORK

2.1 Introduction

Disability rights are recognised in the Constitution of South Africa. The adoption of the 1993 Constitution²⁴ and the 1996 Constitution²⁵ represents a major change to the face of the legal system in this country. The right to equality was given constitutional recognition for the first time when the 1993 Constitution was adopted and it also meant equal treatment for people with disabilities. People with disabilities are unfairly discriminated against on a daily basis in employment places as a result of widespread ignorance, fear and stereotypes. It is because of these negative perceptions that they experience high unemployment levels and often remain in low status jobs and earn a lower salary.

It is a fact that disability differs from one person to another and there are those people who can still perform their duties irrespective of their disabilities. This category of people must be reasonably accommodated at the workplace. South Africa is one of the few countries that have constitutionally entrenched the rights of people with disabilities while at the same time passing legislation that ensures that people with disabilities have rights and protection at the workplace.²⁶

This chapter will examine the constitutional provisions, statutory provisions and policies relating to the protection of people with disabilities in the South African workplace. It will also examine how they must be accommodated.

2.2 Constitutional Arrangement

The Constitution of the Republic of South Africa is the supreme law of the country. Section 172(1), provides that when deciding a Constitutional matter within its power, a court (1) must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its

²⁴ 200 of 1993. Hereafter referred to as the Interim constitution of the Republic of South Africa.

²⁵ 108 of 1996.

²⁶ Dupper O et al "Essential Employment Discrimination Law" 1st ed 154(2004 Juta Cape Town).

inconsistency and (2) May make any order that is just and equitable, including an order limiting the retrospective effect of the declaration of invalidity.²⁷

As already highlighted above, the important development for people with disabilities in South Africa took place when the 1993 Constitution was adopted which preceded the 1996 Constitution. The 1996 Constitution²⁸ endorses the idea that disability discrimination should not be tolerated in a democratic South Africa²⁹. The fundamental rights to equality and to human dignity are central to the protection of people with disabilities. The South African courts have consistently held, also in the area of employment, that there is close correlation between the right to equality and the protection of a person's dignity³⁰, and in *Walters v Transitional local council of Port Elizabeth*, the court held that at the heart of the prohibition of unfair discrimination is the recognition that under the Constitution all human beings, regardless of position in society, must be accorded equal dignity.³¹

In the case of *Brink v Kitshof*³² the Constitutional Court argued that the primary purpose of the equality clause in the 1993 Constitution that preceded the final constitution was to prohibit patterns of discrimination and their results. The recognition of the right to equality the 1996 Constitution³³ is one of the most important human rights principles acknowledged. This section provides that "everyone is equal before the law and has the right to equal protection and benefit of the law." The Constitution³⁴ further provides that "the state may not 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". The Constitution protects all people against direct and indirect discrimination.

The Constitution³⁵ neither the state nor any person has the right to discriminate any person on the listed grounds. In terms of these provisions all people have a duty and responsibility to promote equality, so does the state. Discrimination based on disability is listed as one of the specific grounds

²⁷ Act 108 of 1996.

²⁸ Section 9(3) of Act 108 of 1996.

²⁹ Supra.

³⁰ *Larbi-Ordam V Mec for Education, North West Province*, 1998(1) SA 745 (CC).

³¹ 2001 SA 98 LC.

³² 1996 (4) S A 197(CC).

³³ Section 9(1) of Act 108 of 1996.

³⁴ Section 9(3) of Act 108 of 1996.

³⁵ Section 9(3&4) of Act 108 of 1996.

that will constitute unfair discrimination, and people with disabilities are thus guaranteed the right to be treated equally and to enjoy the same rights as all other citizens.

In the case of *Leornard Dingler Employee Representative council & others v Leornard Dingler (Pty) Ltd & others*³⁶, it was stated that “Discrimination is unfair if it is reprehensible in terms of society’s prevailing norms; whether or not society will tolerate the discrimination depends on what the object is of discrimination and the means used to achieve it”. Differentiation on the basis of one of the grounds listed in section 9 of the Constitution is presumed to be unfair discrimination until the contrary is proved. There is accordingly a presumption that differentiation on one of the listed grounds will impose burdens on people who have been victims of past patterns of discrimination or will impair the fundamental dignity of those affected.³⁷

In the case of *Harksen v Lane*³⁸ the Constitutional Court stated the following “What the specified grounds have in common is that they have been used or misused in the past to categorise, marginalise and often oppress persons who have had or who have been associated with, these attributes or characteristics. These grounds have the potential, when manipulated to demean persons in their inherent humanity and dignity”. In this case the court listed various factors that must be considered in making the determination of unfairness or otherwise. These factors are: The position of the complainants in society. The nature of the provision or power and the purpose sought to be achieved by it and the extent to which the discrimination has affected the rights of the complainants and whether it has led to an impairment of their fundamental dignity.³⁹

The determining factor in deciding whether discrimination is unfair is its impact on the people affected in particular whether it has impacted on her or his dignity. In the case of *Liberty Life Association v George*⁴⁰, the court acknowledged that, because of South Africa’s past, a need exists to address previous discrimination. The purpose of the equality clause is to bind the state to implement measure to prohibit discrimination of any nature everywhere, either on a listed ground or unlisted

³⁶ 1998 19 SA 295 .

³⁷ De Waal J & Currie I “*The Bill of Rights Handbook*” 5th ed 248 (2005 Juta Cspe Town).

³⁸ 1998 (1) S A 300 (CC).

³⁹ Supra.

⁴⁰ 1996 BLLR 985 (IC).

ground. Section 9(2) of the Constitution⁴¹ provides that “Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons or categories of persons, disadvantaged by unfair discrimination may be taken”. These measures referred to in the above section include Affirmative Action programmes. Affirmative Action means preferential treatment for disadvantaged groups of people. This type of programme can be seen as an exception to the right to equality or as part of the right to equality; the former view sees Affirmative Action as ‘reverse discrimination’, a practice of favouring those discriminated against in the past and the latter view sees it as a means to the end of a more equal society.⁴²

Affirmative Action programmes must therefore be seen not as a derogation from, but a substantive and composite part of the right to equality. Differentiation aimed at protecting or advancing persons disadvantaged by unfair discrimination is therefore warranted provided the measures are shown to conform to the internal test.⁴³ This test covers persons or categories of persons who have been disadvantaged by unfair discrimination and designed to protect and advance such persons or categories of persons as well as to promote the achievement of equality once shown to be an Affirmative Action measure. It is not unfair discrimination even if the basis of differentiation is a listed ground⁴⁴. The Constitution provides general protection to all citizens. The Constitution declares that everyone has a right to a full enjoyment of those rights. As a result, the labour laws which are introduced or will be introduced in future must be in line with it and must aim at promoting and protecting rights of the employees as well as the employers.

⁴¹ 108 of 1996.

⁴² De Waal J and Currie I “*The Bill of Rights, Handbook*” 5th ed 264 (2005 Juta Cape Town).

⁴³ Section 9(2) of Act 108 of 1996.

⁴⁴ De Waal J and Currie I “*The Bill of Rights, Handbook*” 5th ed 264-265 (2005 Juta Cape Town).

2.3 Legislative Framework

2.3.1 White Paper on the Integrated National Disability Strategy

This policy represents the government's approach on how it can contribute to the development and integration of people with disabilities and to the promotion and protection of their rights. The Integrated National Disability Strategy provides a blueprint for the integration and inclusion of disability into every aspect of governance. Another important feature of this policy is that it articulates a paradigm shift from dealing with disability related issues as solely health and welfare issues to a rights-based integrated approach.⁴⁵

The objectives of the Integrated National Disability Strategy, among others are the (i) the facilitation of the integration of disability issues into government developmental strategies, planning and programs, and (ii) the development of an integrated management system for the conciliation of disabilities planning, implementation and monitoring in the various line functions at all spheres of government. The development of the Integration National Disability Strategy needs to take place within a coherent programme of reconstruction and development and must be planned and implemented in terms of strategic guidelines.⁴⁶

This policy makes the point that people with disabilities should not be seen as objects of pity but rather as capable individuals who are and can contribute immensely to the development of the society. It also underscores the importance of transformation of attitudes, perceptions and behaviour towards people with disabilities. This is perhaps one of the greater challenges to overcome as people in general have an ingrained mindset as to what and what not people with disabilities can do⁴⁷. This policy is supposed to guide employers in accommodating the needs of people with disabilities instead of reflecting what the government intends to do in order to promote the rights of these people.

⁴⁵ McClain C V “ *Governance and Legislation in South Africa: A contemporary overview*” issue no12, January-March 2002, www. Disability World.Org, 23 March 2004 2.

⁴⁶ White Paper on Integrated National Disability Strategy 5 (November 1997).

⁴⁷ Supra 6.

This policy was introduced for the purpose of ensuring that the needs of people with disabilities are catered for, but it is soft on employers because it does not impose on them to accommodate the needs of people with disabilities. The Employment Equity Act was introduced specifically to deal with those injustices and inequalities, which cause discrimination at the workplace and also to promote equality at the workplace. Employers are obliged to go an extra mile in ensuring that the needs of people with disabilities are accommodated.

2.3.2 Labour Relation Act 66 of 1995

In July 1994, a ministerial legal task team was appointed to draft a new Labour Relations Act.⁴⁸ The task team was instructed among others to draft a bill that would bring our legislation in line with various International Labour Organisation Conventions⁴⁹. The first legislative response to the constitutional challenge of protecting all persons against unfair discrimination at the workplaces, including people with disabilities was expressed in the Labour Relations Act, which in terms of schedule 7 item 2(1) (a) before it was repealed, and replaced by Chapter II of the Employment Equity Act, prohibited discrimination based on various grounds including disability.⁵⁰

The government felt obliged not only to protect rights of citizens at large but also to protect the rights of employees which are conferred in the Constitution against any form of discrimination at the workplace. The Labour Relations Act introduced an important change in the area of the employment practice. Important protection was provided for employees and job seekers against unfair discrimination on the basis of their disability particularly on the area of dismissal. The Labour Relations Act confirmed the constitutional right to equality. The Labour Relations Act prohibits discrimination based on various grounds including disability and regards such dismissal as automatically unfair. The Labour Relations Act⁵¹ provides that a dismissal is automatically unfair if the employer in dismissing the employees, “unfairly discriminated against an employee, directly or indirectly on an arbitrary ground, including but not limited to race, gender, sex, ethnic, or social

⁴⁸ 66 of 1995.

⁴⁹ Dupper O et al *Essential Employment Discrimination law* 1st ed 21(2004 Juta Cape Town).

⁵⁰ 66 of 1995.

⁵¹ Section 187(1) (f) of Act 66 of 1995.

origin, colour, sexual orientation, age, disability, religion, conscience, belief, political opinion, culture, language, marital status or family responsibility". A dismissal may be fair if the reason for the dismissal is based on the inherent requirements of the particular job⁵². In case the employer dismisses employee, it is incumbent on him to prove that it is based on inherent requirements.

An employer must always consider alternative options before dismissing employees. The employer is only allowed to consider dismissing an employee basically if dismissal is the last resort and he must prove that he has considered all the options but of no assistance. The reason for dismissal should not be based on one of these listed discrimination grounds because that automatically amounts to an unfair dismissal. The Labour Relations Act recognises the right of an employee not to be unfairly dismissed. In the event that an employee alleged that the dismissal was fair, it is expected of an employer to prove that the dismissal was fair. The general procedure is that in cases of dismissals an employer is expected to prove that the dismissal was for a fair reason relating to any of the categories listed in section 188 of the Labour Relation Act⁵³ and in compliance with a fair procedure. Two of these categories will be discussed as follows:

2.3.2.1 Dismissal for Incapacity

In the case of incapacity in the form of poor work performance, questions such as whether or not there was any material breach of the required work standards, whether the employee was aware of the standards, and whether a fair opportunity was given to meet the required standards are relevant.⁵⁴ In the case of *Mambula v AECI Explosives Ltd*⁵⁵, it was stated as a rule that the employer is permitted to dismiss an employee who is frequently absent due to illness and that this may be justified on the basis of operational requirements. However the employer is obliged to consult with employee and consider alternatives prior dismissal. In *Elvey International (pty) Ltd*⁵⁶, an employee was temporarily incapable of performing his duties due to psychological disorder abuse of prescribed

⁵²Section 187 (2) (a) of LRA 66 of 1995.

⁵³ There are three categories which are listed in terms of section 188 of Labour Relations Act. These categories are Dismissal for Misconduct, Dismissal for Incapacity and Dismissal for Operational Requirements.

⁵⁴ Supra, 31.

⁵⁵ 1995 5 SA 62 (IC).

⁵⁶ 1995 5 SA 108 (IC).

medication. He was then unfairly dismissed for operational reasons in the absence of employer consulting and counseling employee and giving him an opportunity to improve.

It is a fact that employer prior dismissal must comply with the fair procedure, including consulting with an employee with a hope of considering alternatives or temporary employee in case an employee will be absent for a long period, however an employer cannot wait for an unreasonable period without prospects of recovery on the side of an employee, in this situation dismissal is the solution.

In *Henn v Eskom*,⁵⁷ it was stated that employee's frequent and lengthy absence due to ill-health may justify termination at point where employer can no longer be expected to tolerate such absences. Evidence is required from employer to show that such point has been reached, and in *Nehawu v SA Institute for Medical Research*,⁵⁸ it was stated that a sympathetic approach is required from an employer. The Employer consulted thrice with an employee and waited for five years before dismissing an employee. The bottom line is that an employer is expected to conduct a hearing on the alleged incapacity with an employee concerned because failure to do so will amount to unfair dismissal, and as a result he will not be in a position to assess whether he can improve or not. If the employee cannot improve his performance or he is ill indefinitely and the employer has invited the employee to a hearing, dismissal may take place.

2.3.2.2 Dismissal for Operational Requirements

Operational requirements are defined in terms of Labour Relations Act⁵⁹ as "requirements based on the economic, technological, structural or similar needs of an employer". The Labour Relations Act 66 of 1995 also recognises the possibility of dismissal based on the employer's operational requirements. It states that the employer has to consult with a representative body of the workers, and the purpose of consultation among others is to minimise the numbers of persons who will be dismissed and also to reach consensus on issues such as measures to avoid dismissal.

⁵⁷ 1996 6 SA 747 (IC).

⁵⁸ 1997 2 SA 146 (IC).

⁵⁹ Section 213 of Act 66 of 1995.

In cases of dismissal based on operational requirements the employer is expected to prove that the dismissal was indeed based on the needs of the employer. Failure to prove it will deem the dismissal to be unfair. In *BMD Knitting Mills (Pty) Ltd v Sactwu*⁶⁰ it was stated that in cases of dismissal based on operational retrenchment, the court would have to examine whether the decision to retrench was reasonable, having regard to employer's needs, and in *SACWU & others v Afrox Ltd*⁶¹, that in order for an employer to succeed in dismissal of operational requirements, he must prove that the reason for the dismissal was 'operational reasons' as defined.

In *Numsa v Atlantis Diesel Engines Ltd*⁶² it was stated "fairness in this context goes further than a bona fide and commercial justification for the decision to retrench. It is concerned, first and foremost, with the question whether termination of employment is the only reasonable option in the circumstance. It has become trite for the courts to state that termination of employment for disciplinary and performance should always be a measure of last resort.

Although the Labour Relations Act brought about some important changes in the area of employment and has sharpened the employment relationship it still could not redress the past injustices and inequalities which were prevailing at various workplaces and which discriminated against those who were previously denied access to the employment places.

The Labour Relations Act prohibited dismissal based on disability in schedule 7 of the Labour Relations Act, but the problem is that it has failed to promote equality at the workplace and protect rights of people with disabilities at the workplace. It did not even encourage employers to either employ people with disabilities or to advocate for their accommodation. Although the Labour Relation Act is the first legislation to respond to the constitutional mandate of protecting employees against unfair discrimination, it has not been of much assistance to people with disabilities.

⁶⁰ 2001 7 BLLR SA 705 (LAC).

⁶¹ 1999 10 BLLR SA 1005 LAC.

⁶² 1993 ILJ 642 (LAC).

In pursuance to our democracy the Integrated National Disability Strategy was drafted and this policy came into effect in 1997 after a lengthy discussion and consultation with the organisations of disabled community.

2.3.3 The Employment Equity Act.

The Employment Equity Act is of great importance in ensuring that there are equal opportunities for those who are falling within the umbrella of designated groups, Designated groups are blacks, People with disabilities, women, Indians and Coloureds. The purpose of the Employment Equity Act is to achieve equity at the workplace through the following:

- Promoting equal opportunities and fair treatment in employment through the elimination of unfair discrimination, and
- Implementing Affirmative Action measures to redress the disadvantage in employment experienced by the designated groups, in order to ensure their equitable representation in all occupational categories and levels in the workplace.⁶³

People with disabilities are amongst those who are identified as beneficiaries of Affirmative Action programmes. The Employment Equity Act explicitly provides that unfair discrimination in the workplace based purely on the ground of disability is prohibited⁶⁴. Section 6 of the Employment Equity Act⁶⁵, reads as follows; “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, social origin, colour, sexual orientation, age, disability, religion, HIV status, conscience, belief, political opinion, culture, language and birth.

