



# Interpreting "reasonable accommodation" of persons with disabilities in the South African workplace

**CP ROBERTS**

 [orcid.org/0000-0003-2087-9086](https://orcid.org/0000-0003-2087-9086)

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Supervisor: Dr Botes

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Student number: 24245720

## **ABSTRACT**

This study aims to establish how reasonable accommodation requirements for the fair and equal treatment of persons with disabilities should be interpreted and applied in South African labour law. The rationale of this study is to advance the rights of persons with disabilities; moreover their right to be provided with reasonable accommodation in the workplace to eliminate disability-based discrimination.

However, the right to reasonable accommodation is limited when such reasonable accommodation might cause unjustifiable hardship for the employer who is required to provide the accommodation. An employer may use such unjustifiable hardship as a defence for failure or refusal to provide reasonable accommodation to persons with disabilities. Despite an employer's ability to rely on unjustifiable hardship as a defence, no clear criteria are followed in testing the threshold of a reasonable accommodation to determine when an employer has reached unjustifiable hardship in the South African workplace. The aforementioned inadequacy may lead to the arbitrary denial of providing reasonable accommodation to persons with disabilities, which in itself might constitute unfair discrimination.

The study consequently sets out to establish a standard of fair treatment of persons with disabilities with specific reference to reasonable accommodation, and it is the view of this study that such a standard can only be reached by the development of a uniform test by which the threshold of reasonable accommodation can be tested to determine whether an unjustifiable hardship has occurred.

Notwithstanding the fact that legislation and codes of good practices exists in South Africa that regulate the treatment of persons with disabilities, these legislations are, in the view of this study, not always sufficiently applied and interpreted to ensure equal and fair treatment of persons with disabilities.

Consequently, the standardisation of a test to determine unjustifiable hardship within the South African workplace can only be done if the interpretation and implementation of reasonable accommodation and unjustifiable hardship in foreign jurisdictions are taken into consideration. These foreign jurisdictions for purposes of this study consist

of those of Canada due to its jurisprudence which has established several determining factors for unjustifiable hardship, and of the United States of America, which has integrated the criteria for unjustifiable hardship into legislation.

In conclusion, the implementation of a standardised test for unjustifiable hardship will ensure the advancement of the right of persons with disabilities to equality, more over the equal opportunity for employment within the South African workplace.

## **KEYWORDS AND PHRASES**

Affirmative action

Automatically unfair dismissal

Designated group

Inherent requirements of the job

Persons with disabilities

Reasonable accommodation

Unfair discrimination

Unjustifiable hardship

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## **LIST OF ABBREVIATIONS**

CC	Constitutional Court
CCMA	Commission for Conciliation, Mediation and Arbitration
CRPD	Convention on the Rights of Persons with Disabilities Disabilities
EEA	Employment Equity Act
IJOHR	International Journal on Human Rights
IJSW	International Journal of Social Welfare
ILO	International Labour Organisation
INDS	Integrated National Disability Strategy
LAC	Labour Appeal Court
LC	Labour Court
LDD	Law Democracy and Development
LRA	Labour Relations Act
NEDLAC	National Economic Development and Labour Council
PEPUDA	The Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000
SAJHR	South African Journal on Human Rights
Stell LR	Stellenbosch Law Review
TAG	Technical assistance guidelines on the Employment of Persons with
UN	United Nations

USA United States of America

WHO World Health Organisation

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## CHAPTER 1 INTRODUCTION

### *1.1 Background*

As a starting point, it is important to understand the concept of disability, more specifically persons with disabilities (for purposes of this study) and how the concept of reasonable accommodation and unjustifiable hardship relates to persons with disabilities and may affect society in general. The aforementioned is particularly important as "disability is part of being human", predicated upon the fact that almost everyone in society will at some or other stage in their lifetime experience a disability albeit; temporarily or permanent.<sup>1</sup>

According to the World Health Organisation (WHO), approximately one billion individuals worldwide live with some or other form of disability,<sup>2</sup> which number of persons with disabilities is ever-increasing as a result of various factors which, include but are not limited to: "demographic trends and increases in chronic health conditions".<sup>3</sup> The WHO characterises disability as:

the outcome or result of a complex relationship between an individual's health condition and personal factors, and of the external factors that represent the circumstances in which the individual lives.<sup>4</sup>

As a result of the foregoing relationship, various environments may have a diverse impact on the same individual with a disability.<sup>5</sup> The performance of persons with disabilities may be limited as a result of barriers within an environment, or the lack of facilitators within a specific environment.<sup>6</sup> Nevertheless, the performance of persons

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<sup>1</sup> World Health Organisation date unknown [https://www.who.int/health-topics /disability #tab=tab\\_1](https://www.who.int/health-topics /disability #tab=tab_1).

<sup>2</sup> World Health Organisation date unknown [https://www.who.int/health-topics /disability #tab=tab\\_1](https://www.who.int/health-topics /disability #tab=tab_1); According to the WHO this corresponds to about 15% of the world's population.

<sup>3</sup> World Health Organisation date unknown [https://www.who.int/health-topics /disability #tab=tab\\_1](https://www.who.int/health-topics /disability #tab=tab_1).

<sup>4</sup> World Health Organization International classification of impairments, disabilities, and handicaps: A manual of classification relating to the consequences of disease 15.

<sup>5</sup> World Health Organization International classification of impairments, disabilities, and handicaps: A manual of classification relating to the consequences of disease 15.

<sup>6</sup> World Health Organization International classification of impairments, disabilities, and handicaps: A manual of classification relating to the consequences of disease 15.

with disabilities may be enhanced by environments that are more facilitating to persons with disabilities.<sup>7</sup>

According to the WHO, disability refers to:

the interaction between individuals with a health condition (e.g. cerebral palsy, Down syndrome and depression) and personal and environmental factors (e.g. negative attitudes, inaccessible transportation and public buildings, and limited social supports).<sup>8</sup>

The WHO further defines disabilities in terms of the International Classification of Impairments, Disabilities and Handicaps (ICIDH) as:

any restriction or lack of ability (resulting from an impairment) to perform an activity in the manner or within the range considered normal for a human being.<sup>9</sup>

Despite the abovementioned definition and based on the fact that disability is a complex and an ever-changing concept, defining disability must be done by taking into account the fact that disability has progressively changed over time, and that there is not a single definition of disability which is internationally recognisable and that there are various definitions which share common elements,<sup>10</sup> such as:

the presence of impairment, internal and external limitations or barriers which hinder full and equal participation, a focus on the abilities of the person with a disability and loss or lack of access to opportunities due to environmental barriers and/or negative perceptions and attitudes of society.<sup>11</sup>

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<sup>7</sup> World Health Organization International classification of impairments, disabilities, and handicaps: A manual of classification relating to the consequences of disease 15.

<sup>8</sup> World Health Organisation date unknown [https://www.who.int/health-topics/disability#tab=tab\\_1](https://www.who.int/health-topics/disability#tab=tab_1).

<sup>9</sup> World Health Organization International classification of impairments, disabilities, and handicaps: A manual of classification relating to the consequences of disease.

<sup>10</sup> White Paper On The Rights Of Persons With Disabilities the office of the President of South Africa 9 December 2015 30.

<sup>11</sup> White Paper On The Rights Of Persons With Disabilities the office of the President of South Africa 9 December 2015 30.

It is important to note that impairment, disability and handicap have been replaced by body functions and structures and activities and participation,<sup>12</sup> with a view to extend their meanings to include positive experiences.<sup>13</sup>

The Centres for Disease Control and Prevention (CDC) further defines disability as:

any condition of the body or mind (impairment) that makes it more difficult for the person with the condition to do certain activities (activity limitation) and interact with the world around them (participation restrictions).<sup>14</sup>

In addition to the aforementioned definitions of persons with disabilities, the United Nations (UN) defines persons with disabilities in terms of Article 1 of the UN Convention on the Rights of Persons with Disabilities, 2007 (CRPD) as being:<sup>15</sup>

those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.<sup>16</sup>

In consideration of the aforementioned brief overview of the concept of persons with disabilities as defined by the WHO and the UN, it is noteworthy that persons with disabilities are not limited to persons with physical disabilities but also include any underlying impairments which might constitute a disability, as such affecting a larger number of individuals within a society. Nevertheless, the different forms of disability together with the definition of disability for purposes of the workplace, will be discussed in more depth in the following chapters.

Now that an overview has been given in relation to the concept of persons with disabilities, it should be noted that discrimination against persons with disabilities manifests in various ways.<sup>17</sup> One of these being the exclusion of persons with

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<sup>12</sup> World Health Organization International classification of impairments, disabilities, and handicaps: A manual of classification relating to the consequences of disease 1.

<sup>13</sup> World Health Organization International classification of impairments, disabilities, and handicaps: A manual of classification relating to the consequences of disease 1.

<sup>14</sup> Centres for Disease Control and Prevention date unknown <https://www.cdc.gov/ncbddd/disabilityandhealth/disability.html>.

<sup>15</sup> Department of Economic and Social Affairs Division for Inclusive Social Development date unknown <https://www.un.org/development/desa/disabilities/convention-on-the-rights-of-persons-with-disabilities.html> ; UN Convention on the Rights of Persons with Disabilities, 2007.

<sup>16</sup> Article 1 of the UN Convention on the Rights of Persons with Disabilities, 2006.

<sup>17</sup> Marumoagae 2012 *PELJ* 350.

disabilities from the South African workplace due to an alleged inherent requirement of the job, that persons with disabilities are presumably not capable of meeting,<sup>18</sup> based on the fact that persons with disabilities are generally judged on the basis of their disability, and not their qualifications and ability to do the job in question.<sup>19</sup>

Although the exclusion of a person based on a legitimate inherent requirement of a job that such a person cannot meet does not constitute unfair discrimination in terms of the South African labour legislation,<sup>20</sup> the barriers that arise as a result of an inherent job requirement can be overcome by employers reasonably accommodating persons with disabilities.<sup>21</sup> Therefore persons with disabilities could be given equal opportunities and equal access to the labour market, through reasonable accommodation.<sup>22</sup>

It should be noted that the nature and extent of the required accommodation will depend on the particular disability of a person. The question is, however, what reasonable accommodation truly entails and to what lengths an employer can or must go in accommodating persons with disabilities before such accommodation exceeds what could be reasonably expected from the particular employer in question.

This study is predominantly focused on how reasonable accommodation is and should be interpreted in the South African law and how it needs to be applied to successfully assist persons with disabilities.

In the past, persons with disabilities were excluded from job opportunities and subjected to discrimination.<sup>23</sup> The aforementioned is mainly due to the stigma surrounding persons with disabilities, being that it would be a hassle to appoint persons with disabilities as they are considered to be incapable of delivering proper service.<sup>24</sup> In addition to the aforementioned, the perception exists that persons with disabilities

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<sup>18</sup> Marumoagae 2012 *PELJ* 350.

<sup>19</sup> Marumoagae 2012 *PELJ* 350.

<sup>20</sup> Section 6(2)(b) of the *Employment Equity Act* 55 of 1998.

<sup>21</sup> The National Strategic Framework on Reasonable Accommodation for Persons with Disabilities 14.

<sup>22</sup> The National Strategic Framework on Reasonable Accommodation for Persons with Disabilities 14.

<sup>23</sup> Marumoagae 2012 *PELJ*.

<sup>24</sup> Marumoagae 2012 *PELJ*.

are wholly limited in their functions, more specifically in relation to what persons with disabilities can do to work effectively, and how they can contribute towards the workplace.<sup>25</sup>

In amplification of the aforementioned exclusion of persons with disabilities from the labour market are the following cases in which job applicants were overlooked for employment due to their disabilities. In the case of *Hoffmann v South African Airways*,<sup>26</sup> a job applicant was not assigned to the position of cabin attendant as a result of his HIV status.<sup>27</sup> Furthermore, in the matter of *IMATU and others v City of Cape Town*,<sup>28</sup> a job applicant was excluded from the position as a firefighter, due to the applicant's insulin-dependent diabetes mellitus. The aforementioned cases are but a few examples of instances where job applicants were excluded from the workplace based on their disabilities.

## **1.2 Literature review**

The right to equality and not to be discriminated against based on a disability is a fundamental right enshrined in the *Constitution of the Republic of South Africa, 1996* (hereafter referred to as the Constitution).<sup>29</sup> Section 9 of the Constitution specifically states that neither the State nor any other individual may unfairly discriminate against a person on the ground of disability.<sup>30</sup> This is a general human right and finds application in all spheres of life. However, the aforementioned prohibition is given effect to in the *Employment Equity Act 55 of 1998* (hereafter referred to as the EEA) for purposes of the employment realm.<sup>31</sup>

Section 6 of the EEA states that an employee may not be unfairly discriminated against based on a provided list of grounds, inclusive of disability.<sup>32</sup> It ought to be noted that

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<sup>25</sup> Ngwane 2007 SAHRJ 120.

<sup>26</sup> *Hoffmann v South African Airways* (2000) 21 ILJ 2357 (CC).

<sup>27</sup> *Hoffmann v South African Airways* (2000) 21 ILJ 2357 (CC).

<sup>28</sup> *IMATU and others v City of Cape Town* [2005] 11 BLLR 1084 (LC).

<sup>29</sup> Section 9 of the *Constitution of the Republic of South Africa, 1996*.

<sup>30</sup> Section 9(3)-(4) of the *Constitution of the Republic of South Africa, 1996*.

<sup>31</sup> *Employment Equity Act 55 of 1998*; the *Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000* (hereafter PEPUDA) is also important as certain employment matters are also regulated in terms of this act.

<sup>32</sup> Section 6(1) of the *Employment Equity Act 55 of 1998*.

for purposes of section 6 of the EEA, candidates, more specifically candidates with disabilities, who have applied and/or are considered for a position, are also deemed to be employees in terms of the EEA.<sup>33</sup> This is relevant and important to mention as the focus group of this dissertation will not only be persons with disabilities who are currently employed, but also prospective employees with disabilities who are seeking employment.

Notwithstanding the fact that unfair discrimination has been defined by the courts in South Africa (as will be discussed in the chapter below), it should be noted that unfair discrimination is not defined in the Constitution or the EEA;<sup>34</sup> hence international law instruments should be considered to give further guidance on the meaning of this concept. In accordance with the Constitution, international law should be considered when interpreting the Bill of Rights.<sup>35</sup> In addition to the aforementioned, when interpreting the law, courts must prioritise impartial interpretation of the law which is compatible with international law over any alternative interpretation which might be contrary to international law.<sup>36</sup> Hence the definitions as specified in the conventions of the International Labour Organisation (hereafter referred to as the ILO) as well as the UN in terms of the CRPD, should be applied when determining the meaning of discrimination.<sup>37</sup> It is appropriate to consider and apply the definitions of the ILO and the UN in this regard, since South Africa is a member state of this ILO,<sup>38</sup> and the UN,<sup>39</sup>

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<sup>33</sup> Section 9 of the *Employment Equity Act* 55 of 1998; see also Grogan *Workplace Law* 78.

<sup>34</sup> Du Toit and Potgieter *Unfair Discrimination in the Workplace* 16; see also *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1998 12 BCLR 1517 (CC) where discrimination was defined as the impairment of a person's dignity, thus leading to the "scarring of the sense of dignity and self-worth" connected to the membership of a certain group; However discrimination is extensively dealt with in case law, especially jurisprudence of the Constitutional Courts See Currie and De Waal *The Bill of Rights Handbook* 209-250; see also Grobbelaar-du Plessis and Van Reenen *Aspect of Disability Law in Africa* 241.

<sup>35</sup> Section 39(1)(b) of the *Constitution of the Republic of South Africa*, 1996.

<sup>36</sup> Section 233 of the *Constitution of the Republic of South Africa*, 1996.

<sup>37</sup> Du Toit and Potgieter *Unfair Discrimination in the Workplace* 17.

<sup>38</sup> International Labour Organisation date unknown  
[https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100\\_Ilo\\_Code:C111](https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_Ilo_Code:C111).

<sup>39</sup> United Nations date unknown <http://www.un.org/en/member-states/>; admission date was 7 October 1945.

and therefore is obligated to take cognisance of the guidelines and minimum standards provided by the ILO and UN.<sup>40</sup>

Section 3(d) of the EEA further states that the EEA should be interpreted to comply with ILO conventions. Therefore, a consideration of the position of the ILO on discrimination matters is relevant to this investigation. Discrimination in accordance with the Discrimination (Employment and Occupation) Convention No. 111 (hereinafter referred to as DEOC) consists of two parts and can, for purposes of the South African labour law, be defined as:

Any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin, which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation.<sup>41</sup>

In addition to the aforementioned, the second part of the definition of discrimination in terms of C111 states that:

Such other distinction, exclusion or preference which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation as may be determined by the Member concerned after consultation with representative employers' and workers' organisations, where such exist, and with other appropriate bodies.<sup>42</sup>

South Africa ratified DEOC in 1997,<sup>43</sup> and is therefore required to enact legislation and adopt practices by means of which it can be ensured that compliance with the international policy of non-discrimination in the workplace is accomplished.<sup>44</sup>

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<sup>40</sup> *Convention 111 Convention concerning Discrimination in Respect of Employment and Occupation, 1958.*

<sup>41</sup> Section 1(a) of the *Convention 111 Convention concerning Discrimination in Respect of Employment and Occupation, 1958.*

<sup>42</sup> Section 1(b) of the *Convention 111 Convention concerning Discrimination in Respect of Employment and Occupation, 1958.*

<sup>43</sup> International Labour Organisation date unknown  
[https://www.ilo.org/dyn/normlex/en/f?p=1000:11300:0::NO:11300:P11300\\_INSTRUMENT\\_ID:312256](https://www.ilo.org/dyn/normlex/en/f?p=1000:11300:0::NO:11300:P11300_INSTRUMENT_ID:312256); see also United Nations Treaty Collection date unknown [https://treaties.un.org/Pages/Overview.aspx?path=overview/glossary/page1\\_en.xml#ratification](https://treaties.un.org/Pages/Overview.aspx?path=overview/glossary/page1_en.xml#ratification) for the definition of ratification; "Ratification defines the international act whereby a state indicates its consent to be bound to a treaty if the parties intended to show their consent by such an act", " The institution of ratification grants states the necessary time-frame to seek the required approval for the treaty on the domestic level and to enact the necessary legislation to give domestic effect to that treaty".

<sup>44</sup> Du Toit and Potgieter *Unfair Discrimination in the Workplace* 11.

Although the definition does not specify disability as a possible ground for discrimination, it could be read into the second part of the definition as any other distinction or exclusion which nullifies equality of opportunity or treatment in the workplace. The concept of discrimination will be discussed in depth in the subsequent chapters. It is, however, important to note that it is the intent of this study to analyse the nature and extent of discrimination, as discrimination has a direct impact on equality and the achievement thereof through the reasonable accommodation of persons with disabilities.

For purposes of this study, attention will specifically be given to disability-based discrimination as provided for by the UN. South Africa is a member state of the UN,<sup>45</sup> and as such must comply with the UN conventions that it has signed and ratified – more specifically, the UN Convention on the Rights of Persons with Disabilities, 2006 (hereafter CRPD).<sup>46</sup> The CRPD places a clear prohibition on discrimination with specific reference to disability. Disability-based discrimination is defined in terms of article 2 of the CRPD as:

any distinction, exclusion or restriction on the basis of disability which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise, on an equal basis with others, of all human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field. It includes all forms of discrimination, including denial of reasonable accommodation.<sup>47</sup>

Apart from the wide-ranging definition provided above, the CRPD extends its applicability to employment and the workplace, specifically in terms of section 27 of the CRPD.<sup>48</sup> As clearly established in the definition, reasonable accommodation is required as part of the elimination of discrimination, the denial of which is in itself construed as discrimination.<sup>49</sup>

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<sup>45</sup> United Nations date unknown <http://www.un.org/en/member-states/>; admission date was 7 October 1945.

<sup>46</sup> Department of Economic and Social Affairs Division for Inclusive Social Development date unknown <https://www.un.org/development/desa/disabilities/convention-on-the-rights-of-persons-with-disabilities.html> ; *UN Convention on the Rights of Persons with Disabilities*, 2006.

<sup>47</sup> Article 2 of the *UN Convention on the Rights of Persons with Disabilities*, 2006.

<sup>48</sup> Article 27 of the *UN Convention on the Rights of Persons with Disabilities*, 2006.

<sup>49</sup> See *Singh v Minister of Justice & Constitutional Development, RSA & another* [2006] JOL 18049 (N); the state does not just have the obligation to prohibit disability-based discrimination, but it must also take steps to promote equality.

Consequently, the South African legislature has an obligation in terms of the CRPD to not only prevent discrimination but to also implement reasonable accommodation for persons with disabilities.

The aforementioned statement is substantiated by article 5(3) of the CRPD, which states that parties to the CRPD: "shall take all appropriate steps to ensure that reasonable accommodation is provided".<sup>50</sup>

The protection against disability-based discrimination in South Africa is not only provided for in national legislation as indicated above, but is also provided in terms of the Code of Good Practice on Employment of Persons with Disabilities (hereafter referred to as the Code), which Code provides guidance to employers in their quest to eradicate disability-based discrimination in employment practices.<sup>51</sup> Although it is a very important and helpful document, the Code regrettably gives little guidance on the matter of reasonable accommodation and the interpretation and implementation thereof.<sup>52</sup> For this reason, this study intends to analyse the CRPD in conjunction with the EEA and its Code, to shed more light on the concept of reasonable accommodation, by examining the definition of reasonable accommodation and the relevant provisions relating to it (as set out in the CRPD and the EEA) with a view to fully explain the nature and extent of reasonable accommodation.

Notwithstanding the obligation to provide reasonable accommodation, item 6(11) of the Code provides that an employer may dismiss an application to reasonably accommodate persons with disabilities where such reasonable accommodation will lead to an unjustifiable hardship.<sup>53</sup> Unfortunately, there is no clear standard for unjustifiable hardship within the South African workplace,<sup>54</sup> based on the fact that the Code provides that "what constitutes an unjustifiable hardship for one employer does

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<sup>50</sup> Article 5(3) of the *UN Convention on the Rights of Persons with Disabilities*, 2006.

<sup>51</sup> GN 1085 of 9 November 2015; see also Labour Department date unknown <http://www.labour.gov.za/DOL/downloads/documents/useful-documents/employment-equity/tagdisability2017.pdf>.

<sup>52</sup> GN 1085 of 9 November 2015; see also Labour Department date unknown <http://www.labour.gov.za/DOL/downloads/documents/useful-documents/employment-equity/tagdisability2017.pdf>.

<sup>53</sup> Item 6(11) in Gen Not 1085 in GG 39383 of 9 November 2015.

<sup>54</sup> Item 6(13) in Gen Not 1085 in GG 39383 of 9 November 2015; see Labour Department date unknown [http://www.labour.gov.za/DOL/downloads/documents/useful-documents/employmentequity/tag disability2017.pdf](http://www.labour.gov.za/DOL/downloads/documents/useful-documents/employmentequity/tag%20disability2017.pdf) which is clearer in this regard.

not necessarily constitute an unjustifiable hardship for another employer."<sup>55</sup> This is a clear indication that there cannot be a "one-size-fits-all" approach to the concept of reasonable accommodation and unjustifiable hardship, and would require a variety of considerations to establish whether one particular employer has satisfied his obligation to reasonably accommodate persons with disabilities within the workplace. Consequently, in the chapter below, this study intends to analyse the definition of unjustifiable hardship and its related provisions with a view to demonstrate more fully the nature and extent of how unjustifiable hardship is interpreted and implemented in South Africa.

From the aforementioned it is clear that no clear criteria exist that need to be followed in relation to unjustifiable hardship in South Africa, as will be discussed in the subsequent chapters. Hence this has created the necessity for a study to be conducted to establish how the aforementioned problem can be resolved by looking at best practices from foreign jurisdictions compared to the South African labour legislation with a view to create a standardised test for unjustifiable hardship.

In terms of the Constitution, foreign law may be considered,<sup>56</sup> in interpreting any legislation, and where the national laws and principles do not provide proper guidance.<sup>57</sup> Therefore this study intends to consider the foreign jurisdictions of the United States of America (USA) and Canada's federal law on the matter of reasonable accommodation and unjustifiable hardship, for the reasons as set out below.

### **1.3 A Consideration of Best Practices**

Reasonable accommodation first originated in the USA in the *Civil Rights Act* of 1968,<sup>58</sup> and the *Equal Employment Opportunity Act* of 1972,<sup>59</sup> which made reference to reasonable accommodation as far as it related to discrimination based on employees'

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<sup>55</sup> Item 6(13) in Gen Not 1085 in GG 39383 of 9 November 2015.

<sup>56</sup> Section 39(1)(c) of the *Constitution of the Republic of South Africa*, 1996.

<sup>57</sup> Section 39(2) of the *Constitution of the Republic of South Africa*, 1996.

<sup>58</sup> *Civil Rights Act* of 1968.

<sup>59</sup> Sur Journal date unknown <https://sur.conectas.org/en/reasonable-accommodation/>; see also *Equal Employment Opportunity Act* of 1972.

religious practices.<sup>60</sup> Reasonable accommodation however evolved and was introduced in respect of persons with disabilities in the USA's *Rehabilitation Act* of 1973.<sup>61</sup> Subsequent to the aforementioned introduction of reasonable accommodation of persons with disabilities and unjustifiable hardship, the terms have become commonly used in USA law, but it was not until the promulgation of the *Americans with Disabilities Act* of 1990 (hereafter referred to as ADA),<sup>62</sup> that these terms gained traction and were the focus of debates in both doctrine and case law.<sup>63</sup>

In terms of the ADA, undue hardship (for purposes of consistency in this study, undue hardship as referred to in American law will be henceforth referred to as unjustifiable hardship) is defined as "an action requiring significant difficulty or expense".<sup>64</sup> The aforementioned definition must be read in conjunction with the factors as set out in section 12111(10) (B) of the ADA,<sup>65</sup> to establish whether reasonable accommodation will cause unjustifiable hardship.<sup>66</sup> These factors include but are not limited to:<sup>67</sup> the "nature and costs" involved for reasonably accommodating an employee with a disability,<sup>68</sup> "the overall financial resources of the facilities involved" to provide such reasonable accommodation,<sup>69</sup> "the overall financial resources of the covered entity",<sup>70</sup> and the type of operations that the covered entity is conducting.<sup>71</sup>

It is apparent from the aforesaid sections of the ADA that the USA legislation has established clear criteria that need to be applied in determining what would be construed as unjustifiable hardship when it comes to reasonably accommodating persons with disabilities in the workplace. Thus it is the view of this study that it would be appropriate to consider the USA as a foreign jurisdiction, in respect of reasonable

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<sup>60</sup> United Nations 2006 <https://www.un.org/esa/socdev/enable/rights/ahc7bkgrndra.htm>;

<sup>61</sup> United Nations 2006 <https://www.un.org/esa/socdev/enable/rights/ahc7bkgrndra.htm>; see also *Rehabilitation Act* of 1973.

<sup>62</sup> *Americans with Disabilities Act* of 1990.

<sup>63</sup> Sur Journal date unknown <https://sur.conectas.org/en/reasonable-accommodation/>.

<sup>64</sup> Porter A New Look at the ADA's Undue Hardship Defense 3; see also Section 12111(10)(A) of the *Americans with Disabilities Act* of 1990.

<sup>65</sup> Section 12111(10)(A)-(B) of the *Americans with Disabilities Act* of 1990.

<sup>66</sup> Befort *Ariz.L. Rev.* 936.

<sup>67</sup> Brandfield *Fordham L. Rev.* 117; see also Befort *Ariz.L. Rev.* 964.

<sup>68</sup> Section 12111(10)(B)(i) of the *Americans with Disabilities Act* of 1990.

<sup>69</sup> Section 12111(10)(B)(ii) of the *Americans with Disabilities Act* of 1990.

<sup>70</sup> Section 12111(10)(B)(iii) of the *Americans with Disabilities Act* of 1990.

<sup>71</sup> Section 12111(10)(B)(iv) of the *Americans with Disabilities Act* of 1990.

accommodation and unjustifiable hardship, based on the fact that reasonable accommodation originated in the USA and has consequently established a comprehensive list of factors that can be considered in establishing unjustifiable hardship. In addition to the aforementioned, it is the view of this study that the criteria as set out in the ADA could assist in creating a standardised test for determining unjustifiable hardship in South Africa, as the criteria set out by the ADA are not only contained in a code (which is a guideline for employers as is the case of the Code in South Africa) but in legislation which is accordingly binding on employers when reasonably accommodating persons with disabilities and establishing whether such accommodation will constitute unjustifiable hardship.

In light of the above, it is the intent of this study to conclude a critical analysis in relation to how reasonable accommodation and unjustifiable hardship are interpreted and implemented in the USA in consideration of the ADA and how this would assist in developing South African law on the subject matter, more specifically, a standardised test for determining unjustifiable hardship.

Besides the USA's implementation and development of reasonable accommodation, and unjustifiable hardship, Canada is also known as being one of the innovators of reasonable accommodation and unjustifiable hardship.<sup>72</sup> While the USA was pioneering the notion in the 1970s, Canada had a conservative discrimination case law as Canada did not recognise theories such as adverse effect discrimination, which Canada consequently adopted together with the concept of reasonable accommodation from the USA.<sup>73</sup> The notion of reasonable accommodation thrived in Canada's legal system after Canada's acceptance of the aforementioned concepts, even more than in that of the USA and therefore led to a transformation of the Canadian judicial judgements which accordingly caused Canada to become a reference point on the subject matter.<sup>74</sup>

In Canada, unjustifiable hardship is defined as "excessive and substantial disruption or interference with the employer's operation".<sup>75</sup> The courts in Canada have also

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<sup>72</sup> Sur Journal date unknown <https://sur.conectas.org/en/reasonable-accommodation/>.

<sup>73</sup> Sur Journal date unknown <https://sur.conectas.org/en/reasonable-accommodation/>.

<sup>74</sup> Sur Journal date unknown <https://sur.conectas.org/en/reasonable-accommodation/>.

<sup>75</sup> Public Service Alliance of Canada date unknown <http://psacunion.ca/book/1151>.

developed certain factors that should be considered to determine unjustifiable hardship, namely the "financial costs of accommodation", "disruption of the collective agreement", "problems of morale of other employees", "interchangeability of workforce and facilities", "size of the employer's operation" and any safety concerns.<sup>76</sup>

In consideration of the above, it is the view of this study that it would be appropriate to consider Canada as a foreign jurisdiction, as Canada is not only one of the pioneers when it comes to reasonable accommodation and unjustifiable hardship but has also become the frame of reference when considering the interpretation and implementation of reasonable accommodation and unjustifiable hardship, as a result of its extensive list of court decisions which dealt with the subject matter and accordingly created criteria to establish unjustifiable hardship. Furthermore, a consideration of the Canadian approach to reasonable accommodation and unjustifiable hardship as outlined in the Canadian jurisprudence might be able to assist in addressing the issue at hand, more specifically, the lack of a standardised test to determine unjustifiable hardship in the South African workplace.

Therefore the importance of analysing foreign jurisdictions of both the USA and Canada in this study is to demonstrate how far legislation and jurisprudence of these foreign jurisdictions have developed on the matter of reasonable accommodation and unjustifiable hardship compared to the South Africa labour legislation, to such an extent that unjustifiable hardship can easily be determined by applying the criteria as provided for in the ADA and the Canadian jurisprudence, to each specific case where persons with disabilities require reasonable accommodation. Notwithstanding the fact that both USA and Canada were pioneers of reasonable accommodation, it is important to note that the main difference between the interpretation and implementation of reasonable accommodation and unjustifiable hardship in the USA and Canada is that: reasonable accommodation and unjustifiable hardship in the USA are provided for in terms of legislation, more specifically the ADA, whereas in Canada, reasonable accommodation and unjustifiable hardship is provided for in terms of Canadian

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<sup>76</sup> *Alberta Dairy Pool v Alberta (Human Rights Commission)*, [1990] 2 S.C.R. 489.

jurisprudence. It therefore is important, for purposes of this study, that an analysis of both jurisdictions be done with a view to create a standardised test for unjustifiable hardship, as both jurisdictions have a significantly different resource which stipulates that employers should provide persons with disabilities with reasonable accommodation and which circumstances such accommodation will constitute unjustifiable hardship in consideration of the various criteria that have been provided for and/or established by the ADA and the Canadian jurisprudence.

#### ***1.4 Scope and limitations of study***

This study will focus on launching an investigation into the reasonable accommodation of prospective and current employees with disabilities in South Africa as provided for in the EEA and the Code. From this study, it will be determined how the concepts of reasonable accommodation and unjustifiable hardship should be interpreted and applied to harness the advantages for employees with disabilities, which the obligation to provide persons with disabilities with reasonable accommodation may hold. In this study, consideration will also be given to the best practices from foreign jurisdictions, particularly those from the USA and Canada, to assist with the abovementioned implementation of reasonable accommodation and interpretation of unjustifiable hardship. The study is, however, limited to persons with disabilities in that the dissertation will only focus on the fundamental rights as set out in the international arena, Constitution, labour laws and all relevant legal aspects that concern the sustainability of vulnerable groups in society, specifically persons with disabilities.

#### ***1.5 Rationale and justification***

The rationale and justification for this study are to ascertain the rights of persons with disabilities, with specific reference to reasonable accommodation in the workplace. Secondly, to identify the injustice of the denial of reasonable accommodation persons with disabilities have to endure due to the gap in the South African labour law caused by insufficient criteria by which unjustifiable hardship is determined. Furthermore, the main focus of the study is to form a standard of fair treatment that employers should apply to reasonably accommodate persons with disabilities. This standard can only be

achieved by the development of a uniform test by which reasonable accommodation and unjustifiable hardship can be established.

Although legislation and codes of good practices exist that regulate the treatment of persons with disabilities in the workplace, these legislations are not always sufficiently applied and interpreted for the reasons discussed in the subsequent chapters. Thus the standardisation of a test to establish what constitutes unjustifiable hardship can only be achieved by considering the meaning of reasonable accommodation and unjustifiable hardship as interpreted by the South African courts in conjunction with foreign courts, specifically those of the USA and Canada, and combining the test formed by these courts.

### **1.6 Framework of Study**

In this dissertation, the study into the interpretation of reasonable accommodation and unjustifiable hardship will be discussed in accordance with the framework as set out below.

Firstly, an analysis will be undertaken of the development of the Constitution and labour laws (both international and national) with specific reference to the rights of persons with disabilities in South Africa. The aforementioned is important so as to understand how legislation and good practice guidelines have changed to focus on and give effect to the rights of persons with disabilities as set out in the Constitution with regard to substantive equality.<sup>77</sup>

Secondly, the interpretation of legislation and good practice guidelines regarding reasonable accommodation and unjustifiable hardship will be discussed to determine what the issues are surrounding the implementation of the relevant labour legislation

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<sup>77</sup> In the case of *Minister of Finance & another v Van Heerden* (2004) 25 ILJ 1593 (CC) the court described substantive equality as "equality recognises that besides uneven race, class and gender attributes of our society, there are other levels and forms of social differentiation and systematic under-privilege, which still persist. The Constitution enjoins us to dismantle them and to prevent the creation of new patterns of disadvantage. It is therefore incumbent on courts to scrutinise in each equality claim the situation of the complainants in society; their history and vulnerability; the history, nature and purpose of the discriminatory practice and whether it ameliorates or adds to group disadvantage in real life context, in order to determine its fairness or otherwise in the light of the values of our Constitution".

relating to reasonable accommodation and unjustifiable hardship are – more specifically, to indicate that there is no clear test to determine unjustifiable hardship. This will be done by considering the obligations that are placed on the State and employers by the UN and ILO to reasonably accommodate persons with disabilities. A study of the best practices of other jurisdictions will be undertaken, specifically with reference to relevant statutory provisions and how the different courts interpret reasonable accommodation, unjustifiable hardship and the obligations placed on employers regarding employment of persons with disabilities.

