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## DISABILITY DISCRIMINATION AND THE RIGHT OF DISABLED PERSONS TO ACCESS THE LABOUR MARKET

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### 1 Introduction

South Africa has been characterised by great number of discriminatory practices in the past, some of which still persist today. Even though a fair amount of attention has been given to discrimination relating to race<sup>1</sup>, religion<sup>2</sup> and gender<sup>3</sup>, not much has been accorded to disability discrimination, particularly in the workplace.<sup>4</sup> Inequality, discrimination and transformation remain the key challenges which most employees are faced with in the South African Labour Market. Key among such challenges has also been the employers' ability to ensure that persons with disabilities access the labour market. Persons with disabilities have generally had difficulties in exercising their fundamental social, political and economic rights.<sup>5</sup> Despite the increased sensitivity of this subject in this country, applicants for work and employees generally find themselves to be the victims of employment discrimination due to their disability.

This paper aims to discuss the employment discrimination experienced by persons with disabilities in South African workplaces. I will be arguing that employers need to consider employing persons with disabilities and also to reasonably accommodate them within South African workplaces. In this paper I will also draw attention to the

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<sup>1</sup> Rospabe 2002 *South African Journal of Economics* 198.

<sup>2</sup> Mesriani Law Group 2011 [www.hg.org](http://www.hg.org).

<sup>3</sup> Gregory *Women and Workplace Discrimination* 13.

<sup>4</sup> In the context of this paper, disability discrimination should be understood in the context of an employer' making adverse decisions based on his or her perceptions relating to and affecting an employee or job applicant on the grounds of the disability of such an employee or job applicant.

<sup>5</sup> However, this problem is not unique to South Africa. See generally Office of the President [date unknown] [www.independentliving.org](http://www.independentliving.org). See also Buckup 2009 [www.ilo.org](http://www.ilo.org). Buckup states that 'there are approximately 650 million people with disabilities in the world, and at least 80 percent of them live in developing countries. Because of stigma and discrimination a vast majority are excluded from accessing basic services such as health, education and work opportunities. The lack of access to vital services and programmes contributes to their marginalization and exclusion, with little or no option to escape from poverty'.

jurisprudence of the United States of America as well as to guidelines provided by the United Nations regarding the universal rights of persons with disabilities. This will be done to assess if South Africa is in line with international developments with regard to the prohibition of discrimination against persons with disabilities in the labour market. I will further reflect on how the *Employment Equity Act* 55 of 1998 (hereinafter referred to as 'the *EEA*') has attempted to address the discrimination experienced by persons with disabilities. I will also discuss the guidelines provided in the Code of Good Practice: Key Aspects on the Employment of People with Disabilities<sup>6</sup> (hereinafter referred to as 'the Disability Code') as far as the obligation placed on employers to reasonably accommodate persons with disabilities in South African workplaces is concerned. Furthermore I will be arguing that persons with disabilities have a role to play in developing the South African labour market and that their skills should be enhanced and utilised without being unduly discriminated against on the grounds of their perceived disability.

## **2 Substantive equality and persons with disabilities**

Discrimination against people with disabilities is one of the worst social stigmas that society has not been able to overcome.<sup>7</sup> 'Women, men and children with disabilities are too often amongst the most marginalized in all societies and face unique challenges in the enjoyment of their human rights'.<sup>8</sup> All of us need to understand how cultural, social, physical and other barriers continue to prevent persons with disabilities in South Africa from enjoying their constitutional rights to equality, freedom and human dignity.<sup>9</sup> It is desirable that society at large and government work together towards eradicating these barriers. It has been argued that 'the majority of persons with disabilities can live independent and productive lives, particularly if they have access to opportunities, resources, environments and

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<sup>6</sup> GN 1345 in GG 23702 of 19 August 2002.

<sup>7</sup> Scholasticus 2009 [www.buzzle.com](http://www.buzzle.com).

<sup>8</sup> Pillay 2010 [www.ohchr.org](http://www.ohchr.org). Pillay states that 'for a long time it was assumed that such challenges were the natural and unavoidable consequence of their physical, mental, intellectual or sensory impairment'.

<sup>9</sup> McClain 2002 [www.info.gov.za](http://www.info.gov.za).

technical aids that allow them independence, dignity, self-sufficiency and responsibility'.<sup>10</sup>

South Africa has committed itself not only to overcome the legacy of racial and gender discrimination, but also disability discrimination especially, in the workplace, in order to afford persons with disabilities an opportunity to participate fully in the labour market without being unfairly discriminated against.<sup>11</sup> In order to effectively eradicate employment barriers, the notion of equality advocated for in South Africa has been one of substantive equality. In the context of this paper, substantive equality can be understood as entailing that equality for persons with disabilities cannot stop with injunctions to refrain from invidious discrimination, but there must be a practical acknowledgment that persons with disabilities are not fully catered for by existing societal structures and that they have a right to participate fully in society and the labour market in particular.<sup>12</sup>

There have been challenges against the state's implementing progressive measures to ensure that persons with disabilities attain their much needed equality within the labour market.<sup>13</sup> Some of these challenges relate to persons with disabilities' lack of reasonable accommodation measures at work, accessible public transportation to get them to and from work, and ignorance about their potential at work.<sup>14</sup> Furthermore, installation of lifts in workplaces with more than one floor will be fundamental in increasing accessibility to the workplace for persons with disabilities.