⁶³ Isaak W “The prohibition of unfair discrimination in the workplace”, published under www.equality.org.za/Legal/Article, 23 March 2004, at 1.

⁶⁴ Dupper O et al *Essential Employment Discrimination Law* 159 (Juta 2004 Cape Town).

⁶⁵ Act 55 of 1998.

In *Hoffman v South African Airways*⁶⁶, the airline policy was that people who are HIV-positive could not be employed as cabin attendants. An applicant who was HIV-positive applied for a post as a cabin attendant and he was not appointed as a result of his status. It was argued that the policy amounted to unfair discrimination on the listed ground of disability. The Constitutional Court avoided this argument, preferring to deal with HIV-status as an analogous ground. The determining factor when deciding whether the discrimination is unfair is its impact on the affected people. For people to be denied employment because of their HIV-positive status without regard to their ability to perform the duties of the position from which they have been excluded is a violation of their dignity.

The Employment Equity Act⁶⁷ encourages employers to take steps in promoting equal opportunities in the workplace by eliminating unfair discrimination in any employment policy or practice. The Employment Equity Act is one of the most advanced legislative measures in the field of equity and disability. The Act prohibits unfair discrimination in any employment policy or practice against people with disabilities and advocates for Affirmative Action measures in favour of those who are classified as designated groups.

This section obliges employers to eliminate all employment barriers or difficulties, which prevent designated groups, including people with disabilities from accessing employment. The employer is required to identify employment barriers, which are affecting people from the designated groups from accessing employment. For example, employment barriers in the area of recruiting employees with disability would occur when an employer fails to draft advertisements in such a way as to accommodate them.

It is submitted that the term employment barriers includes any criterion 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 promotion of black people, women or people with disability⁶⁸. The employers should consult with the employees who are affected by employment barriers in order to jointly identify them and develop a strategy of

⁶⁶ 2002 21 SA 2357 (IC).

⁶⁷ Section 5 of Act 55 of 1998.

⁶⁸ Du Toit D et al *Labour Relations Law: A Comprehensive Guide* 4th ed(2003 Butterworths Durban) at 493.

preventing them. Failure to prevent them on the part of the employer amounts to unfair discrimination.

According to section 15(1) of the Employment Equity Act, affirmative action measures are “measures designed to ensure that suitably qualified people from designated groups have equal employment opportunities and are equitably represented in all occupational categories and levels in the workplace of a designated employer.”⁶⁹ A designated employer refers to an employer who employs 50 or more employees or to employers with less than 50 employees but who have more than a certain annual turnover depending on the economic sector they operate in⁷⁰. In the case of *Public Servants Association of South Africa v Minister of Justice*,⁷¹ the court stated that the words ‘designed’ and ‘achieve’ denote a causal connection between the designed measures and the objectives.

The question is whether all people from designated groups are entitled to benefit under an Affirmative Action programme just because they were previously discriminated against. However in order to stand a good chance of benefiting, two requirements must be met as follows:

- The employee must fall within the category of designated groups, and
- The employee must be suitably qualified.

This basically means that it is not enough if an employee or applicant falls within the category of the designated groups. He or she must be suitably qualified in order to stand a better chance of benefiting from Affirmative Action. Suitably qualified can be interpreted to mean that an employee is required among others to be skilful, capable and knowledgeable or to possess necessary qualifications in order to be appointed.

In *Lagadien v University of Cape Town*,⁷² an employee was appointed on contract as acting co-ordinator of the respondent’s disability unit. It had been agreed that her responsibilities would be re-

⁶⁹ Act 55 of 1998.

⁷⁰ Section 1 of Act 55 of 1998.

⁷¹ 1997 3 SA 925 (T).

⁷² 2001 1 SA 76 (LAC).

negotiated if a new head of the unit were appointed prior to the termination of her contract. The post was advertised and four candidates were interviewed. A black woman with disability from Zimbabwe was appointed. However due to the difficulties she encountered with her work permit she could not accept the offer. The post was re-advertised and the applicant applied again and she was not even interviewed. The applicant contended that she was unfairly discriminated against on the basis of race or gender, but finally contended that the discrimination against her was based on lack of academic and tertiary qualifications. The respondent denied that the sole reason why the successful candidates had been preferred was the fact that they possessed tertiary qualifications. The court held that an allegation of discrimination raises a presumption of unfairness, which the respondent is obliged to rebut.

The respective advertisement for the post had not indicated that possession of tertiary qualifications was an inherent requirement of the position. On the contrary, the immutable requirements were “proven skills, experience and knowledge” in specified areas. The applicant was judged weaker than the successful candidates in one critical area, namely, assisting students with disabilities to cope with their lecture material. There was no doubt that the possession of academic qualifications would enhance the incumbent’s ability to perform this function. There was accordingly no basis for concluding that the respondent had been arbitrary or capricious in attaching some weight to that factor when evaluating the applicants. The application was dismissed with costs.

In *Harmse City of Cape Town*,⁷³ the applicant challenged a decision by his employer not to shortlist him for any three posts, which he applied for. He alleged that his exclusion from the shortlist constituted discrimination against him on the grounds of his race, his political beliefs, and his lack of relevant experience/lack of arbitrary grounds. In addition, he alleged that he had been unfairly discriminated against because the council had failed, in considering his application for short listing, to apply certain of provisions of the Employment Equity Act,⁷⁴ which deals with the notion of suitable qualification for a job and an employer’s obligation in determining whether a person is suitable qualified.

⁷³ 20003 6 BLLR 557 (LC).

⁷⁴ Section 20 of Act 55 of 1998.

In relation to discrimination based on race his allegation was that he had not been short listed but that two whites were short listed instead. The court stated that it was not necessary for the applicant to claim that any discrimination against him was direct or indirect; this was a matter that ought to be proved at trial. The applicant further alleged that he had been unfairly discriminated on the grounds of political beliefs, because he was not regarded as “appropriately politically aligned” with the political party that was in control of the council. In relation to the allegation concerning council’s alleged failure to comply with the provisions of section 20, the council took the point that the statement of claim disclosed no cause of action since it was based on Chapter III of the Employment Equity Act, which deals with an employer’s obligation to apply affirmative action measures, while Chapter II prohibits unfair discrimination in employment practices and policies.

The court noted that chapter II of the Act, and section 6 in particular, provides that to take affirmative measure consistent with the purpose of the Act, does not amount to unfair discrimination. The court observed that one of the ways in which an employer can eliminate unfair discrimination is by taking affirmative action measure consistent with the purpose of the Act. In relation to the concept of ‘suitable qualification’, section 20 specifies the hierarchy of elements that make up the content of the concept and specifically singles out ‘relevant experience’ for special attention. The applicant’s claim, to the extent that he was suitably qualified for the post that he had applied for and that the council had failed to comply with its obligations to review all of the relevant factors when determining whether or not he was suitably qualified, could conceptually constitute an unfair discrimination.

The court considered that if an employer failed to promote the achievement of equality through affirmative action measure, then “it may probably be said” that the employer had violated the rights of employees in designated groups not to be unfairly discriminated against. In so far as an employer adopted an employment equity plan, that for example, regulated appointments and promotions, employees may have a legitimate expectation that their employer would act in accordance with the plan. The applicant was an employee of the council, and the judgment concerned his application for posts that would have resulted in his promotion. The exception raised by the council was dismissed with costs.

The labour court in the *Dudley v City of Cape Town*⁷⁵, rejected the approach that was followed in the case of Harmse, the judge held that on a proper interpretation of the Act, the distinction between chapter II and III should be maintained on this basis, if affirmative action measures have not been applied by a designated employer that give rise to a claim to enforcement chapter III but not to an unfair discrimination claim under chapter II. In particular, the judge found that there was no sound basis on which section 20 should be read together with the provisions of chapter II and likewise, no basis on which that can be produce a right to affirmative action.

The prohibition in section 20(5) against unfair discrimination solely on the ground of relevant experience relates only to the determination to be made in section 20(4) concerning whether a person is “suitably qualified” for the purpose of an employment equity plan.⁷⁶

According to section 9(2) of the Constitution, the beneficiaries of Affirmative Action may be persons or categories of persons disadvantaged by unfair discrimination.⁷⁷ The Employment Equity Act, in section 15, describes affirmative action measures as measures to ensure equal employment opportunities and equitable representation of suitably qualified persons from designated groups in all occupational work levels. This means a beneficiary has to meet two requirements; he or she has to be suitably qualified and be from a designated group.

The Employment Equity Act obliges employers to implement measures such as Affirmative Action measures in favour of people with disabilities and this includes “ making a reasonable accommodation” for the people from the designated groups to ensure that they enjoy equal opportunities. According to this section an employee must be capable or skilful in order to perform his or her duties.

There is nothing which prevents an employer in a situation where there are two applicants, one is able and skilful and another has a disability and is under-skilled, to appoint the capable applicant, and appoint the other as an intern with the idea of capacitating that person. There is no automatic qualification as a beneficiary of affirmative action. Those who allege that they have been

⁷⁵ 2004 8 BCLR 805(CC).

⁷⁶ Supra.

⁷⁷ Dupper O et al *Essential Employment Discrimination law* 1st ed 26 (2004 Juta Cape Town).

discriminated against as a result of misuse of affirmative action programmes can seek recourse from our courts. It will be incumbent on the employer to prove that the appointment of the successful candidate was fair.

In the event that the employer has advertised vacancies and there are no suitable candidates from the designated groups and he also has no affirmative action plan, able-bodied employees must be employed. This was the position in the case of *Coetzer and another v Minister of Safety and Security*,⁷⁸ the white applicants were not appointed due to affirmative action. The applicants approached the Labour Court, as the employer did not have an affirmative action plan and also no suitable applicants from the designated groups applied for those vacancies. The court held that failure to appoint them was discriminatory.

In the early case of *George V Liberty Life*,⁷⁹ the applicant claimed that the choice of an affirmative action candidate over him amounted to an unfair labour practice. Mr. George, a white male was an internal candidate for the position. The court recognises that the unfair labour practice concept had on occasion been interpreted as prohibiting discrimination on arbitrary grounds. The court referred to this as a negative discrimination, however, the court acknowledged that it had never before considered whether positive discrimination was a legitimate exception to the right not to be unfairly discriminated against. In order to answer this question, the court had to take the values of the broader community into consideration, most importantly the rights enshrined in the Constitution. The court accepted the necessity of affirmative action measure in order to assist those who have been historically disadvantaged, even though it amounted to a form of discrimination.⁸⁰

Section 19 of the Employment Equity Act requires designated employers to conduct an analysis of their employment policies, practices and procedures and to compile a workforce profile. This analysis serves the purpose of identifying employment barriers in order to eliminate those barriers or obstacles. In respect of the applicable employment policies and practices, the analysis should identify the following:

⁷⁸ 2003 3 SA 368 (LC).

⁷⁹ 1996 BLLR 985 (IC).

⁸⁰ Supra.

- Which criteria were used?
- Whether they potentially discriminate against persons of colour, women, or people with disabilities; and if so
- Whether they are justified in terms of the actual requirements of the job.⁸¹

Although employers are expected to submit reports or profiles on their employment equity plan, the question is whether the information contained therein is a true reflection of what transpires at the workplace or not, and also after identifying those barriers are steps taken to remedy the situation and prevent the future occurrence of those barriers? Another important question is that after submitting those profiles are employers doing something to eliminate those barriers and prevent future occurrence of them?

The Employment Equity Act is indeed welcomed by people with disabilities as progressive on the basis that it attempts to address the disadvantages faced by people with disability in the workplace. This Act does not prohibit failure to reasonably accommodate people with disabilities as a form of discrimination; it views it as a positive measure that must be included by employers to attain equal opportunities.⁸²

Employers are obliged to accommodate the needs of people with disabilities. The accommodation might vary from one person to another, the question is that if the employer fails to accommodate the needs or raises an excuse that accommodation is very expensive and as result he cannot accommodate them, how is the situation going to be remedied? After the employers have submitted the profile and there are some employment barriers identified which they cannot accommodate, the government will have to step in and assist them in catering for the needs of employees with disabilities, for an example a blind person who need audiotapes for performing his duties.

It is expected of the employer to make reasonable accommodation. Although the Act does not contain a provision in this regard, possible factors that can be taken into account to determine whether a specific accommodation can be expected to be made include financial costs involved, the

⁸¹ Du Toit et al *Labour Relation Law- A Comprehensive Guide* 4th ed 493 (2003 Butterworths Durban).

⁸² Truter L, Doctoral Thesis- Disability Discrimination, Unpublished 80 (Submitted at University of Johannesburg).

size of the employer, possible safety risks and the benefit acquired by the employee⁸³. The Employment Equity Act has been of great assistance to the people with disabilities, as it promotes their rights at the workplace and prohibits discrimination of any nature. It also provides for equal opportunities and lastly it obliges employers to design measures to accommodate the needs of people with disabilities.

The Employment Equity Act has managed thus far to promote equal employment opportunities and to eliminate employment barriers, which prevented designated groups including people with disabilities from accessing employment. In as much as it accommodates designated groups, the shortfall is that it applies to employees defined in terms of section 1 of this Act and excludes certain categories of workers, for example independent contractors.

The Promotion of Equality and Prevention of Unfair Discrimination Act was introduced in order to cater for those who are excluded in terms of section 1 of the Employment Equity Act.

2.3.4 Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000

The Promotion of Equality and Prevention of Unfair Discrimination Act⁸⁴ imposes a clear and unequivocal duty on the state to give special consideration to the rights of persons with disabilities. This legislation prevents and prohibits unfair discrimination by providing for procedures and substantive requirements for the determination of unfair discrimination to be made. The following aspects will be pivotal in disability discrimination cases:

- (a) The impairment of human dignity;
- (b) The position of the complainant in society and whether he or she suffers from patterns of Disadvantage or belongs to a group which so suffers; and
- (c) Whether or not the respondent has taken steps to accommodate diversity.⁸⁵

⁸³Supra, at 80.

⁸⁴ 4 of 2000. hereafter referred to as the Equality Legislation.

⁸⁵ Olivier et al *Social Security- A Legal Analysis* 323 (2003 Butterworths Durban) 323.

The Promotion of Equality and Prevention of Discrimination Act was introduced in order to comply with section 9(4) of the Constitution which places a duty on the state to pass national legislation to prevent or prohibit unfair discrimination and to promote the achievement of equality. This Act⁸⁶ is intended to give substance to the constitutional commitment to equality by providing for a legal mechanism with which to confront, address and remedy the past and present forms of incidental, as well as institutionalised or structural, unfair discrimination and inequality.

According to section 1(viii)⁸⁷ discrimination whether directly or indirectly is prohibited if it has a negative impact of disadvantaging or withholding benefits, opportunities or advantages from any person on one or more of the prohibited grounds. Prohibited grounds refer to “race, gender, sex, pregnancy, marital status, ethnic, or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth”. These listed grounds are similar to those listed in terms of section 9 of the Constitution, Act 108 of 1996.

The person alleging discrimination in terms of the above section must prove that it was based on any of the listed grounds and as a result he or she has been denied some opportunities or benefits. There is a difference in terms of the scope of application between the Employment Equity Act and the Promotion of Equality and Prevention of Unfair Discrimination Act since the Employment Equity Act covers only employees defined in terms of section 1, certain categories of workers are excluded e.g. independent contractors and South African national defence force. Those who are excluded in terms of section 1 of Employment Equity Act can seek recourse or protection from the Promotion of Equality and Prevention of Unfair Discrimination Act if they encounter any discrimination.

In terms of section 2(c),⁸⁸ the Act states that one of its objectives is to provide for measures to facilitate the eradication of unfair discrimination, hate speech and harassment, particularly on the grounds of race, gender and disability. It is clear that in terms of the PEPUDA discrimination whether directly and indirectly is prohibited in terms of section 2; measures must be implemented to outlaw discrimination in respect of people with disabilities.

⁸⁶ Albetyn C et al *Introduction to Promotion of Equality and Prevention of Unfair Discrimination Act* 1st ed 3(2001 Witwatersrand University Press Johannesburg).

⁸⁷ Act 4 of 2000.

⁸⁸ Supra.

Unfair discrimination on the ground of disability is prohibited in terms of section 9 of PEPUDA, which reads as follows: “Subject to section 6, no person may unfairly discriminate against any person on the ground of disability including the following:

- Denying or removing from any person who has a disability, any supporting or enabling facility necessary for their functioning in society and,
- Failing to eliminate obstacles that unfairly limit or restrict persons with disabilities from enjoying equal opportunities or failing to take steps to reasonably accommodate the needs of such.