Thirdly, the development of a standardised test that can be implemented in the South African labour law will be investigated. Various criteria based on the findings of the investigations into the best practices of foreign countries will be considered to establish the most suitable test within the South African context.

Lastly, a thorough conclusion will be reached with recommendations on how the labour laws, more specifically relating to reasonable accommodation and unjustifiable hardship, should be implemented concerning persons with disabilities in South Africa.

### ***1.7 Research methodology***

The research method that will be utilised in this study will first and foremost entail a literature review, historical study and a consideration of best practices with reference to foreign jurisdictions such as those of the USA and Canada. Although foreign jurisdictions will be considered, it is important to note that the study will not be a comparative study and will only be used to emphasise some points in law.

The two foreign jurisdictions that will be used are USA and Canada. The reason for this, firstly is based on the fact that the USA has integrated the criteria for unjustifiable hardship into legislation. Provisions are made in the ADA which consist of certain criteria that have to be applied to define unjustifiable hardship in every circumstance. Although the South African labour law has implemented some measures that regulate the way in which unjustifiable hardship should be established, it is insufficient.

Secondly, Canada's jurisdiction will be used because the Canadian courts have determined the criteria for unjustifiable hardship by combining different judgments from case law. This led to the development of a standardised test that is applied to determine unjustifiable hardship in every instance. A few judgements on reasonable accommodation and unjustifiable hardship in the South African context exist,<sup>78</sup> but the courts are still unsuccessful in developing a uniform test,<sup>79</sup> that can specifically be applied to unjustifiable hardship in the case of persons with disabilities. Although it can be argued that the South African approach to determine undue hardship is sufficient based on the fact that the test is more flexible than a check-list bound test (as provided for in ADA), the problem occurs due to the fact that the criteria to establish unjustifiable hardship is not pertained in legislation and only in the Code.<sup>80</sup>

The importance of looking at best practices is to establish a standardised test for unjustifiable hardship within the South Africa context. The material that will be of the greatest use during this research includes legislation, case law and literature.

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<sup>78</sup> See *Independent Municipal and Allied Trade Union obo Strydom v Witzenburg Municipality & others* [2012] 7 BLLR 660 (LAC); *Department of Correctional Services & another v POPCRU & others* [2011] JOL 27866 (LAC); *POPCRU & others v Department of Correctional Services & another* [2010] 10 BLLR 1067 (LC); *Department of Correctional Services and another v Police and Prisons Civil Rights Union and others* [2013] 3 All SA 1 (SCA); *Dlamini v Green Four Security* 2006 11 BLLR 1074 (LC); *Kievits Kroon Country Estate (Pty) Ltd v Mmoledi* 2012 11 BLLR 1099 (LAC).

<sup>79</sup> Uniform test or standardised test in the context of this dissertation means a test prescribed by law which is binding and must be applied in the case of persons with disabilities.

<sup>80</sup> As mentioned previously the Code is only a guideline and not binding whereas legislation is binding.

## **CHAPTER 2 THE RIGHTS OF PERSONS WITH DISABILITIES: NATIONAL AND INTERNATIONAL PERSPECTIVE**

### ***2.1 Introduction***

In this chapter, the history and development of the Constitution and labour laws (international and national) will be analysed, with specific reference to the rights of persons with disabilities. The purpose of this analysis is to apprehend how regulation and practice guidelines have evolved in relation to the rights of persons with disabilities as provided for by the Constitution, with specific reference to the prohibition of disability-based discrimination. Moreover, the evaluation may even assist in analysing the improvement of regulation and concepts which prohibit disability-based discrimination.

Firstly, the nature and extent of the concept of persons with disabilities will be unpacked to establish a proper understanding of what it means to be a person with a disability. A better grasp of this concept will lead to a greater appreciation of the origins of the stigma surrounding persons with disabilities and the need to provide reasonable accommodation. This analysis will be conducted by considering the various definitions of persons with disabilities as provided for in terms of national and international law and standards, as well as those developed in applicable case law.

Secondly, the historical rights of persons with disabilities will be discussed to clearly set out what the status was of persons with disabilities prior to the enactment of the Constitution. Furthermore, this will assist in establishing the reasons for the development of legislation that affords persons with disabilities more protection.

Thirdly, an analysis will be conducted of the current national legislation and international instruments, which gives effect to the fundamental right to equality for persons with disabilities.

Lastly, the concept of discrimination, particularly unfair discrimination, will be discussed to determine in which circumstances certain exceptions arise as a defence against unfair discrimination based on disability and how these exceptions are limited.

## ***2.2 The meaning of persons with disabilities***

It is important to understand how the term persons with disabilities is defined, as this is the starting point for recognising individuals with disabilities and the nature and extent of these individuals' impairments. This is important predicated on the fact that disabilities are not limited to one category but rather extended to a large number of impairments, including long-term physical, mental, intellectual or sensory impairments.

Understanding the meaning of the concept persons with disabilities further assists in providing clarity as to whom this study applies to and why reasonable accommodation plays such a fundamental role in the participation of a person with a disability in the labour market. A variety of resources exist that outline the definitions of persons with disabilities, which will be discussed in more detail below.

### *2.2.1 Definitions*

In relation to the definition of persons with disabilities, we first turn to the World Health Organisation's (WHO) International Classification of Functioning, Disability and Health (ICF), which was briefly discussed in the previous chapter. It is important to note that the WHO is a United Nations (UN) organisation responsible for governance and coordination of healthcare.<sup>81</sup> Furthermore, the ICF is a WHO framework for measuring health and disability at both individual and population levels, which explains functions and disorders related to health.<sup>82</sup> The ICF was officially approved by all 191 member states, of which South Africa is one,<sup>83</sup> as an international standard for describing and measuring health and disability.<sup>84</sup>

The ICF describes disability as:

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<sup>81</sup> E-International Relations 8 November 2010 <https://www.e-ir.info/2010/11/08/what-are-the-main-functions-of-the-world-health-organization/>.

<sup>82</sup> Physiopedia date unknown [https://www.physio-pedia.com/International\\_Classification\\_of\\_Functioning,\\_Disability\\_and\\_Health\\_\(ICF\)](https://www.physio-pedia.com/International_Classification_of_Functioning,_Disability_and_Health_(ICF)).

<sup>83</sup> World Health Organisation date unknown <https://www.who.int/countries>.

<sup>84</sup> World Health Organisation date unknown <https://www.who.int/standards/classifications/international-classification-of-functioning-disability-and-health>.

a result of a relationship between a person's medical or health condition and the person's personal circumstances as well as environmental factors.<sup>85</sup>

According to the aforementioned definition, disability can be seen as a result of environmental interactions and not solely as a result of an individual's intrinsic features.<sup>86</sup> The aforementioned is predicated upon the fact that the same individual may deliver different functioning levels in different environments and/or circumstances.<sup>87</sup>

Disability is furthermore defined by the United Nations (UN) Convention on the Rights of Persons with Disabilities, 2007 (CRPD).<sup>88</sup> The CRPD is an international human rights treaty drafted and proposed by the UN and accordingly adopted by its members.<sup>89</sup> As a member state of the UN,<sup>90</sup> and predicated upon South Africa's signing and ratification of the CRPD, South Africa is bound by the CRPD.<sup>91</sup>

Prior to dealing with the CRPD, it is important to note that the UN is an international organisation established in 1945, which specialises in the maintenance of world peace and security, the development of friendly relations between nations, the promotion of social progress, better living standards and human rights.<sup>92</sup> Moreover, the UN aims to promote the rights and progress of persons with disabilities within the broad authority established by the world action plan, the standards regulations and the CRPD.<sup>93</sup> It is noteworthy that the CRPD is the first comprehensive human rights treaty of the 21<sup>st</sup> century as well as the first human rights treaty to be signed by a regional integration

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<sup>85</sup> World Health Organization *International classification of impairments, disabilities, and handicaps: A manual of classification relating to the consequences of disease* 15; see also Hurling Disability *Discrimination And Reasonable Accommodation In The South African Workplace* 8.

<sup>86</sup> United Nations date unknown <https://www.un.org/esa/socdev/enable/rights/ahc8docs/ahc8whodis1.doc>.

<sup>87</sup> United Nations date unknown <https://www.un.org/esa/socdev/enable/rights/ahc8docs/ahc8whodis1.doc>.

<sup>88</sup> UN Convention on the Rights of Persons with Disabilities, 2006.

<sup>89</sup> European Disability Forum date unknown <https://www.edf-feph.org/un-crpd/>.

<sup>90</sup> United Nations date unknown <http://www.un.org/en/member-states/>; admission date was 7 October 1945.

<sup>91</sup> Department of Economic and Social Affairs Division for Inclusive Social Development date unknown <https://www.un.org/development/desa/disabilities/convention-on-the-rights-of-persons-with-disabilities.html> ; UN Convention on the Rights of Persons with Disabilities, 2007.

<sup>92</sup> United Nations date unknown <https://careers.un.org/lbw/home.aspx?viewtype=wwd&lang=en-us>.

<sup>93</sup> United Nations date unknown <https://www.un.org/development/desa/disabilities/convention-on-the-rights-of-persons-with-disabilities.html>.

body.<sup>94</sup> Furthermore, the CRPD is intended as a human rights document with a clear social development aspect which adopted a broad classification of persons with disabilities with the view of ensuring that all persons with disabilities enjoy all human rights and fundamental freedoms.<sup>95</sup>

Now in dealing with the definition of persons with disabilities in accordance with the CRPD, it should be noted that although article 2 of the CRPD contains various definitions for purposes of the CRPD, persons with disabilities are not specifically defined in this article of the CRPD.<sup>96</sup> Notwithstanding this, article 1 of the CRPD (as stated above) provides a clear indication as to who constitutes persons with disabilities in terms of the CRPD.<sup>97</sup> It is important to note that there are two approaches in deconstructing "disability", namely the medical model and the social model.<sup>98</sup> The medical model regards disability as being an issue relating to welfare, and as such requires a persons' disability to be cured to allow such person to fit into society.<sup>99</sup> On the other hand, the social model views disability as "something created by the social environment" and not only by the impairment itself; thus requiring society to be cured in order to accommodate persons with disabilities.<sup>100</sup> The CRPD has consequently incorporated the social model into its approach to disability;<sup>101</sup> therefore persons with disabilities will only be considered having a disability once such disability creates a barrier for the individual in question. The CRPD, however, refers to persons with disabilities in general and does not provide specific guidance on whether or not a specific individual with some kind of impairment falls squarely within the category of persons with disabilities for purposes of South African labour law. The CRPD has however included a broad description of persons with disabilities to assist with general

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<sup>94</sup> United Nations date unknown <https://www.un.org/development/desa/disabilities/convention-on-the-rights-of-persons-with-disabilities.html>.

<sup>95</sup> United Nations date unknown <https://www.un.org/development/desa/disabilities/convention-on-the-rights-of-persons-with-disabilities.html>.

<sup>96</sup> See article 2 of the *UN Convention on the Rights of Persons with Disabilities*, 2006.

<sup>97</sup> See article 1 of the *UN Convention on the Rights of Persons with Disabilities*, 2006.

<sup>98</sup> Ngwena 2007 *SAHRJ* 619.

<sup>99</sup> Hurling *Disability Discrimination And Reasonable Accommodation In The South African Workplace* ii.

<sup>100</sup> Hurling *Disability Discrimination And Reasonable Accommodation In The South African Workplace* ii.

<sup>101</sup> Ngwena 2007 *SAHRJ* 645.

international guidance and also to ensure effective and equal inclusion of persons with disabilities within the broader society.<sup>102</sup> However, this is not sufficient for the purposes of this dissertation. Consequently, the study will now turn to the definition of persons with disabilities as provided by the International Labour Organisation (ILO).

The ILO is the only multilateral UN agency, established in 1919 with the intent of bringing together governments, employers and workers of all of its 187 member States.<sup>103</sup> The main goal of the ILO includes establishing labour standards, the development of policies and devise programmes promoting decent work for all women and men.<sup>104</sup> South Africa is a member state of the ILO, and as such obligated to take cognisance of the guidelines and minimum standards provided by the ILO, its conventions and other relevant instruments.<sup>105</sup>

In relation to the definition of a person with disabilities as provided by the ILO, we turn to the ILO Code of Practice: Managing Disability in the workplace (ILO Code),<sup>106</sup> which states that a "disabled person" (or for purposes of this study, persons with disabilities) means:

an individual whose prospects of securing, retaining and advancing in suitable employment are substantially reduced as a result of a duly recognised physical or mental impairment.<sup>107</sup>

The aforementioned definition of persons with disabilities should be read in conjunction with the definition of "impairment" as provided by the ILO Code, as the definition of persons with disabilities is built around the concept of impairment.<sup>108</sup> An impairment

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<sup>102</sup> Article 3 of the *UN Convention on the Rights of Persons with Disabilities*, 2006; see also Item 5.2 of the Code of good practice on Employment of Persons with Disabilities.

<sup>103</sup> International Labour Organisation date unknown <https://www.ilo.org/global/about-the-ilo/lang-en/index.htm>.

<sup>104</sup> International Labour Organisation date unknown <https://www.ilo.org/global/about-the-ilo/lang-en/index.htm>.

<sup>105</sup> *Convention 111 Convention concerning Discrimination in Respect of Employment and Occupation*, 1958.

<sup>106</sup> ILO Code of Practice: Managing Disability in the workplace.

<sup>107</sup> ILO Code of Practice Managing Disability in the workplace 4.

<sup>108</sup> ILO Code of Practice Managing Disability in the workplace.

according to the ILO Code is: "Any loss or abnormality of a psychological, physiological or physical function".<sup>109</sup>

The aforementioned definition of persons with disabilities and impairments is, however, not comprehensive enough for purposes of this study, and as such, the study will now turn to the definition of persons with disabilities as provided in terms of the *Employment Equity Act 55 of 1998 (EEA)*.

The EEA defines people with disabilities (or persons with disabilities for purposes of this study) as:

people who have a long-term or recurring physical or mental impairment which substantially limits their prospects of entry into, or advancement in, employment.<sup>110</sup>

The aforementioned definition in terms of the EEA is similar to Article 1 of the CRPD as reflected above. However, the Code of Good Practice on Employment of Persons with Disabilities (Code) gives further guidance on identifying persons with disabilities.

It is, however, important to make reference to the following cases where the courts were confronted with determining whether the employees fell within the definition of persons with disabilities. In the case of *IMATU v City of Cape Town*,<sup>111</sup> the Labour Court held that a person with type-1 diabetes does not limit a person's employment prospects. Although type-1 diabetes is a long-term physical impairment, it can be controlled through the use of medication.<sup>112</sup> Notwithstanding this, in the case of *Jansen v Legal Aid SA*,<sup>113</sup> the Labour Court held that an employee suffering from depression falls within the aforementioned definition of persons with disabilities.<sup>114</sup> It was further determined in the case of *Abels and Dialogue Group (Pty) Ltd*,<sup>115</sup> that an employee who is required to undergo dialysis treatment as a result of his renal failure, constitutes

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<sup>109</sup> ILO Code of Practice Managing Disability in the workplace 6.

<sup>110</sup> Section 1 of the *Employment Equity Act 55 of 1998*.

<sup>111</sup> *IMATU & another v City of Cape Town* [2005] 11 BLLR 1084 (LC).

<sup>112</sup> *IMATU & another v City of Cape Town* [2005] 11 BLLR 1084 (LC).

<sup>113</sup> *Jansen v Legal Aid SA* (2018) 39 ILJ 2024 (LC).

<sup>114</sup> *Jansen v Legal Aid SA* (2018) 39 ILJ 2024 (LC).

<sup>115</sup> *Abels and Dialogue Group (Pty) Ltd* (2009) 30 ILJ 2167 (CCMA).

a person with a disability as per the aforementioned definition of persons with disabilities.<sup>116</sup>

Now in dealing with the definition of persons with disabilities as set out in the Code: according to item 5.3 of the Code, an individual is considered a person with a disability if the following three elements/criteria are present, and/or are applicable to such an individual. These include the following: such person must have a physical or mental impairment,<sup>117</sup> the physical or mental impairment is long-term or recurring,<sup>118</sup> and the impairments above (whether long-term or recurring) considerably limit the individual's prospects of entry into and/or advancement in employment.<sup>119</sup>

The aforementioned elements are furthermore defined in terms of the Code, of which the definitions will be subsequently analysed.

An impairment, according to item 5.3.1 of the Code, consists of three categories, namely: a physical impairment, a mental impairment or alternatively, a combination of both physical and mental impairment.<sup>120</sup>

Firstly, physical impairments are defined as: "a partial or total loss of a bodily function or part of the body".<sup>121</sup> In addition to the aforementioned, sensory impairments also form part of physical impairments.<sup>122</sup> Sensory impairments consist of disabilities which affect sight, hearing and touch.<sup>123</sup>

Secondly, mental impairments are defined as a: "clinically recognised condition or illness that affects a person's thought processes, judgment or emotions".<sup>124</sup> A mental impairment must consequently be clinically recognised by a medical practitioner,<sup>125</sup> as

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<sup>116</sup> *Abels and Dialogue Group (Pty) Ltd* (2009) 30 ILJ 2167 (CCMA).

<sup>117</sup> Item 5.3(a) of the Code of good practice on Employment of Persons with Disabilities.

<sup>118</sup> Item 5.3(b) of the Code of good practice on Employment of Persons with Disabilities.

<sup>119</sup> Item 5.3(c) of the Code of good practice on Employment of Persons with Disabilities.

<sup>120</sup> Hurling *Disability Discrimination And Reasonable Accommodation In The South African Workplace* 10.; see also Item 5.3.1 of the Code of good practice on Employment of Persons with Disabilities.

<sup>121</sup> Item 5.3.1(a) of the Code of good practice on Employment of Persons with Disabilities.

<sup>122</sup> Item 5.3.1(a) of the Code of good practice on Employment of Persons with Disabilities.

<sup>123</sup> South African Human Rights Commission *Disability Toolkit* 9.

<sup>124</sup> Item 5.3.1(b) of the Code of good practice on Employment of Persons with Disabilities.

<sup>125</sup> Hurling *Disability Discrimination And Reasonable Accommodation In The South African Workplace* 10.

there is "a presumption of sanity in South Africa".<sup>126</sup> Consequently, the onus lies with an individual who makes an allegation of mental impairment to prove the existence of such mental impairment.<sup>127</sup> It is notable that a mental impairment will furthermore limit not only a person's thought process but also such person's "emotions or judgement".<sup>128</sup>

For both physical and mental impairments, it is noteworthy that the presence of a physical or mental impairment will, in itself, not constitute a disability. As such, medical evidence will be required to confirm that a physical or mental impairment constitutes a disability.<sup>129</sup> Notwithstanding this because persons with disabilities are not "conditions or diseases", the existence of an impairment is merely one component for consideration in determining whether an individual is a person with a disability.<sup>130</sup>

As stated above, physical and/or mental impairments can either be long-term or recurring and/or progressive.<sup>131</sup> Firstly, long-term impairments arise where an impairment has persisted or is likely to endure for a period of at least twelve months.<sup>132</sup> In contrast, recurring impairments refer to impairments that are expected to reoccur and to be substantially limiting. Recurring impairments also include a constant chronic condition, even if its effects on a person fluctuate from time to time.<sup>133</sup>

On the other hand, progressive conditions refer to conditions that are likely to develop, change or, in the alternative, recur. An individual who lives with an illness or any other

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<sup>126</sup> Hurling *Disability Discrimination And Reasonable Accommodation In The South African Workplace* 11; see also Burchell and Milton *Principles of Criminal Law* 390.

<sup>127</sup> Burchell and Milton *Principles of Criminal Law* 390; see also Hurling *Disability Discrimination And Reasonable Accommodation In The South African Workplace* 11 which states that in proving a claim of mental impairment "A court or quasi-judicial body must hear expert evidence on a condition or illness that is claimed to form the basis of, or amounts to, a mental impairment and must make a finding of fact on whether such condition or illness is clinically recognized".

<sup>128</sup> Hurling *Disability Discrimination And Reasonable Accommodation In The South African Workplace* 10.

<sup>129</sup> Hurling *Disability Discrimination And Reasonable Accommodation In The South African Workplace* 11.

<sup>130</sup> Hurling *Disability Discrimination And Reasonable Accommodation In The South African Workplace* 11 – 12; see also Item 1.3.1.1 of the Technical Assistance Guidelines on the Employment of People with disabilities.

<sup>131</sup> Item 5.3.2 of the Code of good practice on Employment of Persons with Disabilities.

<sup>132</sup> Item 5.3.2(a) of the Code of good practice on Employment of Persons with Disabilities.

<sup>133</sup> Item 5.3.2(b) of the Code of good practice on Employment of Persons with Disabilities.

progressive condition is deemed to be a person with a disability for purposes of the employment law in South Africa.<sup>134</sup> However, this only is applicable where the illness or progressive conditions become substantially limiting.<sup>135</sup>

In contrast to the aforementioned, illnesses and/or progressive conditions which do not substantially limit an individual or which do not have clear symptoms are excluded from qualifying as a disability, and as such individuals who are not substantially limited by their illness or condition, do not fall within the meaning of persons with disabilities.<sup>136</sup>

The final element which forms part of the concept persons with disabilities in terms of the Code is to determine whether or not the impairment is substantially limiting.<sup>137</sup> An impairment is considered substantially limiting in circumstances where an individual's ability to perform the essential functions of the job for which he/she is being considered, is hindered as a result of the individual's impairment.<sup>138</sup> In establishing whether the impairment is substantially limiting, one has to holistically look at the effects of a person's long-term or recurring physical or mental impairment.<sup>139</sup> The aforementioned consideration must be given in making a factual finding that the impairment in question is substantially limiting.<sup>140</sup>

Notwithstanding the aforementioned, impairments are not regarded as having substantially limiting effects on an individual where such impairments are easily

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<sup>134</sup> Hurling *Disability Discrimination And Reasonable Accommodation In The South African Workplace* 13; see also Item 5.3.2(c) of the Code of good practice on Employment of Persons with Disabilities.

<sup>135</sup> Item 5.3.2(c) of the Code of good practice on Employment of Persons with Disabilities.

<sup>136</sup> Item 5.3.2(c) of the Code of good practice on Employment of Persons with Disabilities.

<sup>137</sup> Item 5.3.3 of the Code of good practice on Employment of Persons with Disabilities.

<sup>138</sup> Item 5.3.3(a) of the Code of good practice on Employment of Persons with Disabilities; the nature, duration or effects of the impairment should be considered when determining whether or not the impairment is substantially limiting.

<sup>139</sup> Hurling *Disability Discrimination And Reasonable Accommodation In The South African Workplace* 14.

<sup>140</sup> Hurling *Disability Discrimination And Reasonable Accommodation In The South African Workplace* 14.

regulated, remedied or minimised,<sup>141</sup> as is the case with individuals who wear spectacles or contact lenses.<sup>142</sup>

Notwithstanding the aforementioned broad description of persons with disabilities, certain conditions and/or impairments are excluded from the definition of persons with disabilities based on public policy.<sup>143</sup> These exclusions are as follows:

(i) sexual behaviour disorders that are against public policy; (ii) self-imposed body adornments such as tattoos and body piercing; (iii) compulsive gambling, tendency to steal or light fires; (iv) disorders that affect a person's mental or physical state if they are caused by current use of illegal drugs or alcohol, unless the affected person is participating in a recognised programme of treatment, normal deviations in height, weight and strength; and (v) conventional physical and mental characteristics and common personality traits.<sup>144</sup>

Although the Code is founded on the principle of non-discrimination based on disability, a person who has an impairment which falls within the list of exclusions will not be considered to have a disability for purposes of the Code.<sup>145</sup> Consequently, these individuals will not be offered the protection against discrimination as set out in the Code and the EEA.<sup>146</sup>

Now that the nature and extent of persons with disabilities have been dealt with at the hand of the relevant definitions and the criteria which need to be considered when identifying persons with disabilities, the relevant legislation as far as it relates to the development of the rights of persons with disabilities will be discussed.

### ***2.3 A historical overview of the rights of persons with disabilities***

Historically persons with disabilities were afforded little to no protection against disability-based discrimination in terms of South African legislation. As a minority

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<sup>141</sup> Hurling *Disability Discrimination And Reasonable Accommodation In The South African Workplace* 14.

<sup>142</sup> Item 5.3.3(b) of the Code of good practice on Employment of Persons with Disabilities; An example of this is where a person who wears spectacles or contact lenses does not have a disability unless even with spectacles or contact lenses the person's vision is substantially impaired.

<sup>143</sup> Item 5.3.3(c) of the Code of good practice on Employment of Persons with Disabilities.

<sup>144</sup> Item 5.3.3(c)(i)-(v) of the Code of good practice on Employment of Persons with Disabilities.

<sup>145</sup> Hurling *Disability Discrimination And Reasonable Accommodation In The South African Workplace* 16.

<sup>146</sup> Hurling *Disability Discrimination And Reasonable Accommodation In The South African Workplace* 16.

group, persons with disabilities have been subjected to "discrimination and stigmatisation".<sup>147</sup> Disability-based discrimination was and unfortunately still remains one of the worst social stigmas that society has struggled to overcome.<sup>148</sup> As a result of the disability-base discrimination and stigmatisation of persons with disabilities, persons with disabilities further suffered and continue to suffer "indignity, widespread discrimination and lack of economic independence".<sup>149</sup> The stigmatisation of persons with disabilities existed because persons with disabilities were earmarked as receiving charity as they are deemed as being unable to do things for themselves,<sup>150</sup> and as a result, persons with disabilities were and continue to be excluded from the job market or are under-represented in the workplace. The under-representation in the workplace, together with the under-remuneration of persons with disabilities cannot be explained purely by looking at the differential levels of education and skills between able-bodied individuals and persons without disabilities,<sup>151</sup> but has much to do with employers' inclination to treat disability as a synonym for incapacity.<sup>152</sup> This is predicated upon the fact that employers deemed persons with disabilities as being unable to perform the inherent requirements of the job.<sup>153</sup>

This position in relation to disability-based discrimination has since improved dramatically, but room still remains for advancements and further development. In this part of the dissertation, the development of legislation regarding the rights of persons with disabilities will be discussed. Notwithstanding this, the nature and extent of the various legislation and law instruments that have developed in favour of the rights of persons with disabilities will be investigated below.

The Wiehahn Commission (WC) was appointed in 1977 to embark on an investigation into the labour laws of South Africa. In its report, the WC recommended that anti-discrimination principles be incorporated into the South African labour laws to outlaw

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<sup>147</sup> Ngewna 2004 *JJS* 168.

<sup>148</sup> Marumoagae 2012 *PER* 346.

<sup>149</sup> Ngewna 2004 *JJS* 168.

<sup>150</sup> Ngwena 2006 *SAHRJ* 616.

<sup>151</sup> Ngewna 2004 *JJS* 170.

<sup>152</sup> Ngewna 2004 *JJS* 170.

<sup>153</sup> Ngewna 2004 *JJS* 170.

and criminalise discrimination based on specific grounds.<sup>154</sup> Notwithstanding the WC's report, no headway was made in terms of the development of legislation relating to the rights of persons with disabilities during the transitional period of 1979 to 1994. Nevertheless, the foundations for democracy were however laid during this period.<sup>155</sup>

In 1992 the minimum requirements for persons being classified with disabilities were established with the adoption of the South African Disability Rights Charter (DRC),<sup>156</sup> which led to the inclusion of a prohibition on unfair discrimination based on disability in terms of section 8 of the *Interim Constitution of the Republic of South Africa*, 200 of 1993.<sup>157</sup> This section was later repealed by section 9 of the final Constitution in 1996.<sup>158</sup>

The inclusion mentioned above regarding the prohibition of unfair discrimination based on disability in the Constitution was followed by the White Paper on an Integrated National Disability Strategy for South Africa (INDS).<sup>159</sup> This White Paper was aimed at creating a society for all in terms of which each and every citizen's needs constitute the basis for planning and policy enactment, and where all systems and institutions within the Republic are accessible to all citizens.<sup>160</sup> The INDS was subsequently followed by the Integrated Provincial Disability Strategies, which was created with a view to facilitate the implementation of the INDS at provincial level.<sup>161</sup>

The Constitution and the INDS were followed by labour-specific legislation, which was enacted between 1995 and 1999 to give effect to the right to equality, namely the Labour Relations Act 66 of 1995 (LRA) and EEA. These statutes were followed by the enactment of further legislation which confirmed the right to equality in general society, namely the *Promotion of Equality and Prevention of Unfair Discrimination Act*

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<sup>154</sup> Van Staden *A Strategy For The Employment Of Persons With Disabilities* 114.

<sup>155</sup> Van Staden *A Strategy For The Employment Of Persons With Disabilities* 114.

<sup>156</sup> The Presidency of the Republic of South Africa *Background Paper: Disability* 3.

<sup>157</sup> Section 8 of the *Interim Constitution of the Republic of South Africa*, 200 of 1993.

<sup>158</sup> Section 9 of the *Constitution of the Republic of South Africa*, 1996.

<sup>159</sup> The Presidency of the Republic of South Africa *Background Paper: Disability* 3.

<sup>160</sup> The Presidency of the Republic of South Africa *Background Paper: Disability* 3; see also section 9 of the *Constitution of the Republic of South Africa*, 1996.

<sup>161</sup> Olivier 2013 *LAWSA* 265.

4 of 2000 (hereinafter referred to as PEPUDA).<sup>162</sup> The aforementioned legislation specifically gives protection to persons with disabilities and confirms the rights of persons with disabilities rights as well as the prohibition of disability-based discrimination. Notwithstanding this, PEPUDA will for purposes of this study not be discussed in detail as the study specifically relates to the employment realm.

In amplification of the EEA, the Code of Good Practice on Employment of Persons with Disabilities (Code) was published on the advice of the Commission for Employment Equity in 2002.<sup>163</sup> The Code did, however, not create additional rights and obligations and was published as a guideline to be read in conjunction with the EEA with a view of developing, implementing and refining disability equity policies and programmes.<sup>164</sup>

It is important to mention that certain vulnerable groups have received dedicated legislation outlining the rights of these groups, such as elderly persons who received protection in terms of the *Older Persons Act* 13 of 2006,<sup>165</sup> and children receiving protection under the *Children's Act* 38 of 2005.<sup>166</sup> Persons with disabilities, however, do not have dedicated legislation pertaining to disability-specific rights – the rights of persons with disabilities are scattered throughout national legislation and other instruments which do not have the power of law. Therefore the rights of persons with disabilities are dealt with in a fragmentary manner in terms of the various relevant legislation, as will be highlighted below.

Now that a brief overview of the development of legislation establishing the rights of persons with disabilities has been provided, the next section of this chapter will delve into matters of substantive equality.

## **2.4 The right to equality**

In this section of the chapter, the various national and international legislation and law instruments which have been enacted to give effect to the fundamental right to

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<sup>162</sup> *Promotion of Equality and Prevention of Unfair Discrimination Act* 4 of 2000.

<sup>163</sup> Van Staden *A Strategy For The Employment Of Persons With Disabilities* 128.

<sup>164</sup> Van Staden *A Strategy For The Employment Of Persons With Disabilities* 128.

<sup>165</sup> *Older Persons Act* 13 of 2006.

<sup>166</sup> *Children's Act* 38 of 2005.

equality, more specifically the right to equality of persons with disabilities, will be examined. The purpose of this analysis is to understand the nature and extent of the equality rights afforded to persons with disabilities in terms of the various legislation and law instruments; more specifically the implementation thereof and the obligations placed on employers to provide reasonable accommodation to persons with disabilities with the view of eliminating disability-based discrimination.

#### *2.4.1 National law*

##### 2.4.1.1 Constitution

First and foremost, we turn to the Constitution, which gives rise to the right to equality within South Africa and which proudly proclaims the accomplishment of equality.<sup>167</sup> As a starting point, section 1 of the Constitution sets out the values of the Republic, which values include, but are not limited to, human dignity, the achievement of equality and the advancement of human rights and freedoms.<sup>168</sup> From the aforementioned values, it is important to note that one of the first values in the Constitution includes the "achievement of equality", and from this it is clear that the right to equality is a priority in terms of the Constitution.<sup>169</sup>

The right to equality is established in terms of section 9(1) of the Constitution, which states that "everyone is equal" and "has the right to equal protection and benefit of the law".<sup>170</sup> In consideration of the aforementioned, more specifically that "everyone is equal" and "has the right to equal protection and benefit of the law", the Constitution may be considered to provide a formal approach to equality.<sup>171</sup> In our constitutional disposition, it is assumed that all are given equal rights, can compete equally, equality is treated equally, and inequality is treated unequally.<sup>172</sup> Formal equality however fails

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<sup>167</sup> Henrico 2015 *OBITER* 275.

<sup>168</sup> Section 1(a) of the *Constitution of the Republic of South Africa*, 1996; see also Henrico 2015 *OBITER* 275.

<sup>169</sup> Henrico 2015 *OBITER* 275.

<sup>170</sup> Section 9(1) of the *Constitution of the Republic of South Africa*, 1996; see also Henrico 2015 *OBITER* 276.

<sup>171</sup> Henrico 2015 *OBITER* 277.

<sup>172</sup> Henrico 2015 *OBITER* 277.

to address social disadvantages,<sup>173</sup> as such a substantive approach should be taken in relation to achieving equality as will be discussed below.

The right to equality consists of the "equal enjoyment of all rights and freedom" in terms of section 9(2) of the Constitution.<sup>174</sup> This right to "equal enjoyment of all rights and freedom" does however depend on the realisation of socio-economic rights,<sup>175</sup> which is not addressed by a formal approach to equality.<sup>176</sup> This is predicated upon the fact that building a society based on social justice entails removing structural disparities in access to economic resources and social services, and therefore socio-economic rights play a vital role in achieving the right to "equal enjoyment of all rights and freedom".<sup>177</sup> Section 9(2) of the Constitution further states that:

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.<sup>178</sup>

Thus legislation must be enacted to achieve equality through protecting and/or promoting previously disadvantaged groups,<sup>179</sup> of which persons with disabilities form part. Consequently, affirmative-action legislation has been enacted to realise the achievement of equality as per clause 9(2) of the Constitution, and which legislation is furthermore aimed at promoting equality by advancing particular groups of people.<sup>180</sup> The aforementioned accordingly ties into the substantive approach to equality. It should be noted that section 9 of the Constitution does, however, not explicitly provide that a substantive approach, as opposed to a formal approach to equality, should be adopted.<sup>181</sup> The Constitutional Court however confirmed this position in the case of *The President of the Republic of South Africa v Hugo*,<sup>182</sup> where it was held that:

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<sup>173</sup> Fredman 2005 *SAJHR* 161.

<sup>174</sup> Section 9(2) of the *Constitution of the Republic of South Africa*, 1996.

<sup>175</sup> Ngwena and Pretorius 2012 *SAJHR* 94.

<sup>176</sup> Fredman 2005 *SAJHR* 161.

<sup>177</sup> Ngwena and Pretorius 2012 *SAJHR* 94.

<sup>178</sup> Section 9(2) of the *Constitution of the Republic of South Africa*, 1996.

<sup>179</sup> Henrico 2015 *OBITER* 276.

<sup>180</sup> Henrico 2015 *OBITER* 276.

<sup>181</sup> Henrico 2015 *OBITER* 278.

<sup>182</sup> *President of the Republic of South Africa v Hugo* 1997 (4) SA 1 (CC).