Dupper argues that 'the constitutional right to equality ... envisage[s] a two pronged strategy to achieve the goal of "substantive equality" – the elimination of existing inequality, and the implementation of measures designed to protect and advance

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<sup>10</sup> McClain 2002 [www.info.gov.za](http://www.info.gov.za).

<sup>11</sup> Habib and De Vos "Human Rights" 24.

<sup>12</sup> Ngwena 2004 [www.leeds.ac.uk](http://www.leeds.ac.uk).

<sup>13</sup> Office of the President [date unknown] [www.independentliving.org](http://www.independentliving.org), where it is stated that 'legislation has contributed to the social exclusion of people with disabilities. First, legislation fails to protect the rights of people with disabilities and, second, through legislation, barriers are created to prevent people with disabilities from accessing equal opportunities.

<sup>14</sup> Anon [www.dsd.gov.za](http://www.dsd.gov.za).

those people disadvantaged by past discrimination ...'.<sup>15</sup> Persons with disabilities have not only experienced unfair discrimination in the past, but they continue to be at the receiving end of 'unjustified' perceptions by employers, which leads to their continued discrimination and marginalisation in the labour market.<sup>16</sup> It has been argued that 'the marginalization of persons with disabilities still arises in large part from biased attitudes and a lack of awareness and knowledge rather than from a lack of economic resources alone, yet persons with disabilities remain among the most vulnerable and marginalized'.<sup>17</sup> Such perceptions act as an effective bar to persons with disabilities to meaningfully participate in and contribute to the South African economy, thereby making it difficult for them to be provided with fair opportunities to realise their full potential. The International Labour Organisation (ILO) and various countries, including South Africa, have conducted intensive research which has revealed that the perceptions which some employers have cause insurmountable barriers for persons with disabilities to enter the labour market. Biased attitudes and unjustified perceptions are largely strengthened by widespread ignorance and a belief in stereotypes, which ultimately lead to such persons being unfairly discriminated against in society at large and in employment in particular.<sup>18</sup>

### **3 The *Employment Equity Act* and suitably qualified persons with disabilities**

The *EEA* is the principal legislation for protecting and promoting the right to equality in the workplace. It is designed to overcome the disadvantages that have been endured by historically marginalised groups such as people with disabilities.<sup>19</sup> In

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<sup>15</sup> Dupper 2002 *SA Merc LJ* 275.

<sup>16</sup> Department of Labour [date unknown] [www.workinfo.com](http://www.workinfo.com).

<sup>17</sup> UN Secretary General 2007 [www.un.org](http://www.un.org).

<sup>18</sup> See Perry 2004 [www.ilo.org](http://www.ilo.org). Perry argues (correctly in my view) that in many countries supportive legislation for persons with disability exists, but the mechanisms for implementation and enforcement are weak.

<sup>19</sup> See Ngwena 2004 [www.leeds.ac.uk](http://www.leeds.ac.uk). In terms of section 2 of the *EEA*, the purpose of the Act is to achieve equity in the workplace by promoting equal opportunity and fair treatment in employment through the elimination of unfair discrimination; and implementing affirmative action measures to redress the disadvantages in employment experienced by designated groups, in order to ensure their equitable representation in all occupational categories and levels in the workforce.

terms of Section 6 of the *EEA* 'no person may unfairly discriminate, directly or indirectly, against an employee, in any employment policy or practice, on one or more grounds, including ... disability ....' The *EEA* aims to achieve equality in the workplace and the equitable representation of disadvantaged groups in all occupational categories and levels in the workforce.<sup>20</sup> The aim of the *EEA* as stated in its preamble is to 'achieve a diverse workforce broadly representative of our people; [and to] promote economic development and efficiency in the workforce'. The *EEA* seeks to achieve equity in employment through promoting equal opportunities and fair employment practices.<sup>21</sup> To achieve this objective the *EEA* requires employers to eliminate unfair discrimination in their employment policies and practices.<sup>22</sup>

However, the elimination and 'prohibition of discrimination alone is not a guarantee of equality in practice, the realisation of which could require special measures to promote equal opportunities for members belonging to certain vulnerable groups'<sup>23</sup> such as persons with disabilities. The elimination of unfair discrimination and the implementation of employment equity in the workplace are measures designed to complement each other.<sup>24</sup> The *EEA* aims to implement affirmative action measures in order to redress the disadvantages in employment that have been experienced by those discriminated against in the past, which includes persons with disabilities. The *EEA* enjoins every employer to adopt measures that are aimed at the promotion of equal opportunities in the workplace. Such measures should ensure the complete elimination of unfair discrimination in any employment policy or practice.<sup>25</sup>

The *EEA* mandates employers to strive to achieve employment equity in order to diversify their workforce, which includes employing suitably qualified persons with disabilities. The Code of Good Practice: Key Aspects on the Employment of People

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<sup>20</sup> Section 15(1) of the *EEA*.