The Promotion of Equality and Prevention of Unfair Discrimination Act encourages employers to remove any obstacle that may result in the inequality and discrimination of the employee based on disability. Such employees must not be denied access to facilities that will enable them to function and their needs must be reasonably accommodated. In terms of section 9 of PEPUDA, failure to eliminate obstacles that unfairly limit or restrict persons with disabilities from enjoying equal opportunities amounts to unfair discrimination. This Act closed a gap in section 1 of the Employment Equity Act, which covered a certain category of employees only. However it is not clear in terms of this Act how people with disabilities should be accommodated and it does not impose an obligation on employers to reasonably accommodate the needs of these people.

Both the Employment Equity Act and the Promotion of Equality and Prevention of Unfair Discrimination Act prohibit unfair discrimination at the workplace, and the Employment Equity Act advocates for equal opportunities of the designated groups, which include implementing measures to reasonably accommodate people with disabilities at the employment place. The problem is that both Acts does not provide clear guidelines as to how people with disabilities should be reasonably accommodated and this gives the employers all the powers to determine how they should accommodate them. These Acts also do not stipulate clearly as to whether there are any strict measures or qualify penalty for employers who fail to accommodate people with disabilities.

In South Africa, one can safely submit that relevant labour laws and policies have been passed, which clearly protect the rights of people with disabilities. The Labour Relations Act was passed to govern the relationship between employer and employee, and also to ensure that there is no unfair discrimination and unfair labour practices at various employment places. Subsequently the Employment Equity Act also was introduced in a quest to eliminate employment barriers and to call for positive measures in order to reasonably accommodate people with disabilities at the workplace.

A Code of Good Practice that basically supplements the Employment Equity Act, the Integrated National Disability Strategy and the Technical Guidelines on the Employment of People with Disabilities, which provide some guidelines on how people with disabilities should be reasonably accommodated must be hailed as a positive step towards ensuring that the labour rights of people with disabilities are protected and upheld. In view of the above laws and policies, it is clear that the government has played an important role by taking a significant statutory measures aimed at protecting the rights of all the employees including people with disabilities and integrating them into the labour markets.

CHAPTER THREE: COMPARATIVE PERSPECTIVE

3.1. Introduction

In this chapter focus will be placed on the International and Regional instruments applicable to the reasonable accommodation of people with disabilities in the labour market, among others United Nations' Instruments, relevant ILO Conventions and Recommendations, African Instruments and the European Instruments.

3.2 International Position: Declarations and Treaties

The South African Constitution⁸⁹ stipulates that “When interpreting the Bill of Rights, a court, tribunal or forum must consider international law”. South Africa after rejoining the International Labour Organisation has ratified a number of international conventions, which directly protect the rights of people with disabilities in the labour market and society at large. These will be discussed below.

3.2.1 Universal Declaration of Human Rights

On 10 December 1948, the United Nations General Assembly proclaimed the Universal Declaration of Human Rights. There has been some criticism of the fact that the Declaration ignores persons with disabilities and that disabled persons were not included as a distinct group vulnerable to human rights violations and that disability is not mentioned as a protected category.⁹⁰ The United Nations General Assembly does, however, at the outset, proclaim the Declaration ‘as a common standard of achievement for all people’. Article 1 of the Declaration states that ‘All human beings are born free

⁸⁹ Section 39(1) (b) of Act 108 of 1996.

⁹⁰ Degener T and Quinn G. “A Survey of International Comparative and Regional Disability Law Reform”. Paper presented at from principles to practice symposium, Washington D C16, www.dredf.org/international/degener_quinn.html, last visited 28 January 2006.

and equal in dignity and rights” and Article 2 goes further to assure everyone of his or her entitlement to rights and freedoms and that no one must be discriminated against on any ground listed in this article or other status which includes people with disabilities.

Universal Declaration on Human Rights⁹¹ provides that all human beings are equal before the law and as a result they must be treated equally. This protection by the Universal Declaration on Human Rights means that the member states must ensure that they protect the rights of people with disabilities in the labour market and also within the society. Over the past decade the organisations of people with disabilities all over the world have worked hard to reposition disability as a human rights issue. The result is a societal model for disability based on the premise that if society cannot cater for people with disabilities, it is the society that must change. This model requires substantial changes to the physical environment. The goal must be the right of people with disabilities in the labour market to play a full, participatory role in the society.⁹²

The recognition of people with disability in employment has been strongly advocated for, throughout the world, and this is premised on the fact that the United Nations proclaimed 1981 as the international year of disabled people, with the theme “full participation and equality”. Towards the end of 1981, the General Assembly urged member states to consolidate and build further on the results of the international year in order to secure prevention of disability, rehabilitation and full integration of disabled persons into society. The General Assembly also urged the Secretary General of the United Nations, the specialised agencies and other United Nations bodies to undertake or expedite measures already under way to improve employment opportunities for disabled persons within these bodies at all levels.⁹³

While the United Nations does not deal with labour matters as such, and recognises the ILO as the specialised agency responsible for taking appropriate action for the accomplishment of the purpose set out in its constitution, some United Nations

⁹¹ Article 7 of Universal Declaration on Human Rights.

⁹² White Paper on Integrated National Disability Strategy 3(November 1997).

⁹³ United Nations General Assembly Resolution 36/77 of 8 December 1981.

instruments of more general scope have also covered labour matters. A number of provisions concerning labour matters are contained in the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights, which are legally binding human rights agreements. Both were adopted in 1966 and entered into force 10 years later, making many provisions of the Universal Declaration of Human Rights effectively binding on states parties.⁹⁴

Article 6 of the International Covenant on Economic, Social and Cultural Rights, states that, “The states parties to the present covenant recognise the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts, and will take appropriate steps to safeguard this right and that the steps to be taken to achieve the full realization of this right shall include technical and vocational guidance and training programmes, policies and techniques to achieve steady economic, social and cultural development and full and productive employment under conditions safeguarding fundamental political and economic freedoms to the individual”. The International Covenant on Civil and Political Rights contains no specific provisions on employment, but it does include an important safeguard against discrimination.

Article 2 states that all persons are equal before the law and are entitled without any discrimination to the equal protection of the law.⁹⁵ This article prohibits any form of discrimination and guarantees to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political, or other opinion, national or social origin, property, birth or other status. The United Nations Committee on Economic, Social and Cultural rights, General Comment no 4, provides that although disability is not explicitly included in either Covenant among their prohibited grounds of discrimination, it is encompassed by the term “or other status.”

The United Nations Standard Rules on the Equalization of Opportunities for Persons with Disabilities, rule 7, provides that “states should recognise the principle that persons with

⁹⁴ ILO, International labour standards- Regular Supervisory System at 27-28.

⁹⁵ International Covenant on Civil and political Rights.

disabilities must be empowered to exercise their human rights, particularly in the field of employment. In both rural and urban areas they must have equal opportunities for productive and gainful employment in the labour market. In terms of this rule:

- Laws and regulations in the employment field must not discriminate against persons with disabilities and must not create obstacles to their employment;
- States should actively support the integration of persons with disabilities into open employment. This active support could occur through a variety of measures, such as vocational training, incentive-oriented quota schemes, reserved or designated employment, loans or grants for small business, exclusive contracts or priority production rights, tax concessions, contract compliance or other technical or financial assistance to enterprises employing workers with disabilities. States should also encourage employers to make reasonable adjustments to accommodate persons with disabilities;
- States programmes should include among others, measures to design and adapt workplace and premises in such a way that they become accessible to persons with different disabilities and support for the use of new technologies and the development and the production of aiding devices, tools and equipments and measures to facilitate access to such devices and equipments for persons with disabilities to enable them to gain and maintain employment; and
- In their capacity as employers, states should create favourable conditions for the employment of people with disabilities in the public sector, and measures should to include people with disabilities in training and employment programmes in the private and informal sector.

The aim of the abovementioned factors should always be to promote a sustainable life for persons with disabilities in order for them to find a place in the labour market like any

other able-bodied employee. In case they are not ready to fit in the labour market alternatives should be considered, for examples support programmes, so as to prepare them for full-time employment. The employers have the ultimate responsibility of removing obstacles or physical barriers, which people with disabilities are faced with on a daily basis, and promote their participation in the workplace.

3.2.2 International Labour Organisations Instruments: Conventions and Recommendations

Conventions are instruments designed to create international obligations for the states, which ratify them. Since its formation in 1919, the ILO has adopted a number of conventions and Recommendations which are different from the point of view of their legal character.

Recommendations do not create obligations, but rather provide guidelines for action.⁹⁶ International Convention no 111 and Recommendation no 111 concerning discrimination in employment and occupation were adopted in 1958. They both outline policies of non-discrimination in the promotion of equal opportunity and equal treatment. Both the Convention and Recommendation call for a national policy to eliminate discrimination in access to employment, training, and working conditions, on grounds of sex, race, colour, religion, political opinion, national extraction, or social origin and to promote equality of opportunity and treatment.⁹⁷

The International Labour Organisation adopted another Convention in 1967, called the Old Age and Survivors Benefits, Convention no 128, which provides for the following:

⁹⁶ ILO. International Labour Standards at15.

⁹⁷ Supra, at 17.

- Rehabilitation services designed to prepare a disabled person wherever possible for the resumption of previous activity, or, if this is not possible, the most suitable alternative gainful activity, having regard to aptitudes and capacity and,
- Take measures to further the placement of disabled persons in suitable employment.⁹⁸

Human Resource Convention No 142, called on member states to develop comprehensive and coordinated policies and programmes of vocational guidance and vocational training, closely linked with employment, in particular through public employment services. Systems of vocational guidance, including continuing employment information, were to be extended to ensure that comprehensive information and the broadest possible guidance would be available to all, including persons with disabilities.⁹⁹

People with disabilities are not a homogenous group. They may have a physical, a sensory, intellectual or mental disability. They may have had a disability from birth, or acquired this in their childhood, teenage years, or later in life, during further education or while in employment¹⁰⁰. Their disability may have little impact on their ability to work, and take part in society, or it may have a major impact, requiring considerable support and assistance and throughout the world, people with disabilities are participating and contributing in the world of work at all levels.¹⁰¹

The International Labour Organisation adopted another resolution in 1975. This resolution acknowledged growing public recognition of the need for special measures to integrate disabled persons into the community, deplored the fact that too many persons with disabilities, the majority of whom lived in developing countries, had very limited opportunity for work, and called on all public authorities and employers and workers

⁹⁸ Article 13 of Old Age and Survivors' Benefits, Convention no 128.

⁹⁹ Human Resources Development Convention, No 142 1975.

¹⁰⁰ ILO, Managing Disability in the Workplace published 2002, Geneva at 1.

¹⁰¹ Supra.

organisations to promote maximum opportunities for people with disabilities to perform, secure and retain suitable employment.

The Resolution called for a comprehensive campaign for vocational rehabilitation and social integration of people with disabilities, in cooperation and coordination with the United Nations, its specialised agencies, and international, regional and non-governmental organisations, a campaign which was to result, inter-alia, in the International Year of Disabled Persons and the World Programme of Action concerning People with disabilities.¹⁰²

Throughout the world people with disabilities are organising themselves to engage society on the questions of their fundamental rights. The United Nations has issued two documents dealing with the concerns of people with disabilities; these are the United Nations Standard Rules for the Equalization of Opportunities for Persons with Disabilities and the World Programme of Action concerning people with disabilities. Both documents call for the extensive changes in the environment to accommodate the diverse needs of people with disabilities in society.¹⁰³

The competent authorities should advocate for the adoption of workplace disability management strategies by the employers, as part of a national policy to promote employment opportunities for people with disabilities in the private and public sectors.¹⁰⁴

The International Labour Organisation adopted the Vocational Rehabilitation and Employment Convention No 159 and Recommendation No 168 in 1983. The Convention requires member states, in accordance with national conditions, practice and possibilities, to formulate, implement and periodically review a national policy on Vocational rehabilitation and employment of disabled persons. The renewed emphasis on

¹⁰² Resolution Concerning Vocational Rehabilitation and Social Reintegration of Disabled or Handicapped Persons, adopted 24 June 1975.

¹⁰³ White Paper on Integrated National Disability Strategy 1(November 1997).

¹⁰⁴ ILO, "Managing Disability in the Workplace" 1(2002 International Labour Organisation Geneva).

full participation is reflected in article 1.2, which describes the purpose of vocational Rehabilitation as being to enable people with disabilities to secure, retain and advance in suitable employment and thereby to further such person's integration or reintegration into society.

Article 4 of this Convention which advocate equality, submits that equality of men and women workers with disabilities shall be respected and that special positive measures aimed at effective equality of opportunity and treatment between disabled workers and other workers shall not be regarded as discrimination against other workers. This Convention prescribes the action to be taken at national level to implement the policy.

Article 7 of Recommendation no 168 provides that people with disabilities should enjoy equality of opportunity and treatment in respect of access to, retention and advancement in employment which, where possible, corresponds to their own choice and takes account of their individual suitability for such employment. Article 10 of the same Convention also provides that measures should be taken to promote employment opportunities for workers with disabilities, which conform to the employment and salary standards applicable to workers generally.¹⁰⁵

The International Labour Organisation's Committee of Experts on the Application of Conventions and Recommendations (CEACR) is entrusted with the responsibility for the regular supervision of observance by member states of the standards adopted by these member states through ratifications of relevant Conventions.

The Committee of Experts on the Application of Conventions and Recommendation in its reports on the general survey on the implementations of the provisions of Convention No 159 and Recommendation No 168, commented that the principle of equality of opportunity and the equality of treatment in employment of people with disabilities requires particular attention in an environment characterised by global competition and

¹⁰⁵ Recommendation No 168 of 1983.

deregulation of labour markets, and emphasised the applicability of the Convention to all member states.

In a final comment, the committee emphasised that the implementation of the Convention's provisions and the measures advocated by Recommendation No 168 did not necessarily require vast resources, but depended on a commitment of the relevant stakeholders. Employers should be compelled where necessary to employ a quota of employees with disabilities, and furthermore efforts should be made in close cooperation with the employers and workers organisations to overcome employment discrimination against workers with disabilities that are not related to their ability and job performance.

3.3 African Instruments

3.3.1 African Charter on Human Rights, 1981

In terms of Articles 2 and 3¹⁰⁶ every individual shall be entitled to the enjoyment of rights and freedoms recognised and guaranteed in this Charter without distinction of any kind such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status and that all individuals are equal before the law and are entitled to equal protection of the law. Although this Charter does not expressly provide for protection of people with disabilities, one can argue that the word 'other status' used in article 2 also includes people with disabilities.

Article 78(4) provides that the aged and people with disabilities shall also have the right to special measure of protection in keeping with their physical and moral needs.¹⁰⁷ South Africa by virtue of being a member of the African Union has an obligation to implement and domesticate the provisions of the African Charter on Human and Peoples' Rights.

¹⁰⁶ African Charter on Human and Peoples' Rights, 1981.

¹⁰⁷ Supra.

3.3.2 Southern African Development Community (SADC)

The objectives of the charter among others is to promote labour policies and practices measurers, which facilitate labour mobility, remove barriers in the labour market and enhance industrial harmony and increase productivity, in the member states. Article 9(1) of the Charter provides that member states shall create an enabling environment such that all persons with disabilities, whatever the origin and the nature of their disability shall be entitled to additional concrete measure aimed at improving their social and professional integration.

Article 9(2) further provides that the measure shall relate to, in particular, according to the capacities of the beneficiaries, vocational training, accessibility and mobility, means of transport and having appropriate organisations of work and workplaces to take into account their needs. South Africa as a member of the Southern African Development Community and a signatory to the Charter has a clear legal commitment to address disability issues with the urgency and dignity they deserve. This is of course a Constitutional mandate.

3.4 European instruments

3.4.1 European Union Recommendation Concerning Employment for People With Disabilities.

In 1986 the above Recommendation was adopted urging member states to take appropriate measures to promote fair opportunities for persons with disabilities in the field of employment and vocational training. Regulations are directly and automatically effective and Directives typically allow member states discretion as to the method of implementation and usually allow a number of years before full implementation.

3.4.2 European Social Charter of 1969

Part 1 of this Charter sets out general principles which the member states undertake to accept including the right of everyone to appropriate facilities for vocational guidance and vocational training, the right of persons with disabilities to independence, social integration and participation in the life of the community and the right of everyone to protection against poverty and social exclusion.

Article 15 of this Charter reads as follows; ‘With a view of ensuring to persons with disabilities, irrespective of age and the nature and origin of their disabilities, the effective exercise of their right to independence social integration and participation in the life of the community, the parties undertake, in particular, to promote their access to employment through all measure tending to encourage employers to hire and keep in employment persons with disabilities in the ordinary working environment and to adjust the working conditions to the needs of the disabled or, where this is not possible by the reason of disability, by arranging for or creating sheltered employment according to the level of disability.’

3.4.3 European Charter of Fundamental Rights of 2000

Article 20 and 21, both call for equality of everyone before the law and prohibits any form of discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic feature, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age, or sexual orientation.¹⁰⁸

The Charter of Fundamental Rights was adopted in 2000. Article 21 provides that any discrimination based on any ground including disability is prohibited and article 26 also guarantees persons with disabilities the right to benefit from measures designed to ensure

¹⁰⁸ Charter of the Fundamental Rights of the European Union, 2000/C/ 364/01.

their independence. This Charter in terms of Article 30 protects everyone against any unjustified dismissal, in accordance with the community law and national law and practices. This charter was a break through as regards of persons with disabilities at the employment places.