We need to develop a concept of unfair discrimination which recognises that although a society which affords each human being equal treatment on the basis of equal worth... we cannot achieve that goal by insisting upon identical treatment in all circumstances before that goal is achieved.<sup>183</sup>

In consideration of the above, equality cannot be achieved by treating everyone equally in all circumstances.<sup>184</sup> This has consequently created the basis for substantive equality, and as such, it should be noted that the key insight of substantive equality is, "the recognition that it is not colour, gender or some other group characteristic per se which is at issue, but the attendant disadvantage".<sup>185</sup> In the light of this, for substantive equality to be achieved a positive duty to provide has been established,<sup>186</sup> as can be seen from section 9(2) of the Constitution, more specifically in respect of affirmative-action legislation that has to be enacted to advance previously disadvantaged groups.<sup>187</sup> In contrast to formal equality, substantive equality is "less concerned with equal treatment and more focused on equal access and equal benefits".<sup>188</sup>

Consequently, substantive equality recognises that "instead of treating all individuals as one and the same and applying laws consistently without distinction or discrimination", individuals should be considered in conjunction with their substantive worth and differences; the aforementioned of which has to be "tolerated and accommodated in a pluralistic democratic order".<sup>189</sup>

In terms of section 9(3)-(4) of the Constitution, neither the state nor any other person may discriminate against another person based on the grounds as listed in section 9(3) of the Constitution.<sup>190</sup> These grounds include the following:

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<sup>183</sup> *President of the Republic of South Africa v Hugo* 1997 (4) SA 1 (CC) par 112.

<sup>184</sup> *President of the Republic of South Africa v Hugo* 1997 (4) SA 1 (CC) par 112.

<sup>185</sup> Fredman 2005 *SAJHR* 163.

<sup>186</sup> Fredman 2005 *SAJHR* 163.

<sup>187</sup> Section 9(2) of the *Constitution of the Republic of South Africa*, 1996.

<sup>188</sup> Lord and Brown *The Role Of Reasonable Accommodation In Securing Substantive Equality For Persons With Disabilities: The Un Convention On The Rights Of Persons With Disabilities* 275.

<sup>189</sup> Henrico 2015 *OBITER* 276.

<sup>190</sup> Section 9(3)-(4) of the *Constitution of the Republic of South Africa*, 1996.

Gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.<sup>191</sup>

It can, however be argued that the grounds listed above are not exclusive considering the wording of section 9(3) of the Constitution, which states that: "The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds including...".<sup>192</sup> It is especially important to note for purposes of this study that "disability" is a prohibited ground in terms of section 9(3) of the Constitution, which also forms part of the prohibited grounds of discrimination referred to in section 9(4) of the Constitution.

Despite the prohibited grounds as referred to above, a person who discriminates against another based on any one of the listed grounds does not necessarily constitute unfair discrimination, as section 9(5) of the Constitution permits circumstances where discrimination based on one of the listed grounds might be proven as being a fair discrimination.<sup>193</sup> It is therefore clear that the right to equality and not to be discriminated against is not an absolute right, and the possibility of limitation of this right in a fair manner exists.

The right to equality can, however, not be considered in isolation from the right to dignity, as the right to dignity is one of the founding values of the Constitution together with the right to equality,<sup>194</sup> and both values are intertwined. Section 1(a) of the Constitution provides that South Africa is a sovereign state founded on the values of human dignity.<sup>195</sup> Section 10 of the constitution further gives rise to the fundamental right of human dignity as section 10 of the Constitution states that: "Everyone has inherent dignity and the right to have their dignity respected and protected".<sup>196</sup>

It should be noted that the struggle to remove and resolve behaviour that results in the unequal treatment of individuals in general and against employees is ongoing.<sup>197</sup>

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<sup>191</sup> Section 9(3) of the *Constitution of the Republic of South Africa*, 1996.

<sup>192</sup> Henrico 2015 *OBITER* 276.

<sup>193</sup> Section 9(5) of the *Constitution of the Republic of South Africa*, 1996.

<sup>194</sup> Bernard 214 *PELJ*2870.

<sup>195</sup> Section 9(5) of the *Constitution of the Republic of South Africa*, 1996; see also Henrico 2015 *OBITER* 277.

<sup>196</sup> Section 10 of the *Constitution of the Republic of South Africa*, 1996.

<sup>197</sup> Henrico 2015 *OBITER* 284.

The aforementioned treatment of individuals is better known as discrimination, which will be discussed in depth below. Notwithstanding this and predicated upon the fact that discrimination is *prima facie* abhorrent to equality, the relationship between the concepts equality and discrimination is inseparable,<sup>198</sup> and the intimate relationship between equality and human dignity is also woven into this thread as every individual has an ultimate inherent value.<sup>199</sup> Consequently all individuals are on an equal footing in terms of this value, and dignity is the ultimate worth.<sup>200</sup> It has been held that the right to human dignity considered in the context of the right to equality "does not relate to the status or position of an individual in society per se, but rather concerns the manner in which a person legitimately feels when confronted with a particular law".<sup>201</sup> The right to dignity will be further discussed below, where the nature and extent of the concept discrimination is discussed.

In relation to the right to equality, further preventive and prohibitive measures against unfair discrimination in the workplace, especially discrimination based on disability, are governed by the EEA and LRA, which will be discussed below.

#### 2.4.1.2 The Employment Equity Act

The most important national statute relating to employment and the protection of the right to equality for persons with disabilities in South Africa is the EEA.

The purpose of the EEA is to promote equal opportunity and fair treatment in employment, which can only be achieved by eliminating unfair discrimination in the workplace.<sup>202</sup> In addition to this, affirmative action measures must also be implemented by employers to equalise the disadvantages in employment suffered by designated groups in the past,<sup>203</sup> in order to ensure equitable representation and equal opportunity in the workplace.<sup>204</sup> With reference to the provisions regarding affirmative

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<sup>198</sup> Henrico 2015 *OBITER* 285.

<sup>199</sup> Henrico 2015 *OBITER* 285.

<sup>200</sup> Henrico 2015 *OBITER* 285.

<sup>201</sup> Fredman 2005 *SAJHR* 177.

<sup>202</sup> Section 2(a) of *the Employment Equity Act* 55 of 1998.

<sup>203</sup> Section 1 of the *Employment Equity Act* 55 of 1998 defines designated groups as: "black people, women and people with disabilities".

<sup>204</sup> Section 2(b) of *the Employment Equity Act* 55 of 1998.

action, the EEA attempts to give effect to section 9(2) of the Constitution. In terms of section 1 of the EEA, persons with disabilities are included in the definition of designated groups and will therefore be included in the attempts to address previous disadvantages suffered.<sup>205</sup>

A "positive obligation" is placed upon all employers in terms of section 5 of the EEA.<sup>206</sup> In terms of this section, an employer must "eliminate unfair discrimination" by taking the necessary measures to ensure equal opportunities for all employees.<sup>207</sup>

Section 6 of the EEA further states that an employee may not be unfairly discriminated against based on the grounds as set out in section 6(1) of the EEA.<sup>208</sup> These grounds are similar to those listed in section 9(3) of the Constitution, but with a few additional grounds. The grounds in section 6(1) of the EEA include race, gender, colour, sexual orientation, age and disability, just to name a few.<sup>209</sup> The aforementioned grounds are not limited to the grounds as stated in the EEA, as the prohibited grounds may also include *any* other arbitrary grounds on which discrimination may take place.<sup>210</sup> Notwithstanding this, for this study, it is significant to highlight that "disability" is a listed ground in terms of section 6(1) of the EEA and, as such, gives protection to persons with disabilities against unfair discrimination.

As stated above, for purposes of section 6 of the EEA, candidates that apply for a position are deemed to be employees.<sup>211</sup> Consequently, the EEA affords prospective employees with disabilities the same protection and right to equality as current employees with disabilities.

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<sup>205</sup> Section 1 of the *Employment Equity Act* 55 of 1998.

<sup>206</sup> Grogan *Workplace Law* 95.

<sup>207</sup> Section 5 of the *Employment Equity Act* 55 of 1998.

<sup>208</sup> Section 6(1) of the *Employment Equity Act* 55 of 1998.

<sup>209</sup> Section 6(1) of the *Employment Equity Act* 55 of 1998; further grounds include: pregnancy, marital status, sex, family responsibility, ethnic or social origin, religion, HIV status, conscience, belief, political opinion, culture, language and birth.

<sup>210</sup> Section 6(1) of the *Employment Equity Act* 55 of 1998.

<sup>211</sup> Section 9 of the *Employment Equity Act* 55 of 1998.

Despite the prohibition of unfair discrimination as mentioned above, section 2 of the EEA, however, provides that it is not unfair discrimination to:<sup>212</sup>

(a) take affirmative action measures consistent with the purpose of this Act; or (b) distinguish, exclude or prefer any person on the basis of an inherent requirement of a job.<sup>213</sup>

The aforementioned are possible defences which may be raised by an employer in the event where such employer fails and/or refuse to provide reasonable accommodation to persons with disabilities, which defences will be discussed in depth hereunder.

In conjunction with the EEA, the Code,<sup>214</sup> which was issued in terms of section 54(1)(a) of the EEA,<sup>215</sup> should be considered when protecting the right to equality of persons with disabilities, as well as any other rights and protections afforded to persons with disabilities in terms of the EEA and any other regulations and/or codes of good practices.<sup>216</sup>

It should be noted that the Code sets standards for the employment of persons with disabilities.<sup>217</sup> As such, the Code is merely an extension of the EEA and a guide for courts and employers to affirm the rights of persons with disabilities in the workplace,<sup>218</sup> and does not place extra obligations upon employers.<sup>219</sup>

The Code furthermore confirms the principles contained in the Constitution and the EEA, more specifically that persons with disabilities may not be unfairly discriminated against based on their disability.<sup>220</sup> In addition to the aforementioned, the Code is consistent with the right to fair labour practices as enshrined in section 23 of the Constitution.<sup>221</sup>

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<sup>212</sup> Section 6(2) of the *Employment Equity Act* 55 of 1998.

<sup>213</sup> Section 6(2)(a) – (b) of the *Employment Equity Act* 55 of 1998.

<sup>214</sup> GN 1085 of 9 November 2015: Code of Good Practice on Employment of Persons with Disabilities (Government Gazette No. 39383).

<sup>215</sup> Section 54(1)(a) of the *Employment Equity Act* 55 of 1998.

<sup>216</sup> Item 3.2 of the Code of Good Practice on Employment of Persons with Disabilities.

<sup>217</sup> Grobbelaar-Du Plessis and Nienaber 2014 *SAJHR* 374.

<sup>218</sup> Gresse and Mbaio 2020 *LDD* 119.

<sup>219</sup> Item 3.1 of the Code of Good Practice on Employment of Persons with Disabilities.

<sup>220</sup> Item 4 of the Code of Good Practice on Employment of Persons with Disabilities.

<sup>221</sup> Gresse and Mbaio 2020 *LDD* 119; see also section 23 of the *Constitution of the Republic of South Africa*, 1996 which states that: "Everyone has the right to fair labour practices".

The Code accepts the social model of disability, which focuses on how the disability may be influenced by the working environment, rather than the impairment itself.<sup>222</sup> The Code consequently aims to raise awareness of the contributions that persons with disabilities can make and encourage employers to maximise their capabilities within the workplace.<sup>223</sup>

Notwithstanding this, employers cannot be expected to hire people who are unable to perform a particular job or to retain employees who are unable to perform a particular job simply because they are disabled.<sup>224</sup> It is argued that the appointment or retention of persons with disabilities should be based on merit, or at least on the fact that persons with disabilities can be trained and trained to perform the duties of the designated position properly.<sup>225</sup> It should be noted that in the event where an applicant with a disability has the appropriate qualifications, the employer may make a job offer which is subject to medical or functional testing to establish an applicant's actual or potential ability to perform the job.<sup>226</sup>

In the case of *Stoman v Minister of Safety and Security & Others*,<sup>227</sup> it was held that it could not be justified to employ a person in a responsible position where such person is "wholly unqualified, or less than suitably qualified or incapable".<sup>228</sup> It is argued that persons with disabilities should not be discriminated against solely on the basis of the associated lack of experience as persons with disabilities should be considered for employment where they are suitably qualified and capable of acquiring the necessary skills for the job, in a reasonable time.<sup>229</sup>

The Code contains key principles as contained in the CRPD,<sup>230</sup> which principles include but are not limited to: "human rights and the respect for inherent dignity";<sup>231</sup> "non-

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<sup>222</sup> Gresse and Mbao 2020 *LDD* 119.

<sup>223</sup> Marumoaga 2012 *PELJ* 350.

<sup>224</sup> Marumoaga 2012 *PELJ* 350.

<sup>225</sup> Marumoaga 2012 *PELJ* 350.

<sup>226</sup> Item 7.3 of the Code of Good Practice on Employment of Persons with Disabilities; see also Marumoaga 2012 *PELJ* 350.

<sup>227</sup> *Stoman v Minister of Safety and Security & Others* 2002 23 ILJ 1020 (T).

<sup>228</sup> *Stoman v Minister of Safety and Security & Others* 2002 23 ILJ 1020 (T).

<sup>229</sup> *Stoman v Minister of Safety and Security & Others* 2002 23 ILJ 1020 (T).

<sup>230</sup> Article 2 of the *UN Convention on the Rights of Persons with Disabilities*, 2006.

<sup>231</sup> Item 4(a) of the Code of Good Practice on Employment of Persons with Disabilities.

discrimination",<sup>232</sup> and "equality of opportunity, including equitable representation",<sup>233</sup> just to name a few. It is clear from the aforementioned key principles that the purpose of the Code is to promote equality and guide how equality can be achieved within the workplace, with specific regard to persons with disabilities.

As stated above, the EEA should be interpreted in compliance with the international law obligations,<sup>234</sup> in particular those provided for by the ILO as set out in the C111<sup>235</sup> In addition, with the view of achieving equality in the workplace,<sup>236</sup> any other relevant code of good practice and/or employment laws should be taken into consideration.<sup>237</sup> It should, however, be reiterated that the Code is an extension of the EEA and as such it has to be interpreted in the same manner as set out in section 3 of the EEA, more notably that it should be interpreted against the C111.<sup>238</sup>

In the light of the above, it may be argued that the DEOC had a role in the development of the Code, especially in consideration of article 3(b) of DEOC.<sup>239</sup> According to this article, South Africa, as a member state of the ILO, has to "enact such legislation and to promote such educational programmes as may be calculated to secure the acceptance and observance of the policy".<sup>240</sup> The legislation in the context of the aforementioned article is the EEA, and the educational programme is the Code which sets out to secure the acceptance and observance of the EEA. The aforementioned is consequently the rationale for developing and implementing the Code.

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<sup>232</sup> Item 4(c) of the Code of Good Practice on Employment of Persons with Disabilities.

<sup>233</sup> Item 4(f) of the Code of Good Practice on Employment of Persons with Disabilities.

<sup>234</sup> Section 3(d) of the *Employment Equity Act* 55 of 1998; see also *HOSPERSA obo Venter v SA Nursing Council* [2006] 6 BLLR 558 (LC) par 30.

<sup>235</sup> Convention 111 Convention concerning Discrimination in Respect of Employment and Occupation, 1958.

<sup>236</sup> Hurling *Disability Discrimination And Reasonable Accommodation In The South African Workplace* 46; see also Section 3(b) of the *Employment Equity Act* 55 of 1998.

<sup>237</sup> Section 3(c) of the *Employment Equity Act* 55 of 1998.

<sup>238</sup> Hurling *Disability Discrimination And Reasonable Accommodation In The South African Workplace* 46.

<sup>239</sup> Convention 111 Convention concerning Discrimination in Respect of Employment and Occupation, 1958.

<sup>240</sup> Article 3(b) of the Convention 111 Convention concerning Discrimination in Respect of Employment and Occupation, 1958.

### 2.4.1.3 The Labour Relations Act

Apart from the EEA discussed above, yet another key labour law statute is aimed at the protection of employees. In terms of section 1 of the LRA, the purpose thereof is to ensure the advancement of economic development within South Africa, together with the advancement of social justice.<sup>241</sup> Additionally, the LRA was enacted to ensure labour peace and the democratisation of the workplace.<sup>242</sup> The aforementioned purpose of the LRA can be achieved by reaching certain primary goals, which will be discussed next.

The first primary goal of the LRA is to give effect to section 23 of the Constitution,<sup>243</sup> which not only states that every employee has the right to fair labour practices in terms of section 23(1) but also covers the fundamental rights to freedom of association, collective bargaining and the right to strike in section 23(2)-(4).<sup>244</sup> Matters such as the right not to be unfairly dismissed,<sup>245</sup> to join a trade union and participate in its lawful activities,<sup>246</sup> the right to strike,<sup>247</sup> and the right to refer a dispute,<sup>248</sup> are subsequently covered in the LRA. The right to fair labour practices is specifically confirmed in terms of section 185(b) of the LRA, which states that every employee has the right not to be subjected to unfair labour practices.<sup>249</sup> Unfair labour practices are described in terms of section 186(2) of the LRA, for purposes of the LRA, as any unfair act or omission that arises between an employer and an employee which consists of the various forms of unfair labour practices as set out in section 186(2)(a) – (d) of the LRA.<sup>250</sup>

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<sup>241</sup> Section 1 of the *Labour Relations Act* 66 of 1995.

<sup>242</sup> Section 1 of the *Labour Relations Act* 66 of 1995.

<sup>243</sup> Section 1(a) of the *Labour Relations Act* 66 of 1995.

<sup>244</sup> Section 23(1) of the *Constitution of the Republic of South Africa*, 1996.

<sup>245</sup> Section 185(a) of the *Labour Relations Act* 66 of 1995.

<sup>246</sup> Section 6 of the *Labour Relations Act* 66 of 1995.

<sup>247</sup> Section 64 of the *Labour Relations Act* 66 of 1995.

<sup>248</sup> Section 133 of the *Labour Relations Act* 66 of 1995.

<sup>249</sup> Section 185(b) of the *Labour Relations Act* 66 of 1995.

<sup>250</sup> Section 186(2) of the *Labour Relations Act* 66 of 1995; see also section 186(2)(a) – (d) of the *Labour Relations Act* 66 of 1995 in relation to the specific circumstances which constitute unfair labour practices.

The second primary goal of the LRA is to give effect to the various obligations placed on South Africa in terms of the ILO.<sup>251</sup> These obligations are more extensively discussed below.

With reference to persons with disabilities, the LRA also specifically affords certain protections which affirm the right to equality and the fundamental right to fair labour practices as set out above. The provision in the LRA, which specifically provides for persons with disabilities and their protection against disability-based discrimination is section 187(1)(f). This section has specific regard to matters of dismissal based on some unacceptable grounds. Section 187(1)(f) states that a dismissal will be automatically unfair, where 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.<sup>252</sup>

The grounds mentioned above are similar to the prohibited grounds set out in section 9(3) of the Constitution and section 6(1) of the EEA. For purposes of the current study at hand, it is important to note that the prohibited grounds as set out in section 187(1)(f) of the LRA make specific reference to dismissals based on a "disability", and that a dismissal based on an employee's disability will constitute an automatically unfair dismissal.<sup>253</sup> Nevertheless, in the case of a claim for automatically unfair dismissal the alleged ground for dismissal must first be established before a claim for automatic unfair dismissal can be proven, failing which, a claim for automatic unfair dismissal will be unsuccessful.<sup>254</sup>

An important case to take cognisance of for purposes of the current study is the case of *Standard Bank of South Africa v CCMA*,<sup>255</sup> which relates to both a dismissal based

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<sup>251</sup> Section 1(b) of the *Labour Relations Act* 66 of 1995.

<sup>252</sup> Section 187(1)(f) of the *Labour Relations Act* 66 of 1995.

<sup>253</sup> *Standard Bank of South Africa v CCMA & others* [2008] 4 BLLR 356 (LC); see also *Marsland v New Way Motor & Diesel Engineering* [2008] 11 BLLR 1078 (LC).

<sup>254</sup> *Aarons v University of Stellenbosch* [2003] 7 BLLR 704 (LC).

<sup>255</sup> *Standard Bank of South Africa v CCMA & others* [2008] 4 BLLR 356 (LC).

on disability and the employer's failure to reasonably accommodate the employee who had a disability.

In the current case, the employee was dismissed for incapable of preventing sustaining injuries in a car accident. The CCMA found that the employer had not done enough to assist the employee and held that the dismissal of the employee was therefore unfair.

The matter was consequently taken on review, during which review the Labour Court considered the employer's duty to provide reasonable accommodation to the employee together with the defence of unjustifiable hardship, for which defence the employer failed to provide any substantiating evidence. The court held that employers must follow a four-stage enquiry process before proceeding with a dismissal based on incapacity. The aforementioned will however be discussed in detail in the following chapter. The court found that not only was the employee's dismissal unfair, but automatically unfair.<sup>256</sup>

It should be noted that a proven discrimination-based dismissal will have more severe financial consequences for employers than normal unfair dismissal. As such, employers would be more reluctant to dismiss an employee based on their disability. This is predicated upon the fact that an employee may be awarded compensation of up to twelve months' salary in the event that his or her dismissal is found to be unfair,<sup>257</sup> and in the event of dismissal being declared automatically unfair, and employee may be awarded maximum compensation equal to twenty-four months' salary.<sup>258</sup>

Notwithstanding the prohibition in section 187(1)(f) of the LRA, there is an exception to the prohibition of a discrimination-based dismissal, as a dismissal in this regard may be fair in circumstances where such dismissal is effected for a reason related to an inherent requirement of the particular job.<sup>259</sup> Marumoaga<sup>260</sup> is of the view that the

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<sup>256</sup> *Standard Bank of South Africa v CCMA & others* [2008] 4 BLLR 356 (LC).

<sup>257</sup> Section 194(1) of the *Labour Relations Act* 66 of 1995.

<sup>258</sup> Section 194(2) of the *Labour Relations Act* 66 of 1995.

<sup>259</sup> Henrico 2015 *OBITER* 286.; see also Section 187(2)(a) of the *Labour Relations Act* 66 of 1995; see also *Department of Correctional Services v POPCRU* 2011 32 ILJ 2629 (LAC) for the definition of the inherent requirement of a job as will be discussed below.

<sup>260</sup> Marumoaga 2012 *PELJ* 355.

employer should be able to prove that the employee was unable to perform core functions of the job as a result of his or her "injury or disease".<sup>261</sup> A dismissal based on the inherent requirements of the job does however differ from a dismissal based on incapacity,<sup>262</sup> predicated upon the fact that a dismissal in respect of incapacity relates to the "employer's legitimate loss of confidence in the ability of the employee to perform in accordance with the contract of employment".<sup>263</sup>

This exception will, however, only succeed if the employer can prove that the employee genuinely could not meet the inherent requirements of the particular job and that he attempted to accommodate the employee's disability first before taking the drastic step of dismissal. These issues, as key to this study, will be dealt with in more detail below.

## *2.4.2 International law*

### 2.4.2.1 The Universal Declaration of Human Rights

In terms of the UDHR, all persons are born free and equal,<sup>264</sup> and are entitled to the rights and freedoms set out in the UDHR; free from discrimination on any of the grounds as set out in article 2 of the UDHR.<sup>265</sup>

The UDHR does however not specifically refer to "disability" as a prohibited ground for discrimination as contained in the South African legislation.<sup>266</sup> Notwithstanding this, the UDHR is broad enough to afford everyone the right to equality. Moreover, everyone is afforded the right not to be discriminated against.<sup>267</sup> In support of the aforementioned, article 7 of the UDHR provides that everyone is equal before the law and are entitled to equal protection of the law and furthermore, that this shall be done without any discrimination against such person.<sup>268</sup>

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<sup>261</sup> Marumoaga 2012 *PELJ* 355.

<sup>262</sup> Marumoaga 2012 *PELJ* 356.

<sup>263</sup> Marumoaga 2012 *PELJ* 356.

<sup>264</sup> Article 1 of the Universal Declaration of Human Rights.

<sup>265</sup> Article 2 of the Universal Declaration of Human Rights.

<sup>266</sup> Article 7 of the Universal Declaration of Human Rights.

<sup>267</sup> Article 7 of the Universal Declaration of Human Rights.

<sup>268</sup> Article 7 of the Universal Declaration of Human Rights.

Article 23 of the UDHR further relates to the employment realm in general.<sup>269</sup> Article 23(1) states that: "Everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment".<sup>270</sup> This article does however not make specific provision for protection against disability-based discrimination, which is relevant for purposes of this study.

Article 23(2) of the UDHR, which makes reference to a prohibition against discrimination, states that: "Everyone, without any discrimination, has the right to equal pay for equal work".<sup>271</sup> Although the aforementioned article alludes to a prohibition against discrimination in the workplace, such prohibition against discrimination only relates to equal pay for equal work done.

Therefore the UDHR fails to prohibit discrimination against employees based on disabilities specifically, and as such, the study will now turn to the CRPD.

#### 2.4.2.2 The UN Convention on the Rights of Persons with Disabilities

South Africa signed the CRPD on 30 March 2007 and subsequently ratified the CRPD on 30 November 2007.<sup>272</sup> The UN enacted the CRPD to afford persons with disabilities certain rights and protections, specifically moreover the right to equality.<sup>273</sup> Notwithstanding this, before dealing with the aforementioned rights and protections, it is important to look at the purpose of the CRPD and at the principles on which the CRPD is founded.

In terms of article 1 of the CRPD, the purpose of the CRPD is to promote, protect and ensure that persons with disabilities fully and equally enjoy all human and fundamental rights.<sup>274</sup> The principles are the same as the principles adopted by the Code (as

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<sup>269</sup> Article 23 of the Universal Declaration of Human Rights.

<sup>270</sup> Article 23(1) of the Universal Declaration of Human Rights.

<sup>271</sup> Article 23(2) of the Universal Declaration of Human Rights.

<sup>272</sup> United Nations Human Rights Treaty Bodies date unknown  
[https://tbinternet.ohchr.org/\\_layouts/15/TreatyBodyExternal/Treaty.aspx?CountryID=162&Lang=E](https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?CountryID=162&Lang=E).

<sup>273</sup> Hurling *Disability Discrimination And Reasonable Accommodation In The South African Workplace* 3; see also Article 2 of the *UN Convention on the Rights of Persons with Disabilities*, 2006.

<sup>274</sup> Article 1 of the *UN Convention on the Rights of Persons with Disabilities*, 2006.

mentioned above), namely: "respect for inherent dignity";<sup>275</sup> "non-discrimination";<sup>276</sup> and "full and effective participation and inclusion in society".<sup>277</sup> However, the aforementioned is not a closed list of the principles on which the CRPD is based, but merely an extract of the most salient principles relevant for this study.

As a starting point for the right of equality as enjoyed by persons with disabilities in terms of the CRPD, article 4 places an obligation on state parties to ensure the elimination of disability-based discrimination:<sup>278</sup> by adopting relevant legislation,<sup>279</sup> by implementing measures to do away with and improve legislation, policies and practices which constitutes disability-based discrimination,<sup>280</sup> to endeavour to promote and protect the rights of persons with disabilities in all legislation and regulations,<sup>281</sup> and to take all measures possible to eliminate disability-based discrimination,<sup>282</sup> to name but a few.<sup>283</sup>

Article 5 of the CRPD specifically relates to the right to equality of persons with disabilities.<sup>284</sup> Article 5(1) states that all persons are equal before the law and, as such, afforded equal protection and equal benefit of the law free of discrimination.<sup>285</sup>

Disability-based discrimination should be prohibited by a state party, and persons with disabilities must be guaranteed the equal and effective protection against discrimination, regardless of the ground of such discrimination.<sup>286</sup>

Article 27 of the CRPD specifically relates to the employment of persons with disabilities.<sup>287</sup> According to article 27(1) of the CRPD, the rights of persons with

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<sup>275</sup> Article 2(a) of the *UN Convention on the Rights of Persons with Disabilities*, 2006.

<sup>276</sup> Article 2(b) of the *UN Convention on the Rights of Persons with Disabilities*, 2006.

<sup>277</sup> Article 2(c) of the *UN Convention on the Rights of Persons with Disabilities*, 2006.

<sup>278</sup> Article 4(1) of the *UN Convention on the Rights of Persons with Disabilities*, 2006.

<sup>279</sup> Article 4(1)(a) of the *UN Convention on the Rights of Persons with Disabilities*, 2006.

<sup>280</sup> Article 4(1)(b) of the *UN Convention on the Rights of Persons with Disabilities*, 2006.

<sup>281</sup> Article 4(1)(c) of the *UN Convention on the Rights of Persons with Disabilities*, 2006.

<sup>282</sup> Article 4(1)(e) of the *UN Convention on the Rights of Persons with Disabilities*, 2006.

<sup>283</sup> See article 4(1)(a) – (i) of the *UN Convention on the Rights of Persons with Disabilities*, 2006 for the full list of the principles on which the CRPD is based.

<sup>284</sup> Article 5 of the *UN Convention on the Rights of Persons with Disabilities*, 2006.

<sup>285</sup> Article 5(1) of the *UN Convention on the Rights of Persons with Disabilities*, 2006.

<sup>286</sup> Article 5(2) of the *UN Convention on the Rights of Persons with Disabilities*, 2006.

<sup>287</sup> Article 27 of the *UN Convention on the Rights of Persons with Disabilities*, 2006.

disabilities to work should be recognised by state parties on an equal basis with others.<sup>288</sup> These rights include: "the right to the opportunity to gain a living by work freely chosen or accepted in a labour market and work environment that is open, inclusive and accessible to persons with disabilities".<sup>289</sup>

Article 27(1) of the CRPD further provides that state parties must enact legislation and take necessary steps to achieve the various goals as set out below.<sup>290</sup>

Firstly, legislation must be enacted to "prohibit discrimination based on disability with regard to all matters concerning all forms of employment, including conditions of recruitment, hiring and employment, the continuance of employment, career advancement and safe and healthy working conditions".<sup>291</sup> Such legislation must furthermore:

protect the rights of persons with disabilities, on an equal basis with others, to just and favourable conditions of work, including equal opportunities and equal remuneration for work of equal value, safe and healthy working conditions, including protection from harassment, and the redress of grievances.<sup>292</sup>

According to article 27(1)(c) the legislation must "ensure that persons with disabilities can exercise their labour and trade union rights on an equal basis with others".<sup>293</sup>

Article 27(1)(d) further provides that the legislation should "enable persons with disabilities to have effective access to general technical and vocational guidance programmes, placement services and vocational and continuing training".<sup>294</sup>

The legislation should also "promote employment opportunities and career advancement for persons with disabilities in the labour market, as well as assistance in finding, obtaining, maintaining and returning to employment".<sup>295</sup> In addition, the

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<sup>288</sup> Article 27(1) of the *UN Convention on the Rights of Persons with Disabilities*, 2006.

<sup>289</sup> Article 27(1) of the *UN Convention on the Rights of Persons with Disabilities*, 2006.

<sup>290</sup> Article 27(1) of the *UN Convention on the Rights of Persons with Disabilities*, 2006.

<sup>291</sup> Article 27(1)(a) of the *UN Convention on the Rights of Persons with Disabilities*, 2006.

<sup>292</sup> Article 27(1)(b) of the *UN Convention on the Rights of Persons with Disabilities*, 2006.

<sup>293</sup> Article 27(1)(c) of the *UN Convention on the Rights of Persons with Disabilities*, 2006.

<sup>294</sup> Article 27(1)(d) of the *UN Convention on the Rights of Persons with Disabilities*, 2006.

<sup>295</sup> Article 27(1)(e) of the *UN Convention on the Rights of Persons with Disabilities*, 2006.

legislation should "promote opportunities for self-employment, entrepreneurship, the development of cooperatives and starting one's own business."<sup>296</sup>

Article 27(1)(g) further states that the legislation should promote the employment of persons with disabilities in the public and private sectors.<sup>297</sup>

Article 27(1)(i) is especially relevant for the purposes of this study as the article states that legislation should be enacted to "ensure that reasonable accommodation is provided to persons with disabilities in the workplace".<sup>298</sup>

The required legislation must furthermore promote the acquisition of work experience by persons with disabilities in the open labour market,<sup>299</sup> and "vocational and professional rehabilitation, job retention and return-to-work programmes for persons with disabilities". We now turn to the ILO on the subject matter.<sup>300</sup>

#### 2.4.2.3 The ILO Convention Concerning Discrimination in respect of Employment and Occupation (DEOC)

The DEOC was adopted by the ILO on 25 June 1958,<sup>301</sup> and ratified by South Africa on 5 Mar 1997.<sup>302</sup> The primary goal of the DEOC was to give guidance on the international standards as far as it relates to the right to equality within the workplace.<sup>303</sup>

In terms of article 2 of the DEOC, South Africa, as a member state, is bound to declare and pursue a national policy to promote equality and to eliminate any discrimination.<sup>304</sup>

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<sup>296</sup> Article 27(1)(f) of the *UN Convention on the Rights of Persons with Disabilities*, 2006.

<sup>297</sup> Article 27(1)(h) of the *UN Convention on the Rights of Persons with Disabilities*, 2006.

<sup>298</sup> Article 27(1)(i) of the *UN Convention on the Rights of Persons with Disabilities*, 2006.

<sup>299</sup> Article 27(1)(j) of the *UN Convention on the Rights of Persons with Disabilities*, 2006.

<sup>300</sup> Article 27(1)(k) of the *UN Convention on the Rights of Persons with Disabilities*, 2006.

<sup>301</sup> *Convention 111 Convention concerning Discrimination in Respect of Employment and Occupation*, 1958

<sup>302</sup> International Labour Organisation date unknown  
[https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11300:0::NO:11300:P11300\\_INSTRUMENT\\_ID:312256:NO](https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11300:0::NO:11300:P11300_INSTRUMENT_ID:312256:NO).

<sup>303</sup> International Labour Organisation date unknown  
[https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100\\_Ilo\\_Code:C111](https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_Ilo_Code:C111).

<sup>304</sup> Article 2 of the *Convention 111 Convention concerning Discrimination in Respect of Employment and Occupation*, 1958.

Although article 1 of the DEOC does not specifically define discrimination based on "disability",<sup>305</sup> article 1(b) is broad enough to include disability-based discrimination,<sup>306</sup> which will be discussed in more detail below.

Article 2 of the DEOC, as stated above, confirms employees' rights to equality as enshrined in the Constitution and the various other legislation and instruments discussed above, and this right to equality will also be applicable to persons with disabilities. Further relevant articles and discussions surrounding the DEOC are set out below.

## **2.5 Discrimination**

Now that the right to substantive equality has been discussed, it is important to establish the nature and extent of discrimination (both nationally and internationally). Firstly, the definition of discrimination will be discussed.

### *2.5.1 Definition of discrimination*

Discrimination is not defined in the Constitution,<sup>307</sup> nor is it defined in the EEA.<sup>308</sup> Notwithstanding this, discrimination has been defined by the Constitutional Court in the case of *National Coalition for Gay and Lesbian Equality v Minister of Justice*,<sup>309</sup> as the impairment of a person's dignity; thus leading to the "scarring of the sense of dignity and self-worth" connected to the membership of a certain group.<sup>310</sup> It has furthermore been held by the Constitutional Court that discrimination is "differentiation that violates human dignity or differentiation with similar serious consequences",<sup>311</sup>

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<sup>305</sup> Article 1 of the *Convention 111 Convention concerning Discrimination in Respect of Employment and Occupation*, 1958.

<sup>306</sup> Article 1(b) of the *Convention 111 Convention concerning Discrimination in Respect of Employment and Occupation*, 1958.

<sup>307</sup> Rautenbach and 2016 *S. Afr. Law J.* 112.

<sup>308</sup> Hurling *Disability Discrimination And Reasonable Accommodation In The South African Workplace* 51.

<sup>309</sup> *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1998 12 BCLR 1517 (CC).

<sup>310</sup> *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1998 12 BCLR 1517 (CC) par 25.

<sup>311</sup> Rautenbach and 2016 *S. Afr. Law J.* 112.

which will be discussed in more detail with reference to the test as set out in the case of *Harksen v Lane NO*.<sup>312</sup>

Despite the aforementioned, it is notable that this definition of discrimination, as held by the Constitutional Court, is too narrow. Consequently, the definitions in the ILO conventions should be used when determining a suitably relevant definition of discrimination,<sup>313</sup> based on the fact that discrimination is not defined in the Constitution or in the EEA.<sup>314</sup>

Furthermore, the definition of discrimination as provided by the ILO is accepted as a definition by the South African courts.<sup>315</sup> The aforementioned consideration of the ILO definition of discrimination is in line with the Constitution that provides that international law must be considered when interpreting national legislation,<sup>316</sup> and that the reasonable interpretation of legislation should be considered where it is consistent with international law.<sup>317</sup> Based on the fact that the EEA should be interpreted to comply with ILO conventions (as stated above), where the EEA does not provide clarity on the meaning or interpretation of a particular aspect, the ILO must be consulted to seek clarity. The definition of discrimination as per the DEOC has been set out in the aforementioned chapter. This definition of discrimination consists of prohibited grounds, similar to those set out in the Constitution and the EEA.<sup>318</sup> The definition does, however, not make specific provision for disability as a prohibited ground for discrimination. Notwithstanding this, section 1(b) of DEOC allows member states to determine further prohibited grounds as set out in the Constitution and the EEA. This is predicated upon the DEOC's wording that provides "such other distinction, exclusion or preference which has the effect of nullifying or impairing equality of opportunity or

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<sup>312</sup> *Harksen v Lane NO* 1998 (1) SA 300 (CC).

<sup>313</sup> Du Toit and Potgieter *Unfair Discrimination in the Workplace* 17.

<sup>314</sup> Du Toit and Potgieter *Unfair Discrimination in the Workplace* 16.

<sup>315</sup> Du Toit and Potgieter *Unfair Discrimination in the Workplace* 9; see also *HOSPERSA obo Venter v SA Nursing Council* [2006] 6 BLLR 558 (LC); see also *Hoffmann v South African Airways* [2000] JOL 7446 (CC).

<sup>316</sup> Section 39(1)(b) of the *Constitution of the Republic of South Africa, 1996*.

<sup>317</sup> Section 233 of the *Constitution of the Republic of South Africa, 1996*.

<sup>318</sup> Article 9(3) of the *Constitution of the Republic of South Africa, 1996*; see also section 6(1) of the *Employment Equity Act* 55 of 1998.

treatment in employment or occupation as may be determined by the Member".<sup>319</sup> Consequently, disability may be read into the definition of discrimination, which may have the effect of nullifying or impairing equality of opportunity or treatment.

Section 1(2) of DEOC however provides that: "any distinction, exclusion or preference in respect of a particular job based on the inherent requirements thereof shall not be deemed to be discrimination",<sup>320</sup> which accordingly ties in with the discussion.

Discrimination can be either direct or indirect. Direct discrimination occurs when actions are taken against a person based on one or more of the listed grounds in section 6 of the EEA.<sup>321</sup> In amplification of the aforementioned, the Labour Court held in the case of *Association of Professional Teachers v Minister of Education*,<sup>322</sup> that direct discrimination "is generally easily recognisable as it involves a direct differentiation between [for example] the two sexes".<sup>323</sup>

On the other hand, indirect discrimination arises where an apparently neutral rule or standard:

which will apply equally to all employees . . . has a discriminatory effect upon a prohibited ground on one employee or group of employees in that it imposes, because of some special characteristic of the employee or group, obligations, penalties or restrictive conditions not imposed on other members of the workforce.<sup>324</sup>

In consideration of the aforementioned, indirect discrimination focuses on the effect rather than the intent of the rule or standard which may constitute discrimination.<sup>325</sup>

In illustration of the concept of indirect the Labour Court held in the case of *Dingler Employee Representative Council v Leonard Dingler (Pty) Ltd*,<sup>326</sup> that the restriction of a particular staff benefit to monthly paid employees had a disparate impact on black

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<sup>319</sup> Section 1(b) of the *Convention 111 Convention concerning Discrimination in Respect of Employment and Occupation*, 1958.

<sup>320</sup> Section 1(2) of the *Convention 111 Convention concerning Discrimination in Respect of Employment and Occupation*, 1958.

<sup>321</sup> Grogan *Workplace Law* 96.

<sup>322</sup> *Association of Professional Teachers v Minister of Education* [1995] 9 BLLR 29 (IC).

<sup>323</sup> *Association of Professional Teachers v Minister of Education* [1995] 9 BLLR 29 (IC) 62,

<sup>324</sup> *Association of Professional Teachers v Minister of Education* [1995] 9 BLLR 29 (IC) 62; see also *Human Rights Commission v Simpson Sears Ltd* (1985) 2SCR 536 p551.

<sup>325</sup> *Association of Professional Teachers v Minister of Education* [1995] 9 BLLR 29 (IC) 62 – 63.

<sup>326</sup> *Leonard Dingler Employee Representative Council v Leonard Dingler (Pty) Ltd* [1997] 11 BLLR 1438 (LC).

employees predicated upon the fact that only eight out of 50 monthly paid employees, and all weekly paid employees, were black. As such, "the company's insistence that only monthly paid employees be permitted to join the Staff Benefit Fund indirectly discriminated against its black employees on the grounds of their race".<sup>327</sup> It was further held in the case of *Kadiaka v Amalgamated Beverage Industries*,<sup>328</sup> that indirect racial discrimination could not be established in circumstances where the racial composition of the group that alleged being discriminated against, was similar to the group that allegedly benefited from it.<sup>329</sup>

A further concept that needs to be deliberated on is differentiation as opposed to discrimination, which will be discussed below. Now that the distinction between direct and indirect discrimination has been discussed, the concept of fair discrimination will be discussed below.

### *2.5.2 Fair discrimination*

Now that it has been established what the rights of persons with disabilities are in relation to equality and protection against disability based discrimination, it is important to note that no right in terms of the Constitution is absolute and can be limited in terms of section 36 of the Constitution.

Section 36 of the Constitution states that a fundamental right, which in the current study is the right to equality, may be limited in terms of "law of general application", but the limitation should be "reasonable and justifiable".<sup>330</sup>

Section 36(1) of the Constitution contains certain factors that should be followed when limiting a fundamental right, and these factors will ensure that the limitation is reasonable and justifiable. These factors that should be considered are as follows: the nature of the right, the importance of the purpose of the limitation, the nature and extent of the limitation, the relation between the limitation and its purpose and less

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<sup>327</sup> *Leonard Dingler Employee Representative Council v Leonard Dingler (Pty) Ltd* [1997] 11 BLLR 1438 (LC) 1446.

<sup>328</sup> *Kadiaka v Amalgamated Beverage Industries* [1998] JOL 4069 (LC).

<sup>329</sup> *Kadiaka v Amalgamated Beverage Industries* [1998] JOL 4069 (LC) par 32.

<sup>330</sup> Section 36(1) of the *Constitution of the Republic of South Africa*, 1996.

restrictive means to achieve the purpose.<sup>331</sup> The limitation of the right to equality as found in the LRA and the EEA, are typical examples of where legitimate defences are available to the employer in the event where he or she differentiates between particular people or groups of people. In the LRA, fair discrimination against persons with disabilities is allowed where such a person has been dismissed due to an inherent requirement of the job the employee cannot meet due to his or her disability. Section 187(2)(a) of the LRA states that: "a dismissal may be fair if the reason for dismissal is based on an inherent requirement of the particular job".<sup>332</sup> Similar to the aforementioned section of the LRA, section 6(2)(b) of the EEA states that it is not unfair discrimination where an employer does: "distinguish, exclude or prefer any person on the basis of an inherent requirement of a job".<sup>333</sup>

A further defence that can be raised by an employer against an allegation of unfair discrimination is set out in section 6(2)(a) of the EEA, which states that:

It is not unfair discrimination to— (a) take affirmative action measures consistent with the purpose of this Act; or . . .<sup>334</sup>

the aforementioned defence to an allegation of unfair discrimination relates to affirmative action, which will subsequently be discussed in depth.

In dealing with the defence of inherent requirements of the job, it should be noted that an inherent requirement of the job as described by the Supreme Court of Appeal in the case of *Department of Correctional Services v POPCRU*,<sup>335</sup> is:

a permanent attribute or quality forming an ... essential element ... and an indispensable attribute which must relate in an inescapable way to the performing of a job.<sup>336</sup>

It should be noted that a workplace rule may be intertwined with an inherent requirement of the job, but it was however held by the Labour Court in the case of

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<sup>331</sup> Section 36(1)(a)-(e) of the *Constitution of the Republic of South Africa*, 1996.

<sup>332</sup> Section 187(2)(a) of the *Labour Relations Act* 66 of 1995.

<sup>333</sup> Section 6(2)(b) of the *Employment Equity Act* 55 of 1998; see also Item 2(2)(c) of Schedule 7 of the *Labour Relations Act* 66 of 1995.

<sup>334</sup> Section 6(2)(a) of the *Employment Equity Act* 55 of 1998.

<sup>335</sup> *Department of Correctional Services v POPCRU* 2013 ZASCA 40 (28 March 2013).

<sup>336</sup> *Department of Correctional Services v POPCRU* 2013 ZASCA 40 (28 March 2013) para 23.

*Dlamini v Green Four Security*,<sup>337</sup> that in terms of the LRA, a workplace rule is justified if it is an inherent requirement of the job.<sup>338</sup> Notwithstanding this, in the event where a requirement in a code of conduct conflicts with human rights law, the human right will prevail.<sup>339</sup>

The Labour Court further held that a policy is not justified in the case where such policy "restricts a practice of religious beliefs that do not affect an employee's ability to perform his duties",<sup>340</sup> "nor jeopardises the safety of the public or other employees" or "cause undue hardship to the employer in a practical or economic sense".<sup>341</sup>

The court further referred to article 1(2) of the DEOC, which states that:<sup>342</sup> "Any distinction, exclusion or preference in respect of a particular job based on an inherent requirement thereof shall not be deemed to be discrimination".<sup>343</sup> In conjunction with the aforementioned article of the DEOC, the Labour Court held that an inherent requirement of the job has been interpreted as:

existing in something as a permanent attribute or quality; forming an element, especially an essential element, of something, intrinsic, essential and as an indispensable attribute which must relate in an inescapable way to the performing of the job.<sup>344</sup>

Now that the definitions of inherent requirements of the job have been dealt with, it is important to refer to the Labour Court's findings in the case of *SACTWU v Berg River Textiles, A division of Seardel Group Trading (Pty) Ltd*,<sup>345</sup> in terms of which the Labour Court has set out guidelines which are comprehensive and offer guidance to courts in dealing with disputes relating to unfair discrimination in the workplace.<sup>346</sup> According to these guidelines, a duty is placed on both the employer and the employee. Notwithstanding this, the employer bears the ultimate duty of balancing the relevant

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<sup>337</sup> *Dlamini v Green Four Security* 2006 11 BLLR 1074 (LC).

<sup>338</sup> *Dlamini v Green Four Security* 2006 11 BLLR 1074 (LC) par 39.

<sup>339</sup> *Dlamini v Green Four Security* 2006 11 BLLR 1074 (LC) par 43.

<sup>340</sup> *Dlamini v Green Four Security* 2006 11 BLLR 1074 (LC) par 43.

<sup>341</sup> *Dlamini v Green Four Security* 2006 11 BLLR 1074 (LC) par 43.

<sup>342</sup> The *UN Convention on the Rights of Persons with Disabilities*, 2006.

<sup>343</sup> Article 1(2) of the *UN Convention on the Rights of Persons with Disabilities*, 2006.

<sup>344</sup> *Dlamini v Green Four Security* 2006 11 BLLR 1074 (LC) par 40.

<sup>345</sup> *SACTWU v Berg River Textiles, A division of Seardel Group Trading (Pty) Ltd* 2012 33 ILJ 972 (LC).

<sup>346</sup> Bernard 2014 *PELJ* 2886.

interests.<sup>347</sup> The guideline as set out in the *SACTWU v Berg River Textiles, A division of Seardel Group Trading (Pty) Ltd*,<sup>348</sup> is as set out below. Although the aforementioned case related to discrimination based on religion, the same test will apply in the case of disability-based discrimination.<sup>349</sup> Notwithstanding this, the test will accordingly be explained as it was set out in the case of *SACTWU v Berg River Textiles, A division of Seardel Group Trading (Pty) Ltd*.<sup>350</sup>

Firstly, the onus lies with the employee to prove "that a policy or rule which appears to be neutral is, in fact, discriminatory in its application",<sup>351</sup> and that interference occurred in relation to an employee's participation in a religion or culture, through the "enforcement of a prohibition".<sup>352</sup> In addition to this, the employee has to illustrate that the prohibition is "a central tenet of his or her religion".<sup>353</sup> Notwithstanding this, the employee does, however, bear the onus to make the employer aware of the employee's religious practice.<sup>354</sup>

As soon as the employee has discharged the aforementioned burden of proof, the onus shifts to the employer to establish that "the discrimination is fair or that the prohibition or rule is an inherent requirement of the job".<sup>355</sup> The employer furthermore has to prove that steps were taken to "reasonably accommodate the sincerely held religious belief of the employee".<sup>356</sup> It should be noted that the employer's motive and intent is irrelevant for the purpose of discharging his burden of proof.<sup>357</sup> The employer is

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<sup>347</sup> Bernard 2014 PELJ 2886.

<sup>348</sup> *SACTWU v Berg River Textiles, A division of Seardel Group Trading (Pty) Ltd* 2012 33 ILJ 972 (LC).

<sup>349</sup> Bernard 2014 PELJ 2886.

<sup>350</sup> *SACTWU v Berg River Textiles, A division of Seardel Group Trading (Pty) Ltd* 2012 33 ILJ 972 (LC).

<sup>351</sup> Bernard 2014 PELJ 2885; See also *Department of Correctional Services v POPCRU* 2013 ZASCA 40 (28 March 2013) para 35.

<sup>352</sup> *Department of Correctional Services v POPCRU* 2013 ZASCA 40 (28 March 2013) par 24.

<sup>353</sup> *Dlamini v Green Four Security* 2006 11 BLLR 1074 (LC) par 14 - 18.

<sup>354</sup> Bernard 2014 PELJ 2885; see also *Department of Correctional Services v POPCRU* 2013 ZASCA 40 (28 March 2013) par 27.

<sup>355</sup> Bernard 2014 PELJ 2885; see also *Department of Correctional Services v POPCRU* 2013 ZASCA 40 (28 March 2013) par 35.

<sup>356</sup> *Department of Correctional Services v POPCRU* 2013 ZASCA 40 (28 March 2013) par 35; see also Bernard 2014 PELJ 2885 which states that the "principle of proportionality must be applied" in proving that steps were taken to "reasonably accommodate the sincerely-held religious belief of the employee".

<sup>357</sup> Bernard 2014 PELJ 2885; see also *Department of Correctional Services v POPCRU* 2013 ZASCA 40 (28 March 2013) par 35.

however required to balance the operational needs of the business against the religious convictions of the employee.<sup>358</sup>

In consideration of the aforementioned defence relating to inherent requirements of the job, it should be noted that section 9 of the Constitution prohibits disability-based discrimination. Notwithstanding this, discrimination based on a disability may not always constitute unfair discrimination as section 9(5) of the Constitution states that: "Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair".<sup>359</sup> Consequently, section 36 of the Constitution will find application in the limitation of employees' rights, as the purpose of the defences, as provided for by the EEA and the LRA, against unfair discrimination will be justifiable in instances where employees' right to equality is limited as a result of either of the defences against unfair discrimination.

In this part of the study, a discussion will follow concerning case law regarding unfair discrimination. This is imperative to establish how courts test and interpret unfair discrimination and condone disability-based discrimination as a defence. The study further intends to examine in which circumstances employers' defences against disability-based discrimination will succeed, more specifically in circumstances where an employer has failed and/or refused to reasonably accommodate persons with disabilities based on one or more of the defences available to an employer.

As an example of fair discrimination, affirmative action is based on the concept of differentiation. Differentiation can be defined as a "distinction, exclusion or preference" of a certain group, but differentiation in itself is not discrimination and also not necessarily unfair.<sup>360</sup> This matter became apparent in the Constitutional Court. The

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<sup>358</sup> Bernard 2014 *PELJ* 2886.

<sup>359</sup> Section 9(5) of the *Constitution of the Republic of South Africa*, 1996; see also section 9(3) of the Constitution of the Republic of South Africa which includes the following arbitrary grounds for discrimination, namely: including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.

<sup>360</sup> Du Toit and Potgieter *Unfair Discrimination in the Workplace* 80.

Constitutional Court compiled a test to determine whether or not an action constitutes unfair discrimination in the case of *Harksen v Lane NO*.<sup>361</sup>

The first question that needs to be answered is whether or not the conduct differentiates between people or categories of people.<sup>362</sup> If so, it needs to be determined whether it has a rational connection to a legitimate governmental purpose.<sup>363</sup> In understanding the meaning of legitimate government purpose in relation to the aforementioned test, in the case of *IMATU & another v City of Cape Town*,<sup>364</sup> it was found that the exclusion of insulin-dependent diabetics from a firefighter position amounted to a form of differentiation as the rationale behind the legitimate government objective was to ensure public safety.<sup>365</sup> In consideration of the abovementioned, the rationale behind differentiation in each case should be assessed to determine whether there is a legitimate purpose.

If there is no legitimate governmental purpose, then it will constitute a violation of section 9(1) of the Constitution.<sup>366</sup> However, even if a rational connection is present, it may nevertheless be discrimination; therefore secondly, it has to be determined whether the differentiation amounts to discrimination. This question consists of two parts as set out below.<sup>367</sup>

Firstly, does the differentiation amount to discrimination? If discrimination is based on a listed ground, then discrimination will be present. If the discrimination is not based on a listed ground, then it will depend on whether the ground is based on attributes and characteristics that have the potential to impair the fundamental human dignity of the person or group.<sup>368</sup>

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<sup>361</sup> *Harksen v Lane NO* 1998 (1) SA 300 (CC).

<sup>362</sup> *Harksen v Lane NO* 1998 (1) SA 300 (CC) par 53.

<sup>363</sup> *Harksen v Lane NO* 1998 (1) SA 300 (CC) par 53.

<sup>364</sup> *IMATU & another v City of Cape Town* [2005] 11 BLLR 1084 (LC).

<sup>365</sup> *IMATU & another v City of Cape Town* [2005] 11 BLLR 1084 (LC) par87.

<sup>366</sup> *Harksen v Lane NO* 1998 (1) SA 300 (CC) 53.

<sup>367</sup> *Harksen v Lane NO* 1998 (1) SA 300 (CC) 53.

<sup>368</sup> *Harksen v Lane NO* 1998 (1) SA 300 (CC) 53.

The second part of this question is to establish whether differentiation amounts to discrimination and whether such discrimination is unfair.<sup>369</sup> If discrimination is based on a listed ground, then the discrimination will be presumed to be unfair. If discrimination is not based on a listed ground, the complainant will have to prove the unfairness of the discrimination. This can be done by proving that the ground for the alleged discrimination is an arbitrary ground.<sup>370</sup> In the case of *Kadiaka v Amalgamated Beverage Industries*,<sup>371</sup> an arbitrary ground was defined as "a ground which is capricious or proceeding merely from will and not based on reason or principle".<sup>372</sup> Hence the complainant in a case based on a claim for unfair discrimination as a result of an arbitrary ground must prove that the ground is without reason or purposeless or alternatively even if there is a reason for the ground, that the reason is not "a commercial reason of sufficient magnitude that it outweighs the rights of the job seeker and is not morally offensive".<sup>373</sup> If differentiation is not unfair, then there will be no breach of the right to equality.<sup>374</sup>

Lastly, if discrimination is found to be unfair, section 36 of the Constitution should be consulted and considered. As mentioned above, section 36 of the Constitution allows for fundamental rights to be limited in terms of law of general application, to the extent that the limitation is reasonable and justifiable, in consideration of the factors as set out above.<sup>375</sup>

Furthermore, in the case of *Minister of Finance & Another v Van Heerden*,<sup>376</sup> the court compiled the following test (hereafter the Van Heerden-case) to establish whether affirmative action measures are fair.

In terms of the court's test, the following questions need to be posed: does the measure target people who had been disadvantaged by unfair discrimination, are such

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<sup>369</sup> *Harksen v Lane NO* 1998 (1) SA 300 (CC).

<sup>370</sup> Section 6(1) of the *Employment Equity Act* 55 of 1998 prohibits discrimination based on an arbitrary ground.

<sup>371</sup> *Kadiaka v Amalgamated Beverage Industries* [1998] JOL 4069 (LC).

<sup>372</sup> *Beckingham v Boksburg Licensing Court* 1931 TPD 280 282.

<sup>373</sup> *Woolworths (Pty) Ltd v Whitehead* [2000] 6 BLLR 640 (LAC) 42 – 43.

<sup>374</sup> *Harksen v Lane NO* 1998 (1) SA 300 (CC).

<sup>375</sup> Section 36(1) of the *Constitution of the Republic of South Africa*, 1996.

<sup>376</sup> *Minister of Finance & another v Van Heerden* (2004) 25 ILJ 1593 (CC)).

measures designed to protect or advance such people and do such measures promote the achievement of equality.<sup>377</sup> If the answer to all these questions is yes, then the affirmative action measures will be fair.<sup>378</sup>

In the case of *South African Police Service v Solidarity obo Barnard (Police and Prisons Civil Rights Union as amicus curiae)* (hereafter the Barnard-case),<sup>379</sup> the complainant, Ms Barnard, was a white female who applied for a position as superintendent at Police Services. Although she had received the highest score of all the candidates, she was not appointed in the position. She made allegations that she was unfairly discriminated against based on the fact that she was white. Police services responded to this allegation and held that the discrimination was not unfair, as it was in accordance with their employment equity plan. Before this case reached the Constitutional Court, it was heard by the Labour Court (LC), the Labour Appeal Court (LAC) and the Supreme Court of Appeal (SCA). All three courts had different outcomes. Finally, the Constitutional court held that the EEP of Police Services met all the requirements of the EEA and that there had been no discrimination.<sup>380</sup>

In the case of *Fourie v Provincial Commissioner of the South African Police Service (North West Province)*,<sup>381</sup> the applicant in this matter was a white female police officer who applied for a promotion post, but it was overlooked, and a black male officer was appointed in the position instead of the white female applicant. The white female officer alleged that she was unfairly discriminated against based on her race. However, this was disputed by the respondent, as the respondent purported that it had acted in accordance with section 9(2) of the Constitution, the requirements of the EEA, and its affirmative action policy.<sup>382</sup> Thus the employer appointed a black candidate instead of a white candidate to ensure that the employer complies with the affirmative action

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<sup>377</sup> *Minister of Finance & another v Van Heerden* (2004) 25 ILJ 1593 (CC)).

<sup>378</sup> *Minister of Finance & another v Van Heerden* (2004) 25 ILJ 1593 (CC)).

<sup>379</sup> *South African Police Service v Solidarity obo Barnard (Police and Prisons Civil Rights Union as amicus curiae)* [2014] 11 BLLR 1025 (CC).

<sup>380</sup> *South African Police Service v Solidarity obo Barnard (Police and Prisons Civil Rights Union as amicus curiae)* [2014] 11 BLLR 1025 (CC).

<sup>381</sup> *Fourie v Provincial Commissioner of the South African Police Service (North West Province)* [2004] 9 BLLR 895 (LC).

<sup>382</sup> *Fourie v Provincial Commissioner of the South African Police Service (North West Province)* [2004] 9 BLLR 895 (LC) par 2.

policy. The court stated that given the goals which his appointment was meant to serve, the decision to appoint a black male candidate was in the circumstances "rational, justifiable and fair".<sup>383</sup>

The aforementioned cases are set out as an illustration of the difference between differentiation and discrimination. Notwithstanding that the aforementioned cases relate to affirmative action, the principle of differentiation as opposed to discrimination is clearly set out herein, and will have application for this study, more specifically in the event where an employer refuses to accommodate persons with disabilities. This is predicated upon the fact that reasonable accommodation is one of the key aspects in respect of persons with disabilities in the workplace, since designated employers,<sup>384</sup> have a duty to provide reasonable accommodation to persons with disabilities as part of affirmative action measures.<sup>385</sup> Although reasonable accommodation is "phrased as an affirmative action duty" in terms of the EEA, it should be noted that reasonable accommodation is also a principle of the prohibition against disability-based discrimination.<sup>386</sup>

## **2.6 Conclusion**

In conclusion, it is clear from the discussion above what the nature and extent of the concept "persons with disabilities" is, as defined in terms of national and international law and standards, and which consideration should be taken into account for determining whether a person is considered to be a person with a disability for the purpose of the relevant legislation. These considerations consist of the fact that a

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<sup>383</sup> *Fourie v Provincial Commissioner of the South African Police Service (North West Province)* [2004] 9 BLLR 895 (LC) par 2.

<sup>384</sup> See section 1 of the *Employment Equity Act* 55 of 1998 which defines designated employers as: "(a) an employer who employs 50 or more employees; (b) an employer who employs fewer than 50 employees but has a total annual turn-over that is equal to or above the applicable annual turn-over of a small business in terms of the Schedule 4 of this Act; (c) a municipality, as referred to in Chapter 7 of the Constitution; (d) an organ of state as defined in section 239 of the Constitution, but excluding the National Defence Force, the National Intelligence Agency and the South African Secret Service; and (e) an employer bound by collective agreement in terms of section 23 or 31 of the Labour Relations Act, which appoints it as a designated employer in terms of this Act, to the extent provided for in the agreement".

<sup>385</sup> Section 15(2)(c) of the *Employment Equity Act* 55 of 1998.

<sup>386</sup> Hurling *Disability Discrimination And Reasonable Accommodation In The South African Workplace* iv.

person must have an impairment which is either a physical or mental impairment, or alternatively, a combination of both physical and mental impairment.<sup>387</sup> More notably it is clear that the presence of a physical or mental impairment in itself does not constitute a disability,<sup>388</sup> and should therefore be proven through medical evidence to confirm that such impairment constitutes a disability.<sup>389</sup> Furthermore, as a result of persons with disabilities not being "conditions or diseases", the existence of an impairment is but one component for consideration in determining whether an individual is a person with a disability.<sup>390</sup> A further consideration therefore is to determine whether or not the impairment is substantially limiting, as individuals who are not substantially limited by their illness or condition, do not fall within the ambit of persons with disabilities,<sup>391</sup> and as such will not benefit from the rights afforded to persons with disabilities as set out in the relevant national and international legislation as described above, more specifically in relation to being reasonably accommodated to give effect to the fundamental right to equality.

It is furthermore clear from the above how the rights of persons with disabilities were neglected prior to the enactment of the Constitution and how legislation has developed throughout the years to afford persons with disabilities legislative protection from disability-based discrimination.

From the foregoing discussion, it is notable that persons with disabilities were afforded little to no protection against disability-based discrimination prior to the enactment of the Constitution. Based on the fact that persons with disabilities are a minority group, they were subjected to "discrimination and stigmatisation",<sup>392</sup> which led to persons with disabilities suffering "indignity, widespread discrimination and lack of economic

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<sup>387</sup> Hurling *Disability Discrimination And Reasonable Accommodation In The South African Workplace* 10.; see also Item 5.3.1 of the Code of good practice on Employment of Persons with Disabilities.

<sup>388</sup> Hurling *Disability Discrimination And Reasonable Accommodation In The South African Workplace* 11.

<sup>389</sup> Hurling *Disability Discrimination And Reasonable Accommodation In The South African Workplace* 11.

<sup>390</sup> Hurling *Disability Discrimination And Reasonable Accommodation In The South African Workplace* 11 – 12; see also Item 1.3.1.1 of the Technical Assistance Guidelines on the Employment of People with disabilities.

<sup>391</sup> Item 5.3.2(c) of the Code of good practice on Employment of Persons with Disabilities.

<sup>392</sup> Ngewna 2004 *JJS* 168.

independence".<sup>393</sup> Furthermore, the stigmatisation of persons with disabilities existed because persons with disabilities were earmarked as receiving charity as they are deemed unable to do things for themselves,<sup>394</sup> and therefore employers' were inclined to treat disability as a synonym for incapacity,<sup>395</sup> based on the fact that employers deemed persons with disabilities as being unable to perform the inherent requirements of the job.<sup>396</sup> This position has however dramatically changed through the enactment of the Constitution, EEA, LRA and other legal instruments which afford persons with disabilities the right to equality, more so through the implementation of reasonable accommodation.

From the discussion led above in relation to the current national and international instruments which give effect to the fundamental right to equality of persons with disabilities, it becomes clear that persons with disabilities are prioritised as they form part of previously disadvantaged groups in terms of section 9(2) of the Constitution.<sup>397</sup> As such legislation has been enacted to achieve equality through protecting and/or promoting previously disadvantaged groups.<sup>398</sup> This legislation includes affirmative-action legislation which is aimed at promoting equality by advancing persons with disabilities.<sup>399</sup>

It has furthermore become apparent that not all forms of discrimination are unfair as the right to equality may be limited in terms of "law of general application", but that the limitation should be "reasonable and justifiable".<sup>400</sup> These limitations are found in the LRA and the EEA, which consist of defences which may be raised by employers in response to allegations of discrimination, namely that it is not unfair discrimination if the discrimination is based on an inherent requirement of the job,<sup>401</sup> where discrimination is present where an employer has taken affirmative action measures

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<sup>393</sup> Ngewna 2004 *JJS* 168.

<sup>394</sup> Ngwena 2006 *SAHRJ* 616.

<sup>395</sup> Ngewna 2004 *JJS* 170.

<sup>396</sup> Ngewna 2004 *JJS* 170.

<sup>397</sup> Section 9(2) of the *Constitution of the Republic of South Africa*, 1996.

<sup>398</sup> Henrico 2015 *OBITER* 276.

<sup>399</sup> Henrico 2015 *OBITER* 276.

<sup>400</sup> Section 36(1) of the *Constitution of the Republic of South Africa*, 1996.

<sup>401</sup> Section 187(2)(a) of the *Labour Relations Act* 66 of 1995; see also S 6(2)(b) of the *Employment Equity Act* 55 of 1998.

consistent with the purpose of this EEA.<sup>402</sup> In addition, an important discussion was led on the difference between differentiation as opposed to discrimination. It is notable from the aforementioned discussion that differentiation is defined as a "distinction, exclusion or preference" of a certain group, which in itself is not discrimination, and also not necessarily unfair.<sup>403</sup> Furthermore, that differentiation ties in with substantive equality, which is "less concerned with equal treatment and more focused on equal access and equal benefits".<sup>404</sup> Differentiation is therefore applied to promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination,<sup>405</sup> and as such equality is achieved through protecting and/or promoting previously disadvantaged groups,<sup>406</sup> which includes persons with disabilities.

In the following chapter of this study, the nature and extent of reasonable accommodation, coupled with the duty placed on employers to provide reasonable accommodation to persons with disabilities, will be discussed. In addition to the aforementioned, the limitation on duty to provide reasonable accommodation will also be examined, which limitation may occur in instances where the reasonable accommodation of persons with disabilities may lead to unjustifiable hardship.

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<sup>402</sup> Section 6(2)(a) of the *Employment Equity Act* 55 of 1998.

<sup>403</sup> Du Toit and Potgieter *Unfair Discrimination in the Workplace* 80.

<sup>404</sup> Lord and Brown *The Role Of Reasonable Accommodation In Securing Substantive Equality For Persons With Disabilities: The Un Convention On The Rights Of Persons With Disabilities* 275.

<sup>405</sup> Section 9(2) of the *Constitution of the Republic of South Africa*, 1996.

<sup>406</sup> Henrico 2015 *OBITER* 276.

## **CHAPTER 3 THE IMPLEMENTATION OF LEGISLATION AND PRACTICE GUIDELINES RELATING TO REASONABLE ACCOMMODATION AND PERSONS WITH DISABILITIES**

### ***3.1 Introduction***

In this chapter, the interpretation of legislation, relevant international instruments and good practice guidelines pertaining to the reasonable accommodation of persons with disabilities in the workplace will be discussed. The purpose of this analysis is to determine to what extent provision in this regard has already been made in the South African labour law. This analysis will commence with an investigation into the meaning of the concept "reasonable accommodation", after which the obligation to reasonably accommodate as prescribed by international organisations will be unpacked. In this regard, the relevant international instruments and publications of the United Nations (UN) and the International Labour Organisation (ILO) will be discussed. South Africa is a member state of these organisations and will, upon ratification thereof, be obligated to give effect to the relevant instruments in national legislation.<sup>407</sup>

The next part of the chapter will be devoted to an analysis of the South African labour law and how it interprets and addresses the requirement to reasonably accommodate. The analysis of the aforementioned concept would subsequently also require an investigation into the meaning of "unjustifiable hardship" as a threshold for the extent to which employers are required to reasonably accommodate persons with disabilities. Through this investigation, the current obligations of employers to accommodate persons with disabilities in the South African workplace will come to light.

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<sup>407</sup> *Convention 111 Convention concerning Discrimination in Respect of Employment and Occupation, 1958; see also United Nations date unknown*  
[https://treaties.un.org/pages/ViewDetails.aspx?chapter=4&clang=\\_en&mtdsg\\_no=IV-15&src=IND](https://treaties.un.org/pages/ViewDetails.aspx?chapter=4&clang=_en&mtdsg_no=IV-15&src=IND).

## **3.2 The nature and extent of reasonable accommodation**

### *3.2.1 International law*

#### 3.2.1.1 United Nations

In this part of the Chapter, the nature and extent of reasonable accommodation as set out in the UN Convention on the Rights of Persons with Disabilities, 2006 (CRPD) will be discussed, together with the obligations placed on employers to provide reasonable accommodation prescribed by the CRPD.

In the previous chapter, CRPD was introduced as the primary instrument that deals with the rights of persons with disabilities. In terms of article 2 thereof, reasonable accommodation is defined as:

necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms.<sup>408</sup>

The rationale behind the obligation placed on employers to reasonably accommodate persons with disabilities is clear from the following extract, where Du Plessis<sup>409</sup> notably quoted Lisa Waddington:

The obligation to make a reasonable accommodation is based on the recognition that, on occasions, the interactions between an individual's inherent characteristics, such as impairment, sex, religion or belief, and the physical or social environment can result in the inability to perform a particular function or job in the conventional manner. The characteristic is therefore relevant in that it can lead to an individual being faced with a barrier that prevents him or her from benefiting from an employment opportunity that is open to others who do not share that characteristic. The resulting disadvantage is exclusion from the job market, or a restricted set of employment opportunities.<sup>410</sup>

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<sup>408</sup> Article 2 of the *UN Convention on the Rights of Persons with Disabilities*, 2006; see also Policy On Reasonable Accommodation And Assistive Devices For Employees With Disabilities In The Public Service 6.

<sup>409</sup> Du Plessis *Access To Work For Disabled Persons In South Africa: The Intersections Of Social Understandings Of Disability, Substantive Equality And Access To Social Security* 138.

<sup>410</sup> Du Plessis *Access To Work For Disabled Persons In South Africa: The Intersections Of Social Understandings Of Disability, Substantive Equality And Access To Social Security* 138.