3.4.4 European Directive on Discrimination of 2000

The European Union Social Affairs Ministers adopted a new European Union Directive on Discrimination in Employment at the end of 2000.¹⁰⁹ The Directive prohibits direct and indirect discrimination on a number of grounds, including disability, and applies, inter alia, to selection criteria and recruitment conditions, vocational guidance, vocational training and employment and working conditions. Importantly, the directive states that ‘reasonable accommodation’ shall be provided, which means that the employers are to take appropriate measures, where needed, to enable a person with disability to have access to, participate in, or advance in employment, or to provide training, unless such measures would impose a disproportionate burden on the employer.¹¹⁰

Article 20¹¹¹ stipulates that “Everyone is equal before the law”. The principle of equal treatment obliges the members of the EU to promote equality and also to ensure that all citizens of the member states are treated equally, and they enjoy equal protection of the law.

Article 7(2)¹¹² permits measures that safeguard or promote integration of workers with Disabilities into the working environment. This creates a positive duty on employers to pre-empt discrimination by taking measures adapted to the needs of the particular disabled person. Appropriate measures should be provided, effective and practical measures to adapt the workplace to the disability, for example adapting premises and

¹⁰⁹ Council Directive 2000/78/EC of 27 November 2000.

¹¹⁰ Article 5 of European Directive on Discrimination.

¹¹¹ Charter of fundamental Rights of the European Union/ 2000/C 364/01.

¹¹² Council Directive 2000/78/EC of 27 November 2000.

equipments, patterns of working time, the distribution of tasks or the provision of training or integration resources.¹¹³

Article 2¹¹⁴ provides that “indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice 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, that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriately and necessary”. The purpose of the Directive is to combat discrimination based on various grounds, among others disability.

All the members of the European Union, including Germany have to ensure that they implement the policies formulated and developed by the European Union. The rights of all persons to equality before the law and protection against discrimination constitute a universal right recognised by the Universal Declaration of Human Rights.¹¹⁵ Discrimination based on religion or belief, disability, age, or sexual orientation may undermine the achievement of the objectives of a high level of employment and social protection, raising the standard of living and the quality of life, economic and social cohesion and solidarity, and the free movement of persons.¹¹⁶

Article 21¹¹⁷ provides that “Any discrimination based on any ground such as sex, race, colour, ethnic or Social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age, or sexual orientation shall be prohibited”.

United Nations is in active support of Universal protection of Human Rights which include right not be discriminated on any ground among others disability. This means that all the countries who are members of the United Nations must purport to promote

¹¹³ Supra.

¹¹⁴ Council Directive 2000/78/EC 27 November 2000.

¹¹⁵ Official Journal of the European Communities, L303/16 2 December 2000, par 4 at 1.

¹¹⁶ Supra, par 11 at 2.

¹¹⁷ Charter of Fundamental Rights of the European Union /2000/C 364/01.

equality amongst their citizens and also prohibit discrimination irrespective of whether is indirect or direct. A general trend is that people with disabilities are overlooked when coming to issues of employment and therefore remain in low job status and earn little salary, and remains a problem, which requires urgent response by many countries. Many Nations should be encouraged to provide for the developments of alternative forms of employment for persons with disabilities who may not have the capacity to work in the opened labour market and also they must promote their access to employment through all measures tending to encourage to hire and keep in employment persons with disabilities.

People with disabilities in general face difficulties in entering the open labour market and enjoying equal treatment. The concept of disability protection has recently gained a recognition through out the world and this is premised on the fact that number of United Nations instruments, International Labour Convention (ILO) conventions and recommendation, European Union Instruments and African Instruments have been adopted which unequivocally prohibit any form of discrimination and advocates for equal treatment of people with disabilities as well as their reasonable accommodation at the workplace.

It is evident from the above discussion and analysis of the international, supranational, regional and national that the integration of people with disabilities has long been outstanding. It is clear that all the instruments referred to above are indicative of the fact that there is a need for equal treatment of people with disabilities which includes implementation of positive measures aimed at reasonably accommodating and providing them with equal employment opportunities in the labour market. These instruments promote and enhance efforts and initiatives to accommodate people with disabilities in the labour force.

Although the UDHR does not clearly advocate for the employment opportunities of people with disabilities, it calls for equal treatment for all. One may applaud the UN Standard Rules on the Equalisation of Opportunities for Persons with Disabilities. Rule 7

appeals of the UN Standard Rules on the Equalisation of Opportunities for Persons with Disabilities appeals to all Member States to implement positive measures and empower people with disabilities to gain access to employment. The UN Standard Rules should be commended because they serve as legal sources which attempt to integrate and accommodate people with disabilities in employment markets.

ILO is a specialised agent in dealing with labour matters. This agent has also introduced a number of Conventions and Recommendations which makes provision for prohibition of discrimination in the labour market. It further indicates the need for the implementation of special measures to integrate people with disabilities. This is evident from Convention and Recommendation no 111, Vocational Rehabilitation and Employment Convention no 159 as well as Recommendation no 168 of 1983. the pivotal role played by I.L.O regarding the accommodation of the people with disabilities in labour market is a significant initiative which must be promoted by all the member states

As indicated above, both the African Charter on Human and Peoples' Rights and Social Charter of SADC also promote equality and access of employment to all. These two Charters are accommodative tools necessary to enhance the labour rights of people with disabilities.

At European level, it is clear that integration of people with disabilities has gained recognition, this is evident from the European Union Recommendation Concerning Employment for People with Disabilities which urges member states to take appropriate measures to promote employment opportunities for people with disabilities in the workplace and the European Directive on discrimination which prohibits discrimination on a number of grounds including disability. It further calls for integration and reasonably accommodation of people with disabilities. European efforts and legal initiatives to accommodate people with disabilities in job markets should be seen as a right direction towards the protection of the employment rights of people with disabilities.

It is submitted that at all levels which include International, regional, supranational and national, legislative attempts have been made to offer a reasonable accommodation of people with disabilities, and however there is still a need to put in practice such attempts which is largely depended upon the employers and the commitment of the member states to ensure that there is a sound and profound implementation and monitoring of these instruments.

CHAPTER FOUR: LEGAL FRAMEWORK IN GERMANY

4.1 Introduction

As highlighted above, the South African Constitution¹¹⁸ provides that “when interpreting the bill of rights, a court, tribunal or forum may consider foreign law.” The provision of this section does not necessary oblige the South African courts, tribunals and forum to consider foreign law whenever interpreting the bill of rights. However it is of paramount significance to consider foreign law for the purpose of comparing both systems in order to assess as to what is to be learnt from the other system in order to improve the South African system. Therefore, the legislative framework of Germany will be discussed as follows:

4.2 Background

The problem of integrating people with disabilities into the labour market was regulated for the first time in Germany in 1923. The first legal regulation in the Federal Republic of Germany was the Act on Disabled Persons of 1953. This Act only covered persons whose handicap originated from a specific cause, for example, war and work accidents. This restriction to a specific cause was abandoned in the new Act on disabled Persons of 1974, which presently is known as Social Security Code no IX, this Act no longer focuses on the cause but merely on the degree of the handicap. The main goals of this Act, among others are: The integration of people with disabilities in the employment relationship and special assistance during employment and special protection against dismissal.¹¹⁹

¹¹⁸ Section 39(1)(c) of Act 108 of 1996.

¹¹⁹ Minister of Health and Social Security, Rehabilitation and Participation of People with Disabilities, 2003, at 34.

4.3 The Constitution of the Federal Republic of Germany

The German Constitution provides for equal treatment before the law, and makes illegal any discrimination based on a number of grounds, including race, nationality, ethnic origin, disability, belief or religion.¹²⁰ Article 3.3 states that "no person shall be favoured or disadvantaged because of sex, parentage, race, language, homeland and origin, faith or religion or political affiliation. No person shall be disadvantaged because of disability"¹²¹. The Basic law, passed in 1949 as the Constitution for the western part of Germany, became also the constitution for the unified Germany in 1990. The first and most important Chapter of the Constitution of the Federal Republic of Germany contains a catalogue of fundamental rights, which is of utmost importance.

According to the German Constitution,¹²² all persons shall be equal before the law. This fundamental right has become the basis of legitimacy for the principle of equal treatment which again was developed by the judiciary and which plays a very important role in the employment relationships.¹²³ This constitutional principle guarantees equality before the law in the sense that a statute may not be applied differently in identical situations. It prohibits arbitrary action by the state, so that no one may suffer prejudice as a result of the exercise of the state authority, unless there are material reasons adequately justifying differential treatment.¹²⁴

The principle of equal treatment, on the other hand, demands that every member within a group must be treated equally¹²⁵. The principle of equal treatment does not totally exclude differential treatment, it prohibits arbitrary distinctions but allow differences which are specifically justified.¹²⁶

¹²⁰ Funk L, "Thematic Feature- Implementation of E U Framework Equal Directive" 2 (2004 Cologne Institute for Business Research).

¹²¹ Article 3.par 1 of the Constitution of the Federal Republic of Germany: Basic Law

¹²² Supra.

¹²³ The Constitution of the Federal Republic of Germany: Basic Law.

¹²⁴ Article 3.par 1 of the Constitution of the Federal Republic of Germany: Basic Law

¹²⁵ Funk L "Thematic feature-Implementation of the EU framework Equal Treatment Directive" 2(2004 Cologne Institute for Business Research).

¹²⁶ Article 3.3 of Constitution of the Federal Republic of Germany: Basic law at 12.

The German Law protecting people with disabilities against unfair dismissal is focusing on reinstatement in case of an unlawful dismissal. However, even if the dismissal is judged to be unlawful the employer can still obtain a dissolution of the employment contract and thereby prevent reinstatement. Such a dissolution, however, is granted by the court under two conditions, first the employer has to pay a certain financial compensation and second it has to be demonstrated that further fruitful cooperation no longer can be expected.

According to section 626 of the Civil Code, dismissal without notice is justified if there are reasons, which in view of all circumstances of the case and in evaluating the interests of both parties make it unacceptable for either of the parties to fulfil the contract until the end of the period of notice. Section 1 of the Act on Protection against Dismissal, provides that dismissal with notice only is socially justified and thereby lawful if there are reasons concerning the employee's personality or reasons concerning employee's behaviour or urgent economic reasons.¹²⁷

In all cases of dismissal it is incumbent on the employer to prove on a balance of probabilities that the dismissal was fair and reasonable. Article 80¹²⁸, reads as follows “The Government, a Minister or the state (Land) governments may be authorised by the statute to issue ordinances”, As a result various ordinances have been introduced in line with article 80 of the Basic Law.

4.4 Ordinance on communication

Based on section 9(2) of the Act on Equal Opportunities for Disabled Persons, the Ordinance on the Use of Sign Language and other Communication Aids in Administrative Procedures was issued.

¹²⁷ Supra, at 17.

¹²⁸ Constitution of the Federal Republic of Germany: Basic Law at 60.

This ordinance¹²⁹ applies to all natural persons who are involved in administrative procedures and who are entitled in compliance with section 3 of the Act on Equal Opportunities for Disabled Persons as hearing or speech impaired persons to be provided with oral communication in administrative procedures, with an interpreter for the German sign language, for communication by signs supporting spoken language or other adequate Communication aids in order to protect their own rights.

Entitled persons have the right to choose the communication aid to be used. These persons shall inform the authority in good time of which extent they will make use of their right to choose their communication aid.¹³⁰ The effectiveness of this ordinance shall be evaluated no later than three years after its entry into force.¹³¹

4.5 Ordinance (law) on the Barrier Free Information Technology

This ordinance came into operation as a result of section 11(1) sentence 2 of the Act on Equal Opportunities of Disabled Persons of April 27, 2002. This ordinance shall apply to websites and WebPages, which are publicly accessible, and graphic user interfaces created on the basis of information technology, which are publicly accessible to authorities of the federal administration.

The intention of the design of IT and internet facilities is to enable people with disabilities within the meaning of section 3 of the Act on Equal Opportunities of people with disabilities who can only use information technology to a limited extent unless additional conditions are fulfilled to access it.¹³² The ordinance shall be reviewed regularly, taking into account technological developments.

¹²⁹ Ordinance on communication Aids 17 July 2002.

¹³⁰ Supra, at 1.

¹³¹ Supra, at 3.

¹³² Ordinance on Barrier-Free Information Technology 17 July 2002.

4.6 Ordinance on Barrier Free Documents in the Federal Administration

Based on section 10(2) of the Act on Equal Opportunities for Disabled Persons, the Ordinance on Barrier Free Documents in the federal administration was issued.¹³³ This ordinance applies to all natural persons who are involved in administrative procedures, and who in compliance with section 3 of the Act on Equal Opportunities for Disabled Persons, are entitled as blind or visually impaired persons to access documents in a form perceptible to them in order to protect their own rights¹³⁴. Entitled persons may claim this right in accordance with section 10(1) sentence 2 of the Act on Equal Opportunities of Disabled Persons visa-a- vie every authority of the federal administration.

The rights of entitled person to receive access to documents in a form perceptible for them apply in so far as this is necessary to protect their own rights in administrative procedures. In this regard particular account shall be taken of the individual need of the entitled person.¹³⁵

4.7 Conclusion

In view of the above discussion, it is evident that in Germany the rights of the people with disabilities in respect of the labour markets are constitutionally entrenched and protected . This constitutional protection is also evident in section 9 of the South African Constitution. These constitutional similarities represent commitment of both South Africa and Germany to protect the rights of the people with disabilities in the workplace. Labour legislation of Germany also prohibits disability discrimination at the workplace. Both the constitutional and legislative arrangements in Germany are the necessary mechanisms intended to promote the labour rights of people with disabilities with regard to access to employment and participation in labour markets.

¹³³ Ordinance on Barrier Free Documents in the Federal Administration.

¹³⁴ Supra at 1.

¹³⁵ Supra at 2.

CHAPTER FIVE: COMPARATIVE ANALYSIS: SOUTH AFRICA AND GERMANY

5.1 Introduction

Reasonable accommodation in terms of the Employment Equity Act is defined as “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”.¹³⁶ The accommodation should aim to reduce the impact of the impairment on the person’s capacity to fulfil the essential functions of a job.¹³⁷

The principle of reasonable accommodation applies to all people who are classified as designated groups, which include people with disabilities. It obliges employers to make an extra effort in ensuring that people with disabilities are reasonably accommodated. Importantly, reasonable accommodation depends upon the employer being aware of the applicant’s or the employee’s disability or impairment. It is therefore necessary for an applicant or an employee to disclose his or her disability voluntarily if accommodation is required. The employer is prevented from disclosing that privileged information.

Khosa in her article on reasonable accommodation of people with disabilities, further submitted that “the definition of reasonable accommodation suggests a reconstruction or alteration of an apparatus, device or infrastructure which is attached to the job or working environment”.¹³⁸ The question remains as to whether there is a duty on the part of employers to accommodate people with disabilities and another important question is what entails a

¹³⁶ Employment Equity Act 55 of 1998: Code of Good Practice on Disability in the Workplace at 4 www.dpsa.org.za/policies/Employment, last visited 20 September 2005.

¹³⁷ Supra.

¹³⁸ Khosa D “Reasonable Accommodation for people with Disabilities”, July 2003, CCMAIL ‘at 1, www.ccma.org.za/Displaypage/CCMAil, last visited 14 September 2005.



reasonable accommodation or what is reasonable accommodation? Section 9(2)¹³⁹ of the Constitution provides that “equality includes the full and equal enjoyment of all rights and freedoms”. It further states that in order to promote the achievement of equality, legislative and other measures designed to protect or advance persons or categories of persons, disadvantaged by unfair discrimination may be taken.”

In terms of our Constitution, people or employees with disabilities should be accommodated and whatever measure is necessary for the promotion of their participation must be implemented. Section 15 of the Employment Equity Act was introduced as a response to the provisions of section 9(2) of the constitution. The provisions of section 9(3) of Act 108 of 1996 and section 6 of Employment Equity Act 55 of 1998 are important because both Acts prohibits discrimination based on the listed grounds, Section 5 of the Employment Equity Act also obliges employers to remove all obstacles in eliminating unfair discrimination at employment places.

According to section 15 of the Employment Equity Act, employers are obliged to eliminate employment barriers that adversely affect people with disabilities from accessing employment and also to design some measures in order to increase their participation in the workplace, these measures should include reasonable accommodation.

Reasonable accommodation applies to employees who are already in employment and to applicants. The degree and type of accommodation to be provided depends largely on the nature of the disability. For instance, a blind employee will require accommodation that is different from someone who is confined to a wheelchair. Khosa further observed that reasonable accommodation will differ largely and depend on the circumstances of each case, and of course what is ‘reasonable’ to one employer might be unreasonable to the next employer in terms of discharging an employer’s obligation to provide reasonable accommodation.¹⁴⁰

¹³⁹ Act 108 of 1996.