It is reiterated that South Africa is a state party to the CRPD,<sup>411</sup> which creates a further obligation to reasonably accommodate persons with disabilities. The purpose of the CRPD is:

to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity.<sup>412</sup>

The aforementioned creates an expressed obligation towards persons with disabilities.<sup>413</sup> According to the CRPD the denial of reasonable accommodation in itself constitutes discrimination.<sup>414</sup> It is clear from the previous chapter that the CRPD places an obligation on state parties to eliminate discrimination; as such it is inferred that an obligation is consequently placed on state parties to provide reasonable accommodation to persons with disabilities, where such need is warranted. In the process, unfair discrimination can be avoided and/or eliminated. Since the previous chapter delved into the matter of equality rights of persons with disabilities, the obligation to eliminate discrimination will not be revisited here. This chapter will solely focus on the relevant portions of the CRPD, which explicitly relate to the obligation of providing reasonable accommodation to persons with disabilities.

Article 5(3) of the CRPD places a general obligation on state parties in respect of reasonable accommodation of persons with disabilities, as this article provides that state parties must take appropriate steps to ensure reasonable accommodation of persons with disabilities, with a view to promoting equality and eliminating disability-based discrimination.<sup>415</sup>

The CRPD further provides that where persons with disabilities are deprived of their liberties through any process, these individuals are entitled to guarantees in accordance with international human rights law (as prescribed by the UN and the ILO,

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<sup>411</sup> United Nations date unknown <http://www.un.org/en/member-states/>; admission date was 7 October 1945.

<sup>412</sup> Article 1 of the *UN Convention on the Rights of Persons with Disabilities*, 2006.

<sup>413</sup> Hurling *Disability Discrimination And Reasonable Accommodation In The South African Workplace* 104.

<sup>414</sup> Article 2 of the *UN Convention on the Rights of Persons with Disabilities*, 2006.

<sup>415</sup> Article 5(3) of the *UN Convention on the Rights of Persons with Disabilities*, 2006.

such as the right to equality and dignity) and that persons with disabilities be treated in line with the objectives and principles as set out by the CRPD, which includes the provision of reasonable accommodation to persons with disabilities.<sup>416</sup> As such, an obligation is placed on state parties to provide reasonable accommodation to comply with Article 14(2) of the CRPD.

Article 27 of the CRPD specifically relates to persons with disabilities within the workplace as this section of the CRPD provides that the right of persons with disabilities to work should be recognised by state parties, which right to work includes:<sup>417</sup>

the opportunity to gain a living by work freely chosen or accepted in a labour market and work environment that is open, inclusive and accessible to persons with disabilities.<sup>418</sup>

From the aforementioned, it is clear that persons with disabilities have a right to reasonable accommodation in terms of Article 27,<sup>419</sup> of the CRPD. This is predicated upon the fact that this article of the CRPD clearly states that persons with disabilities have the right to work; moreover, the right to an inclusive and accessible work environment. The aforementioned rights of persons with disabilities can, however, only be achieved through reasonable accommodation. As such, employers are obliged to provide reasonable accommodation to employees with disabilities so as to ensure an inclusive and accessible workplace.

Furthermore, the right of persons with disabilities to work should be promoted through legislation,<sup>420</sup> ensuring that reasonable accommodation is provided to them.<sup>421</sup> Now that the nature of reasonable accommodation and the obligations placed on member states in terms of the CRPD, this study will move on to analyse the relevant ILO instruments in relation to the subject matter.

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<sup>416</sup> Article 14(2) of the *UN Convention on the Rights of Persons with Disabilities*, 2006.

<sup>417</sup> Article 24(5) of the *UN Convention on the Rights of Persons with Disabilities*, 2006.

<sup>418</sup> Article 27(1) of the *UN Convention on the Rights of Persons with Disabilities*, 2006.

<sup>419</sup> Article 27(1) of the *UN Convention on the Rights of Persons with Disabilities*, 2006.

<sup>420</sup> Article 27(1) of the *UN Convention on the Rights of Persons with Disabilities*, 2006.

<sup>421</sup> Article 27(1)(i) of the *UN Convention on the Rights of Persons with Disabilities*, 2006.

### 3.2.1.2 International Labour Organisation

In this part of the Chapter, the nature and extent of reasonable accommodation as prescribed by the ILO will be analysed.

The ILO has defined reasonable accommodation in the ILO Recommendation concerning HIV and AIDS and the World of Work 2010 (No. 200) (ILO Recommendation).<sup>422</sup> Section 1(g) of the Recommendation defines reasonable accommodation as:

any modification or adjustment to a job or to the workplace that is reasonably practicable and enables a person living with HIV or AIDS to have access to, or participate or advance in, employment.<sup>423</sup>

Section 13 of the ILO Recommendation further provides that:

persons with HIV-related illness should not be denied the possibility of continuing to carry out their work, with reasonable accommodation if necessary, for as long as they are medically fit to do so. Measures to redeploy such persons to work reasonably adapted to their abilities, to find other work through training or to facilitate their return to work should be encouraged, taking into consideration the relevant International Labour Organisation and United Nations instruments.<sup>424</sup>

The aforementioned section of the ILO Recommendation accordingly places an obligation on an employer to provide a person with HIV-related illnesses with reasonable accommodation, which might include finding suitably alternative positions for such persons, assisting in obtaining other work through training or alternatively by assisting in their return to the workplace. The ILO Code of Practice on HIV/AIDS and the World of Work (2001) (ILO Code),<sup>425</sup> should be taken into account when looking at reasonable accommodation. The following examples are provided by the ILO Code in respect of possible reasonable accommodation of persons with HIV-related illnesses, namely:

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<sup>422</sup> ILO Recommendation concerning HIV and AIDS and the World at Work 2010 (No. 200).

<sup>423</sup> Section 1(g) of the ILO Recommendation concerning HIV and AIDS and the World at Work 2010 (No. 200); see also Article 2 of the UN Convention on the Rights of Persons with Disabilities, 2006.

<sup>424</sup> Section 13 of the ILO Recommendation concerning HIV and AIDS and the World at Work 2010 (No. 200).

<sup>425</sup> ILO Code of Practice on HIV/AIDS and the World of Work (2001).

rearrangement of working time, special equipment, opportunities for rest breaks, time off for medical appointments, flexible sick leave, part-time work and return-to-work arrangements.<sup>426</sup>

The aforementioned examples of accommodation must be considered in consultation with the individual requesting reasonable accommodation.<sup>427</sup> Notwithstanding the right to reasonable accommodation, an employer's duty to provide reasonable accommodation should be balanced by considering the reasonableness of the accommodation.<sup>428</sup> An accommodation will not be reasonable in instances where such accommodation causes a disproportionate burden or undue hardship for the employer.<sup>429</sup> This is expressed in terms of the ILO's consideration of article 2 of the CRPD which states that: "Reasonable accommodation means necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden...".<sup>430</sup>

Disproportionate burden and undue hardship (for consistency in this study, disproportionate burden and undue hardship will be referred to as unjustifiable hardship) may be established by considering various factors, which include but are not limited to: "the cost of the accommodation", "the size and economic turnover of the enterprise", "the functioning and the organization of the company", "the accommodation will benefit more persons than the individual making the request" and "the existence of public (or other) funding".<sup>431</sup> From the aforementioned it is clear that an obligation is placed on employers in terms of the ILO to provide reasonable accommodation. This right is however limited in the case where such accommodation constitutes unjustifiable hardship.

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<sup>426</sup> Item 5.2(j) ILO Code of Practice on HIV/AIDS and the World of Work (2001).

<sup>427</sup> Item 5.2(j) ILO Code of Practice on HIV/AIDS and the World of Work (2001).

<sup>428</sup> International Labour Organisation *Promoting Diversity And Inclusion Through Workplace Adjustments: A Practical Guide* 19.

<sup>429</sup> International Labour Organisation *Promoting Diversity And Inclusion Through Workplace Adjustments: A Practical Guide* 19.

<sup>430</sup> ILO Code of Practice on HIV/AIDS and the World of Work (2001).

<sup>431</sup> International Labour Organisation *Promoting Diversity And Inclusion Through Workplace Adjustments: A Practical Guide* 19.

This study will now turn to national law to examine how reasonable accommodation and employers' duty to provide reasonable accommodation is interpreted and implemented in South Africa.

### *3.2.2 National law*

#### 3.2.2.1 The Constitution

On national level, the *Constitution of the Republic of South Africa, 1996* is the starting point for the obligations that are placed on employers to provide reasonable accommodation to persons with disabilities. Although the Constitution itself does not expressly provide for reasonable accommodation, it is inferred in the general duty of employers to eliminate discrimination and promote equality as required by section 9(1). The requirement to achieve equity and take steps to advance those previously marginalised (such as persons with disabilities) is found in section 9(2) of the Constitution, which stipulates that:

legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.<sup>432</sup>

The reference to "legislative and other measures" allows for the enactment of legislation such as the EEA (and its schedules) and the subsequent provision therein for reasonable accommodation of persons with disabilities. Such reasonable accommodation thus ultimately requires differentiating treatment of persons with disabilities to put them in a position to gain access to the workplace and excel within this environment. Section 9 of the Constitution subsequently places a positive obligation on employers to eliminate disability-based discrimination in ensuring equity and equal opportunity in the workplace.

As will be discussed in depth in the remainder of the chapter, employers are obliged in terms of the EEA to take positive steps in order to eliminate unfair discrimination in the workplace, more specifically with reference to disability-based discrimination in

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<sup>432</sup> Section 9(2) of the *Constitution of the Republic of South Africa, 1996*.

terms of employment policies and practices.<sup>433</sup> Reasonable accommodation forms part of the aforementioned obligation and is implied in terms of section 5 of the EEA.<sup>434</sup>

In addition, the EEA places an express obligation on employers to reasonably accommodate persons with disabilities in terms of section 15(2)(c) of the EEA (as will be discussed below).

From the aforementioned, it can be inferred that a clear obligation is placed on employers to reasonably accommodate persons with disabilities, which reasonable accommodation should take place with a view of ensuring equal opportunities for an equal representation of persons with disabilities within the workplace.

The EEA provides that affirmative action measures are intended to ensure that suitably qualified individuals from designated groups, more specifically persons with disabilities (for purposes of this dissertation),<sup>435</sup> are afforded equal opportunities and are represented in all spheres within the workplace.<sup>436</sup>

In addition to the obligation to provide reasonable accommodation, as set out in terms of section 15(1)(c) of the EEA, a further obligation is placed on an employer in terms of which an employer should identify and eliminate employment barriers.<sup>437</sup> The

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<sup>433</sup> Du Plessis *Access To Work For Disabled Persons In South Africa: The Intersections Of Social Understandings Of Disability, Substantive Equality And Access To Social Security* 147.

<sup>434</sup> Section 5 of the *Employment Equity Act* 55 of 1998 in terms of which: "Every employer must take steps to promote equal opportunity in the work-place by eliminating unfair discrimination in any employment policy or practice".

<sup>435</sup> Section 5 of the *Employment Equity Act* 55 of 1998 in terms of which designated groups are defined as: "black people, women and people with disabilities".

<sup>436</sup> Section 15(1) of the *Employment Equity Act* 55 of 1998; see also Section 1 of the *Employment Equity Act* 55 of 1998 which defines designated employers as "(a) a person who employs 50 or more employees; (b) a person who employs fewer than 50 employees but has a total annual turn-over that is equal to or above the applicable annual turn-over of a small business in terms of the Schedule 4 of this Act; (c) a municipality, as referred to in Chapter 7 of the Constitution; (d) an organ of state as defined in section 239 of the Constitution, but excluding the National Defence Force, the National Intelligence Agency and the South African Secret Service; and (e) an employer bound by collective agreement in terms of section 23 or 31 of the Labour Relations Act, which appoints it as a designated employer in terms of this Act, to the extent provided for in the agreement".

<sup>437</sup> Section 15(1)(a) of the *Employment Equity Act* 55 of 1998.

aforementioned obligation includes not only identifying and eliminating barriers within the employment, but also unfair discrimination within the workplace.<sup>438</sup>

It should be noted that the obligation to provide reasonable accommodation to persons with disabilities, as referred to in terms of section 15(1)(c) of the EEA, is separate from the obligation to eliminate barriers and/or discrimination,<sup>439</sup> as stated above.

Notwithstanding the separation of the obligation to reasonably accommodate and to eliminate barriers and/or discrimination, the failure and/or refusal by an employer to provide reasonable accommodation to persons with disabilities, does not in itself, constitute barriers for persons with disabilities.<sup>440</sup>

As per the definition of reasonable accommodation, it is inferred that providing persons with disabilities with reasonable accommodation, "will enable a person from a designated group to have access to or participate or advance in employment";<sup>441</sup> therefore the employment barriers as referred to above are not limited to barriers that only necessitate "adjustments or modifications to jobs or work environments".<sup>442</sup>

The most noteworthy difference between the obligation to provide reasonable accommodation and the obligation placed on an employer to eliminate unfair discrimination is that reasonable accommodation is more fitting in circumstances where the interests of the employer should be balanced against the interest of persons with disabilities.<sup>443</sup> In other words, the interest of the employer as oppose to that of persons with disabilities will rarely be considered in relation to the employer's obligation to eliminate unfair discrimination, whereas in the case of reasonable accommodation, a consideration of the employer's interest against that of the

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<sup>438</sup> Section 15(1)(a) of the *Employment Equity Act* 55 of 1998.

<sup>439</sup> Du Plessis *Access To Work For Disabled Persons In South Africa: The Intersections Of Social Understandings Of Disability, Substantive Equality And Access To Social Security* 148.

<sup>440</sup> Du Plessis *Access To Work For Disabled Persons In South Africa: The Intersections Of Social Understandings Of Disability, Substantive Equality And Access To Social Security* 148.

<sup>441</sup> Section 1 of the *Employment Equity Act* 55 of 1998.

<sup>442</sup> Du Plessis *Access To Work For Disabled Persons In South Africa: The Intersections Of Social Understandings Of Disability, Substantive Equality And Access To Social Security* 148.

<sup>443</sup> Du Plessis *Access To Work For Disabled Persons In South Africa: The Intersections Of Social Understandings Of Disability, Substantive Equality And Access To Social Security* 148.

employee is of vital importance to determine the threshold of reasonable accommodation and when unjustifiable hardship has been reached.

A further aspect of the non-discrimination obligation placed on employers is likely to be of relevance to general barriers that are experienced by persons with disabilities, which consist of a pre-emptive element.<sup>444</sup> In this regard the pre-emptive element relates to whether:

courts are of the view that the employer is the appropriate duty bearer, particularly if deficits are structural in nature and relate to socio-economic entitlements for which the state is the primary duty bearer.<sup>445</sup>

We now turn to the EEA in relation to its provisions regarding reasonable accommodation.

### 3.2.2.2 Employment Equity Act

Reasonable accommodation for purposes of the EEA specifically relates to an affirmative action measure as set out in Chapter 3 of the EEA (as will be discussed below), which an employer has to implement with a view of advancing and achieving equal employment of persons with disabilities in the workplace. Section 1 of the EEA states that reasonable accommodation is:

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.<sup>446</sup>

Although the aforementioned definition as per the EEA does not explicitly refer to persons with disabilities, the definition refers to "a designated group",<sup>447</sup> and as mentioned earlier in this dissertation,<sup>448</sup> persons with disabilities form part of a

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<sup>444</sup> Du Plessis *Access To Work For Disabled Persons In South Africa: The Intersections Of Social Understandings Of Disability, Substantive Equality And Access To Social Security* 148.

<sup>445</sup> Du Plessis *Access To Work For Disabled Persons In South Africa: The Intersections Of Social Understandings Of Disability, Substantive Equality And Access To Social Security* 149.

<sup>446</sup> Section 1 of the *Employment Equity Act* 55 of 1998.

<sup>447</sup> Section 1 of the *Employment Equity Act* 55 of 1998 defines designated groups as "black people, women and people with disabilities"; see also *Regional Commissioner Correctional Services, Free State and Northern Cape v Wolfaardt and others* [2013] 7 BLLR 717 (LC) in terms of which it was found that no basis exists to apply affirmative action measures on the ground of religion.

<sup>448</sup> See paragraph **Error! Reference source not found.** above.

designated group.<sup>449</sup> It therefore is clear that persons with disabilities should benefit from the employer's obligation to reasonably accommodate designated employees.<sup>450</sup>

Chapter 3 of the EEA makes provision for affirmative action.<sup>451</sup> However, this chapter is applicable to designated employers only.<sup>452</sup> According to section 13(1) of the EEA every designated employer must implement affirmative action measures for designated employees to achieve equality.<sup>453</sup> Section 13(2) of the EEA further sets out various duties placed on designated employers in respect of implementing affirmative action measures, which will merely be mentioned for purposes of this dissertation. Firstly, a designated employer must consult with its employees.<sup>454</sup> This consultation must be done in accordance with section 16 of the EEA.<sup>455</sup> In terms of section 13(2)(b) of the EEA,<sup>456</sup> the designated employer must conduct an analysis in terms of section 19 of the EEA.<sup>457</sup> An employment equity plan (EEP) must furthermore be prepared in accordance with section 20 of the EEA.<sup>458</sup> A designated employer must furthermore report to the Director-General (DG),<sup>459</sup> in relation to its progress made in relation to implementing its EEP.<sup>460</sup> This is regulated in accordance with section 21 of the EEA.<sup>461</sup>

It should be noted that other employers who do not fall within the definition of designated employers for purposes of Chapter 3 of the EEA, may voluntarily comply

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<sup>449</sup> Section 1 of the *Employment Equity Act* 55 of 1998.

<sup>450</sup> Section 15(2)(c) of the *Employment Equity Act* 55 of 1998.

<sup>451</sup> Chapter 3 of the *Employment Equity Act* 55 of 1998.

<sup>452</sup> Section 12 of the *Employment Equity Act* 55 of 1998; See section 1 of the *Employment Equity Act* 55 of 1998 which defines designated employers as: "(a) an employer who employs 50 or more employees; (b) an employer who employs fewer than 50 employees but has a total annual turn-over that is equal to or above the applicable annual turn-over of a small business in terms of the Schedule 4 of this Act; (c) a municipality, as referred to in Chapter 7 of the Constitution; (d) an organ of state as defined in section 239 of the Constitution, but excluding the National Defence Force, the National Intelligence Agency and the South African Secret Service; and (e) an employer bound by collective agreement in terms of section 23 or 31 of the Labour Relations Act, which appoints it as a designated employer in terms of this Act, to the extent provided for in the agreement".

<sup>453</sup> Section 13(1) of the *Employment Equity Act* 55 of 1998.

<sup>454</sup> Section 13(2)(a) of the *Employment Equity Act* 55 of 1998.

<sup>455</sup> Section 13(2)(a) of the *Employment Equity Act* 55 of 1998.

<sup>456</sup> Section 13(2)(b) of the *Employment Equity Act* 55 of 1998.

<sup>457</sup> Section 13(2)(b) of the *Employment Equity Act* 55 of 1998.

<sup>458</sup> Section 13(2)(c) of the *Employment Equity Act* 55 of 1998.

<sup>459</sup> See section 1 of the *Employment Equity Act* 55 of 1998 which provides that Director-General means "the Director-General of the Department of Labour".

<sup>460</sup> Section 13(2)(d) of the *Employment Equity Act* 55 of 1998.

<sup>461</sup> Section 13(2)(d) of the *Employment Equity Act* 55 of 1998.

with the provisions relating to affirmative actions.<sup>462</sup> These employers should notify the DG of its intentions to comply with this Chapter as if they were designated employers.<sup>463</sup>

Section 15 of the EEA further deals with affirmative action measures,<sup>464</sup> which measures are defined as:

measures designed to ensure that suitably qualified people from designated groups have equal employment opportunities and are equitably represented in all occupational levels in the workforce of a designated employer.<sup>465</sup>

The aforementioned measures must consist of:<sup>466</sup> measures to identify and eliminate barriers which constitute unfair discrimination and, as such, adversely affect designated employees,<sup>467</sup> and to promote diversity in the workplace based on equal dignity and respect for all individuals.<sup>468</sup> In terms of section 15(2)(d) of the EEA, the measures must:

(i) ensure the equitable representation of suitably qualified people from designated groups in all occupational categories and levels in the workforce; and (ii) ensure the equitable representation of suitably qualified people from designated groups in all occupational levels in the workforce; and (iii) retain and develop people from designated groups and to implement appropriate training measures, including measures in terms of an Act of Parliament providing for skills development.<sup>469</sup>

The aforementioned measures are however subject to section 15(3) of the EEA,<sup>470</sup> as these measures "include preferential treatment and numerical goals, but exclude quotas".<sup>471</sup> It should furthermore be noted that an employer is not required to consider section 15(2)(d)(ii) of the EEA when selecting employees for retrenchment.<sup>472</sup>

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<sup>462</sup> Section 14 of the *Employment Equity Act* 55 of 1998.

<sup>463</sup> Section 14 of the *Employment Equity Act* 55 of 1998.

<sup>464</sup> Section 15 of the *Employment Equity Act* 55 of 1998.

<sup>465</sup> Section 15(1) of the *Employment Equity Act* 55 of 1998.

<sup>466</sup> Section 15(2) of the *Employment Equity Act* 55 of 1998.

<sup>467</sup> Section 15(2)(a) of the *Employment Equity Act* 55 of 1998.

<sup>468</sup> Section 15(2)(b) of the *Employment Equity Act* 55 of 1998.

<sup>469</sup> Section 15(2)(d)(i) – (ii) of the *Employment Equity Act* 55 of 1998.

<sup>470</sup> Section 15(2)(d) of the *Employment Equity Act* 55 of 1998.

<sup>471</sup> Section 15(3) of the *Employment Equity Act* 55 of 1998.

<sup>472</sup> *Thekiso v IBM South Africa (Pty) Ltd* [2007] 3 BLLR 253 (LC) par 41.

It has been argued that the role of affirmative action, as provided for in terms of section 15 of the EEA, "goes beyond the passivity of its status as a defence".<sup>473</sup> This is predicated upon the fact that an employer is obliged to take measures to eliminate unfair discrimination,<sup>474</sup> and failing to do so, this may constitute an infringement of designated employees' rights not to be unfairly discriminated against.<sup>475</sup> To the contrary, it was held in the case of *Dudley v City of Cape Town*,<sup>476</sup> an employer's failure to comply with Chapter 3 of the EEA will constitute an issue of non-compliance rather than an issue of unfair discrimination.<sup>477</sup> Notwithstanding an employer's duty to implement affirmative action measures, it was held in the case of *Fourie v Provincial Commissioner, SAPS (North West Province)*,<sup>478</sup> "that affirmative action measures are only permitted in respect of suitably qualified persons from designated groups".<sup>479</sup> In amplification of the aforementioned, a position should not be judged purely based on the technical qualifications of the applicant, "as the need for greater diversity may be a criterion in itself" and based on the fact that one applicant has more experience than another, does not mean that the less experienced applicant is not suitable or unqualified.<sup>480</sup>

The most important affirmative action measure, as set out in the EEA for purposes of this study is in terms of section 15(2)(c) of the EEA, which states that affirmative actions must include:

making reasonable accommodation for people from designated groups in order to ensure that they enjoy equal opportunities and are equitably represented in the workforce of a designated employer.<sup>481</sup>

In accordance with the aforementioned section, reasonable accommodation must be provided to persons with disabilities with a view of ensuring that suitably qualified

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<sup>473</sup> *Harmse v City of Cape Town* [2003] 6 BLLR 557 (LC) par 33 and 47.

<sup>474</sup> *Harmse v City of Cape Town* [2003] 6 BLLR 557 (LC) par 33 and 47.

<sup>475</sup> *Harmse v City of Cape Town* [2003] 6 BLLR 557 (LC) par 33 and 47.

<sup>476</sup> *Dudley v City of Cape Town & another* [2004] 5 BLLR 413 (LC).

<sup>477</sup> *Dudley v City of Cape Town & another* [2004] 5 BLLR 413 (LC) par 72.

<sup>478</sup> *Fourie v Provincial Commissioner, SAPS (North West Province)* [2004] 9 BLLR 895 (LC).

<sup>479</sup> *Fourie v Provincial Commissioner, SAPS (North West Province)* [2004] 9 BLLR 895 (LC) par 42 – 43.

<sup>480</sup> *Fourie v Provincial Commissioner, SAPS (North West Province)* [2004] 9 BLLR 895 (LC) par 46.

<sup>481</sup> Section 15(2)(c) of the *Employment Equity Act* 55 of 1998.

persons with disabilities have equal employment opportunities and are equitably represented in all occupational levels in the workforce of a designated employer,<sup>482</sup> and by doing so, promoting the right of persons with disabilities to equality as enshrined in the Constitution.

In terms of section 15(4) of the EEA, a designated employer is not required in terms of section 15 of the EEA to make any decision in relation to an employment policy or practice which may constitute barriers.<sup>483</sup> These barriers refer to barriers for prospective employees, current employees or alternatively the advancement of designated employees.<sup>484</sup>

This study will now turn to the Code of Good Practice on the Employment of Persons with Disabilities (Code), which gives guidance on how reasonable accommodation in relation to persons with disabilities should be implemented in general.

#### 3.2.2.2.1 Code of Good Practice on the Employment of Persons with Disabilities

Item 6 of the Code,<sup>485</sup> makes provision for reasonable accommodation of persons with disabilities in general and not merely for the purpose of affirmative action.<sup>486</sup> The Code furthermore deals with key aspects of reasonable accommodation, which will accordingly be dealt with, with reference to examples of possible reasonable accommodation in specific circumstances where persons with disabilities may require such accommodation to enable them to fully conduct their functions within the workplace.

There are various forms in which persons with disabilities may require reasonable accommodation from an employer.<sup>487</sup> The employer might adapt existing facilities to make these facilities accessible to persons with disabilities.<sup>488</sup> An example of reasonable accommodation in this regard is where an employer is required to install

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<sup>482</sup> Section 15(1) of the *Employment Equity Act* 55 of 1998.

<sup>483</sup> Section 15(4) of the *Employment Equity Act* 55 of 1998.

<sup>484</sup> Section 15(4) of the *Employment Equity Act* 55 of 1998.

<sup>485</sup> Gen Not 1085 in GG 39383 of 9 November 2015.

<sup>486</sup> Item 6 in Gen Not 1085 in GG 39383 of 9 November 2015.

<sup>487</sup> Item 6(9) in Gen Not 1085 in GG 39383 of 9 November 2015.

<sup>488</sup> Item 6(9)(a) in Gen Not 1085 in GG 39383 of 9 November 2015.

an elevator or access ramps, to make the workplace accessible for an employee who is in a wheelchair and requires the aforementioned aids to freely roam and/or access the workplace. Furthermore, employers can designate vehicle parking spaces close to the entrance of the workplace, install a bathroom stall for disabled persons, provide a larger office or cubical and provide the employee with a space to store the wheelchair when not in use, to name but a few.<sup>489</sup>

The employer might be required to adapt existing equipment or acquire new equipment, including computer hardware and software, depending on the particular employee's needs.<sup>490</sup> This is especially a form of required accommodation in the case of employees who have visual impairments. In this regard, assistive technology forms a vital part in accommodating blind or visually impaired employees. Assistive technology could include magnifiers, digital recorders, screen reading software, refreshable braille displays, braille embossers, and etcetera.<sup>491</sup>

Furthermore, an employer may re-organise workstations to accommodate persons with disabilities.<sup>492</sup> In relation to this form of accommodation, the employer might provide an employee in a wheelchair with a large desk with adjustable height capabilities and also ensure that electrical power points are easily accessible to the employee by placing a connected multi-plug on the employee's desk, and to ensure that the employee has access to a remote to control lights, air-conditioning etcetera.<sup>493</sup>

Another form of accommodation could entail amending assessment materials and systems.<sup>494</sup> In this regard, the employer might be expected to provide employees with visual impairments with training materials electronically, for the employees to access

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<sup>489</sup> CHRON How Do I Accommodate My Workplace for Wheelchairs? date unknown <https://smallbusiness.chron.com/ada-accessibility-guidelines-restrooms-10023.html>.

<sup>490</sup> Item 6(9)(b) in Gen Not 1085 in GG 39383 of 9 November 2015.

<sup>491</sup> Perkins School for the Blind Work Place Accommodations date unknown <https://www.perkins.org/workplace-accommodations/>; see also The National Strategic Framework On Reasonable Accommodation for Persons With Disabilities (which will be discussed in depth below), defines Assistive Technology as: "an umbrella term that includes assistive, adaptive, and rehabilitative devices and services for persons with disabilities, which enable persons with disabilities to attain independence. "

<sup>492</sup> Item 6(9)(c) in Gen Not 1085 in GG 39383 of 9 November 2015.

<sup>493</sup> Rolling Inspiration 4 April 2018 <https://www.rollinginspiration.co.za/accessible-office-every-wheelchair-user-needs/>.

<sup>494</sup> Item 6(9)(d) in Gen Not 1085 in GG 39383 of 9 November 2015.

these materials on their computers by enlarging the materials. Employees with visual impairments will furthermore be able to access the training materials by making use of a text-to-speech application which will enable the employee to read the training materials. In addition to the aforementioned, the employer can provide employees who are blind with training material which is printed in braille.

Lastly, the employer may be required to adjust working conditions, including working time and leave.<sup>495</sup> In this regard, the employer can allow the employee to work ten hours per day for four days per week to enable the employee to receive weekly medical treatments if so required.<sup>496</sup>

Item 6(9) of the Code also includes other forms of accommodation, which consist of the following: the employer may be required to restructure a job in order for non-essential functions to be re-assigned,<sup>497</sup> and the employer might be required to provide specialised supervision, training and support in the workplace.<sup>498</sup>

It should be noted that the list of accommodations that might be necessary to assist persons with disabilities is not an exhaustive list and will depend on the particular needs of an employee. Further forms and examples of reasonable accommodation (which is not reflected in the Code) include:<sup>499</sup>

addressing impact of light and noise; providing readers, hiring sign language interpreters; readers or interpreters to assist an employee; providing temporary workplace specialists to assist in training, and transferring an employee to the same job in another location to obtain better medical care.<sup>500</sup>

In addition to the above, reasonable accommodation should not be limited to the specific activity conducted by persons with disabilities or as requested by persons with disabilities, but must include areas related to the specific activity, for example, "occupational safety measures, and means of escape or access to service-related

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<sup>495</sup> Item 6(9)(f) in Gen Not 1085 in GG 39383 of 9 November 2015.

<sup>496</sup> JDM 12 July 2019 <https://jdemplacements.co.za/understanding-reasonable-accommodation/>.

<sup>497</sup> Item 6(9)(e) in Gen Not 1085 in GG 39383 of 9 November 2015.

<sup>498</sup> Item 6(9)(g) in Gen Not 1085 in GG 39383 of 9 November 2015.

<sup>499</sup> JDM 12 July 2019 <https://jdemplacements.co.za/understanding-reasonable-accommodation/>.

<sup>500</sup> JDM 12 July 2019 <https://jdemplacements.co.za/understanding-reasonable-accommodation/>.

information”.<sup>501</sup> Furthermore, reasonable accommodation might be required, not just during the employment of persons with disabilities,<sup>502</sup> but also during the recruitment and selection processes of persons with disabilities,<sup>503</sup> how work is evaluated and rewarded,<sup>504</sup> and in the benefits and privileges of employment.<sup>505</sup> It is also worth noting that reasonable accommodation may be temporary or permanent.<sup>506</sup> The duration of the reasonable accommodation of persons with disabilities is dependent on the nature and extent of the specific disability.<sup>507</sup>

Apart from the examples of reasonable accommodation provided above, the practice of accommodation itself can, in terms of the Framework, be divided into a number of categories.<sup>508</sup> The category relevant to a particular situation will depend on the nature and extent of the needs of an employee.

The first category entails no-tech accommodation.<sup>509</sup> This category of accommodation has no direct financial implications for an employer and may consist of: "flexi-time, additional preparation time for an individual, a color-coded filing system, adjustments to policies and protocols".<sup>510</sup>

Secondly, accommodation could be required in the form of *low-tech accommodation*.<sup>511</sup> This type of accommodation includes accommodation that is unsophisticated and commonly available in most workplaces, with very little financial strain on the employer; examples of which include: "replacing a doorknob with an accessible door handle, providing a magnifier" etcetera.<sup>512</sup>

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<sup>501</sup> The National Strategic Framework on Reasonable Accommodation for Persons with Disabilities p28.

<sup>502</sup> Item 6(3)(a) – (d) in Gen Not 1085 in GG 39383 of 9 November 2015.

<sup>503</sup> Item 6(3)(a) in Gen Not 1085 in GG 39383 of 9 November 2015.

<sup>504</sup> Item 6(3)(c) in Gen Not 1085 in GG 39383 of 9 November 2015.

<sup>505</sup> Item 6(3)(d) in Gen Not 1085 in GG 39383 of 9 November 2015.

<sup>506</sup> Item 6(8) in Gen Not 1085 in GG 39383 of 9 November 2015.

<sup>507</sup> Item 6(7) in Gen Not 1085 in GG 39383 of 9 November 2015.

<sup>508</sup> The National Strategic Framework on Reasonable Accommodation for Persons with Disabilities p27 - 28.

<sup>509</sup> The National Strategic Framework on Reasonable Accommodation for Persons with Disabilities p27.

<sup>510</sup> The National Strategic Framework on Reasonable Accommodation for Persons with Disabilities p27.

<sup>511</sup> The National Strategic Framework on Reasonable Accommodation for Persons with Disabilities p28.

<sup>512</sup> The National Strategic Framework on Reasonable Accommodation for Persons with Disabilities p28.

The third category of accommodation refers to high-tech accommodation.<sup>513</sup> This category of accommodation relates to any accommodation that requires advanced or sophisticated devices, examples of which include: “screen reading software with synthesised speech as well as assistive devices”. Considering that this category of accommodation is tech-based, it will have high financial implications for an employer, which might not be justifiable in all circumstances where such type of accommodation may be required.

Lastly, live assistance is the fourth category of accommodation that might be required by persons with disabilities,<sup>514</sup> which include the following:

personal aides, guides, lip-speakers, whisper interpreters, South African Sign Language interpreters, note-takers, interpreters for Deaf-blind persons, sexual and intimacy assistants, service dogs, guide dogs.<sup>515</sup>

Similar to the third category this type of accommodation may have a severe financial impact on an employer and, as such, might constitute an unjustifiable hardship. As a result, employers may be reluctant to implement the aforementioned category of accommodation due to the high associated costs.

Now that the nature and extent of reasonable accommodation have been discussed at the hand of various examples, reasonable accommodation should be considered in conjunction with the concept of unjustifiable hardship, as this might place a limitation on the rights of persons with disabilities to be reasonably accommodated by an employer,<sup>516</sup> which will be discussed in depth in the following section of this chapter.

Item 6.1 of the Code places a further obligation on employers to provide reasonable accommodation, as this item states that employers are required to reasonably accommodate the needs of persons with disabilities,<sup>517</sup> with the aim of reducing the

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<sup>513</sup> The National Strategic Framework on Reasonable Accommodation for Persons with Disabilities p28.

<sup>514</sup> The National Strategic Framework on Reasonable Accommodation for Persons with Disabilities p28.

<sup>515</sup> The National Strategic Framework on Reasonable Accommodation for Persons with Disabilities p28.

<sup>516</sup> Item 6(11) in Gen Not 1085 in GG 39383 of 9 November 2015.

<sup>517</sup> Item 6(1) in Gen Not 1085 in GG 39383 of 9 November 2015.

negative impact that might be experienced by persons with disabilities and their capability to fulfil an essential function of the job.<sup>518</sup>

The provision of reasonable accommodation should not only be made with a view to remove barriers but also to ensure that persons with disabilities enjoy equal access to the benefits and opportunities within the South African workplace.<sup>519</sup>

In circumstances where an employer assesses and adapts measures to remove the aforementioned barriers, the employer should assess both the cost and quality that is consistent with removing a barrier.<sup>520</sup> Notwithstanding this, and as mentioned above, the costs will, in itself, not be sufficient for an employer to claim and prove unjustifiable hardship.