¹⁴⁰ Khosa D “Reasonable Accommodation for Employees with Disabilities”, July 2003,CCMAIL at 1 www.ccma.org.za/displaypage/, last visited on the 14th November 2005.

There are various factors that employers need to consider in determining the reasonableness of this accommodation such as:

- The size of the employer;
- The employer's financial circumstances;
- The cost of the accommodation;
- The type or kind of accommodation needed; and
- Consideration of less means to accommodate the person,¹⁴¹ meaning that he will only be accommodated if it does not cause unjustifiable hardship to the employer.

The Employment Equity Act provides for reasonable accommodation for people with disabilities, but the question remains whether adjusting or modifying a particular job or working environment is enough to accommodate the needs of people with disabilities, in considering the abovementioned factors. Modification or adjustment will only be vital if it affects the productivity at the workplace, especially if failure to adjust will cause employees to be unable to perform his or her duties. Apart from these modifications and adjustments there are some other areas which the employer must target or focus on in accommodating the needs of people with disabilities, for example skills development (by providing relevant training) and protection against unfair dismissal.

Vaida¹⁴² in her article stated that although there are many unskilled people with disabilities, there are also highly skilled people who would benefit any company. It is a "narrow" perception that the only work people with disabilities can manage in the workplace is operating a switchboard. She further submitted that there are auditors who are deaf and doctors who are in wheelchairs¹⁴³, but still they are able to carry on their duties or mandates.

The researcher chose to focus on training of employees and their protection against unfair dismissal as areas of concern or investigation, which need to be thoroughly considered in reasonably accommodating the needs of people with disabilities, On a daily basis employees

¹⁴¹ Supra, at 1.

¹⁴² Vaida G "Disabled Forgotten in Equity Frenzy" 25 (24 July 2005 Sunday Times) www.sundaytimes.co.za/careers.

¹⁴³ Supra, at 1.

are dismissed as a result of their incompetence because they lack some necessary skills, which render them unable to perform their duties. It is a fact that not all people with disabilities are under-skilled however because previously they were denied access to employment and were perceived as abnormal people who could not even play an active role in the labour market. The majority of people with disabilities are still unemployed and under-skilled.

5.2 The South African Position

5.2.1 Training

“Unfair labour practice” is defined as follows in section 186(2) of the Labour Relations Act, as the unfair conduct of the employer relating to the promotion, demotion, or training of an employee or relating to the provision of benefits to an employee.

In *George v Liberty Life Association of Africa Ltd*,¹⁴⁴ George applied for appointment to a position within a company advertised in terms of company policies before recruiting externally. It transpired later that the position had been advertised externally. George became aware of the advertisement for the human resource officer post on the office notice board and applied for a transfer for his position as a supervisor to human resource officer. The company representative wrote the following in the application of George, “Strong candidate, high energy levels, positive, enthusiastic, would however, need guidance, support and training”. She further stated that George did not meet the requirements for the above posts, and that there is no Human Resource exposure, as a result the candidate needs full training on the job. The company subsequently appointed an external candidate.

The employer in forwarding reasons in support of their decision to consider an external candidate and not George maintained that the application for the vacancy made by George was strongly considered because of his divisional line experience; however, because their under resourced situation had been preventing them from meeting some of their accountabilities. It was imperative that the incumbent in this position be fully productive from day one and. This requirement necessitated an experienced candidate who would need minimal training. In

¹⁴⁴ 1996 17 SA 571 (IC).

addition, it was necessary to fill the position with someone who supplements the existing skills in the department. This was the primary reason for selecting the candidate who was successful.

The court held that George met all requirements for eligibility and was therefore entitled to be considered for the human resource officer post, and further that the failure by *Liberty Life Associations* to follow the job posting procedure laid down in its staff handbook as regards filling the post of the human resource officer constitutes an unfair labour practice, the court therefore ruled in George's favour.

The employer has a duty, as is the case in any employment place to ensure that he has a capable team at his employment places. In order for him to have this capable team, he has to provide some compulsory or even individual training in building their capacity depending on their different needs. Section 15(2)(a)(ii)¹⁴⁵ provides that Affirmative Action measure by the designated employers must include "measure to retain and develop people from designated groups and to implement appropriate training measure, including measures in terms of the Act of the Parliament for skills development."

Employers must provide training for people with disabilities in order to equip them with the necessary skills and knowledge. According to section 15(2)(a)(ii) of Employment Equity Act and section 2(a-e) of the Skills Development Act, training is seriously considered as a best tool which employees must be armed with, because it serves the purpose of capacitating employees with relevant skills and knowledge in order to execute their mandate without impediments.

The employer is guilty of an unfair labour practice if the employer fails to train his employees when there is a contractual obligation to do so. In *Mitusa v Portnet*,¹⁴⁶ the employer had a contractual obligation to train the employees, but denied the employees training without even consultation. It was held that the employer's conduct amounted to unfair labour practice.

¹⁴⁵ Act 55 of 1998.

¹⁴⁶ 2000 9 BALR 1037, (CCMA.)

Training of employees will assist in producing good results and also in avoiding incapacity on their part. In terms of the Code of Good Practice,¹⁴⁷ employees with disabilities should be consulted in order to ensure input specific to their career advancement and also facilities, materials for training, work organisations and recreation should be accessible to employees with disabilities. There is a need to train these people with disabilities, in order to better their skills in improving their participation at the workplace.

In its quest to ensure that those who were previously disadvantaged in terms of acquiring relevant knowledge and necessary skills in order to find themselves a place in the labour market, including people with disabilities, the government introduced the Skills Development Act¹⁴⁸, This Act was introduced among others for the following reasons;

- To develop the skills of the South African workforce;
- To encourage employers to provide employees with the opportunities to acquire the skills and to employ persons who find it difficult to be employed; and
- To improve the employment prospects of persons previously disadvantaged by unfair discrimination and to redress those disadvantages through training and education.

5.2.2 Dismissal protection

Employees have the right not to be unfairly dismissed and in any case of dismissal it is incumbent on the employer to prove that the dismissal was fair. In terms of section 188 of the LRA 66 of 1995, employer must prove that the dismissal was based on misconduct, incapacity or operational requirements. For the purpose of this dissertation, the researcher will only focus on incapacity and operational requirements.

¹⁴⁷ Employment Equity Act: Code of Good Practice par 10 16.

¹⁴⁸ Section 2(a) of Act 97 of 1998.

5.2.2.1 Operational Requirements

Retrenchment aimed at downsizing a workforce because the employer does not need as many employees as it currently has. It takes place when jobs become redundant, and is aimed at effecting savings on the wage bill. Numerous considerations might tempt the employer to resort to this step, among others a drop in demand for its products or services; the introduction of the new technology which makes production less labour intensive; re-organisation, or the introduction of more productive and cost-efficient work methods.¹⁴⁹

Section 189¹⁵⁰ provides that when an employer contemplates dismissing one or more employees for reasons based on the employer's operational requirements, the employer must consult;

- Any person whom the employer is required to consult in terms of a collective agreement; and
- If there is no collective agreement that requires consultation, a workplace forum, if the employees are likely to be affected by the proposed dismissal, and the event there is no workplace or trade union, the employer must consult with the employees who are likely to be dismissed. The purpose of consultation is to attempt to reach an amicable solution in avoiding dismissal, to reduce number of employees likely to be dismissed and possibility of re-employment in future.

In *General Food Industries Ltd v Food & Allied Workers Union*¹⁵¹ the respondent union had referred an unfair dismissal dispute concerning 58 employees of the appellant company as its Salt River Mill to the Labour Court. By agreement between the parties the Salt River Mill case was to be a test case to enable the parties to decide after judgment whether to continue with cases involving the similar dismissal of employees at three other business concerns of the

¹⁴⁹ Grogan J "Workplace Law" 8th ed 221(2004 Juta Cape Town).

¹⁵⁰ 66 of 1995.

¹⁵¹ 2004 25 SA 1260 (LAC)

company. According to the company the employees were dismissed after it had decided that the outsourcing was the only solution to its operational requirements. The court noted that the company had entered into a wage deal with the union a month before it decided to outsource and that it had undermined the effect of the wage deal by retrenching the very workers affected by the wage increase.

Furthermore, the court found that the outsourcing had constituted a threat to trade unions because it struck at the core of job security and the survival of jobs. Consequently, the company had no compelling reasons to justify the use of section 189 of the Labour Relations Act, other than a reduction of the wage bill, when it decided to outsource. The court accordingly found the dismissals had been used to compel the employees to accept lower wages and had been automatically unfair in terms of section 187(1) (c) of the LRA and it ordered that the employees be reinstated retrospectively. The company appealed to the Labour Appeal Court against the whole of the judgment of the Labour Court.

The questions that remained for decision were therefore whether the dismissals were for a fair reason based on the operational requirements of the company and whether a fair procedure had been followed. The court found that in the context of a dismissal for operational requirements, the question whether the consultation should have been held at national or local level missed the point. A dispute over levels of bargaining was an interest dispute over which a strike or lockout could be resorted to. The correct question was whether, given the level at which the consultations took place; a fair consultation process had preceded the dismissals.

The court did not believe that it was impermissible for the company to retrench after agreeing to the wage increase. From the commencement of national wage bargaining meetings it had been clear that the wages had to be reduced or else substantial retrenchments would follow. The union had wanted neither and had blocked discussions on both topics, which were raised at various meetings by the company. Moreover, the wage increase was agreed to by the company at a time it faced a national strike.

The court accepted that the company had approached the consultation process with a very strong view that outsourcing was the way to go. However, it did not accept that the company was not open to a consideration of other possible solutions to the problem if they had been suggested and appeared viable. The court accordingly concluded that no procedural unfairness had been proved. The appeal was upheld with costs.

The obligation to consult arises only when the employer is contemplating retrenchment, which may include a unilateral amendment to the contract of employment. The labour court has, however, suggested that the requirement that all dismissals must be for a fair reason obliges the employer to show that it was in fact necessary to retrench the employees to effect savings.¹⁵²

In the case of *Heigers v UPC Retail Services*,¹⁵³ an applicant was dismissed by his employer without considering an alternative position, and the court held that the dismissal unfair because it was not satisfied that an alternative position could not have been found for him. Consultation process that must take place whenever an employer contemplates dismissing employees for operational requirements is obligatory, and the procedure laid down in section 189 must also be complied with.

In *Johnson & Johnson (Pty) Ltd v Chemical Workers Industrial Union & Others*,¹⁵⁴ Court described the primary obligation of a retrenching employer as follows:

“The employer must initiate the consultation process when it contemplates dismissal. It must disclose relevant information to the other consulting party; it must allow the other consulting party an opportunity during consultation to make representations about any matter on which they are consulting; it must consider these representations and, if it does not agree with them, it must give reasons.” It is vital that employer must disclose all relevant information in order to assist the negotiation process to run smoothly so as to reach an amicable solution.

¹⁵² Grogan J “*Workplace Law*” 8th ed 222(2004 Juta Cape Town).

¹⁵³ 1998 1 BLLR 45 (LC).

¹⁵⁴ 1999 20 89 (LAC).

In *SA Chemical Workers Union v Afrox Ltd*,¹⁵⁵ the court observed that it is implicit in terms of section 189(2) of the Labour Relations Act that an employer, apart from taking part in the formal consultations on the aspects set out in the section, should also take substantive steps on his or her own initiative to take appropriate measure to avoid the dismissal; to mitigate the adverse effects of the dismissal; to change the timing of the dismissals; to select a fair and objective method for the dismissal and to provide appropriate severance pay for dismissed employees. What is appropriate will depend on the facts of each case, and on the evidence presented about the steps taken, if the matter proceeds to court”.

However, the enquiry is not simply whether the employer acted in good faith or whether it had a bona fide reason to retrench, it now goes further, and requires further proof by the employer, on the balance of probabilities, that the cause of or reason for the dismissal was based on operational requirements as defined in terms of section 213, and that a fair procedure was followed in accordance with the provisions of sections 189; and the facts upon which a finding that there was a substantively fair reason for the dismissal can be made.¹⁵⁶

It is a fact that employees sustain injuries at the workplace while carrying out their duties and some of them might end up losing their jobs as a result of their disability. If an employee becomes disabled, the employer should consult with the employee to assess if the disability can be reasonably accommodated, and if not, the employer should consult the employee to explore the possibility of alternative employment appropriate to the employer’s capacity.¹⁵⁷

5.2.2.2 Incapacity

The Labour Relations Act provides that dismissal will be justified where the employer can prove that the reason for it was fair and related to the employee’s conduct or capacity.¹⁵⁸ Incapacity arising from ill health or injury is recognised as a legitimate reason for terminating the employment relationship, provided, it is done fairly. The Code of Good Practice on

¹⁵⁵ 1999 20 SA 1718 (LAC).

¹⁵⁶ Grogan J “*Workplace Law*” 8th ed 223(2004 Juta 2Cape Town).

¹⁵⁷ Employment Equity Act 55 of 1998: Code of Good Practice, at 16.

¹⁵⁸ Grogan J “*Workplace Law*” 8th ed 174(2004 Juta Cape Town).

Dismissal (item 11)¹⁵⁹ enjoins all persons (including arbitrators and the courts) to consider the following when determining if a dismissal arising from ill health or injury was fair:

- Whether or not the employee is capable of performing the work If the employee is not Capable;
- The extent to which employee is able to perform the work;
- The extent to which the employee's work circumstances might be adapted to accommodate the disability, or, where this is not possible, the extent to which the employee's duties might be adapted; and
- The availability of any suitable alternative work.

According to item 10 of the Code,¹⁶⁰ incapacity on the grounds of ill health may be temporary or permanent. If an employee is temporarily unable to work in these circumstances, the employer should investigate the extent of the incapacity or the injury. If the employee is likely to be absent for a time that is unreasonably long in the circumstances, the employer should investigate all the possible alternatives short of dismissal. When alternatives are considered, relevant factors might include the nature of the job, the period of the absence, the seriousness of the illness or injury and the possibility of securing a replacement for the ill or injured employee. In cases of permanent incapacity, the employer should ascertain the possibility of securing alternative employment, or adapting the duties or work circumstances of the employee to accommodate the employee's disability.

In *Pedzinski v Andisa Securities (pty) Ltd(formerly SCMB Securities(pty) Ltd)*¹⁶¹ the applicant was employed as a compliance manager by the respondent company. In 2000, because of a back ailment, she was put on half-day employment, although she in fact worked full days and overtime because her colleague was off sick for long periods. The need to restructure the compliance department was investigated, but nothing much came of this. The applicant

¹⁵⁹ 66 of 1995.

¹⁶⁰ Supra.

¹⁶¹ 2006 27 SA 362 (LC).

notified her superior and other senior people at the company, of irregular trading in shares by certain staff members.

The applicant contended that she was merely fulfilling and functions as a compliance manager. Her superior was dissatisfied that the applicant had reported irregularities of other persons within the company's hierarchy. Thereafter the relationship between the applicant and her superior deteriorated. Her superior then motivated for an increase in the staff complement of the department, insisting that the applicant had to revert to working on a full-time basis and the applicant was notified by her superior that she would be required to work full-time.

In the same letter that served as a notification in terms of section 189 of the Labour Relations Act, her superior informed her that if no suitable alternative placement could be found for her within the company, she would be retrenched. At a subsequent meeting the applicant made counterclaim in an effort to retain her employment. Her superior rejected these, and the applicant was subsequently dismissed for operational requirements. The applicant instituted action against the company alleging that the retrenchment proceedings were a sham designed to disguise the true reasons for her dismissal.

She contended that her dismissal had been automatically unfair in that she had been dismissed for making a protected disclosure within the meaning of section (1) (h), alternatively she had been dismissed in order to compel to accept a demand in respect of a matter of mutual interest as envisaged by section 187(1) (c), namely to take up full-time employment or accept retrenchment, alternatively she had been unfairly discriminated against because of her disability as defined in section 187(1) (f). She pleaded alternatively that her dismissal had been substantively and procedurally unfair for want of compliance with section 189 of the Labour Relations Act.

The court was of the view that the fact that the applicant's superior decided, as a matter of urgency, to get the applicant to work on full-time basis and he rejected her valid counter-proposals was indicative of one who wanted to get rid of the applicant under the pretext of operational requirements. The only reasonable inference to be drawn was that the applicant

was dismissed because of the protected disclosure she had made. The decision to retrench her was not genuine, but a sham. It was therefore automatically unfair as contemplated in section 187(1) (h). The court found further that when the applicant was given the choice of either working on a full-time basis or being dismissed, her superior was well aware that she had a back problem and that it would be impossible for her to work full-time.

The court found further that the applicant's dismissal had been substantively and procedurally unfair as there had been no fair reason to dismiss her and no meaningful consultations aimed at avoiding her dismissal had taken place. Regarding the appropriate remedy, the court commented that the applicant's dismissal had been a sham and that the company had used her health condition in order to rid itself of an employee who had proved to be diligent and committed to the execution of her duties. It awarded the applicant 24 months' compensation.