The necessity for reasonable accommodation may arise when persons with no visible disabilities voluntarily disclose a disability to the employer and the related accommodation needs.<sup>521</sup> Therefore the employer will be obliged to assess the situation and, where applicable, provide persons with disabilities with the required accommodation, where such reasonable accommodation does not constitute unjustifiable hardship. The need for reasonable accommodation may however occur when such need is reasonably apparent to the employer,<sup>522</sup> and easily recognisable in the specific circumstances. Consequently, the employer will be obliged to reasonably accommodate persons with disabilities when such need is self-evident.<sup>523</sup>

In determining the specific needs that persons with disabilities might have with regard to reasonable accommodation, this determination must be executed in consultation between the employer and persons with disabilities.<sup>524</sup> Consequently, this places an obligation upon the employer to involve the employee requiring the said accommodation, in the process of seeking the appropriate measure to ensure

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<sup>518</sup> Item 6(1) in Gen Not 1085 in GG 39383 of 9 November 2015.

<sup>519</sup> Item 6(2) in Gen Not 1085 in GG 39383 of 9 November 2015; see also section 15 of the Employment Equity Act 55 of 1998 which places the same obligation on employers.

<sup>520</sup> Item 6(2) in Gen Not 1085 in GG 39383 of 9 November 2015.

<sup>521</sup> Item 6(4) in Gen Not 1085 in GG 39383 of 9 November 2015.

<sup>522</sup> Item 6(4) in Gen Not 1085 in GG 39383 of 9 November 2015.

<sup>523</sup> The National Strategic Framework on Reasonable Accommodation for Persons with Disabilities p28.

<sup>524</sup> Item 6(6) in Gen Not 1085 in GG 39383 of 9 November 2015.

reasonable accommodation for such employee. In addition to involving the employee, it may be reasonably expected to also involve the services of technical health experts to establish appropriate mechanisms to reasonably accommodate persons with disabilities. While this is true, it should however be done in agreement with the particular persons with the disability.<sup>525</sup>

An employer may evaluate the work performance of persons with disabilities against the same standards as other non-disabled employees within the workplace. Nevertheless, the employer may be required to adapt the way in which the performance of persons with disabilities is measured and assessed in consideration of the nature of the disability. In certain circumstances it may require an employer to adapt the way in which performance is measured.<sup>526</sup> In this regard an obligation is placed on the employer to adapt its measurement of performance where it relates to persons with disabilities.

The study will now turn to The National Strategic Framework on Reasonable Accommodation for Persons with Disabilities (Framework) for further guidance on the concept of reasonable accommodation.

### 3.2.2.3 The National Strategic Framework on Reasonable Accommodation for Persons with Disabilities

The Framework assists in further broadening the concept of reasonable accommodation within the South African context as the Framework defines Reasonable accommodation as:

necessary and appropriate modification and adjustments, as well as assistive devices and technology, not imposing a situation, where needed in a particular case, to ensure persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms.<sup>527</sup>

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<sup>525</sup> Item 6(6) in Gen Not 1085 in GG 39383 of 9 November 2015.

<sup>526</sup> Item 6(10) in Gen Not 1085 in GG 39383 of 9 November 2015.

<sup>527</sup> The National Strategic Framework on Reasonable Accommodation for Persons with Disabilities 14.

As the Framework specifically relates to reasonable accommodation of persons with disabilities,<sup>528</sup> it should be noted that the purpose of the Framework is to give guidance on the implementation of reasonable accommodation to promote the rights of persons with disabilities, to combat unfair discrimination against persons with disabilities and to develop procedures and norms and minimum standards "for the issuing of assistive devices, reasonable accommodation measures, support services".<sup>529</sup>

It should furthermore be noted that the objectives of the Framework include: to "explain the implications of reasonable accommodation support as a fundamental human right"; to "ensure that reasonable accommodation support is approached from a human rights and inclusive development perspective" and to "ensure that all public and private sector entities make provision for reasonable accommodation in service delivery" to name but a few.<sup>530</sup>

The Framework must be read in conjunction with national legislation and other codes of good practices as the Framework is intended to be used as a guide on the subject matter of reasonable accommodation of persons with disabilities.<sup>531</sup>

The Framework contains qualifying criteria which should be taken into account in determining who qualifies for reasonable accommodation on the basis of disability and how such reasonable accommodation should be implemented,<sup>532</sup> which qualifying criteria will accordingly be discussed.

Firstly, it must be determined whether the individual seeking the reasonable accommodation has an impairment.<sup>533</sup> According to the Framework, an impairment may be "physical, sensory, neurological, intellectual, psychosocial or a combination of these".<sup>534</sup>

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<sup>528</sup> The National Strategic Framework on Reasonable Accommodation for Persons with Disabilities 2.

<sup>529</sup> The National Strategic Framework on Reasonable Accommodation for Persons with Disabilities 2.

<sup>530</sup> The National Strategic Framework on Reasonable Accommodation for Persons with Disabilities 15.

<sup>531</sup> The National Strategic Framework on Reasonable Accommodation for Persons with Disabilities 15.

<sup>532</sup> The National Strategic Framework on Reasonable Accommodation for Persons with Disabilities 23.

<sup>533</sup> The National Strategic Framework on Reasonable Accommodation for Persons with Disabilities 24.

<sup>534</sup> The National Strategic Framework on Reasonable Accommodation for Persons with Disabilities 24.

It must furthermore be established whether the impairment is long-term, recurring or episodic and includes "progressive conditions; in which case it is a permanent condition".<sup>535</sup> Long-term impairments are impairments which last for twelve months or longer,<sup>536</sup> whereas recurring and episodic impairments, on the other hand, are impairments that are likely to recur, which impairments are of a substantially limiting nature.<sup>537</sup> Furthermore, progressive impairments which are likely to "develop, change or recur".<sup>538</sup>

Lastly, it must be determined whether the impairment is substantially limiting in nature.<sup>539</sup> According to the Framework, an impairment is substantially limiting if "in its nature, duration, or the effects of the impairment substantially limit a person's ability to perform essential functions of the job or daily activities independently, without having been assisted".<sup>540</sup>

All three of the aforementioned qualifying criteria must be present before an impairment constitutes a disability for purposes of reasonable accommodation. The aforementioned qualifying criteria are similar to the criteria as set out in the Code in determining whether an impairment constitutes a disability for purposes of reasonable accommodation. The study will now turn to the White Paper on The Rights of Persons With Disabilities (WRPD) for further guidance on this subject matter.

#### 3.2.2.4 White Paper on the Rights of Persons With Disabilities

The White Paper on The Rights of Persons with Disabilities (hereinafter referred to as the WRPD),<sup>541</sup> further defines reasonable accommodation as:

necessary and appropriate modification and adjustments, as well as assistive devices and technology, not imposing a situation, where needed in a particular case, to ensure

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<sup>535</sup> The National Strategic Framework on Reasonable Accommodation for Persons with Disabilities 24.

<sup>536</sup> The National Strategic Framework on Reasonable Accommodation for Persons with Disabilities 24.

<sup>537</sup> The National Strategic Framework on Reasonable Accommodation for Persons with Disabilities 24.

<sup>538</sup> The National Strategic Framework on Reasonable Accommodation for Persons with Disabilities 24.

<sup>539</sup> The National Strategic Framework on Reasonable Accommodation for Persons with Disabilities 24.

<sup>540</sup> The National Strategic Framework on Reasonable Accommodation for Persons with Disabilities 24.

<sup>541</sup> White Paper On The Rights Of Persons With Disabilities the office of the President of South Africa 9 December 2015.

persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms.<sup>542</sup>

The obligations placed on employers in terms of the WRPD<sup>543</sup> will accordingly be discussed. From the outset, the WRPD is based on nine pillars, namely:

removing barriers to access and participation; protecting the rights of persons at risk of compounded marginalisation; supporting sustainable integrated community life; promoting and supporting the empowerment of children, women, youth and persons with disabilities; reducing economic vulnerability and releasing human capital; strengthening the representative voice of persons with disabilities; building a disability equitable state machinery; promoting international co-operation; and monitoring and evaluation.<sup>544</sup>

The obligation placed on employers to provide reasonable accommodation to persons with disabilities, in terms of the WRPD, is derived from the aforementioned pillars – more specifically the pillars relating to: "removing barriers to access and participation"; "promoting and supporting the empowerment of children, women, youth and persons with disabilities" and "reducing economic vulnerability and releasing human capital".<sup>545</sup>

Firstly, the removal of barriers, as stated above, can only be done by providing reasonable accommodation to persons with disabilities in the event of such need for accommodation arising. Secondly, the provision of reasonable accommodation to persons with disabilities will lead to their empowerment. This is predicated upon the fact that reasonable accommodation will enable persons with disabilities to excel in terms of fulfilling their duties within the workplace. Lastly, reasonable accommodation of persons with disabilities within the workplace will ensure that the individuals remain employable and, as such, reduce economic vulnerability.

Furthermore, the WRPD provides that the denial of reasonable accommodation in itself constitutes disability-based discrimination.<sup>546</sup> This fact fortifies the obligation on

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<sup>542</sup> White Paper On The Rights Of Persons With Disabilities the office of the President of South Africa 9 December 2015 p25.

<sup>543</sup> White Paper On The Rights Of Persons With Disabilities the office of the President of South Africa 9 December 2015.

<sup>544</sup> White Paper On The Rights Of Persons With Disabilities the office of the President of South Africa 9 December 2015 p9.

<sup>545</sup> White Paper On The Rights Of Persons With Disabilities the office of the President of South Africa 9 December 2015 p9.

<sup>546</sup> White Paper On The Rights Of Persons With Disabilities the office of the President of South Africa 9 December 2015 p18.

employers to provide reasonable accommodation where such accommodation is fitting. The obligation to eliminate discrimination has been dealt with in the previous chapter, and as such, in this part of the dissertation, only the specific section of the WRPD regarding reasonable accommodation will be dealt with.

In item 5(2) of the WRPD, it is stated that:

mainstreaming of disability occurs on two inter-related levels. One is ensuring that the disability element is inherent in a programme or project and persons with disabilities are included as one of the beneficiaries or target group. The other is ensuring that budget allocations provide for any reasonable accommodation measures that may be required to provide universal access to services.<sup>547</sup>

The most important element of the aforementioned inter-related levels is the second part of the provision from this portion from which it is clear that an obligation is placed on the employer to ensure that the necessary funding is made available to provide persons with disabilities with reasonable accommodation in the circumstances where such accommodation is required. In addition to item 5(2), item 6(1)(1) of the WRPD continues to identify six dimensions which need to be addressed with a view of removing "barriers to access and participation".<sup>548</sup> Reasonable accommodation constitutes one of these dimensions. In the light of the above, it is clear that an obligation may be placed on an employer to ensure the removal of barriers relating to access and participation by persons with disabilities.

Item 6(1)(1)(5) of the WRPD relates to universal access and design,<sup>549</sup> which is defined as:

the removal of cultural, physical, social and other barriers that prevent people with disabilities from entering, using or benefiting from the various systems of society that are available to other citizens and residents. The absence of accessibility or the denial

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<sup>547</sup> Item 5(2) of the White Paper On The Rights Of Persons With Disabilities the office of the President of South Africa 9 December 2015.

<sup>548</sup> Item 6(1)(1) of the White Paper On The Rights Of Persons With Disabilities the office of the President of South Africa 9 December 2015.

<sup>549</sup> Item 6(1)(1)(5) of the White Paper On The Rights Of Persons With Disabilities the office of the President of South Africa 9 December 2015.

of access is the loss of opportunities to take part in the community on an equal basis with others.<sup>550</sup>

In terms of the universal access approach, the responsibility is placed on society, or in terms of this dissertation, on employers, to alter the environment, products and/or systems to accommodate persons with disabilities instead of having the individual work around the barriers which might occur within the workplace environment and/or systems.<sup>551</sup> On the other hand, universal design is defined as:

the design of products, environments, programmes and services to be usable by all persons to the greatest extent possible without the need for adaptation or specialised design.<sup>552</sup>

In accordance with the WRPD and the universal design and access, public and private institutions are obliged to provide training to decision-makers, more specifically employers, on universal design access.<sup>553</sup> This includes the removal of barriers by implementing reasonable accommodation support measures.<sup>554</sup>

Furthermore, item 6(3)(1)(5) places an additional obligation on employers to provide reasonable accommodation specifically in relation to municipal emergency services, which are required to enforce reasonable accommodation support systems.<sup>555</sup> This includes having trained emergency personnel in place to ensure equitable and immediate access to these services for persons with disabilities.<sup>556</sup>

The aforementioned definition of reasonable accommodation and the obligation to provide reasonable accommodation, WRPD together with that of the CRPD has general application as it does not specifically relate to the employment realm, as such

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<sup>550</sup> White Paper On The Rights Of Persons With Disabilities the office of the President of South Africa 9 December 2015 p15.

<sup>551</sup> White Paper On The Rights Of Persons With Disabilities the office of the President of South Africa 9 December 2015 p57.

<sup>552</sup> White Paper On The Rights Of Persons With Disabilities the office of the President of South Africa 9 December 2015 p15.

<sup>553</sup> White Paper On The Rights Of Persons With Disabilities the office of the President of South Africa 9 December 2015 p59.

<sup>554</sup> White Paper On The Rights Of Persons With Disabilities the office of the President of South Africa 9 December 2015 p59.

<sup>555</sup> Item 6(3)(1)(5) of the White Paper On The Rights Of Persons With Disabilities the office of the President of South Africa 9 December 2015.

<sup>556</sup> Item 6(3)(1)(5) of the White Paper On The Rights Of Persons With Disabilities the office of the President of South Africa 9 December 2015.

reasonable accommodation as provided for in terms of the EEA, Code and Framework will remain the focus of this study, notwithstanding this, the WRPD and CRPD still assists in giving guidance on the subject matter.

### **3.3 Unjustifiable hardship**

Unjustifiable hardship is not defined by the CRPD, WRPD or the EEA. As such, it is necessary to turn to the Code for guidance in this regard.

In terms of item 6(11) of the Code an employer may dismiss an application to accommodate persons with disabilities in circumstances where such reasonable accommodation will lead to an unjustifiable hardship that will have a negative impact on an employer,<sup>557</sup> either financially or within the workplace structure.

The rationale for unjustifiable hardship as a limitation to reasonable accommodation of persons with disabilities is to maintain the balance between the interest of persons with disabilities and their rights not to be discriminated against based on their disability. On the other hand, the rationale for unjustifiable hardship is to balance the employer's interest to manage its business in an open economy, free from a lop-sided burden to reasonably accommodate persons with disabilities, without considering the unjustifiable hardship that might be suffered by such an employer.<sup>558</sup>

It is important to note that reasonable accommodation and unjustifiable hardship is recognised as playing a vital part in ensuring that the right individual for the job is secured and developed, and it should not be deemed an additional burden that has to be taken on by an employer to be compliant with legislation.<sup>559</sup>

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<sup>557</sup> Item 6(11) in Gen Not 1085 in GG 39383 of 9 November 2015.

<sup>558</sup> Hurling *Disability Discrimination And Reasonable Accommodation In The South African Workplace* 105; see also Section 36(1) of the *Constitution of the Republic of South Africa, 1996* - the concept of unjustifiable hardship and the limitation which might be imposed on reasonable accommodation, is based on the concept of "proportionality" as provided for in terms section 36 of the Constitution, which allows for the limitation of any right enshrined in the Constitution, as discussed in the previous chapter.

<sup>559</sup> Item 1(6) of the Technical Assistance Guidelines on the Employment of People with Disabilities Department of Labour 2003.

Although the CRPD does not define unjustifiable hardship as such, the CRPD does support the notion of the limitation on reasonable accommodation and implicitly provides that reasonable accommodation may be limited in terms of article 2 of the CRPD,<sup>560</sup> where it states that appropriate modification must be made "not imposing a disproportionate or undue burden".<sup>561</sup>

The Framework defines unjustifiable hardship as:

an action that requires significant or considerable difficulty or expense; this involves considering, among other things, the effectiveness and efficiency of the accommodation and the extent to which it would seriously disrupt the operation of the business or create a disadvantage.<sup>562</sup>

The Code does however not include the last portion of the aforementioned definition, which states "or create a disadvantage". As such, the definition provided by the Framework provides employers with more leeway to prove unjustifiable hardship, where the provided reasonable accommodation causes a disadvantage to the employer in some way or another. It would however still be up to the courts to determine, against the background of the facts and the employer's situation, whether the accommodation would indeed cause a disadvantage no employer could be expected to suffer.

Unfortunately, there are no clear criteria for determining "unjustifiable hardship" as stated in item 6(13) of the Code.<sup>563</sup> The Code simply provides that what constitutes an unjustifiable hardship for one employer does not necessarily constitute an unjustifiable hardship for another employer.<sup>564</sup> With this the Code clearly acknowledges that there cannot be a one-size-fits-all approach to the concept of unjustifiable hardship, and it would require a variety of considerations to establish whether an employer has

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<sup>560</sup> Article 2 of the *UN Convention on the Rights of Persons with Disabilities*, 2006.

<sup>561</sup> Article 2 of the *UN Convention on the Rights of Persons with Disabilities*, 2006.

<sup>562</sup> The National Strategic Framework on Reasonable Accommodation for Persons with Disabilities 15; see also Article 2 of the *UN Convention on the Rights of Persons with Disabilities*, 2006.

<sup>563</sup> Item 6(13) in Gen Not 1085 in GG 39383 of 9 November 2015; see Labour Department date unknown <http://www.labour.gov.za/DOL/downloads/documents/useful-documents/employment-equity/tagdisability2017.pdf> which is more clear in this regard.

<sup>564</sup> Item 6(13) in Gen Not 1085 in GG 39383 of 9 November 2015.

satisfied its obligation to reasonably accommodate persons with disabilities, as there is no specific formula for determining unjustifiable hardship.<sup>565</sup>

Notwithstanding the above, establishing whether reasonable accommodation constitutes an unjustifiable hardship for a particular employer in the specific circumstances requires an objective analysis.<sup>566</sup> Although it is held that there is not a one-size-fits-all approach when dealing with reasonable accommodation, the test for unjustifiable hardship should however not be done subjectively. Consequently, an employer should consider various factors, which include not only establishing whether the reasonable accommodation will create difficulty or expense for the employer and which difficulty or expenses might cause serious disruption to the employer's business operations, but also:<sup>567</sup>

(1) the effectiveness of the accommodation; (2) the impact of providing or failure to provide accommodation to the employee, (3) the systemic patterns of inequality in society, as well as (4) the objectives of the Act and the Constitution.<sup>568</sup>

The Technical Assistance Guidelines on the Employment of People with Disabilities Department of Labour 2003 (hereinafter TAG),<sup>569</sup> states that:

An accommodation that imposes an unjustifiable hardship for one employer at a specific time may not be so for another or for the same employer at a different time.<sup>570</sup>

The objectivity required for the test for unjustifiable hardship is predicated upon the fact that "disabilities or impairments, jobs, equipment and technology and work design" are ever changing.<sup>571</sup> Therefore, an unjustifiable hardship identified in previous

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<sup>565</sup> Standard Bank of SA v CCMA & others [2008] JOL 21221 (LC).

<sup>566</sup> The National Strategic Framework on Reasonable Accommodation for Persons with Disabilities p18.

<sup>567</sup> The National Strategic Framework on Reasonable Accommodation for Persons with Disabilities p18.

<sup>568</sup> The National Strategic Framework on Reasonable Accommodation for Persons with Disabilities p18.

<sup>569</sup> Technical Assistance Guidelines on the Employment of People with Disabilities Department of Labour 2003.

<sup>570</sup> Item 6(13) of the Technical Assistance Guidelines on the Employment of People with Disabilities Department of Labour 2003.

<sup>571</sup> Item 6(13) of the Technical Assistance Guidelines on the Employment of People with Disabilities Department of Labour 2003.

circumstances should not be used as a benchmark to influence current or future reasonable accommodation decisions.<sup>572</sup>

Despite the abovementioned, unjustifiable hardship cannot always be determined by the use of an objective criterion, as there are instances which include, but are not limited to, the examples from the Code, which will accordingly be discussed, where objective criteria will not find application in ascertaining unjustifiable hardship.<sup>573</sup>

- In circumstances where a corporate refuses and/or fails to promote a switchboard operator based on the fact that the switchboard operator requires a voice-output software package as a result of the switchboard operator's visual impairment, which software will enable the switchboard operator to access client information electronically.<sup>574</sup>
- In circumstances where a skilled information systems specialist is refused employment by a corporate, based on the fact that the information systems specialist is hindered from doing filing as a result of a physical impairment.<sup>575</sup>
- In circumstances where a receptionist is refused employment by a corporate due to the receptionist's coordination impairment.<sup>576</sup>
- Where a client service consultant is refused employment, as a result of cerebral palsy syndrome which in the employer's view might lead to a high absenteeism as a result of the aforementioned impairment.
- Where a receptionist is refused employment by a national garden because of a physical disability and the premises of the national garden allegedly not being

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<sup>572</sup> Item 6(13) of the Technical Assistance Guidelines on the Employment of People with Disabilities Department of Labour 2003.

<sup>573</sup> Item 6(15) of the Technical Assistance Guidelines on the Employment of People with Disabilities Department of Labour 2003.

<sup>574</sup> Item 6(15) of the Technical Assistance Guidelines on the Employment of People with Disabilities Department of Labour 2003.

<sup>575</sup> Item 6(15) of the Technical Assistance Guidelines on the Employment of People with Disabilities Department of Labour 2003.

<sup>576</sup> Item 6(15) of the Technical Assistance Guidelines on the Employment of People with Disabilities Department of Labour 2003.

closely situated to major transport possibilities, which might cause punctuality issues for the receptionist.<sup>577</sup>

Hurling<sup>578</sup> is of the view that reference to the term "undue" or "unjustifiable" suggests that some extent of hardship is acceptable and should be tolerated by an employer,<sup>579</sup> and only "unjustifiable hardship" will fulfil the test to show and prove that the employer is and/or will suffer actual unjustifiable hardship by accommodating persons with disabilities.<sup>580</sup> Additionally, the degree to which the employer must go to reasonably accommodate persons with disability, is limited by the word "reasonable" and "short of undue hardship", the aforementioned of which are not independent criteria, but rather alternating concepts.<sup>581</sup>

According to the TAG the costs of reasonable accommodation in itself are not sufficient for an employer to decline a request for reasonable accommodation by persons with disabilities. The reason for this is that the costs of reasonable accommodation is one of many factors which are to be considered by an employer when considering a request for reasonable accommodation, as mentioned above.<sup>582</sup> Furthermore, when an employer considers the financial implications of providing reasonably accommodating persons with disabilities, he or she should bear in mind that this consideration consists of both a "relative and an absolute dimension".<sup>583</sup>

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<sup>577</sup> Item 6(18) of the Technical Assistance Guidelines on the Employment of People with Disabilities Department of Labour 2003.

<sup>578</sup> Hurling *Disability Discrimination And Reasonable Accommodation In The South African Workplace* 2008.

<sup>579</sup> Hurling *Disability Discrimination And Reasonable Accommodation In The South African Workplace* 102.

<sup>580</sup> Hurling *Disability Discrimination And Reasonable Accommodation In The South African Workplace* 102.

<sup>581</sup> Hurling *Disability Discrimination And Reasonable Accommodation In The South African Workplace* 102.

<sup>582</sup> Item 6(18) of the Technical Assistance Guidelines on the Employment of People with Disabilities Department of Labour 2003.

<sup>583</sup> Du Plessis *Access To Work For Disabled Persons In South Africa: The Intersections Of Social Understandings Of Disability, Substantive Equality And Access To Social Security* 168.

The relative dimension relates to balancing the effectiveness of the reasonable accommodation and the effect of providing, or the employer's failure and/or refusal to provide the required reasonable accommodation to persons with disabilities.<sup>584</sup>

On the other hand, the absolute dimension relates to what a particular employer can afford in terms of reasonably accommodating persons with disabilities.<sup>585</sup> In relation to this dimension, the employer's circumstances are the focal point,<sup>586</sup> and the following factors should be taken into consideration to determine whether the employer might suffer unjustifiable hardship as a result of the required reasonable accommodation, namely:

- (i) the financial and human resources at the disposal of the employer; (ii) whether the employer is a public-sector or private-sector organisation; (iii) whether the employer is a large corporation or a small, medium or micro enterprise; and (iv) the nature of the employer's business.<sup>587</sup>

According to the above factors it is clear that unjustifiable hardship should not be considered solely at the hand of the financial implications that might arise for an employer who is required to provide reasonable accommodation.<sup>588</sup> The fact that practical considerations of reasonable accommodation might more often than not relate to the financial implication for an employer is not the determining factor in establishing the existence of unjustifiable hardship, as it should be noted that the TAG states that unjustifiable hardship is "an action that requires significant or considerable difficulty or expense".<sup>589</sup> It is inferred that the aforementioned reference to "difficulty or expense" indicates that difficulties need not always relate to financial implications for the employer,<sup>590</sup> as unjustifiable hardship may be suffered by an employer where

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<sup>584</sup> Du Plessis *Access To Work For Disabled Persons In South Africa: The Intersections Of Social Understandings Of Disability, Substantive Equality And Access To Social Security* 168.

<sup>585</sup> Du Plessis *Access To Work For Disabled Persons In South Africa: The Intersections Of Social Understandings Of Disability, Substantive Equality And Access To Social Security* 168.

<sup>586</sup> Du Plessis *Access To Work For Disabled Persons In South Africa: The Intersections Of Social Understandings Of Disability, Substantive Equality And Access To Social Security* 168.

<sup>587</sup> Du Plessis *Access To Work For Disabled Persons In South Africa: The Intersections Of Social Understandings Of Disability, Substantive Equality And Access To Social Security* 168.

<sup>588</sup> Du Plessis *Access To Work For Disabled Persons In South Africa: The Intersections Of Social Understandings Of Disability, Substantive Equality And Access To Social Security* 169.

<sup>589</sup> Item 6(12) of the Technical Assistance Guidelines on the Employment of People with Disabilities Department of Labour 2003.

<sup>590</sup> Du Plessis *Access To Work For Disabled Persons In South Africa: The Intersections Of Social Understandings Of Disability, Substantive Equality And Access To Social Security* 169.

the reasonable accommodation causes "adverse impacts on the employer's business".<sup>591</sup>

According to the Framework, unjustifiable hardship is a more accurate standard than undue hardship, for which a more rigorous standard is necessitated by South Africa's history of offering little to no employment and/or accommodation to persons with disabilities.<sup>592</sup> As such, employers are required to make more effort to eliminate discrimination, more specifically disability-based discrimination, and to promote affirmative action.<sup>593</sup> A stricter test must subsequently be met by an employer to prove that it has done enough to reasonably accommodate persons with disabilities, which accommodation is short of causing unjustifiable hardship.<sup>594</sup>

According to Du Plessis,<sup>595</sup> as a result of the context-specific nature of the test to determine unjustifiable hardship, the primary factor in determining how narrowly or generously employers' duties are interpreted,<sup>596</sup> is measured by the particular circumstances, rather than what the standard of testing is called.<sup>597</sup>

In terms of unjustifiable hardship in its general application within society, according to the Framework, although an organisation may make a case for unjustifiable hardship, an organisation can however not rebut the need to provide persons with disabilities with reasonable accommodation merely based on comparisons between service users with disabilities to other non-disabled service users, or the cost of such reasonable accommodation.<sup>598</sup> In this regard, the organisation has to consider the size of the organisation.<sup>599</sup> The aforementioned will also be applicable to the South African

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<sup>591</sup> Du Plessis *Access To Work For Disabled Persons In South Africa: The Intersections Of Social Understandings Of Disability, Substantive Equality And Access To Social Security* 169.

<sup>592</sup> The National Strategic Framework on Reasonable Accommodation for Persons with Disabilities p18.

<sup>593</sup> The National Strategic Framework on Reasonable Accommodation for Persons with Disabilities p18.

<sup>594</sup> Item 6(11) of the Technical Assistance Guidelines on the Employment of People with Disabilities Department of Labour 2003.

<sup>595</sup> Du Plessis *Access To Work For Disabled Persons In South Africa: The Intersections Of Social Understandings Of Disability, Substantive Equality And Access To Social Security* 169.

<sup>596</sup> Du Plessis *Access To Work For Disabled Persons In South Africa: The Intersections Of Social Understandings Of Disability, Substantive Equality And Access To Social Security* 168.

<sup>597</sup> Du Plessis *Access To Work For Disabled Persons In South Africa: The Intersections Of Social Understandings Of Disability, Substantive Equality And Access To Social Security* 168.

<sup>598</sup> The National Strategic Framework on Reasonable Accommodation for Persons with Disabilities p25.

<sup>599</sup> The National Strategic Framework on Reasonable Accommodation for Persons with Disabilities p25.

workplaces and as such employers may not invalidate the requirement for reasonable accommodation by comparing employees with disabilities against non-disabled employees.

### ***3.4 Conclusion***

From the aforementioned discussion it becomes clear what the nature and extent of reasonable accommodation is. It is furthermore clear as to how an obligation is placed on employers by national legislation as well as international instruments to provide reasonable accommodation to persons with disabilities.

It is furthermore apparent from the duty placed on employers to provide reasonable accommodation that the rationale behind reasonable accommodation is to prevent disability-based discrimination. Moreover, it is to promote and advance the rights of persons with disabilities as a previously disadvantaged group.

Despite the duty placed on employers to provide reasonable accommodation, such duty may be limited in circumstances where the reasonable accommodation may lead to unjustifiable hardship. However, unjustifiable hardship is not defined by the EEA or the Code, and there are no clear criteria in terms of South African legislation which should be followed in determining unjustifiable hardship, which has accordingly prompted the investigation into establishing a standardised test which might be implemented in South African legislation to determine unjustifiable hardship. This will be done in consideration of best practices from foreign jurisdictions as will be discussed in the following chapter.

## **CHAPTER 4 BEST PRACTICES IN TESTING FOR THE THRESHOLD OF REASONABLE ACCOMMODATION: UNJUSTIFIABLE HARDHSIP**

### ***4.1 Introduction***

From the preceding examination of the interpretation and implementation of reasonable accommodation in South Africa, it has become apparent that no clear criteria are applied when testing the threshold of reasonable accommodation to establish when unjustifiable hardship has been reached by an employer in the South African workplace.

Hence this chapter of the study will embark on an analysis of the best practices established and applied in foreign jurisdictions in relation to reasonable accommodation – moreover the testing of the threshold for reasonable accommodation to determine unjustifiable hardship.

The purpose of this analysis is to endeavour to create clear criteria for testing the threshold of reasonable accommodation, which can accordingly be incorporated and implemented within the South African labour legislation. The two foreign jurisdictions which will be considered for purposes of this analysis are those of Canada and the United States of America (USA) for the reasons as set out in Chapter 1 of this study.<sup>600</sup>

#### ***4.1.1 Canada***

The first jurisdiction which will be considered is that of Canada. As stated in chapter 1, Canada is known as one of the innovators of reasonable accommodation and unjustifiable hardship.<sup>601</sup> Canada had conservative discrimination case law predicated upon the fact that Canada did not recognise theories such as adverse effect discrimination.<sup>602</sup> Notwithstanding this, Canada did subsequently adopt the aforementioned theory together with the concept of reasonable accommodation from

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<sup>600</sup> See par 1.3 above.

<sup>601</sup> Sur Journal date unknown <https://sur.conectas.org/en/reasonable-accommodation/>.

<sup>602</sup> Sur Journal date unknown <https://sur.conectas.org/en/reasonable-accommodation/>.

the USA.<sup>603</sup> Since then, the notion of reasonable accommodation thrived in Canada's legal system, even more than in that of the USA.<sup>604</sup> This accordingly led to a transformation of the Canadian judicial judgements, and as such, Canada has become a reference point for testing the threshold of reasonable accommodation to determine unjustifiable hardship.<sup>605</sup> This study will thus examine how reasonable accommodation and unjustifiable hardship are applied in Canada.

In Canada, an obligation is placed on employers to provide reasonable accommodation to persons with disabilities, which obligation is provided for in terms of federal and provincial human rights statutes and of the judicial interpretation of non-discrimination clauses as set out in the relevant statutes.<sup>606</sup>

As a starting point, the Canadian Charter of Rights and Freedoms (Canadian Charter),<sup>607</sup> forms the basis for reasonable accommodation in relation to persons with disabilities.<sup>608</sup> Prior to the enactment of the Canadian Charter on 17 April 1982,<sup>609</sup> reasonable accommodation was predominantly implemented in respect of religious minority groups.<sup>610</sup> Section 15(1) of the Canadian Charter states that:

Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.<sup>611</sup>

The aforementioned section of the Canadian Charter prohibits disability-based discrimination amongst other prohibited grounds of discrimination. Notwithstanding the fact that reasonable accommodation is not explicitly included in section 15(1) of the Canadian Charter, reasonable accommodation has developed into a constitutional

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<sup>603</sup> Sur Journal date unknown <https://sur.conectas.org/en/reasonable-accommodation/>.

<sup>604</sup> Sur Journal date unknown <https://sur.conectas.org/en/reasonable-accommodation/>.

<sup>605</sup> Sur Journal date unknown <https://sur.conectas.org/en/reasonable-accommodation/>.

<sup>606</sup> United Nations date unknown Ad Hoc Committee on a Comprehensive and Integral International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities date unknown <https://www.un.org/esa/socdev/enable/rights/ahc7bkgrndra.htm>.

<sup>607</sup> *The Canadian Charter of Rights and Freedoms*.

<sup>608</sup> Mégret and Msipa 2014 *SAJHR* 255.

<sup>609</sup> Canadian Museum for Human Rights date unknown <https://humanrights.ca/story/canadian-charter-rights-and-freedoms>.

<sup>610</sup> Mégret and Msipa 2014 *SAJHR* 255.

<sup>611</sup> Section 15(1) of the the *Canadian Charter of Rights and Freedoms*.

principle for eradicating disability-based discrimination with a view to achieve substantive equality.<sup>612</sup> It has been held that the rationale for reasonable accommodation and the development thereof by Canadian judges through case law is predicated upon the fact that for equality to be achieved, some "accommodation of individual differences" is required.<sup>613</sup> As such, individuals in different circumstances may require some form of accommodation.<sup>614</sup> This has been confirmed in the case of *Eaton v Brant County Board of Education*,<sup>615</sup> in terms of which the court established the clear link between reasonable accommodation and equality.<sup>616</sup> In consideration of the aforementioned it becomes clear that the achievement of equality is the basis for reasonable accommodation.

Notwithstanding the duty to provide reasonable accommodation, such duty is limited in instances where the reasonable accommodation will constitute unjustifiable hardship.<sup>617</sup> This was confirmed in the case of *British Columbia (Public Service Employee Relations Comm) v BCGEU*<sup>618</sup> in which the court held that "accommodation will be required unless it is impossible to do so without undue hardship".<sup>619</sup> In Canada, unjustifiable hardship is defined as "excessive and substantial disruption or interference with the employer's operation".<sup>620</sup>

Various factors have been established by the Canadian court, which should be taken into consideration when determining unjustifiable hardship.<sup>621</sup> These factors include: the "financial costs of accommodation", "disruption of the collective agreement", "problems of morale of other employees", "interchange ability of work force and facilities", "size of the employer's operation" and any safety concerns.<sup>622</sup> Nevertheless, the Policy and Guidelines on Disability and the Duty to Accommodate (Policy),<sup>623</sup>

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<sup>612</sup> Ngwena 2005 *Stell LR* 544.