An employer faces a dilemma where an employee suffers from a medical condition that could be a health problem or safety hazard. For an example, if an employee suffers from epilepsy in a factory environment, should the employee's services be terminated due to the potential threat to the safety of others?¹⁶² Employers have to be careful in opting for dismissal in cases of incapacity. The Code of Good Practice attached to the Labour Relations Act, provides guidelines on the fair dismissal for incapacity relating to ill health or injury. The Labour Relations Act makes it automatically unfair to dismiss an employee because of a disability, but also provides that it may be fair if it is based on the job's inherent requirements.¹⁶³

All designated employers under the Act and the Code should reasonably accommodate the needs of people with disabilities. This is both non-discrimination and an affirmative action requirement¹⁶⁴ for employers who are required to develop employment equity plans. Accommodations, which are modifications or alterations to the way a job is normally

¹⁶² Janisch H "Epilepsy, Incapacity and Hazard: The Employer's Dilemma" at 1, www.labourwise.co.za, last visited on 13th January 2006.

¹⁶³ Supra.

¹⁶⁴ Technical Assistance Guidelines on the Employment of People with Disabilities, published by the Department of Labour at 13.

performed, should make it possible for a suitably qualified person with a disability to perform as everyone else. The type of reasonable accommodation required would depend on the job and its essential functions, the work environment and the person's specific impairment.¹⁶⁵

In terms of section 15¹⁶⁶ of the Employment Equity Act, reasonable accommodation includes three interrelated functions, namely:

- The accommodation must remove the barriers to performing the job for a person who is otherwise qualified. The employer must take steps, wherever reasonably practicable, to mitigate the effect of an individual's disability to enable him or her to play a full part in the workplace in order to achieve his or her full potential;
- Secondly, it must allow the person with disability to enjoy equal access to the benefits and opportunities of employment. All staff must have equal rights to promotion. The employer must take all reasonable steps to ensure that the working environment does not prevent people with disabilities from accessing or retaining positions for which they are suitably qualified; and
- Thirdly, employers can adopt the most cost effective means consistent with the above two situations.

Reasonable accommodation of people with disabilities in the labour market is an ongoing process, because accommodation is needed before and after employing a person with disabilities. That is why it is important also to accommodate jobseekers or applicants with disabilities. The question remains as to whether there is any obligation on the employer to accommodate people with disabilities, and if yes, when is he obliged to accommodate that employee? Section 9(2) of Act 108 of 1996 unequivocally places a duty or obligation on the employers, both in the public and private sectors as well as NGO's to implement policies which are reasonably accommodating the needs of people with disabilities in the labour market and which will also ensure that they enjoy equal access and opportunities at the workplace.

¹⁶⁵ Supra.

¹⁶⁶ Supra.

The employer will only be obliged to accommodate a particular candidate's disability once he is aware of that disability. This would mean that whenever there is a change at the workplace, the employer must still accommodate the needs of that employee with a disability if his or her performance will be affected by that change. The employer must take all reasonable steps to ensure that the working environment does not prevent people with disabilities from accessing or retaining positions for which they are suitably qualified.

The employee with the disability must be consulted on any proposed changes to the working environment¹⁶⁷ which may affect the employee, for example, in the case of an employee who is blind or visually impaired, the employer must ensure that the employee receives orientation training related to any change in the environment.

Applicants with disability must be given the opportunity to voluntarily disclose their disabilities, for purposes of accommodation during the recruitment, interviews and any subsequent phase of employment. Where it is self-evident during the interview that an applicant or employee requires accommodation, the employer should enquire and reasonably respond to such requests¹⁶⁸. Detailed requests for information on their requirements however can only be sought after a decision has been taken that they are suitably qualified for the job and a conditional job offer has been made.¹⁶⁹

The employer should consult the employee and where practicable, technical experts to establish appropriate mechanisms to accommodate the employee in accordance with the workplace needs¹⁷⁰. Accommodation requirements should be identified and developed through a process that involves the individual employee with a disability and the employer. This

¹⁶⁷ Technical Assistance Guidelines on the Employment of People with Disabilities, published by the Department of Labour at 17.

¹⁶⁸ Supra at 18.

¹⁶⁹ Supra.

¹⁷⁰ , Employment Equity Act 55 of 1998: Code of Good Practice on Disability in the workplace at [6www.dpsa.org.za/Policies/ Employment](http://www.dpsa.org.za/Policies/Employment).

process should focus on establishing accommodation that is required for the individual employee to effectively perform the work for which the individual was employed.¹⁷¹

The creation of employment opportunities for people with disabilities will only come about if a number of government departments as well as key stakeholders in the NGO and the private sector, work together. Research undertaken in 1990 indicated that only 0,26 percentages of people with disabilities were employed in the open labour market. Standards that must be observed in the realisation of the creation of equity in employment and training opportunities for people with disabilities include setting a target for the employment of disabled workers in the private sector and incentives to organisations and the private sector to train and employ persons with multiple or severe disabilities.¹⁷²

The Minister of Public Enterprises, Jeff Radebe, recently remarked “much still need to be done. Today only 0.25 percentage of the public service is made up of people with disabilities, whereas our target by 2005 is to reach 2 percentages. We note however that the total number of people with disabilities in our country is in the region of about 6 percentage of our population¹⁷³. The national skills development strategy calls for four percentage of all people trained to be people with disabilities.¹⁷⁴

The Minister of Labour, Membathisi Mdlhahlana released a statement on 03 November 2003, reminding employers that “the net is closing on employers who fail to implement affirmative action in respect of people with disabilities as the government steps in to seal off loopholes within the Employment Equity Act”. This statement was released in a meeting attended by organised labour, organised business, organisations representing people with disabilities and members of parliament.

¹⁷¹ Supra.

¹⁷² White Paper on Integrated National Disability Strategy at 42(November 1997).

¹⁷³ A key note address by Jeff Radebe, Minister of Public Enterprises, MP, at the Disabled People of South Africa Conference in Boksburg, 12 March 2005: The Current and Future Status and the Role of People with Disabilities at 3 www.dpe.gov.za. last visited 13th November 2005.

¹⁷⁴ Supra, at 3.

The Minister further added that the Department of Labour would do its utmost best to ensure that the stigma attached to access to employment affecting people with disabilities was completely out- rooted and that the challenge affecting employment and advancement of people with disabilities both in government and in the private sector still exists.¹⁷⁵

The public sector had until 2005 to ensure that its staff complement comprises of 2 percentages of people with disabilities at all occupational levels and categories.¹⁷⁶ The creation of employment opportunities for people with disabilities will only come about if a number of government departments, as well as key stakeholders in the NGO and private sector work together.¹⁷⁷

The Employment Equity Act requires private firms with more than 50 workers to create an affirmative action programme, which must contain provisions for achieving employment equity for people with disabilities¹⁷⁸. In a statement issued by the SARS commissioner, he said that SARS has contributed R1 million to the training of ten blind students as call centre agents; on completing the course the students will be employed by SARS.¹⁷⁹

A research study recently undertaken by the South African National Council for the Blind (SANCB) revealed that disabled people are the least employed group in the country with a rate of 0.28 percentages in the corporate world¹⁸⁰. The Ntsika enterprise promotion agency (NEPA) has, in response, appointed a person with disability to assist with the development of targeted assistance measurers and the removal of barriers within the SMME sector for disabled entrepreneurs.¹⁸¹

The most recent South Africa census, conducted in 2001, found that 5.9% of the South African population, what was then 2.3 million, had disabilities. Visual disability was the most common

¹⁷⁵ Government's Technical Assistance Guidelines will ensure People with Disabilities will not be discriminated against, released by the Department of Labour. 03 November 20003, at 1 www.labour.gov.za/media/statement.

¹⁷⁶ Supra.

¹⁷⁷ White paper on Integrated National Disability Strategy at 42(November 1997).

¹⁷⁸ Section 1 of Act 55 of 1998.

¹⁷⁹ SARS leads in employing the blind at 1 released on Tuesday July 13 2004 [www.dpsa.org.za/ display article/ News & Events](http://www.dpsa.org.za/display_article/News%26Events) last visited on the 13th November 2005.

¹⁸⁰ Supra.

¹⁸¹ White Paper on an Integrated National Disability Strategy at 44,(November 1997).

type. However, the 2002-03 report on the Commission for Employment Equity, released earlier in, 2005, found that just 1% of the workforce has some sort of disability, but that these individuals account for 1% of recruits, 0,5% of all promotions and 2.2 % of all terminations¹⁸²

Organisations for people with disabilities that engage in income-generating activities provide invaluable experience, empowerment opportunities and skills training for individuals with disabilities interested in entering the SMME sector¹⁸³. The Minister of Labour released a statement on 03 November 2003, recommending to employers, workers, the disability sector, service providers, and institutions of higher learning to prioritise the challenges facing people with disabilities by taking advantage of the human resource development interventions, which are earmarked for people with disabilities both by government and the private sector and in particular the sector education and training authorities¹⁸⁴.

People with disabilities need to be targeted for learner-ships. This may require adjustments to the working environment and the acquisition of specialised capabilities so that they are able to access incomes through formal sectors jobs, through SMME or community projects. The aim should be to promote continuous learning and adaptation to the constantly changing environment.¹⁸⁵

The way in which the environment is developed and organised contributes to a large extent, to the level of independence and equality that people with disabilities enjoy. There are a number of barriers in the environment which prevents people with disabilities from enjoying equal opportunities with non-disabled people, for example, structural barriers in the built environment, inaccessible entrances due to security systems, poor town planning and poor interior design.¹⁸⁶

¹⁸² Vaida G "Disabled Forgotten in Equity Frenzy" 1(24 July 2005 Sunday times) www.sundaytimes.co.za/careers.

¹⁸³ Supra.

¹⁸⁴ Government's Technical Assistance Guidelines will ensure People with Disabilities will not be discriminated released by the Department of Labour 03 November 2003 www.labour.gov.za/media/statement.

¹⁸⁵ White Paper on an Integrated National Disability Strategy 47(November 1997).

¹⁸⁶ Supra, at 30.

Howiston (as referred to by Vaida in her article) says people with disabilities battle to find work because when employers see them, they think the individual will “cost” money {because many of the workplace facilities will have to be adapted}, be off sick frequently and not be productive because they are slower. According to Howiston(*as referred to by Vaida on disabled forgotten in frenzy*) adapting facilities sometimes simply requires a higher desk or files placed at a lower level, and “if people are blind they may need a voice synthesiser for the computer, which costs about R2000, or a voice recognition software package, which costs around R3000.”¹⁸⁷

There must be a bathroom that is accessible but, she points out, a current employee who, for example, has had a back operation can also use such a facility. As for the perception that people with disabilities are sicklier, “research by the Employers’ Forum on Disability in the UK shows that, overall, disabled people have less sick leave than non-disabled.” She says “people with disabilities tend to remain employed with the same company for longer and show a commitment to the job, good punctuality records and a low absenteeism rate.”¹⁸⁸

Furthermore, many people with disabilities have had to be innovative in how they do things; they can bring this innovative thinking to the workplace. Maharaj¹⁸⁹ says people who acquire disability later in life are often the least equipped to deal with their new state, and most of the companies focus primarily on race and secondly on gender. Maharaj further submits that very few companies include people with disabilities in their equity plan, and that companies are ignorant about the competence of people with disabilities.¹⁹⁰

Accommodation of people with disabilities at the workplace should be made according to the particular needs of the individual concerned and the nature of the essential requirements of the job. For example, if at any centre a consultant with a physical disability has difficulty in typing with his or her hands at great speed, the solution would be that, at minimal cost to the employer the consultant is allowed to type with a mouth stick or use voice input or output

¹⁸⁷ Vaida G “Disabled Forgotten in Equity Frenzy” 1(24 July 2005 Sunday times) www.sundaytimes.co.za/careers.

¹⁸⁸ Supra, at 1.

¹⁸⁹ Shakila Maharaj is a Blind Industrial Psychologists and a CEO of a Durban-Based Disability Management services.

¹⁹⁰ Vaida G “Disabled Forgotten in Equity Frenzy” 1(24 July 2005 Sunday times) www.sundaytimes.co.za/careers

depending on preference, both of which allow the consultant to fall within the acceptable typing speed range.

Another situation could be, that a university lecturer with sight impairment has difficulty with access to written research information, and then the university will have to employ a reader as a research assistant to remove this barrier.¹⁹¹ The aim of reasonably accommodating employees or applicants with disabilities should be to remove all those obstacles, which prevent people with disabilities from enjoying same opportunities like able-bodied employees. Employers should also be aware of the Code of Good Practice on key aspects on the Employment of People with Disabilities, which was issued in terms of the Employment Equity Act and which has introduced guidelines on how to protect people with disabilities against discrimination.¹⁹²

In *Numsa obo White v Lear Automotive Interiors*¹⁹³ an epileptic employee was dismissed after the employer had conducted an incapacity hearing and had concluded that the employee was unsuited for employment in a factory setting. The employee was employed as a line feeder in the production department of a manufacturer of motor interiors. After an incident in which an urn of boiling water fell on the employee, the employer was alerted to the possible risks of his condition and an incapacity hearing was convened.

At an incapacity hearing, note was taken of a medical certificate from the employee's doctor that he was receiving treatment, but could still expect to suffer fits at least once to twice a month. The employer had also discussed the matter with its doctor. It was decided that the employee posed a big risk in terms of the Occupational Health and Safety Act and he was dismissed for incapacity. The employee's union claimed that the employer should have done more to accommodate the employee and the dismissal was substantively unfair. The employer did not question the employee's ability to do his work, but rather argue that his condition posed an undue risk to himself and the others in the factory environment. The arbitrator

¹⁹¹ Technical Assistance Guidelines on the employment of People with Disabilities, published by the Department of Labour, at 43.

¹⁹² *Supra*.

¹⁹³ 2005 26 1816 (BCA).

nevertheless decided that the employer had acted unfairly in dismissing the employee. The employer was ordered to reinstate the employee.

The arbitrator decided that even though the employer had followed the guidelines in the Code of Good Practice, it had not based its conclusions on reliable evidence. Referring to the literature on epilepsy in the workplace, he found that medical opinion, preferably from an occupational physician, who would thoroughly examine both the employee and the workplace, should have been sought on the suitability of the epileptic's working conditions and on adaptations that could be made to accommodate him.¹⁹⁴

The incapacity must arise from illness or injury. Any physical disability will be enough to fall under this head, however occasioned. It is suggested, however, that special considerations must be given to work-related sickness or injury, so by implication it must follow that employees who are injured off duty, or who contract a sickness unconnected with the workplace, are deserving of less consideration – still less it is suggested, where the injury or illness arises from the employee's negligent or intentional conduct.¹⁹⁵

A problem may arise, however, where an employee is repeatedly absent for short periods. Many companies have absenteeism procedures that provide for dismissal in such circumstances, and in the case of *ACEI Explosives Ltd v Mambalu*¹⁹⁶ the court held that dismissal is in principle permissible in the case of an employee guilty of habitual absenteeism even if for medical reasons. The employee in the above case was absent for a period of 90 days due to illness in a period of four years, and the court held that it was sufficient to justify dismissal.

In *Hendricks v Mercantile & General Reinsurance Co of S A Ltd*¹⁹⁷ it was submitted that, what period may be deemed 'unreasonably long' is expressly made dependent on the circumstances, which, it is suggested, should be evaluated according to such factors as the strategic

¹⁹⁴ Supra at 1-2.

¹⁹⁵ Grogan J "Workplace Law" 8th ed 216-7(2004 Juta Cape Town).

¹⁹⁶ 1995 16 SA 1505 (LAC).

¹⁹⁷ 1994 15 SA 304 (LAC).

importance of the employee's job, his or her length of service, the ease with which he or she can be replaced, the financial capacity of the employer to make arrangements to replace the absent employee, the prospect of the employee recovering, and the effect of his or her absence on the other employees. The court further submitted that whether because of the employee's absence and incapacity, having regard to the frequency and duration of such absences and the effect they have on his co-workers' morale, the employer could in fairness have been expected to wait any further before considering dismissal. The court found that this test might be applied even before the employee had exhausted his contractual sick leave.

The employer is obliged to investigate both the extent of the disability and the possible ways of adapting the employee's work to accommodate such disability. This clearly entails consultation with the employee, and examining how such disability impacts on the employee's performance¹⁹⁸. Possible alternatives to termination include adapting the employee's current duties so that he or she is able to perform them in spite of the disability, providing him or her with reasonable assistance and or equipment to help him or her to cope, or finding the employee alternative work with which he or she can cope notwithstanding the disability.

Dismissal will be unfair if it based on disability. Employers are not allowed to dismiss an employee on the ground of his or her disability. A dismissal is automatically unfair¹⁹⁹ if the employer in dismissing the employee acts contrary to section 5 of the Employment Equity Act or if the reason for the dismissal is that the employer unfairly discriminated against an employee, directly or indirectly, on any arbitrary ground, including but not limited to race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, political opinion, culture, language, marital status or family responsibility.

In the case of *Master of the High Court v Deedat*²⁰⁰ an application was made for the removal of one of the trustees of a trust who had suffered a stroke and was bed-ridden, paralyzed from the neck down, and unable to speak. It was argued that it would be unconstitutional to have the trustee removed on the ground of his physical disability. According to the court, it would be

¹⁹⁸ Grogan J "*Workplace Law*" 8th ed 218(2004 Juta Cape Town).

¹⁹⁹ Section 187 (1)(f) of Act 66 of 1995.

²⁰⁰ 1999 (11) BCLR 1285 (N).

unfairly discriminatory to remove a trustee solely on the grounds of physical incapacity without any reference to his or her ability to perform the duties of a trustee.

Schedule 8, paragraph 10 (1)²⁰¹ of the Labour Relations Act provides that if an employee is temporarily unable to work in these circumstances the employer should investigate the extent of the incapacity or the injury, and if the employee is likely to be absent for a time that is unreasonably long in the circumstances, the employer should investigate all the possible alternatives short of dismissal. The employer must consider dismissal as the last resort and must ensure that all fair procedures are exhausted or considered before he could dismiss an employee.

Termination can take place if the employee does not meet the required expectations in relation to the issues discussed above. But, this should only happen after consultation with the employee concerned. Most employees who become disabled whilst at work fall victims to dismissal before consideration of the factors outlined above. The case of *Ndlovu v Tonlee Glass (unpublished ccma case)*²⁰² seems to be relevant to this regard. The employee was injured at work. His doctor advised him to perform light duties for ten days since he was unable to perform his normal duties. However, when his manager returned, he was told that he was not fit to work in the company and that there was no work for him at all. The CCMA held that the employer unfairly dismissed the applicant on substantive and procedural grounds. An order of costs was made against the employer.

In *Govindsamy v BB Cereals (unpublished ccma case)*,²⁰³ the employee was injured on duty. He remained at home for almost two years and still received his full salary. The employer finally terminated his services because it was accepted that there was no position for him. The employee claimed that he was unfairly dismissed. The CCMA stated that the employer did all in its power to place the employee in an alternative position but due to the employee's

²⁰¹ 66 of 1995.

²⁰² Khosa D" Reasonable Accommodation in Relation to Inability to perform", July 2003 at 13 www.ccma.org.za/CCMAIL.

²⁰³ Supra.

disability and the nature of the employer's business this proved fruitless. The application was dismissed.²⁰⁴

The employer is obliged to prove that all reasonable alternatives were considered but were of no assistance, and as a result he had no choice but to terminate the employment contract, and has in doing so complied with a fair procedure. This is required because normally an employer would dismiss an employee alleging that that particular employee is unable to perform his or her duties whereas it is not necessarily the case. Reasonable accommodation measure will enable them to enjoy their employment rights. Accommodation must, therefore, be considered at all stages of employment, recruitment, selection, during the work process and in the work environment, as well as during performance appraisal and promotion processes and for the evaluation of benefits.

The accommodation must also be considered when work or the work environment changes or when the impairment varies and thus affects an employee's ability to perform in a new or different way. This type of employees can experience further discrimination in situations where employers claim that the accommodation to be provided is unreasonable and could cause unjustifiable hardship to them.²⁰⁵

5.2.3 The German Approach

In Germany, people with disabilities are entitled to assistance in order to eliminate their disabilities and to enable them to play an active role in the labour market. The integration of people with disabilities persons into the labour market is a central element of a policy of support aimed at prevention.²⁰⁶ The German system prioritises integration for the workers with disabilities. Government's policies are designed to integrate people with disabilities into companies and administrations, since the best integration into society is integration into work

²⁰⁴ Khosa D "Reasonable Accommodation for people with Disabilities" CCMAil-July 2003 at 3 www.ccma.org.za

²⁰⁵ Supra, at 4.

²⁰⁶ Weiss M and Schmidt M "Job creation policies in Germany: The Role of labour law, Social Security and Industrial Relations" 156 (2000 Kluwer International Law Germany).

and occupation “says the ILO “. Work is more than a means to make a living; it is also an opportunity for active participation.²⁰⁷

Employers are obliged to employ people with disabilities; failure to do so exposes them to a fine. The employment obligation is of particular importance for securing the participation of people with severe disabilities in the labour market. Employers with a workforce of 20 or more are obliged to ensure that at least 5 percent of their workforce is made up of people with severe disabilities.²⁰⁸ This obligation applies not only to private, but also to public employers. In calculating compulsory places, the employment office may take into account more than one, at most three, compulsory places for one person with severe if participation of that person in working life is particularly difficult.²⁰⁹

However, employers are not obliged to create additional jobs for people with severe disabilities or to replace a non-severely employee with disabilities with a person with severe severely disabilities.²¹⁰ Many employers are not really willing to recruit persons with disabilities and they wrongly assume that workers with disabilities perform less or that the workplace will have to undergo costly alterations²¹¹. In most cases, however, the failure to hire a person with disability is not due to lack of money, rather it is due to a lack of imagination, an inability to visualise a person with disability doing the job.

A lack of information and existing pre-conceptions have given rise to the notion that the recruitment of person with severe disabilities constitutes a risk which, at a time of increasing cost constraints and tougher competition, many are not prepared to take a risk.²¹² If an employer does not comply with the quota system, he has to pay a monthly compensation penalty for each unfilled compulsory place. The penalty is scaled as follows:

²⁰⁷ International Confederations of Free Trade Unions “A Lame Excuse: A Fight for the Rights of Workers with Disabilities” www.icftu.org, last visited 13 November 2005.

²⁰⁸ Federal Ministry of Health and Social Security, Rehabilitation and Participation of Disabled Persons, February 2004 par 95 at 73.

²⁰⁹ Supra par 95 at 73.

²¹⁰ Kock M “Disability Law in Germany: An Overview on Employment, Education and Access” at 5 www.germanlawjournal.com last visited 01 January 2006.

²¹¹ , International Confederations of Free Trade Unions “A Lame Excuse: A Fight for the Rights of Workers with Disabilities in Germany” at 9 www.icftu.org, last visited on the 13 November 2005.

²¹² Supra, at 9.

- Eur 105 for a quota less than five percentage but more than three percentages.
- Eur 180 for a quota of less than three percentages but more than two percentages.
- Eur 260 for a quota of up to two percentages²¹³.

The revenue from this compensation levy is used for the employment benefits for employees with disabilities and their employers. The compensation levy is necessary to improve the disabled employment opportunities because the unemployment rate of workers with disabilities is higher than average in comparison with the general unemployment rate.²¹⁴ All employers are obliged to review their vacant jobs to determine whether they are suitable for people with severe that are registered with the employment offices.²¹⁵ The employer is entitled to ask the job applicant if he or she is severely disabled in order to accommodate his or her disability.

The employer is bound by the general anti-discrimination obligation in that the employer cannot refrain from employing the disabled applicant because of his or her disability. If the employer violates this obligation, the rejected applicant with disability has the right to sue for damages, but cannot claim employment.²¹⁶ However the employer will not be found to have discriminated on the basis of a disability if he or she selects a candidate according to suitability and performance and the chosen non-disabled candidate is either more suitable or better performing. If the two applicants are equal in suitability and performance, however, the employer may be obligated to select the applicant with disability.²¹⁷

In Germany, employees or applicants with disabilities are offered workshops in order to improve their capabilities and knowledge and also for the purpose of equal opportunities and competition with able-bodied employees.

²¹³ Federal Ministry of Health and Social Security, Rehabilitation and Participation of Disabled Persons, par 98, at 75.

²¹⁴ Supra par 98-99.

²¹⁵ , Kock M "Disability Law in Germany: An overview on Employment, Education and Access" at 5 www.germanlawjournal.com last visited 01 January 2006.

²¹⁶ Supra, at 6.

²¹⁷ Supra, at 7.

For a person with disability who because of the nature or severity of their disability and in spite of every assistance, and are not yet able to participate (again) in the general labour market, there are workshops for the disabled which offer suitable vocational, training and employment while paying wages that are commensurate with the performance of person with disability (section 54 of the persons with disability's Act). According to this provision, the workshops are open to all those persons with disabilities, irrespective of the nature and severity of their disability.²¹⁸

Employees who are severely disabled must be employed in such a way that they can use and develop their knowledge and capabilities more effectively. This means that the employer has the obligation to ensure that there is neither too little nor too much challenge in the job. However the employees with disabilities cannot demand placement at a certain workplace in the company or to be employed solely according to his or her desires.²¹⁹ The employer is also obliged to furnish and equip the working environment in such a way that he or she is able to employ the mandatory number of the employees with disabilities, unless this imposes an unreasonable burden on the employer. If the employer is not able to comply with this obligation due to financial reasons, part or all the expenses can be borne by the severely disabled compensation levy.²²⁰

The person to be elected as representative or deputy may also be a non-disabled employee of the operation. The representative mainly has the task of monitoring the company's compliance with the legislation concerning the employees with severe disabilities.

In addition, the employer has to consult with the *Vertrauensmann* prior to any measure that is related to the employees with severe disabilities, such as hiring, dismissal, or relocation. A breach of this duty may be sanctioned with a fine of up to EUR 10,000.²²¹ As the researcher the areas for investigation on reasonable accommodation of people with disabilities in both

²¹⁸ Federal Ministry of Health and Social Security : Rehabilitation and Participation of Disabled Person, February 2004, at 28.

²¹⁹ Kock M "Disability Law in Germany: An Overview on Employment, Education and Access" at 6 www.germanlawjournal.com last visited 01 January 2006.

²²⁰ Supra, at 6-7.

²²¹ Supra at 9.

South Africa and Germany will focus on training and protection against unfair dismissal has earlier indicated it. The researcher will at this stage also examine the position of Germany on training of employees and protection against unfair dismissal.

5.2.3.1 Training

Employees with disabilities should be assisted with pre-employment training and also training during their employment in a quest to equip them with skills and knowledge, in order to perform their duties. In terms of article 5,²²² employers must accommodate employees with disabilities in the workplace, by giving those who need to undergo a training that is relevant for his or her employment a chance to undergo such training.

Vocational training cannot guarantee permanent participation in working life. It is nevertheless indispensable, since persons with disabilities can only survive competition in working life with non-disabled persons if they have the best possible vocational qualifications. It is therefore a primary task of educational and social policy together, and particular in the cases of the problems on the labour market, to provide comprehensive training opportunities.²²³

People with disabilities and non-disabilities shall receive training in both private companies and public employment. However, if this is not possible due to the nature or severity of the disability, young people with disabilities shall receive special vocational training that is equipped appropriately.²²⁴ Rehabilitation funds bear all the expenses for the training measures.²²⁵ According to section 11 of the Rehabilitation Adjustment Act, employment-promoting benefits for rehabilitation should include all forms of assistance necessary to sustain, enhance, generate or restore the earning power of persons with disabilities in accordance with their capabilities, thereby assuring their permanent integration into working life, if possible.

²²² Council Directive 2000/78/EC, Article 5.

²²³ Federal Ministry of Health and Social Security, Rehabilitation and Participation of Disabled Persons, February 2004, at 20.

²²⁴ Kock M "Disability law in Germany: An overview on Employment, Education and Access" 5 www.germanlawjournal.com.

²²⁵ Supra,

The selection of employment promoting measures must take sufficient account of the aptitude, inclinations and earlier occupation of the persons with disabilities as well as of the situation on the labour market; assistance may also be given for the purposes of career advancement²²⁶. Employers are obliged to consult with the representatives of people with disability at the workplace for the severely disabled regarding filling a reasonable part of the training slots with persons with severe disability. In addition employer are granted allowances and bonuses for training of the people with severe disabilities, furthermore, training programmes in special workshops shall more frequently be linked with training parts in private companies.²²⁷

5.2.3.2 Dismissal protection

Article 11²²⁸ of the Council Directive of the European Union provides that member states shall introduce into their national legal systems such measures as are necessary to protect the employees against dismissals or other adverse treatment by the employer as a reaction to a complaint within the undertaking or to any legal proceeding aimed at enforcing compliance with the principle of equal treatment.

Prior to dismissal, the employer has a general obligation to offer an employee whose job will be cut another suitable job, if any such job is available and vacant in the company. Therefore, the employer is obliged to offer a vacant suitable job in the company to the people with severe disabilities employee if he or she can no longer fulfil a job due to a health condition. If no suitable job is vacant but the employer can rearrange the employees' jobs within his or her rights to issue directives, in order to find a suitable job for the employee with severe disabilities, the employer is obliged to do so instead of dismissing the employee. However, the

²²⁶ Federal Ministry of Labour and Social Affairs, The integration of disabled persons, July 2000, at 43.

²²⁷ Kock M "Disability Law in Germany: An overview on Employment, Education and Access" 10 www.germanlawjournal.

²²⁸ Council Directive 2000/78/EC.

employer is not obligated to create a new job for the employees with severe disabilities who can no longer fulfil his or her current job responsibilities.²²⁹

A further important instrument for the security and preservation of jobs for persons with disabilities is the special protection against dismissals. This commences six months after the start of employment. The employer's obligation to obtain the approval from the integration office before giving a notice of dismissal is intended primarily to examine all forms of assistance that might secure continuing employment and to weigh the interests of both parties. Should these measures serve to show that the continued employment of person with disability is unreasonable, given the circumstances of the individual cases, the dismissal is approved.²³⁰

In the event of a termination without notice, the integration office shall, in general, approve the planned dismissal if the dismissal ground is not related to the disability. This special protection does not apply in cases of voluntary notice of termination given by the employee with severe disabilities employee or to an amicable termination.²³¹ Article 3(3) of the Basic Law is regarded as a "statutory prohibition" within the meaning of section 134 of the Civil Code. A dismissal, which is solely based on one of the grounds listed in this article, is therefore null and void.²³²

The researcher previously indicated that at a later stage it would be imperative to single out some comparable factors that would clearly show which system has progressed further as compared to the other system. In examining which system (South Africa and Germany) has further progressed regarding the accommodation of people with disabilities in the labour market, one needs to look at the following; In Germany:

- Employees are provided with workshops in order to prepare them for the full-time job, and they are paid while attending those workshops;

²²⁹ Kock M "Disability Law in Germany: An overview on Employment, Education and Access" 10 www.germanlawjournal.com.

²³⁰ Weiss M and Schmidt M *Labour Law and Industrial Relations* 3rd Revised Edition 113.

²³¹ Kock M "Disability Law in Germany: An overview on Employment, Education and Access" 8, www.germanlawjournal.com.

²³² Federal Ministry of Health and Social Security, Rehabilitation and Participation of disabled persons, February 2004, at 27.

- In the event that the employer fails to accommodate an employee with disability due to financial constraints, the severely disabled compensation levy assist in this regard, this levy assists employers by subsidising them in order to accommodate the needs of People with disabilities in the workplace;
- There is an obligation to find out whether one suffers from disability or not, so that an employer could accommodate that particular disability. Employers normally would ask the employee about the type of his or her disability in order to accommodate that disability;
- Employers with 20 or more employees must accommodate at least five percent of employees with disability, both in the private and public sector;
- Employers are exposed to a fine in the event that they fail to employ people with disabilities;
- Levies paid by employers who are not prepared to employ people with disabilities are used for training of people with disabilities; and
- In the event that an employee with disability has been refused employment because of his or her status, that person can sue for damages.

In South Africa also the following must be considered;

- Employers with 50 or more employees in public sector should implement affirmative action programmes in order to accommodate the needs of people with disabilities;
- Disclosure of one's disability is voluntary; there is no obligation on the employer to find out. However in the event one discloses his or her disability such information will be treated confidentially, because such right is constitutionally protected; and
- There are no workshop preparing of employees with disability for a full-time job, for an example to improve their skills in various fields of the labour market; and no fines are imposed in the event that an employer refuses to employ a candidate with disability. However should an applicant prove that the refusal to employ him or her was because he or she was discriminated on discrimination ground listed in Section 9 of our Constitution, that applicant can refer the matter to the relevant bodies for an the labour court, as it was

the position in the case of *Whitehead v Woolworth (pty) Ltd*,²³³ employer dismissed an employee because she was pregnant. The employer submitted that the dismissal was justified because the type of job the employee was employed for required a twelve months uninterrupted rendering of services. The court found that the dismissal was unfair, because her pregnancy had nothing to do with her job and subsequently she was compensated.

The Constitution of South Africa brought hope to the society and employees at large. This Act protects the rights of employees at the workplace including people with disability. Section 9(2)²³⁴ calls for implementation of positive measures by the employers in order to promote the participation of people with disability at the workplace. Labour law statutes which are in operation to date came into effect as a response to section 9(2) of Act 108 of 1996, for example the Employment Equity Act and the Promotion of Equality and Prevention of Unfair discrimination Act, were both introduced in order to comply with the provisions of the above section which calls for equality at the workplace and implementation of positive measures in reasonably accommodating people with disabilities.