<sup>613</sup> Ngwena 2005 *Stell LR* 544.

<sup>614</sup> Ngwena 2005 *Stell LR* 544.

<sup>615</sup> *Eaton v Brant County Board of Education* [1997] 1 S.C.R. 241.

<sup>616</sup> Ngwena 2005 *Stell LR* 545.

<sup>617</sup> *British Columbia (Public Service Employee Relations Comm) v BCGEU* [1999] 3 SCR 3.

<sup>618</sup> *British Columbia (Public Service Employee Relations Comm) v BCGEU* [1999] 3 SCR 3.

<sup>619</sup> *Vickers Religious Freedom, Religious Discrimination and the Workplace* 14.

<sup>620</sup> Public Service Alliance of Canada date unknown <http://psacunion.ca/book/1151>.

<sup>621</sup> *Alberta Dairy Pool v Alberta (Human Rights Commission)*, [1990] 2 S.C.R. 489.

<sup>622</sup> *Alberta Dairy Pool v Alberta (Human Rights Commission)*, [1990] 2 S.C.R. 489.

<sup>623</sup> Policy and Guidelines on Disability and the Duty to Accommodate.

provide guidance on establishing unjustifiable hardship. The Policy furthermore provides guidance in relation to the obligation to provide reasonable accommodation. This chapter will however focus on the criteria laid down by the Canadian legislation and/or practices for determining unjustifiable hardship.

Item 5 of the Policy provides that assessing whether or not an accommodation would lead to unjustifiable hardship for an employer, the following three factors relating to the reasonable accommodation of persons with disabilities should be considered, namely:<sup>624</sup> "cost; outside sources of funding, if any; and health and safety requirements, if any".<sup>625</sup> The aforementioned are the only three factors provided for in terms of the Policy that should be considered when determining unjustifiable hardship, as no other factors can be taken into consideration thoroughly when determining unjustifiable hardship.<sup>626</sup>

In addition to the aforementioned, several specific factors are excluded from considerations for unjustifiable hardship, which will subsequently be discussed.

Firstly, business inconvenience may not be taken into consideration when determining unjustifiable hardship.<sup>627</sup> This is predicated upon the fact that business inconvenience is not a justification for avoiding the need to accommodate persons with disabilities<sup>628</sup>. The legislature rejected business inconvenience as a determining factor for unjustifiable hardship when it amended the Policy in 1988, based on the fact that in terms of the cost test (as will be discussed below), expenditures that can be quantified and linked to the proposed accommodation can be considered in determining whether an accommodation constitutes an unjustifiable hardship. The aforementioned is captured in the Policy which provides that these costs must be demonstrably tied to

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<sup>624</sup> Ontario Human Rights Commission date unknown [https://www.ohrc.on.ca/en/policy-ableism-and-discrimination-based-disability/9-undue-hardship#\\_edn243](https://www.ohrc.on.ca/en/policy-ableism-and-discrimination-based-disability/9-undue-hardship#_edn243).

<sup>625</sup> Section 5 of the Policy and Guidelines on Disability and the Duty to Accommodate.

<sup>626</sup> Ontario Human Rights Commission date unknown [https://www.ohrc.on.ca/en/policy-ableism-and-discrimination-based-disability/9-undue-hardship#\\_edn243](https://www.ohrc.on.ca/en/policy-ableism-and-discrimination-based-disability/9-undue-hardship#_edn243).

<sup>627</sup> Section 5(1)(1) of the Policy and Guidelines on Disability and the Duty to Accommodate 22.

<sup>628</sup> Ontario Human Rights Commission date unknown [https://www.ohrc.on.ca/en/policy-ableism-and-discrimination-based-disability/9-undue-hardship#\\_edn243](https://www.ohrc.on.ca/en/policy-ableism-and-discrimination-based-disability/9-undue-hardship#_edn243).

the diminished productivity, efficiency, or effectiveness.<sup>629</sup> Notwithstanding the aforementioned, in the event where the employer can demonstrate "costs attributable to decreased productivity, efficiency or effectiveness", these factors can be taken into account when determining unjustifiable hardship in accordance with the cost test as set out in item 5(1) of the Policy,<sup>630</sup> subject to such costs specifically related to the required reasonable accommodation.<sup>631</sup>

Secondly, employee morale is also not a determining factor for unjustifiable hardship.<sup>632</sup> Co-workers who are either uninformed about the reason for the accommodation, or who think the employee is receiving an unfair benefit, can harbour unfavourable feelings towards the individual receiving the accommodation.<sup>633</sup> As such the individuals in charge of making accommodations should ensure that staff members are helpful and are fostering a healthy work environment for all employees,<sup>634</sup> as discriminatory attitudes against persons with disabilities by co-workers should not be allowed to grow into hostilities that harm the environment for those with disabilities.<sup>635</sup> Notwithstanding the fact that employee morale is not a determining factor for unjustifiable hardship, the court held in the case of *McDonald v Mid-Huron Roofing*,<sup>636</sup> that if an employee wants to use workplace morale as evidence of unjustifiable hardship, it should be able to provide evidence of its own attempts to disprove untrue rumours that an accommodation is being requested excessively.<sup>637</sup> It was further confirmed in the case of *Backs v Ottawa (City)*,<sup>638</sup> where the employer relied on employee morale as the determining factor for unjustifiable hardship, that it is important to note that reasonable accommodation might cause management to run

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<sup>629</sup> Ontario Human Rights Commission date unknown [https://www.ohrc.on.ca/en/policy-ableism-and-discrimination-based-disability/9-undue-hardship#\\_edn243](https://www.ohrc.on.ca/en/policy-ableism-and-discrimination-based-disability/9-undue-hardship#_edn243).

<sup>630</sup> See Section 5 of the Policy And Guidelines On Disability And The Duty To Accommodate.

<sup>631</sup> Section 5(1)(1) of the Policy And Guidelines On Disability And The Duty To Accommodate.

<sup>632</sup> Section 5(1)(2) of the Policy and Guidelines on Disability and the Duty to Accommodate 22.

<sup>633</sup> Ontario Human Rights Commission date unknown [https://www.ohrc.on.ca/en/policy-ableism-and-discrimination-based-disability/9-undue-hardship#\\_edn243](https://www.ohrc.on.ca/en/policy-ableism-and-discrimination-based-disability/9-undue-hardship#_edn243).

<sup>634</sup> Ontario Human Rights Commission date unknown [https://www.ohrc.on.ca/en/policy-ableism-and-discrimination-based-disability/9-undue-hardship#\\_edn243](https://www.ohrc.on.ca/en/policy-ableism-and-discrimination-based-disability/9-undue-hardship#_edn243).

<sup>635</sup> Ontario Human Rights Commission date unknown [https://www.ohrc.on.ca/en/policy-ableism-and-discrimination-based-disability/9-undue-hardship#\\_edn243](https://www.ohrc.on.ca/en/policy-ableism-and-discrimination-based-disability/9-undue-hardship#_edn243).

<sup>636</sup> *McDonald v Mid-Huron Roofing*, 2009 HRTO 1306.

<sup>637</sup> *McDonald v Mid-Huron Roofing*, 2009 HRTO 1306 par 43.

<sup>638</sup> *Backs v Ottawa (City)*, 2011 HRTO 959.

into issues relating to employee morale. Nevertheless, such problems are typically not taken into account when conducting an examination of unjustifiable hardship.<sup>639</sup>

Furthermore, customer preference is also excluded as a determining factor for unjustifiable hardship.<sup>640</sup> In the case of *Qureshi v G4S Security Services*,<sup>641</sup> the employer rejected the applicant after learning that the employee needed an hour off work every Friday to pray. The employer argued that condominium customers do not like different employees to work on their premises, so they strive to use the same employees and work as often as possible on the same premises. The court however held that customer preference was not an appropriate factor in assessing unjustifiable hardship.<sup>642</sup>

Lastly, collective agreements or contracts are also precluded from one of the determining factors for establishing unjustifiable hardship.<sup>643</sup> This is predicated upon the fact that the consideration of collective agreements or other contracts will allow parties to contract out of the provisions of the Policy which is contrary to the purpose of the Policy.<sup>644</sup> In the case of *Ontario Human Rights Commission v Etobicoke*,<sup>645</sup> the Supreme Court held that parties do not have the power to contractually deviate from the provisions of the Policy as a statute, and that contracts with such effects are invalid as they are against public policy.<sup>646</sup> In addition, it was held that agreements must give way to the requirements of human rights law.<sup>647</sup> As such the terms of any agreement (whether collective or otherwise) cannot justify discrimination against persons with disabilities.<sup>648</sup>

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<sup>639</sup> *Backs v Ottawa (City)*, 2011 HRTO 959 par 58.

<sup>640</sup> Section 5(1)(3) of the Policy and Guidelines on Disability and the Duty to Accommodate 22.

<sup>641</sup> *Qureshi v G4S Security Services* 2009 HRTO 409.

<sup>642</sup> Section 5(1)(4) of the Policy And Guidelines On Disability And The Duty To Accommodate.; see also *Qureshi v G4S Security Services* 2009 HRTO 409 par 35.

<sup>643</sup> *Chatham-Kent Children's Services v Ontario Public Service Employees' Union, Local 148 (Bowen Grievance)*, [2014] O.L.A.A. No. 424; see also Section 5 of the Policy and Guidelines on Disability and the Duty to Accommodate 22.

<sup>644</sup> *Ontario Human Rights Commission v Etobicoke* 1982 15 (SCC), [1982] 1 SCR 202.

<sup>645</sup> *Ontario Human Rights Commission v Etobicoke* 1982 15 (SCC), [1982] 1 SCR 202.

<sup>646</sup> *Ontario Human Rights Commission v Etobicoke* 1982 15 (SCC), [1982] 1 SCR 202 par 213.

<sup>647</sup> Section 5(1)(4) of the Policy And Guidelines On Disability And The Duty To Accommodate.

<sup>648</sup> Section 5(1)(4) of the Policy And Guidelines On Disability And The Duty To Accommodate.

As is the case in terms of South African legislation, the employer in terms of Canadian legislation, bears the onus of proving unjustifiable hardship and not the individual requiring such accommodation.<sup>649</sup> The evidence which should be produced by an employer in proving unjustifiable hardship should be "objective, real, direct and, in the case of cost, quantifiable".<sup>650</sup> The employer should furthermore provide "facts, figures and scientific data or opinion" in supporting an allegation of unjustifiable hardship,<sup>651</sup> as a mere claim of unjustifiable hardship will not be sufficient for an employer to prove unjustifiable hardship.<sup>652</sup> The objective evidence as referred to above includes, but is not limited to, the following:<sup>653</sup>

- "financial statements and budgets";
- "scientific data, information and data resulting from empirical studies";
- "expert opinion; detailed information about the activity and the requested accommodation";
- "information about the conditions surrounding the activity and their effects on the person or group with a disability".

The three factors which may be considered in establishing unjustifiable hardship will accordingly be discussed.

Firstly, in terms of costs, it has been noted that it is far too easy for employers to use increased costs as a reason for refusing equal treatment to persons with disabilities, more specifically to provide disabled persons with reasonable accommodation.<sup>654</sup> The Supreme Court of Canada however held in the case of *Miele v Famous Players Inc*<sup>655</sup> that "one must be wary of putting too low a value on accommodating the disabled".<sup>656</sup>

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<sup>649</sup> *Grismer v British Columbia (Attorney General)* (1994), 25 CHRR par 42; see also section 5(2) of the Policy And Guidelines On Disability And The Duty To Accommodate.

<sup>650</sup> Section 5(2) of the Policy And Guidelines On Disability And The Duty To Accommodate.

<sup>651</sup> Section 5(2) of the Policy And Guidelines On Disability And The Duty To Accommodate.

<sup>652</sup> *Grismer v British Columbia (Attorney General)* (1994), 25 CHRR par 41.

<sup>653</sup> Section 5(2) of the Policy And Guidelines On Disability And The Duty To Accommodate.

<sup>654</sup> *Miele v Famous Players Inc.* (2000), 37 C.H.R.R.

<sup>655</sup> *Miele v Famous Players Inc.* (2000), 37 C.H.R.R.

<sup>656</sup> *Miele v Famous Players Inc.* (2000), 37 C.H.R.R. D/1 (B.C.H.R.T.); see also Item 5.3.1 of the Policy And Guidelines On Disability And The Duty To Accommodate.

As such, costs are a high standard of proving unjustifiable hardship.<sup>657</sup> Nevertheless, costs will be sufficient defence for unjustifiable hardship where the costs are:<sup>658</sup>

- "quantifiable";
- "shown to be related to the accommodation"; and
- "so substantial that they would alter the essential nature of the enterprise, or so significant that they would substantially affect its viability".

This test is applicable regardless of whether the accommodation might benefit an individual or the collective within the workplace.<sup>659</sup> The financial costs of reasonable accommodation may consist of the following:

capital costs, such as the installation of a ramp, the purchase of screen magnification or software; operating costs such as sign language interpreters, personal attendants or additional staff time; costs incurred as a result of restructuring that are necessitated by the accommodation; any other quantifiable costs incurred directly as a result of the accommodation.<sup>660</sup>

The employment of persons with disabilities within a particular job may be a cause for concern for employers, as such employment might lead to an increase in insurance premiums, and where an employer can show having endeavoured to obtain alternative forms of coverage, the insurance costs may be considered in proving unjustifiable hardship.<sup>661</sup>

The following factors, as discussed below, need to be considered to establish whether the provision of reasonable accommodation will alter the essential nature of the employer's organisation, which might contribute to a claim for unjustifiable hardship. Firstly, it needs to be determined whether the employer would be able to recover the costs spent in providing reasonable accommodation to persons with disabilities.<sup>662</sup>

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<sup>657</sup> Section 5(3)(1) of the Policy And Guidelines On Disability And The Duty To Accommodate.

<sup>658</sup> Section 5(3)(1) of the Policy And Guidelines On Disability And The Duty To Accommodate.

<sup>659</sup> Section 5(3)(1) of the Policy And Guidelines On Disability And The Duty To Accommodate.

<sup>660</sup> Section 5(3)(1) of the Policy And Guidelines On Disability And The Duty To Accommodate.

<sup>661</sup> Section 25(1) of the Policy And Guidelines On Disability And The Duty To Accommodate; see also Section 5(3)(1) of the Policy And Guidelines On Disability And The Duty To Accommodate.

<sup>662</sup> Section 4(4)(1) of the Policy And Guidelines On Disability And The Duty To Accommodate; see also Section 5(3)(1) of the Policy And Guidelines On Disability And The Duty To Accommodate.

Secondly, it should be considered whether the employer has access to "grants, subsidies or loans from the federal, provincial or municipal government" or other sources which might provide the employer with funding for the reasonable accommodation of persons with disabilities.<sup>663</sup> Thirdly, whether the employer will be able to distribute the costs of providing reasonable accommodation to persons with disabilities throughout its operation.<sup>664</sup> Fourthly, whether the employer would be able to repay or depreciate the costs linked to the reasonable accommodation in accordance with accepted accounting principles.<sup>665</sup> Fifthly, it should be considered whether the employer is able to deduct from the reasonable accommodation costs, savings that might be available in the following circumstances:

tax deductions and other government benefits (see section 4.4.4); an improvement in productivity, efficiency or effectiveness (see section 4.4.5); any increase in the resale value of property, where it is reasonably foreseeable that the property might be sold; any increase in clientele, potential labour pool, or tenants.<sup>666</sup>

Lastly, it should consider whether the workplace safety and Insurance board's second injury and enhancement fund is available to the employer.<sup>667</sup>

According to the Policy, larger organisations may be more likely to be suitably equipped to provide reasonable accommodation to persons with disabilities, as the costs for such reasonable accommodation might be easily absorbed by such organisation, in the event where such organisation employs a large number of persons with disabilities and has already made provision for reasonable accommodation.<sup>668</sup>

In terms of item 5(3)(1)(a) of the Policy, controversial issues surround access to heritage buildings and provide reasonable accommodation to persons with disabilities, as persons with disabilities might generally be excluded, as heritage buildings gain more protection, which makes it impossible to provide the necessary reasonable

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<sup>663</sup> Section 5(3)(1) of the Policy And Guidelines On Disability And The Duty To Accommodate.

<sup>664</sup> Section 4(4)(2) of the Policy And Guidelines On Disability And The Duty To Accommodate; see also Section 5(3)(1) of the Policy And Guidelines On Disability And The Duty To Accommodate.

<sup>665</sup> Section 5(3)(1) of the Policy And Guidelines On Disability And The Duty To Accommodate.

<sup>666</sup> Section 5(3)(1) of the Policy And Guidelines On Disability And The Duty To Accommodate.

<sup>667</sup> Section 4(4)(6) of the Policy And Guidelines On Disability And The Duty To Accommodate; see also Section 5(3)(1) of the Policy And Guidelines On Disability And The Duty To Accommodate.

<sup>668</sup> Section 5(3)(1) of the Policy And Guidelines On Disability And The Duty To Accommodate.

accommodation for persons with disabilities in certain circumstances.<sup>669</sup> Consequently, the costs of providing the required reasonable accommodation might increase as a result of the necessity to preserve the specific heritage building. Notwithstanding this, "aesthetic features, in and of themselves, that are not historic design features" are excluded from the aforementioned precondition for reasonable accommodation in cases of heritage buildings.<sup>670</sup> Unjustifiable hardship may however be proven in consideration of whether the alteration is made to the essential nature of the heritage building or where such alterations substantially affect the preservation of the "defining features of a heritage property".<sup>671</sup>

The second consideration in terms of the Policy is an outside source of funding,<sup>672</sup> which might assist an employer in reducing the costs of providing reasonable accommodation to persons with disabilities.<sup>673</sup> Employers are required to utilise outside sources of funding (which will be discussed below) prior to making allegations of unjustifiable undue hardship. The individual requiring the accommodation is also expected to avail themselves of any outside funding which might be obtained by an employer to provide reasonable accommodation.<sup>674</sup>

The first source of outside funding is funds provided through government programs to the individual and which programmes are linked to the specified individual's disability. Funding obtained through the aforementioned programmes may be utilised to provide reasonable accommodation to persons with disabilities in general or "at work, in their apartment or while accessing a service".<sup>675</sup>

The second source of outside funding consists of funds that would assist employers in contributing to the costs related to providing reasonable accommodation.<sup>676</sup> This might be in the case where more than one organization has an "overlapping or

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<sup>669</sup> Section 5(3)(1)(a) of the Policy And Guidelines On Disability And The Duty To Accommodate.

<sup>670</sup> Section 5(3)(1)(a) of the Policy And Guidelines On Disability And The Duty To Accommodate.

<sup>671</sup> Section 5(3)(1)(a) of the Policy And Guidelines On Disability And The Duty To Accommodate.

<sup>672</sup> Section 5(3)(2) of the Policy And Guidelines On Disability And The Duty To Accommodate.

<sup>673</sup> Section 5(3)(2) of the Policy And Guidelines On Disability And The Duty To Accommodate.

<sup>674</sup> Ontario Human Rights Commission date unknown [https://www.ohrc.on.ca/en/policy-ableism-and-discrimination-based-disability/9-undue-hardship#\\_edn243](https://www.ohrc.on.ca/en/policy-ableism-and-discrimination-based-disability/9-undue-hardship#_edn243).

<sup>675</sup> Section 5(3)(2) of the Policy And Guidelines On Disability And The Duty To Accommodate.

<sup>676</sup> Section 5(3)(2) of the Policy And Guidelines On Disability And The Duty To Accommodate.

interconnected sphere" to provide reasonable accommodation to persons with disabilities.<sup>677</sup> The example as provided by the CA Policy refers to the situation where a deaf lawyer receives "real-time captioning or sign language interpreter accommodation funded and provided by a court". Although the lawyer might be employed by a law firm, the court has taken over the responsibility of providing reasonable accommodation.<sup>678</sup> As such the court and the employer are interlinked; thus share the duty of providing reasonable accommodation to the deaf lawyer.

Thirdly, funding programs concerning corporate responsibilities exist with a view to improve accessibility for persons with disabilities, which funding may be used to provide reasonable accommodation.<sup>679</sup>

Now in dealing with the third factor which may be considered in determining unjustifiable hardship, section 5(3)(3) of the Policy provides that health and safety should be taken into account as this might contribute to unjustifiable hardship.<sup>680</sup> In Canada, health and safety may be regulated in terms of legislation, practices or procedures which might have been established through time.<sup>681</sup>

An obligation is placed on employers to undertake health and safety assessments within the workplace to ensure that the health and safety risks are not higher for persons with disabilities than for other employees within the workplace.<sup>682</sup>

In circumstances where a health and safety requirement creates barriers for persons with disabilities, the employer should determine whether such requirements can be waived or modified to accommodate persons with disabilities.<sup>683</sup> If waiving the health and safety requirements is likely to result in a violation of the Canadian Occupational Health and Safety Act (OHSA), the employer must generate an alternative to ensure

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<sup>677</sup> Section 5(3)(2) of the Policy And Guidelines On Disability And The Duty To Accommodate.

<sup>678</sup> Section 5(3)(2) of the Policy And Guidelines On Disability And The Duty To Accommodate.

<sup>679</sup> Section 5(3)(2) of the Policy And Guidelines On Disability And The Duty To Accommodate.

<sup>680</sup> Section 5(3)(3) of the Policy And Guidelines On Disability And The Duty To Accommodate; see also *Gibson v Ridgeview Restaurant Limited* 2013 HRTO.

<sup>681</sup> Section 5(3)(3) of the Policy And Guidelines On Disability And The Duty To Accommodate.

<sup>682</sup> Section 5(3)(3) of the Policy And Guidelines On Disability And The Duty To Accommodate.

<sup>683</sup> Section 5(3)(3) of the Policy And Guidelines On Disability And The Duty To Accommodate.

compliance with the OHSA.<sup>684</sup> In addition, the employer bears the onus of proving that the accommodation might cause a risk to health and safety within the organisation and as a result the required accommodation cannot be provided.<sup>685</sup>

Employers are furthermore required to show an objective assessment of the risks within the workplace together with demonstrating how the alternative measures in relation to health and safety provide equal opportunities to persons with disabilities.<sup>686</sup> Unjustifiable hardship cannot merely be determined by relying on an "impressionistic or anecdotal evidence, or after-the-fact justifications".<sup>687</sup> It should be noted that expected hardships which might be caused by the proposed accommodations should not be relied upon if it is merely based on speculation or unsubstantiated concern by the employer that certain adverse effects could arise as a result of the required accommodation.<sup>688</sup>

In consideration of the aforementioned, an employer may allege unjustifiable hardship after the abovementioned measures have been considered, and still lead to a significant risk within the workplace.<sup>689</sup>

Further considerations should be taken by employers where health and safety are in question as far as it relates to providing reasonable accommodation to persons with disabilities and where such accommodation might lead to unjustifiable hardship. These factors will accordingly be discussed.

Firstly, the employer should consider the *bona fide* and reasonable requirements of health and safety measures.<sup>690</sup> Unjustifiable hardship might occur where the risk in relation to health and safety remains after providing persons with disabilities with reasonable accommodation and where such risks outweigh the benefits of reasonable

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<sup>684</sup> Ontario Human Rights Commission date unknown [https://www.ohrc.on.ca/en/policy-ableism-and-discrimination-based-disability/9-undue-hardship#\\_edn243](https://www.ohrc.on.ca/en/policy-ableism-and-discrimination-based-disability/9-undue-hardship#_edn243); see also section 5(3)(3) of the Policy And Guidelines On Disability And The Duty To Accommodate.

<sup>685</sup> *Ouji v APLUS Institute* 2010 HRTO 1389.

<sup>686</sup> Section 5(3)(3) of the Policy And Guidelines On Disability And The Duty To Accommodate.

<sup>687</sup> *Ontario Human Rights Commission v Etobicoke* 1982 15 (SCC), [1982] 1 SCR 202.

<sup>688</sup> *Lane v ADGA Group Consultants Inc.* 2007 HRTO 34.

<sup>689</sup> Section 5(3)(3) of the Policy And Guidelines On Disability And The Duty To Accommodate.

<sup>690</sup> *British Columbia (Public Service Employee Relations Comm) v BCGEU* [1999] 3 SCR 3; see also Section 5(3)(3)(a) of the Policy And Guidelines On Disability And The Duty To Accommodate.

accommodation.<sup>691</sup> Notwithstanding this, health and safety risks that lead to unjustifiable hardship may be reduced to an acceptable standard through the following measures: "by adding safety features or changing job descriptions" to accommodate persons with disabilities.<sup>692</sup>

Secondly, the assumption of risk by persons with disabilities should also be taken into account when considering whether reasonable accommodation might lead to unjustifiable hardship relating to health and safety,<sup>693</sup> as persons with disabilities may wish to assume a risk.<sup>694</sup> Nevertheless, the risk created by "modifying or waiving a health and safety requirement" should be considered in conjunction with the right to equality and eliminate disability-based discrimination by providing reasonable accommodation to persons with disabilities.<sup>695</sup> It should however be noted that reasonable accommodation will constitute unjustifiable hardship where the risk significantly outweighs the benefits received from such reasonable accommodation.<sup>696</sup> In this regard, the following factors should be taken into account when considering whether the modification and/or waiver might significantly outweigh the benefit of the accommodation, namely:

the significance, probability and seriousness of the risk; the other types of risks that the person responsible for accommodation is assuming within the organization; the types of risks tolerated within society as a whole, reflected in legislated standards such as licensing standards, or in similar types of organizations.<sup>697</sup>

Unjustifiable hardship will be determined by establishing the risks that might be present after the employer has taken into account all precautionary measures to reduce the risks which might occur as a result of providing reasonable accommodations to persons with disabilities.<sup>698</sup> In the event that persons with disabilities are placed at risk due to the medication or waiver of a health and safety requirement, the employer bears the onus of providing persons with disabilities with a detailed explanation of the

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<sup>691</sup> Section 5(3)(3)(a) of the Policy And Guidelines On Disability And The Duty To Accommodate.

<sup>692</sup> Section 5(3)(3)(a) of the Policy And Guidelines On Disability And The Duty To Accommodate.

<sup>693</sup> Section 5(3)(3)(b) of the Policy And Guidelines On Disability And The Duty To Accommodate.

<sup>694</sup> Section 5(3)(3)(b) of the Policy And Guidelines On Disability And The Duty To Accommodate.

<sup>695</sup> Section 5(3)(3)(b) of the Policy And Guidelines On Disability And The Duty To Accommodate.

<sup>696</sup> Section 5(3)(3)(b) of the Policy And Guidelines On Disability And The Duty To Accommodate.

<sup>697</sup> Section 5(3)(3)(b) of the Policy And Guidelines On Disability And The Duty To Accommodate.

<sup>698</sup> Section 5(3)(3)(b) of the Policy And Guidelines On Disability And The Duty To Accommodate.

potential risks.<sup>699</sup> The assumption of risks by persons with disabilities should be made with dignity, subject to unjustifiable hardship.<sup>700</sup> In addition the employer has the duty not to place employees, more specifically persons with disabilities, in threatening situations which might be detrimental to their health and safety,<sup>701</sup> as the high probability of significant harm to an employee will constitute an unjustifiable hardship in itself.<sup>702</sup>

An individual's disability is not sufficient to establish that there is a risk in respect of the health and safety requirements within the workplace, as such evidence will have to be provided by the employer or an expert to prove "the nature, severity, probability and scope" of the specific risk for persons with disabilities.<sup>703</sup> The aforementioned factors can be determined in considering the questions as set out below:

the nature of the risk - what could happen that would be harmful; the severity of the risk - how serious would the harm be if it occurred; the probability of the risk - how likely is it that the potential harm will actually occur; is it a real risk, or merely hypothetical or speculative - could it occur frequently; the scope of the risk - who will be affected by the event if it occurs.<sup>704</sup>

The risk should not be considered to be severe when the potential harm to persons with disabilities is minor, after consideration of the aforementioned factors and its correlating questions.<sup>705</sup> In the case of *Lepofsky v TTC*,<sup>706</sup> it was found that requiring a transit provider to consistently and clearly announce stops to facilitate access to visually impaired individuals may not constitute unjustifiable hardship and as such the carrier's claim that it is dangerous to have the drivers announce a stop when there are many other obligations, was accordingly dismissed.<sup>707</sup>

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<sup>699</sup> Section 5(3)(3)(b) of the Policy And Guidelines On Disability And The Duty To Accommodate.

<sup>700</sup> Section 5(3)(3)(b) of the Policy And Guidelines On Disability And The Duty To Accommodate.

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<sup>705</sup> Section 5(3)(3)(b) of the Policy And Guidelines On Disability And The Duty To Accommodate.

<sup>706</sup> *Lepofsky v TTC* 2007 HRTO 23.

<sup>707</sup> *Lepofsky v TTC* 2007 HRTO 23.

Public safety will also be considered in accordance with the scope of the risk, and on the other hand, the likelihood of the harmful event would be considered as part of the probability of the risk.<sup>708</sup>

The likelihood of substantial harm to an individual will constitute an unjustifiable hardship for an employer, and in certain instances it may be unjustifiable hardship for an employer to endeavour to mitigate imminent and severe risks.<sup>709</sup>

Now that the determination of unjustifiable hardship in CA has been discussed, the dissertation turns to the establishment of unjustifiable hardship in terms of the best practices established in the USA.

#### *4.1.2 United States of America*

As mentioned in chapter 1, reasonable accommodation first originated in the USA in the *Civil Rights Act* of 1968,<sup>710</sup> and the *Equal Employment Opportunity Act* of 1972,<sup>711</sup> which had reference to reasonable accommodation as far as it related to discrimination based on employees' religious practices.<sup>712</sup> Reasonable accommodation however evolved and was introduced in respect of persons with disabilities in the USA's *Rehabilitation Act* of 1973.<sup>713</sup> Subsequent to the aforementioned introduction of reasonable accommodation of persons with disabilities and unjustifiable hardship, the terms have become commonly used in USA law, but it was not until the promulgation of the *Americans with Disabilities Act* of 1990 (ADA),<sup>714</sup> that these terms gained traction and were the focus of debates in both doctrine and case law.<sup>715</sup>

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<sup>708</sup> Section 5(3)(3)(b) of the Policy And Guidelines On Disability And The Duty To Accommodate.

<sup>709</sup> *Barton v Loft Community Centre* 2009 HRTO 647.

<sup>710</sup> *Civil Rights Act* of 1968.

<sup>711</sup> Sur Journal date unknown <https://sur.conectas.org/en/reasonable-accommodation/>; see also *Equal Employment Opportunity Act* of 1972.

<sup>712</sup> United Nations 2006 <https://www.un.org/esa/socdev/enable/rights/ahc7bkgrndra.htm>.

<sup>713</sup> United Nations 2006 <https://www.un.org/esa/socdev/enable/rights/ahc7bkgrndra.htm>; see also *Rehabilitation Act* of 1973.

<sup>714</sup> *Americans with Disabilities Act* of 1990.

<sup>715</sup> Sur Journal date unknown <https://sur.conectas.org/en/reasonable-accommodation/>.

Reasonable accommodation is defined as: "any change in the work environment or in the way things are customarily done that enables an individual with a disability to enjoy employment opportunities".<sup>716</sup>

The ADA contains provisions specifically relating to reasonable accommodation of persons with disabilities and unjustifiable hardship. In terms of section 12111(9) of the ADA, reasonable accommodation may include:<sup>717</sup>

making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and (B) job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities.<sup>718</sup>

In the case of *US Airways, Inc v Barnett*,<sup>719</sup> the court held that "a modification or adjustment is reasonable if it seems reasonable on the face of it".<sup>720</sup> The court further held that reasonable accommodation must be implemented to meet the needs of persons with disabilities; to allow persons with disabilities an equal opportunity to enjoy the equal benefits and privileges within the workplace.<sup>721</sup>

It is important to note who qualifies as a person with disabilities under the ADA and as such an overview thereof will accordingly be given as the term *persons* with disabilities was discussed in detail in chapter 2 of this study. In the case of *Bragdon v Abbott*,<sup>722</sup> the court found that a female with asymptomatic HIV infection is considered a person with a disability for purposes of the ADA. As such, individuals that qualify as persons with a disability under this category of impairment will be entitled to reasonable accommodation. Furthermore, in the case of *Sutton v United Airlines*,<sup>723</sup> the court held that "the determination of whether a person has an ADA disability must

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<sup>716</sup> Befort 2003 *Ariz. L. Rev.* 936.

<sup>717</sup> Section 12111(9) of the *Americans with Disabilities Act* of 1990.

<sup>718</sup> Section 12111(9)(A)-(B) of the *Americans with Disabilities Act* of 1990.

<sup>719</sup> *US Airways, Inc v Barnett*, 535 US, 122 S Ct 1516, 1523 (2002).

<sup>720</sup> *Ibekwe and Aduma* 2019 *IJOCLLEP* 101; see also *US Airways, Inc v Barnett* 535 US, 122 S Ct 1516, 1523 (2002).

<sup>721</sup> *Ibekwe and Aduma* 2019 *IJOCLLEP* 101; see also *US Airways, Inc v Barnett*, 535 US, 122 S Ct 1516, 1523 (2002).

<sup>722</sup> *Bragdon v Abbott*, 524 U.S. 624 (1998).

<sup>723</sup> *Sutton v United Airlines, Inc.*, 527 U.S. 471, 119 S. Ct. 2139 (June 22, 1999).

take into consideration whether the person is substantially limited in a major life activity".<sup>724</sup> In circumstances where the individual experiences no substantial limitation in any major life activity through the use of mitigating measures (such as medication, a prosthesis, or a hearing aid) such an individual will not constitute a person with a disability for purposes of the ADA. This requirement is in line with the EEA, more specifically the Code, which provides that a person will only be considered a person with a disability in the event that such person's impairment is substantially limiting. In the case of *Murphy v United Parcel Service, Inc.*,<sup>725</sup> the court held that a person whose high blood pressure is controlled through medication "did not have an impairment that substantially limited a major life activity".<sup>726</sup> In the case of *Albertsons Inc v Kirkingburg*,<sup>727</sup> the Court held that individuals who specifically develop compensating behaviours to mitigate the effects of impairment do not qualify as persons with disabilities for purposes of the ADA.<sup>728</sup>

Notwithstanding an employer's duty to provide reasonable accommodation to persons with disabilities, this duty is limited in instances where the threshold for reasonable accommodation has been surpassed,<sup>729</sup> and as a result might lead to undue hardship (for purposes of consistency in this study, undue hardship as referred to in American law will be henceforth referred to as unjustifiable hardship) for the employer. In other words, the unjustifiable hardship may be raised as a defence by an employer for not complying with its duty to provide reasonable accommodation to persons with disabilities. Notwithstanding this, the court held in the case of *Vande Zande v Wisconsin Department of Administration*,<sup>730</sup> that the defence of unjustifiable hardship is separate from the concept of *reasonableness* as a limitation that modifies the duty placed on an employer to provide reasonable accommodation.<sup>731</sup> The ADA in conjunction with case law on its provisions gives guidance on how unjustifiable

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<sup>724</sup> *Sutton v United Airlines, Inc.*, 527 U.S. 471, 119 S. Ct. 2139 (June 22, 1999).

<sup>725</sup> *Murphy v United Parcel Service, Inc.*, 527 U.S. 516, 119 S. Ct. 2133(1999).

<sup>726</sup> *Murphy v United Parcel Service, Inc.*, 527 U.S. 516, 119 S. Ct. 2133(1999).

<sup>727</sup> *Albertsons Inc. v Kirkingburg*, 527 U.S. 555, 119 S. Ct. 2162 (1999).