The Constitution and the labour law statutes unequivocally oblige employers to accommodate people with disabilities in the labour market. Employers should also ensure that they implement measures in eliminating employment obstacles and prohibit disability discrimination at the workplace. The advantages of reasonable accommodation are that people with disabilities will be able to: compete with the able-bodied employees, equally participate at the workplace, regain their recognition and confidence within the society and also explore their skills.

In analysing all the provisions of the Constitution and the labour law statutes, one can safely submit that there is a duty on the part of the employers to reasonably accommodate people with disabilities at the workplace.

The government must step in or assist where the employers encounters difficulties in accommodating the needs of people with disabilities. In conclusion one can safely submit that

²³³ 1999 2133 (LC).

²³⁴ Act 108 of 1996.

both systems have some loopholes. In Germany employees or people with disabilities are provided with some workshops in order to acquire some skills and also employers who are reluctant in employing people with disabilities opt for a payment of a fine, and this does not help the state in achieving its goal in employing people with disabilities. In South Africa an employee who has been discriminated because of his disability can also approach the court for recourse, however the only advantage that Germany enjoys as compared to South Africa is the assistance of employers in situations where they encounter difficulties in accommodating the needs of employees with disabilities.

In an attempt to accommodate people with disabilities within the labour market, one must applaud the German system for introducing workshops, which prepare them for a full-time employment by providing necessary training and which capacitate them with knowledge and skills. Also another important factor is that in the event that employers fail to employ people with disabilities, they are exposed to a fine. In South Africa the problem regarding accommodation of people with disabilities still lies with the employers and not the Government.

Government ensures that they pass relevant legislation in order to accommodate people with disabilities and after that it is expected of employers to implement such legislation in a quest to accommodate the needs of people with disabilities in the labour market. However, employers are still not sure whether people with disabilities are capable of executing their duties or not. In South Africa, it would be better if employers were to be sanctioned by failing to employ people with disabilities.

CHAPTER SIX: CONCLUSION AND RECOMMENDATIONS

In this chapter, the researcher will draw an informed conclusions regarding reasonable accommodation of people with disabilities in the labour market. Focus will also be placed on the recommendations in a quest of accommodating people with disabilities in the labour market.

6.1 Conclusion

In South Africa, the Constitution is the supreme law of the Republic and any laws or policies that are passed should be in line with the Constitution. South Africa as a democratic country is still developing; its Constitution is regarded as one of the most progressive country. It is the Constitution that reflects the struggles faced by the majority of South Africans, especially people with disabilities, is founded on the fundamental values of equality, freedom and non-racism.²³⁵

The inclusion of disability protection in our Constitution, in terms of section 9(3), of Act 108 of 1996, is as a result of the relentless struggle that people with disabilities waged during the oppressive apartheid government. It is a result of organised people with disabilities who fought to be heard and who mobilised to achieve this history.²³⁶

Section 9 of Act 108 of 1996, guarantees equality to everyone irrespective of the grounds listed in subsection 3. All the laws and policies which will be passed in a quest to accommodate the needs of people with disabilities should be in line with the Constitution, which advocates for protection, respect, promotion and fulfilment of rights contained in the Bill of Rights.

The problem with disability discrimination in the labour market is that it is a very sensitive issue which does not only affect the individuals who are directly concerned but also their families and friends. The Employment Equity Act, 55 of 1998; is indeed welcomed by the disability sectors as progressive on the basis that it attempts to address the disadvantages faced by people with disability

²³⁵ Mc Clain C V, Governance and legislation in South Africa: A Contemporary Overview, issue no 12, January- March 2002, at 1, www.disabilityworld.org last visited 25 September 2005.

²³⁶ Supra.

in the workplace²³⁷. The Employment Equity Act compels designated employers to adopt Affirmative action measures in order to ensure equal opportunities and ultimately equal representation of persons with disabilities in the workplace.

Unemployment remains a fundamental problem that negatively affects people with disabilities. A number of initiatives have been undertaken by the government since 1994 in an attempt to redress this dire situation in a more affirmative and comprehensive manner.²³⁸ Certain labour laws have since been introduced which among others attempt to ensure that equality prevails at the workplace and that there are equal opportunities for everyone including people with disabilities, and harmonise the employment relationship between employers and employees as well as to do away with past employment injustices.

South Africa has a clear legal commitment to address disability issues with the urgency it deserves. This commitment is enshrined in the Constitution, and affirmed by the Constitutional Court and reaffirmed by the international agreements to which South Africa is a signatory.²³⁹

State institutions and, where appropriate and relevant, juristic and non-juristic entities must:

- Adopt viable plans for the promotion and achievement of equality in respect of race, gender and disability, and
- Give priority to the elimination of unfair discrimination and the promotion of equality in respect of race, gender and disability.²⁴⁰

As South Africa is in a state of transformation many issues struggle for recognition. Disability rights are one such issue; from recent initiatives it is clear that disability rights are receiving some attention from the government. The Employment Equity Act is a proof thereof. A White Paper on an Integrated National Disability strategy has also been published; this document stipulates policy

²³⁷ White Paper on Integrated National Disability Strategy 20 (November 2006).

²³⁸ *Supra*, at 42.

²³⁹ Transforming the Present - Protecting the Future, Report of the Committee of Inquiry into a Comprehensive System of Social Security for South Africa, March 2002, at 102.

²⁴⁰ Albertyn C et al *Introduction to the Promotion of Equality and Prohibition of Unfair Discrimination Act 4 of 2000*, 1st ed 14(2001 Witwatersrand University Press Johannesburg).

guidelines on various issues one of which is employment of people with disabilities. Its vision is to create a society for all South Africans including people with disabilities.²⁴¹

It is a fact that society has always regarded people with disabilities as abnormal people and as a result this perception has prevented or barred people with disabilities from accessing employment like any able-bodied person. Rights of people with disabilities have long been ignored throughout the world. Fortunately a new awareness of disability issues and rights has started to emerge, and presently, many people with disabilities can now participate on an equal level with able-bodied persons.

The issue of reasonable accommodation of people with disabilities in the labour market is a very sensitive and complex issue. However, since the advent of the new democracy we have seen tremendous changes in the area of labour law legislation, whereby many labour laws and policies have been passed, with a view to redress the past injustices.

The Constitution of South Africa has restored the dignity of people with disabilities because it is as a result of this Constitution that people with disabilities are presently recognised and accorded the necessary respect they deserve, and this Constitution in terms of section 9 calls for implementation of progressive and positive measures in ensuring that people with disabilities actively participate at the workplace without experiencing any impediments.

The protection and accommodation of people with disabilities both at the workplace and society in general is at the heart of the Constitution, Act 108 of 1996. The researcher at the beginning of this research aimed to consider the significance of reasonable accommodation in the labour market, and more importantly to analyse the present relevant labour laws and policies which advocate for the promotion and accommodation of people with disabilities and also to examine how they are reasonably accommodated.

The Minister of Public Enterprises, Jeff Radebe has recently remarked; “ much still need to be done regarding accommodation of people with disabilities, today only 0.25 percentage of the public

²⁴¹ White Paper on Integrated National Disability Strategy 81(Noember 1997).

service is made up of people with disabilities, whereas our target by 2005 was to reach 2 percentage”²⁴². This statement by the Minister shows clearly that there is still a resistance on the part of employers to employ people with disabilities, and they are still regarded as an incompetent class of people that cannot play an active role and contribute to the labour market.

The Minister of Labour also released a statement regarding the employability of people with disabilities on 03rd November 2003, reminding employers that “ the net is closing on employers who fail to implement affirmative action in respect of people with disabilities as the government steps in to seal off loopholes within the Employment Equity Act”. This statement was released in a meeting attended by organised labour, organised business, organisations representing people with disabilities and members of Parliament.

The Minister further added that the Department of Labour would do its utmost best to ensure that the stigma attached to access to employment affecting people with disabilities was completely out-rooted and that the challenge affecting employment and advancement of people with disabilities both in government and in private sector still exists²⁴³. Based on this submission it is clear that employment of people with disabilities remains a problem. South Africa, to date, has far progressed in ensuring that they pass relevant labour laws and policies, which advocates for protection against disability discrimination and equal opportunities of people with disabilities.

In South Africa, one can safely submit that relevant labour laws and policies have been passed, which clearly protects the rights of people with disabilities. The Labour Relations Act was passed to govern the relationship between employer and employee, and also to ensure that there is no unfair discrimination and unfair labour practices at various employment places. Subsequently the Employment Equity Act also was introduced in a quest to eliminate employment barriers and to call for positive measures in order to reasonably accommodate people with disabilities at the workplace. A Code of Good Practice that basically supplements the Employment Equity Act, the Integrated National Disability Strategy and the Technical Guidelines on the Employment of People with

²⁴² A keynote address by Jeff Radebe, Minister of Public Enterprises, at the Disabled People of South Africa Conference in Boksburg, 12 March 2005, www.dpe.gov.za.

²⁴³ www.gov.za/media/statement/, “ Government’s Technical Assistance Guidelines will ensure People with disabilities will not be discriminated”, released by the Department of labour, 03rd November 2003, at 1.

Disabilities, which both provide some guidelines on how people with disabilities should be reasonably accommodated, were also introduced.

For a very long people with disabilities have been undermined as a result of the society's negative perception towards them that they are abnormal, and they are a burden to employers. This negative perception has negatively impacted on people with disabilities and contributed in barring them from accessing employment and realising their capabilities. Unless employers accept that people with disabilities are capable like any other able-bodied employee, those who are employed already will continue to remain in low class jobs and people with disabilities who are still seeking for a job will find it difficult to access employment.

In Germany, an employer who employs 20 or more employees has an obligation to employ at least five percent of people with disabilities. In the event that the employer fails to accommodate employee with disabilities in both public and private sectors due to financial constraints, the severely disabled compensation levy assists in this regard. This levy assists employers in subsidising them in order to accommodate the needs of people with disabilities. Failure to employ an applicant with disabilities exposes an employer to a fine and applicant can sue for damages.

This penalty in Germany has really assisted the process of employability of people with disabilities. In South Africa there are no fines in the event that the employer refuses to employ a person with disability. However if a person maintains that he or she has been discriminated against on any ground listed in terms of section 9 of Act 108 of 1996 he or she can take the matter to the courts for recourse.

The advantage Germany enjoys over South Africa is that they prepare an employee with disability for a full-time employment through workshops and that there is a fund responsible to assist employers who experience financial constraints, although employers are exposed to a fine in failing to employ people with disabilities, many employers opt to pay fine instead of employing a person with disability, it shows that employers do believe in employing people with disabilities.

In South Africa the problem of accommodating people with disabilities still lies with employers and not the government, because some do not know what entails reasonable accommodation whereas others are not even prepared to accommodate them based on the negative perception and myths that people with disabilities are not capable and they cannot contribute in the labour market.

In considering the provisions of the Constitution and the relevant labour laws and policies that the researcher has referred to, it is clear that there is a duty on the employers to accommodate employees with disabilities in the labour market. The only challenge to date is the implementation of these laws and policies in advancing the needs of people with disabilities in the workplace.

Employees with disabilities are still not accommodated in the labour market; most of the employers employ them in order to comply with the Employment Equity Act, but they do not consider accommodating their needs. That is why even the employability rate of people with disabilities is still very low in government departments, as well as the private sector. This submission is premised on the statement made by the Minister of Public Enterprise that only 0,25 of public service is made up of people with disabilities.²⁴⁴

The issue of disability it is no longer an individual's problem but a universal problem, and if society cannot accommodate people with disabilities they will continue to experience employment barriers. As the researcher has indicated above, in South Africa we have progressive legislation that unequivocally advocates for the best interests of people with disabilities, and what is only outstanding is for the employers to positively implement those laws in order to accommodate people with disabilities in the labour market, because it is clear that the majority of people with disabilities are still unemployed.

It is the researcher's submission that based on the statement of the above Minister of Public Enterprises, which was released on the 12th March 2005; employers in both the public and private sector still doubt the capabilities of people with disabilities. That is why earlier the researcher submitted that there is no better time than now to accept people with disabilities and give them a chance to unleash their potential in the labour market.

²⁴⁴ Footnote no 221, at 86.

There is much that still must be done to alert the employers to accept people with disabilities and to support them by availing essential assistive device. . At the end, one can submit much has not been done by the employers in accommodating people with disabilities, more so because reasonable accommodation does not only entail mere employment more is required, among others necessary changes to the workplace.

In South Africa, we have progressive labour laws, policies and a Constitution, which are the most important tools, what is only left is to use these tools to fight a tireless battle in ensuring that we accommodate people with disabilities in the labour market. It is premised on the above submission that there is no better time than now, for employers to accept people with disabilities in the labour market as capable and useful like any other able-bodied employee and to give them the necessary support and chance in realising their potential and functioning at the workplace, and also to avail relevant training which will improve their skills and better their performance.

6.2 Recommendations

In an attempt to reasonably accommodate the needs of people with disabilities and promote their participation in the labour market as well as according them the necessary protection and dignity, the researcher has deemed it fit to recommend the following:

- Labour laws must be strictly implemented and monitored by officials of the department of labour at national level and international labour monitors of International Labour Organisation must also these rights in the international arena. Non compliance with the disability non-discrimination laws must be taken serious ant defaulters be severely punished and fined;
- Positive lessons from labour jurisprudence of Germany and both international and regional instruments should be translated into reality in South African legal system and such lessons

be used in such way that they benefit South African labour markets, employers and employees with disabilities;

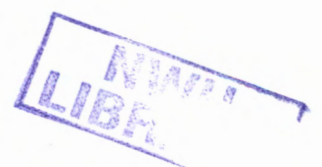
- Employers should be encouraged to give effect to the spirit of the Constitution especially section 9 (Equality Clause) in respect of the rights of the people with disabilities;
- It is recommended that the employers, Government, Non-Governmental Organisations (NGOs) and Human Rights activists should increase the human rights awareness among both the able-bodied employees and employees with disabilities. This awareness will certainly eliminate discrimination against people with disabilities and promote their participation in the workplace;
- People with disabilities should be subsidised by their employers when they purchase their supportive devices. This will promote their participation in the labour market because they will be in a position to afford their supportive devices. Any employer who employs people with disabilities should arrange with specialised dealers who sell the supporting device for people with disabilities to subsidise them and in return they will reimburse those dealers;
- The employers for people with disabilities should conduct training programmes and relevant workshops at various workplaces. The purpose of training will serve to improve their skills and knowledge in their employment, and also help to compete with able-bodied employees, Labour Relations Act, schedule 10, calls for training of employees in improving their performance and to avoid rendering them incompetent;
- At any working place whereby people with disabilities have been employed, they must appoint a representative who will be their mouthpiece, so that people with disabilities should be in the position to voice their concerns. This in a way will be a platform for people with disabilities to communicate with their employers especially if their employer is not willing to

engage them face to face, and a suggestion box will help so that they cannot be victimised by the employers;

- It is a fact that not all employers are unwilling to accommodate people with disabilities in the labour market, Some are ready to accommodate them but they do not have the financial muscle or rather they do experience financial constraints, for example;
 - If an employer has a small business and there is no sufficient income which will enable an employer to accommodate people with disabilities, or
 - It may be necessary to purchase particular software in order to accommodate an employee with disability; for example, an employee whose daily duties are computer related might need particular software, which must be bought in order to enable that employee to work.
 - If an employee with disability has a transport problem to arrive on time at the workplace, that employee cannot be properly accommodated in the public transport and wants to approach car dealers to manufacture a vehicle which will accommodate his or her disability and that particular employee is unable to afford to pay off the debt, the question is whether his or her employer be prepared to meet him or her half way in order to solve this problem. It is my recommendation that government will have to step in thoroughly providing some sort of tax-free incentive to those employers who find themselves in financial constraints as a result of accommodating people with disabilities. This would be a relief to employers and in return people with disabilities would benefit.
- A policy on tax rebate should be adopted which will benefit all employers who have employed people with disabilities. The incentive is that such employer's tax burden be reduced by one percentage which percentage should be channeled towards the training of employees with disabilities.

- A policy also be adopted to discipline Employers who would be in breach of this policy and they must be punished by paying a heavy fine and be forced to employ double the number they were supposed to employ on yearly basis.
- It is lastly recommended that a policy on Constitutional damages be adopted, for example if an employer has discriminated an employer as a result of his or her disability, then an aggrieved employee would approach the Constitutional court for Constitutional damages. This should be separated from the process that normally ensues whereby an employee who has been discriminated on any ground in terms of section 9(3) of our Constitution, Act 108 of 1996 or unfairly dismissed or unfairly treated at the workplace takes the matter to the CCMA or any relevant body.

Should the above recommendations be given a consideration, and then we all look forward to the day when our employment places will be filled with people with disabilities who are able to perform their day-to-day duties without encountering employment barriers, which render them incompetent. In so doing the rate of unemployment of people with disabilities will have been reduced.



CHAPTER SEVEN

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