<sup>728</sup> *Albertsons, Inc. v Kirkingburg*, 527 U.S. 555, 119 S. Ct. 2162 (1999).

<sup>729</sup> *US Airways, Inc v Barnet*, 535 US, 122 S Ct 1516, 1523 (2002).

<sup>730</sup> *Vande Zande v Wisconsin Department of Administration* 44 F3d 538 (7th Cir 1995) (United States).

<sup>731</sup> *Vande Zande v Wisconsin Department of Administration* 44 F3d 538 (7th Cir 1995) (United States).

hardship should be interpreted. Case law decided upon prior to the enactment of the ADA however gave little to no guidance on the interpretation of unjustifiable hardship as there was no uniformity in the court decisions.<sup>732</sup> In terms of the ADA, unjustifiable hardship is defined as "an action requiring significant difficulty or expense".<sup>733</sup> The aforementioned definition of unjustifiable hardship must be read in conjunction with the factors as set out in section 12111(10)(B) of the ADA<sup>734</sup> so as to establish whether reasonable accommodation will cause unjustifiable hardship.<sup>735</sup>

Notwithstanding the determining factors for unjustifiable hardship as set out in the ADA (as will be discussed below) there are various cases which also give guidance on what might constitute unjustifiable hardship in certain instances. In the case of *Arneson v Heckler*,<sup>736</sup> the court held that it would constitute unjustifiable hardship,<sup>737</sup> where an employer is required to employ another individual to perform the duties of persons with disabilities as a result of the latter's inability to perform its duties. The court however further found that the employer failed to adequately identify another possible accommodation which would not constitute unjustifiable hardship under the circumstances.<sup>738</sup> Furthermore, in *Kimbrow v Atlantic Richfield*,<sup>739</sup> the court recognised that business necessity might constitute unjustifiable hardship.<sup>740</sup> In the current case the employee suffered from severe migraine, a condition which consequently constituted a disability and as a result led to the employer taking sick leave without giving the required notice to the employer.<sup>741</sup> The employee was accordingly dismissed due to the aforementioned, whereafter the employee claimed that the employer failed to provide him with the required accommodation.<sup>742</sup> The court held that it was a legitimate need for the employer to schedule work in advance,<sup>743</sup> and the employee's

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<sup>732</sup> Margaret 1991 *S.D. L. REV.* 113.

<sup>733</sup> Porter *A New Look at the ADA's Undue Hardship Defense* 3; see also Section 12111(10)(A) of the *Americans with Disabilities Act* of 1990.

<sup>734</sup> Section 12111(10)(A)-(B) of the *Americans with Disabilities Act* of 1990.

<sup>735</sup> Befort *Ariz.L. Rev.* 936.

<sup>736</sup> *Arneson v Heckler* 879 F.2d 393 (8th Cir. 1989).

<sup>737</sup> Margaret 1991 *S.D. L. REV.* 113.

<sup>738</sup> *Arneson v Heckler* 879 F.2d 393 (8th Cir. 1989) par 393 – 397.

<sup>739</sup> *Kimbrow v Atlantic Richfield* 889 F.2d 869 (9th Cir. 1989).

<sup>740</sup> *Kimbrow v Atlantic Richfield* 889 F.2d 869 (9th Cir. 1989) par 897.

<sup>741</sup> *Kimbrow v Atlantic Richfield* 889 F.2d 869 (9th Cir. 1989) par 874.

<sup>742</sup> *Kimbrow v Atlantic Richfield* 889 F.2d 869 (9th Cir. 1989) par 874.

<sup>743</sup> *Kimbrow v Atlantic Richfield* 889 F.2d 869 (9th Cir. 1989) par 874.

failure to provide the required notice in respect of his sick leave constituted an unjustifiable hardship. The court however found that "other accommodations, such as a leave of absence, were reasonable".<sup>744</sup> The aforementioned cases demonstrated that although a court may find that an accommodation constitutes an unjustifiable hardship, other accommodations than those proposed by the employer may be reasonable under the circumstances, and consequently exhibit reasonable accommodation and unjustifiable hardship.<sup>745</sup>

In the case of an unjustifiable hardship claim by an employer, the employer bears the onus of proof and must therefore prove that the accommodation constitutes a hardship – moreover that such hardship is significant as a mere claim of unjustifiable hardship,<sup>746</sup> is insufficient for an employer to succeed with the defence of unjustifiable hardship. In the case of *US Airways, Inc. v Barnett*,<sup>747</sup> the court laid out the burdens of proof for both an employee to prove that the accommodation is reasonable and an employer to prove that the accommodation constitutes unjustifiable hardship. Firstly, the employee only has to prove that an "accommodation seems reasonable on its face", whereafter the burden of proof shifts to the employer to provide case-specific evidence proving that reasonable accommodation would constitute an unjustifiable hardship.<sup>748</sup>

The study now turns to the determining factors for unjustifiable hardship as set out in section 12111(10)(B) of the ADA,<sup>749</sup> which factors consist of those as set out below.

Firstly, the "nature and costs" involved for reasonably accommodating an employee with a disability must be considered;<sup>750</sup> In relation to this factor, the employer needs to assess the required accommodation against the actual cost involved for providing such accommodation.<sup>751</sup> For example, if the person requests an ergonomic chair from

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<sup>744</sup> *Kimbrow v Atlantic Richfield* 889 F.2d 869 (9th Cir. 1989) par 878.

<sup>745</sup> Margaret 1991 *S.D. L. REV.* 114.

<sup>746</sup> Margaret 1991 *S.D. L. REV.* 115.

<sup>747</sup> *US Airways, Inc. v Barnett*, 535 U.S., 122 S. Ct. 1516 (2002).

<sup>748</sup> *US Airways, Inc. v Barnett*, 535 U.S., 122 S. Ct. 1516 (2002).

<sup>749</sup> Section 12111(10)(A)-(B) of the *Americans with Disabilities Act* of 1990.

<sup>750</sup> Section 12111(10)(B)(i) of the *Americans with Disabilities Act* of 1990.

<sup>751</sup> Job Accommodation Network date unknown <https://askjan.org/articles/Undue-Hardship-is-a-Process.cfm>.

the workplace, the accommodation type is the device requested as accommodation because of a disability. The employer can then calculate the actual costs associated with buying a new chair or providing a chair already available to the employer to meet the needs of the employee's accommodation. As another example, if a person requires some flexibility in the scheduled start time, the type of adjustment is that the person requests a modified schedule as an adjustment. In this case, there is no direct cost, but the employer's actual cost may be related to the employer's ability to cover flexitime with another employee to ensure that the business needs are met.<sup>752</sup>

Section 12111(10)(B)(ii) states the following:

the overall financial resources of the facility or facilities involved in the provision of the reasonable accommodation; the number of persons employed at such facility; the effect on expenses and resources, or the impact otherwise of such accommodation upon the operation of the facility.<sup>753</sup>

If actual costs are associated with the requested accommodation, the employer may need to weigh those costs in relation to their ability to bear those costs. It is important to note that this element is divided into two components that need to be considered, namely: the resources of the facility that provides the accommodation, and the total resources of the employer where the employer has multiple facilities.<sup>754</sup> These factors take into account the situation in which accommodation constitutes unjustifiable hardship when the resources of a single entity are considered in isolation, but the total number of resources of the employer are considered as a whole. The aforementioned is applicable for example where a university department does not have the resources to provide a requested accommodation, but there are resources available within the university as a whole to facilitate the requested accommodation.<sup>755</sup>

Section 12111(10)(B)(iii) of the ADA further provides that:

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<sup>752</sup> Job Accommodation Network date unknown <https://askjan.org/articles/Undue-Hardship-is-a-Process.cfm>.

<sup>753</sup> Section 12111(10)(B)(ii) of the *Americans with Disabilities Act* of 1990.

<sup>754</sup> Job Accommodation Network date unknown <https://askjan.org/articles/Undue-Hardship-is-a-Process.cfm>.

<sup>755</sup> Job Accommodation Network date unknown <https://askjan.org/articles/Undue-Hardship-is-a-Process.cfm>.

the overall financial resources of the covered entity; the overall size of the business of a covered entity with respect to the number of its employees; the number, type, and location of its facilities.<sup>756</sup>

In relation to this factor, the employer needs to consider how compatible the accommodation is with the nature of the employer's business. This is common among employers who work in their own way. As an example, consider an application that gives wheelchair users access to a construction site. As the site changes constantly during the course of a construction project, there may not be a practical way to ensure that wheelchair users have secure and reliable access to all areas of the site.<sup>757</sup>

In terms of section 12111(10)(B)(iv) of the ADA states that:

the type of operation or operations of the covered entity, including the composition, structure, and functions of the workforce of such entity; the geographic separateness, administrative, or fiscal relationship of the facility or facilities in question to the covered entity.<sup>758</sup>

When considering this factor, employers need to consider how the provision of accommodation affects the work of other employees and the business of the company. This consideration concerns determining whether placement can overly disrupt employees or business operations. For example, reorganizing a workplace into accommodation and getting colleagues to receive a significantly increased workload can be a factor to consider. However, a colleague who complains that a person is being given accommodation due to "special treatment" is not a factor that is considered in determining unjustifiable hardship. This is predicated upon the fact that the first situation directly affects the ability of others to complete the task, while the second situation is simply a negative reaction from the employee to the idea of housing.<sup>759</sup>

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<sup>756</sup> Section 12111(10)(B)(iii) of the *Americans with Disabilities Act* of 1990.

<sup>757</sup> Job Accommodation Network date unknown <https://askjan.org/articles/Undue-Hardship-is-a-Process.cfm>.

<sup>758</sup> Section 12111(10)(B)(iv) of the *Americans with Disabilities Act* of 1990.

<sup>759</sup> Job Accommodation Network date unknown <https://askjan.org/articles/Undue-Hardship-is-a-Process.cfm>.

The aforementioned factors will furthermore be discussed in accordance with various cases where the aforementioned factors were considered as well as additional factors raised by employer in relation to their defence of unjustifiable hardship.

In the case of *Vande Zande v Wisconsin Department of Administration*,<sup>760</sup> it was argued that the cost element was only relevant to the test for unjustifiable hardship. This argument was however rejected by the court as the court concluded that:

the term reasonable served to modify (in the sense of weakening) the obligation on employers and that it meant that in order to be reasonable, the cost of making the accommodation should be proportional to the benefit that accrues.<sup>761</sup>

As such, an employer may still raise the defence of unjustifiable hardship despite an accommodation being deemed reasonable under the circumstances.<sup>762</sup> In the case of *Balls v AT&T Corp.*,<sup>763</sup> the employee was diagnosed with carpal tunnel syndrome. As part of the employee's duties she was required to type at least forty-five words per minute.<sup>764</sup> As a result of her carpal tunnel syndrome the employee requested that the employer accommodates her by providing her with voice-activated technology which will do away with the necessity for the employee to type.<sup>765</sup> The court found that the aforementioned accommodation would constitute unjustifiable hardship considering that the voice-activated technology would cost twelve million dollars.<sup>766</sup> In this case, the unjustifiable hardship was determined purely on the cost factor. On the other hand, in the case of *Alabi v Atlanta Public Schools*,<sup>767</sup> the employee was a schoolteacher who as a result of his hearing disability requested a full-time interpreter to assist him in complying with his function as a teacher, more specifically to communicate with learners in the classroom.<sup>768</sup> The employer however held the aforementioned accommodation will be expensive as a skilled sign interpreter would be required for

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<sup>760</sup> *Vande Zande v Wisconsin Department of Administration* 44 F3d 538 (7th Cir 1995) (United States).

<sup>761</sup> Mégret and Msipa 2014 *SAJHR* 268; see also *Vande Zande v Wisconsin Department of Administration* 44 F3d 538 (7th Cir 1995) (United States).

<sup>762</sup> Mégret and Msipa 2014 *SAJHR* 268.

<sup>763</sup> *Balls v AT&T Corp* 28 F. Supp.

<sup>764</sup> *Balls v AT&T Corp* 28 F. Supp par 972.

<sup>765</sup> *Balls v AT&T Corp* 28 F. Supp par 973 - 974.

<sup>766</sup> *Balls v AT&T Corp* 28 F. Supp par 974.

<sup>767</sup> *Alabi v Atlanta Public Schools* No. 1:12-CV-0191-AT, 2011 WL.

<sup>768</sup> *Alabi v Atlanta Public Schools* No. 1:12-CV-0191-AT, 2011 WL par 2.

this specific position.<sup>769</sup> The employer further argued that the salary of the interpreter would be disproportionately higher than that of the teacher's annual salary and would accordingly constitute an undue financial hardship for the employer. Although the court noted that the costs for the interpreter would be high, it held that the employer failed to provide sufficient evidence to establish unjustifiable hardship.<sup>770</sup> In addition, the court held that the employer failed to provide evidence on its attempts to re-negotiate the interpreter's hourly rates or re-assigning an interpreter from within the school district.<sup>771</sup> Similarly, in the case of *Searls v Johns Hopkins Hospital*,<sup>772</sup> the employer alleged that the costs of providing a nurse (who was a job applicant) with a hearing disability, with two interpreters who are proficient in medical terminology would be approximately two hundred and forty thousand dollars per year,<sup>773</sup> and as such would constitute an unjustifiable hardship for the employer, and the nurse's job offer was accordingly withdrawn.<sup>774</sup> The court held that the employer only focused on the resources and operations of the specific unit where the nurse would have been stationed and failed to provide evidence on how the costs of the interpreters would cause an unjustifiable hardship on the employer's annual budget of one hundred and seventy billion dollars.<sup>775</sup> Furthermore, although the employer argued that it had no money to provide reasonable accommodation, the court held that the employer's budget for reasonable accommodation is irrelevant for determining unjustifiable hardship as allowing an employer to base his defence for unjustifiable hardship on its budget would allow employers to determine its own abilities to provide reasonable accommodation,<sup>776</sup> and in addition the court held that it is irrelevant whether the interpreter's salary would exceed that of the nurse.<sup>777</sup> In consideration of the two cases as aforementioned, it is clear that the budget of an employer is irrelevant when dealing with the cost factor in determining unjustifiable hardship.

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<sup>769</sup> *Alabi v Atlanta Public Schools* No. 1:12-CV-0191-AT, 2011 WL par 3.

<sup>770</sup> *Alabi v Atlanta Public Schools* No. 1:12-CV-0191-AT, 2011 WL par 10.

<sup>771</sup> *Alabi v Atlanta Public Schools* No. 1:12-CV-0191-AT, 2011 WL par 10.

<sup>772</sup> *Searls v Johns Hopkins Hospital* 158 F. Supp. 3d 427, 430 (D. Md. 2016).

<sup>773</sup> *Searls v Johns Hopkins Hospital* 158 F. Supp. 3d 427, 430 (D. Md. 2016) par 431.

<sup>774</sup> *Searls v Johns Hopkins Hospital* 158 F. Supp. 3d 427, 430 (D. Md. 2016) par 431.

<sup>775</sup> *Searls v Johns Hopkins Hospital* 158 F. Supp. 3d 427, 430 (D. Md. 2016) par 438.

<sup>776</sup> *Searls v Johns Hopkins Hospital* 158 F. Supp. 3d 427, 430 (D. Md. 2016) par 438 - 439.

<sup>777</sup> *Searls v Johns Hopkins Hospital* 158 F. Supp. 3d 427, 430 (D. Md. 2016) par 439.

Furthermore, in the case of *Anderson v Gus Mayer Boston Store of Delaware*,<sup>778</sup> the court confirmed that determining unjustifiable hardship is a question of fact.<sup>779</sup> In the current case the employer's health care plan for the employer increased as the employee had cancer and was subsequently diagnosed with HIV-AIDs.<sup>780</sup> The employer consequently moved to another insurance company, which accordingly refused to cover the employee.<sup>781</sup> The employer's claim for unjustifiable hardship was accordingly dismissed as the employer failed to prove that the coverage of the employee in the current case under the health care plan would be so expensive that it would lead to the employer's plan becoming financially insolvent,<sup>782</sup> and that there is no alternative which would avoid the insolvency of the employer's health care plan.<sup>783</sup> In consideration of the aforementioned case it is clear that an employer must consider alternatives and prove that accommodation will have actual financial implications for the employer.

Furthermore, in the case of *Kane v Carmel Central School District*,<sup>784</sup> where the employee was a music teacher who was diagnosed with multiple sclerosis, and as a result required to utilise a wheelchair, the employer consequently refused to accommodate the teacher as a result of the high costs of installing a power-assist door and constructing a ramp.<sup>785</sup> The court held that the employer failed to properly research these costs and to consider any other factor relating to the accommodation except for the costs involved,<sup>786</sup> and the employer's claim of unjustifiable hardship was accordingly dismissed. In the light of the aforementioned case it is clear that the cost factor cannot stand in isolation when determining unjustifiable hardship, as other relevant factors besides the cost factor should be considered by an employer when

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<sup>778</sup> *Anderson v Gus Mayer Boston Store of Delaware* 924 F. Supp. 763, 781 (E.D. Tex. 1996).

<sup>779</sup> *Anderson v Gus Mayer Boston Store of Delaware* 924 F. Supp. 763, 781 (E.D. Tex. 1996).

<sup>780</sup> *Anderson v Gus Mayer Boston Store of Delaware* 924 F. Supp. 763, 781 (E.D. Tex. 1996) par 769.

<sup>781</sup> *Anderson v Gus Mayer Boston Store of Delaware* 924 F. Supp. 763, 781 (E.D. Tex. 1996) par 770.

<sup>782</sup> *Anderson v Gus Mayer Boston Store of Delaware* 924 F. Supp. 763, 781 (E.D. Tex. 1996) par 781.

<sup>783</sup> *Anderson v Gus Mayer Boston Store of Delaware* 924 F. Supp. 763, 781 (E.D. Tex. 1996) par 781.

<sup>784</sup> *Kane v Carmel Central School District No. 12 CV 5429(VB)*, 2014 WL.

<sup>785</sup> *Kane v Carmel Central School District No. 12 CV 5429(VB)*, 2014 WL par 2.

<sup>786</sup> *Kane v Carmel Central School District No. 12 CV 5429(VB)*, 2014 WL par 7.

determining unjustifiable hardship for an employer to prove that the employer has considered all alternatives.

In the case of *McGregor v United Healthcare Services, Inc.*,<sup>787</sup> the employer's claim of unjustifiable hardship was dismissed, where the employer failed to accommodate an employee using a wheelchair by installing an automatic door opener due to the costs involved for installing an automatic door.<sup>788</sup>

In the case of *D'Eredita v ITT Corp*,<sup>789</sup> where the employee was diagnosed with mild dyslexia, the employee requested that the employer accommodate him by assigning additional employees to his line and to have his equipment colour coded.<sup>790</sup> The employee was accordingly dismissed. The court held that both accommodations requested by the employee would constitute an unjustifiable hardship for the employer.<sup>791</sup> The first requested accommodation would have led to the employer having to appoint more employees and consequently reduced the employers desired profits.<sup>792</sup> The second requested accommodation would have led to a further unjustifiable hardship for the employer as fifty different types of complex motors of varying types would have to have been colour coded , which would have been costly.<sup>793</sup>

In the case of *Carmichael v Verso Paper LLC*,<sup>794</sup> an employee had sustained several injuries which occurred on the job and subsequently led to certain physical restrictions leading to the employee requesting that he be accommodated by him being allowed to take breaks when needed.<sup>795</sup> The employer however argued that this accommodation constitutes unjustifiable hardship due to the employee's work capacity being limited as a result of the breaks.<sup>796</sup> The court however held that the employer failed to prove why the employee's position could not be modified to provide him with

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<sup>787</sup> *McGregor v United Healthcare Services Inc No.* H-09-2340, 2010 WL.

<sup>788</sup> *McGregor v United Healthcare Services Inc No.* H-09-2340, 2010 WL par 10.

<sup>789</sup> *D'Eredita v ITT Corp No.* 11-CV-6575-CJS-MWP, 2015 WL.

<sup>790</sup> *D'Eredita v ITT Corp No.* 11-CV-6575-CJS-MWP, 2015 WL par 2.

<sup>791</sup> *D'Eredita v ITT Corp No.* 11-CV-6575-CJS-MWP, 2015 WL par 8.

<sup>792</sup> *D'Eredita v ITT Corp No.* 11-CV-6575-CJS-MWP, 2015 WL par 8.

<sup>793</sup> *D'Eredita v ITT Corp No.* 11-CV-6575-CJS-MWP, 2015 WL par 8.

<sup>794</sup> *Carmichael v Verso Paper, LLC* F. Supp. 2d 109, 117 (D. Me. 2010).

<sup>795</sup> *Carmichael v Verso Paper, LLC* F. Supp. 2d 109, 117 (D. Me. 2010) par 130.

<sup>796</sup> *Carmichael v Verso Paper, LLC* F. Supp. 2d 109, 117 (D. Me. 2010) par 130.

the required accommodation, or provide any evidence to the effect that the employee's duties had to be completed within a specific time.<sup>797</sup> Furthermore, in the case of *Hill v Clayton County School District*,<sup>798</sup> where the employee who was a bus driver had a lung disease and as a result had difficulty breathing in the hot Atlanta, Georgia, weather, required air-conditioning in the bus to accommodate her condition. The employer argued that providing the employee with the requested accommodation would have caused an unjustifiable hardship as this would have been contrary to the seniority system, which was applicable within its bus system,<sup>799</sup> which the employer consequently failed to substantiate by providing evidence in relation to the seniority system.<sup>800</sup>

It is apparent from the aforesaid sections of the ADA and case law that the USA legislation has established clear criteria which should be used in determining what would be construed as unjustifiable hardship when it comes to reasonably accommodating persons with disabilities in the workplace. Hence it is the view of this study that it would be appropriate to consider the USA as a foreign jurisdiction, in respect of reasonable accommodation and unjustifiable hardship, based on the fact that reasonable accommodation originated in the USA and has consequently established a comprehensive list of factors that can be considered in establishing unjustifiable hardship. In addition to the aforementioned, it is the view of this study that the criteria as set out in the ADA could assist in creating a standardised test for determining unjustifiable hardship in South Africa, as the criteria set out by the ADA is not only contained in a code (which is a guideline for employers as is the case of South African legislation) but in legislation which is accordingly binding on employers when reasonably accommodating persons with disabilities and establishing whether such accommodation will constitute unjustifiable hardship.

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<sup>797</sup> *Carmichael v Verso Paper, LLC* F. Supp. 2d 109, 117 (D. Me. 2010) par 130.

<sup>798</sup> *Hill v Clayton County School District* 619 Fed. App'x 916, 916 (11th Cir. 2015).

<sup>799</sup> *Hill v Clayton County School District* 619 Fed. App'x 916, 916 (11th Cir. 2015) par 918.

<sup>800</sup> *Hill v Clayton County School District* 619 Fed. App'x 916, 916 (11th Cir. 2015) par 922.

## **4.2 Conclusion**

From the foregoing discussions on Canada and the USA, it has become apparent that these jurisdictions have established clear criteria, whether in terms of legislation or alternatively through case law, to test the threshold for reasonable accommodation and to determine when reasonable accommodation has been reached.

The aforementioned is particularly important for purposes of this study as the South African legislation is vague in this regard, as no clear criteria are set in terms of South African legislation. Despite the fact that the Code deals with unjustifiable hardship, its primary focus is on how reasonable accommodation should be applied in respect of persons with disabilities.

In the following chapter, a thorough conclusion will be drawn with recommendations on how the labour laws, more specifically relating to reasonable accommodation and unjustifiable hardship, should be implemented in relation to persons with disabilities in South Africa in consideration of the aforementioned best practices and how these best practices could be implemented in South Africa.

## CHAPTER 5 CONCLUSION

### *5.1 Conclusion*

The main goal of this study was to determine how the requirements of reasonable accommodation for the fair and equal treatment of persons with disabilities should be interpreted and applied in South African labour law.

In the quest to answer the aforementioned question, there were numerous key aspects which had to be discussed and deliberated on to get a clear understanding of the nature and extent of persons with disabilities, their rights in relation to equality, more specifically, substantive equality, and the concept of reasonable accommodation; moreover, the limitation placed thereon as a result of unjustifiable hardship.

It is significant to reiterate that "disability is part of being human",<sup>801</sup> as almost everyone in society will at some stage or another in their lifetime experience a disability.<sup>802</sup> Notwithstanding this, whether or not an individual is considered to be a "person with a disability" is dependent on numerous factors, which consist of whether the individual has a long-term or recurring: physical, mental or alternatively a combination of both physical and mental impairment. In addition to the aforementioned, it must be determined whether or not any one of the aforementioned categories of impairments are substantially limiting, as individuals who are not substantially limited by their impairment do not fall within the ambit of persons with disabilities. Consequently these individuals will not benefit from the rights afforded to "persons with disabilities" as provided for in the relevant national and international legislation, as set out above. Disability should furthermore be proven through medical evidence to confirm that such impairment constitutes a disability, as the mere existence of an impairment does not constitute a disability in itself.<sup>803</sup>

Persons with disabilities were afforded little to no protection against disability-based discrimination as a minority group, and as such, was subjected to "discrimination and

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<sup>801</sup> See par 1.1 above.

<sup>802</sup> See par 1.1 above.

<sup>803</sup> See par 2.2.1 above.

stigmatisation". As a result of disability-based discrimination, persons with disabilities suffered "indignity, widespread discrimination and lack of economic independence".<sup>804</sup> In addition, the stigmatisation of persons with disabilities, more specifically employers' tendencies to treat disability as a synonym for incapacity, predicated upon the fact that persons with disabilities are viewed as being unable to perform the inherent requirements of the job. This position has however dramatically changed through the enactment of the Constitution, EEA, LRA and other legal instruments which afford persons with disabilities the right to equality, more so through the implementation of reasonable accommodation.<sup>805</sup>

From the consideration of the relevant section in the Constitution and other relevant national legislation and international instruments as discussed in this study, it has been established that persons with disabilities have been prioritised as a vulnerable group, as persons with disabilities form part of previously disadvantaged groups in terms of section 9(2) of the Constitution. Therefore persons with disabilities are enjoying more protection and/or advancement as a result of relevant legislation which has been enacted with a view to achieve equality for persons with disabilities, which legislation includes, but is not limited to, affirmative-action legislation, aimed at promoting equality by advancing persons with disabilities.<sup>806</sup>

Despite the right to equality and not to be subjected to disability-based discrimination, it has become apparent from the aforementioned study that these rights may be limited through "law of general application", which limitation should be "reasonable and justifiable". The limitation to the aforementioned rights are accordingly found in the LRA and the EEA.<sup>807</sup> These limitations further consist of defences which may be raised by an employer in cases of alleged disability-based discrimination, which defences include: disability-based discrimination as a result of the inherent

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<sup>804</sup> See par 2.3 above.

<sup>805</sup> See par 2.3 above.

<sup>806</sup> See par 2.4.1.1 – 2.4.1.3 above.

<sup>807</sup> See par 2.5.2 above.

requirement of the job, or affirmative action measures taken in accordance with the EEA.<sup>808</sup>

The difference between discrimination and differentiation has also become apparent; the latter of which is defined as a "distinction, exclusion or preference" of a certain group, which in itself is not discrimination, and also not necessarily unfair. Differentiation aims to achieve equality, more specifically substantive equality through the protection and advancement of persons with disabilities being part of a previously disadvantaged group.<sup>809</sup>

As discussed in this study, a clear duty has been placed on employers to provide reasonable accommodation to employees, more specifically to persons with disabilities. These obligations are placed on employers by not only national legislation such as the EEA but also international instruments, which international instruments place an obligation on South Africa as a member state, and in turn, on the employers in South Africa. One of these international instruments includes the CRPD, which in accordance with its purpose, places an obligation on South Africa as a state party to the CRPD, to "promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity". This accordingly places an obligation on employers to provide reasonable accommodation to persons with disabilities as should be done by achieving the aforementioned purpose of the CRPD, more specifically the achievement of equality for persons with disabilities through the elimination of disability-based discrimination. A general obligation to provide reasonable accommodation to persons with disabilities is furthermore placed on state parties, as appropriate steps need to be taken to ensure reasonable accommodation of persons with disabilities so as to promote equality and eliminate disability-based discrimination, and the denial of reasonable accommodation in itself constitutes discrimination. The obligation to provide reasonable accommodation to persons with disabilities are furthermore extended to the workplace as persons with disabilities have the right to a "work environment that is open, inclusive

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<sup>808</sup> See par 2.5.2 above.

<sup>809</sup> See par 2.5.1.

and accessible to persons with disabilities", which accordingly establishes the right to provide reasonable accommodation to persons with disabilities. The ILO also places a further obligation on employers to provide reasonable accommodation to persons with disabilities, more specifically persons living with HIV-related illnesses, in terms of the ILO Recommendation.<sup>810</sup>

In addition, an obligation is placed on employers to provide reasonable accommodation to persons with disabilities through affirmative action measures, with a view to eliminate disability-based discrimination. The Code furthermore provides guidelines on how reasonable accommodation may be implemented. Further guidelines and examples have also been given in the discussion above in relation to the Framework and the WRPD.<sup>811</sup>

Despite the clear obligation placed on employers to provide reasonable accommodation to persons with disabilities, this obligation will be limited in instances where such reasonable accommodation may lead to unjustifiable hardship.<sup>812</sup>

As stated in the previous chapter, unjustifiable hardship is not defined in terms of the CRPD or the EEA – as such the Code was consulted in this regard.<sup>813</sup>

It is clear from the Code that an employer may dismiss an employee's request for reasonable accommodation in the event that such reasonable accommodation will lead to an unjustifiable hardship that will have a negative impact on an employer, either financially or within the workplace structure. The CRPD, in support of this limitation on reasonable accommodation, provides that reasonable accommodation may be limited, as the CRPD provides that the appropriate modification must be made "not imposing a disproportionate or undue burden". In consideration of the aforementioned, reasonable accommodation may be made as far as it does not constitute unjustifiable hardship.<sup>814</sup>

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<sup>810</sup> See par 3.2.1 above.

<sup>811</sup> See par 3.2.2.1 – 3.2.2.4 above.

<sup>812</sup> See par 3.3 above.

<sup>813</sup> See par 3.3 above.

<sup>814</sup> See par 3.3 above.

Despite the limitation placed on reasonable accommodation, no clear criteria exist for determining "unjustifiable hardship".<sup>815</sup> It is further clear from the study above that what constitutes an unjustifiable hardship for one employer does not necessarily constitute an unjustifiable hardship for another employer.<sup>816</sup>

In consideration of the above, it is clear that there is not a one-size-fits-all approach to test the threshold for reasonable accommodation to determine when unjustifiable hardship has been reached, which includes not only whether the reasonable accommodation will create difficulty or expense, but also the effectiveness, impact, systemic patterns of inequality as well as the objectives of the EEA and the Constitution.<sup>817</sup>

As a result of disabilities, jobs, equipment, and technology and work design is ever-changing; it has created the necessity for the test for unjustifiable hardship to be objective. In consideration of the aforementioned, despite the fact that an unjustifiable hardship had been proven in a specific situation, this will not create the standard against which unjustifiable hardship should be tested. Notwithstanding this, an objective criterion may not be considered in all circumstances, as there are certain exclusions from the objective test, as set out above.<sup>818</sup>

In addition, the costs of reasonable accommodation in itself will not be sufficient for reasonable accommodation to have been refused by an employer as the costs of reasonable accommodation is one of many factors which should be considered by an employer.<sup>819</sup>

When the financial implications of reasonable accommodating are considered it should be taken into consideration that this consideration consists of both a "relative and an absolute dimension". The relative dimension, on the one hand, relates to balancing the effectiveness of the reasonable accommodation and the effect of providing or the

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<sup>815</sup> See par 1.2; 1.3; 3.3 and 3.4 above.

<sup>816</sup> See par 3.3 above.

<sup>817</sup> See par 3.3 above.

<sup>818</sup> See par 3.3 above.

<sup>819</sup> See par 3.3 above.

employer's failure and/or refusal to provide the required reasonable accommodation to persons with disabilities, and on the other hand, the absolute dimension relates to what a particular employer can afford in terms of reasonably accommodating persons with disabilities. In relation to the latter dimension, the employer's circumstances are the focal point.<sup>820</sup>

Consequently the following factors should be taken into consideration, namely the: "financial and human resources at the disposal of the employer"; "whether the employer is a public-sector or private-sector organisation"; "whether the employer is a large corporation or a small, medium or micro enterprise"; "nature of the employer's business".<sup>821</sup>

According to the above factors, it is clear that unjustifiable hardship should not solely be considered at the hand of the financial implications that might arise for an employer who is required to provide reasonable accommodation. The fact that practical considerations of reasonable accommodation might more often than not relate to the financial implication for an employer is not the determining factor in establishing the existence of unjustifiable hardship, as it should be noted that the TAG states that unjustifiable hardship is "an action that requires significant or considerable difficulty or expense". It is inferred that the aforementioned reference to "difficulty or expense" indicates that difficulties need not always relate to financial implications for the employer, as unjustifiable hardship may be suffered by an employer where the reasonable accommodation causes "adverse impacts on the employer's business".<sup>822</sup>

As a result of the context-specific nature of the test to determine unjustifiable hardship, the primary factor in determining how narrowly or generously employers' duties are interpreted, is measured by the particular circumstances rather than what the standard of testing is called.

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<sup>820</sup> See par 3.3 above.

<sup>821</sup> See par 3.3 above.

<sup>822</sup> See par 3.3 above.

Notwithstanding the above, it is clear that there are no clear criteria for determining unjustifiable hardship in South African legislation, as it has been stated that there cannot be a one-size-fits-all approach to determining unjustifiable hardship.

Furthermore it is clear from the foregoing discussion what the best practices are in relation to the test for the threshold of reasonable accommodation to establish the existence of unjustifiable hardship and the various criteria that should be considered in assessing the same as provided for in Canada and the USA.<sup>823</sup> It is possible for a standardised test to be created in consideration of the best practices as discussed in the previous chapter. Factors which may be considered in determining when a reasonable accommodation constitutes unjustifiable hardship, are as follows:

- cost of the reasonable accommodation;<sup>824</sup>
- outside sources of funding, if any;<sup>825</sup>
- health and safety requirements, if any;<sup>826</sup>
- nature and costs involved for reasonably accommodating an employee with a disability;<sup>827</sup>
- the overall financial resources of the facility or facilities involved in the provision of the reasonable accommodation; the number of persons employed at such facility; the effect on expenses and resources, or the impact otherwise of such accommodation upon the operation of the facility;<sup>828</sup>
- the overall financial resources of the covered entity; the overall size of the business of a covered entity with respect to the number of its employees; the number, type, and location of its facilities;<sup>829</sup> and

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<sup>823</sup> See par 4.1.1 and 4.1.2 above.

<sup>824</sup> See par 4.1.1 above.

<sup>825</sup> See par 4.1.1 above.

<sup>826</sup> See par 4.1.1 above.

<sup>827</sup> See par 4.1.1 and 4.1.2 above.

<sup>828</sup> See par 4.1.2 above.

<sup>829</sup> See par 4.1.2 above.

- the type of operation or operations of the covered entity, including the composition, structure, and functions of the workforce of such entity; the geographic separateness, administrative, or fiscal relationship of the facility or facilities in question to the covered entity.<sup>830</sup>

In conclusion, it is the submission of this study that the aforementioned criteria may be incorporated into South African law, more specifically the EEA, in respect of testing the threshold for reasonable accommodation to establish when unjustifiable hardship has been reached, with a view to ensuring the fair and equal treatment of persons with disabilities in relation to their needs for reasonable accommodation.

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<sup>830</sup> See par 4.1.2 above.

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