<sup>21</sup> Du Plessis and Fouche *Labour Law* 79.

<sup>22</sup> Section 5 of the *EEA*.

<sup>23</sup> Montalti and Bellengère "Affirmative Action" 150.

<sup>24</sup> Anon 2007 [www.sahrc.org.za](http://www.sahrc.org.za).

<sup>25</sup> Section 5 of the *EEA*.

with Disabilities<sup>26</sup> (hereinafter referred to as 'the Disability Code') was introduced to provide guidance for employers and employees on promoting equal opportunities and fair treatment for persons with disabilities, as required by the *EEA*. The Disability Code 'is intended to help employers and employees understand their rights and obligations, promote certainty and reduce disputes to ensure that persons with disabilities can enjoy and exercise their rights at work'.<sup>27</sup> It is further 'intended to help create awareness of the contributions persons with disabilities can make and to encourage employers to fully use the skills of such persons'.<sup>28</sup>

However, employers should not be expected to employ people who cannot perform the duties of a specified job nor retain employees who are unable to perform the tasks of a specified job merely because such people are disabled. It is submitted that any appointment or retention should be based on merit, or at least based on the fact that a person with a disability is capable of being trained and developed to adequately perform the tasks of the specified job. In terms of the Disability Code 'if an applicant with a disability is suitably qualified, an employer may make a job offer conditional on medical or functional testing to determine an applicant's actual or potential ability to perform the essential functions of a specific job'.<sup>29</sup>

It was held in *Stoman v Minister of Safety and Security & Others*<sup>30</sup> that the 'appointment of people who are wholly unqualified, or less than suitably qualified or incapable, in responsible positions, cannot be justified'. However, it is submitted that persons with disabilities should not be discriminated against solely on the basis that they lack relevant experience. As long as they are suitably qualified and have the capacity to acquire the necessary skills within a reasonable time, in order to perform the job in question then they should be considered for appointment. Section 9 of the *EEA* expressly provides that, for the purposes of its anti-discrimination provisions, the 'employee' includes applicants for employment.<sup>31</sup> This essentially entails that

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<sup>26</sup> GN 1345 in GG 23702 of 19 August 2002.

<sup>27</sup> Item 2.3 of the Disability Code.

<sup>28</sup> Item 2.4 of the Disability Code.

<sup>29</sup> Item 7.3 of the Disability Code.

<sup>30</sup> *Stoman v Minister of Safety and Security* 2002 23 ILJ 1020 (T).

<sup>31</sup> Grogan *Workplace Law* 97.

both employees with disabilities who are already within employment and persons with disabilities applying for employment are protected by the *EEA* against unfair discrimination that is based on their disability.

## 4 Reasonable accommodation

### 4.1 Overview

Section 15(2)(c) of the *EEA* requires that the 'affirmative action measures implemented by a designated employer ... include reasonable accommodation for persons with disabilities'. In terms of section 1 of the *EEA*, reasonable accommodation 'means any modification or adjustment to a job or to the working environment that will enable a person from a designated group to have access to or participate or advance in employment'. The concept of reasonable accommodation in the context of disability has not yet been adequately tested in our labour courts, and it remains unclear as to what it precisely entails.

However, guidance can be sought from the Disability Code, which lists several examples which 'constitute' reasonable accommodation; i.e. adapting existing facilities to make them accessible, adapting existing equipment or acquiring new equipment including computer hardware and software, re-organising work stations, changing training and assessment materials and systems, restructuring jobs so that non-essential functions are re-assigned, adjusting working time and leave, providing readers, sign language interpreters, and providing specialised supervision, training and support.<sup>32</sup> The Disability Code further states that 'the employer need not accommodate a qualified applicant or an employee with a disability if this would impose an unjustifiable hardship on the business of the employer.'<sup>33</sup>

The Disability code explains 'unjustifiable hardship' as an 'action that requires significant or considerable difficulty or expense and that would substantially harm the

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<sup>32</sup> Item 6.9 of the Disability Code.

<sup>33</sup> Item 6.11 of the Disability Code.



viability of the enterprise'.<sup>34</sup> It has been argued that 'it is common cause that an employer has a more onerous duty to accommodate an employee who is injured or disabled during employment'.<sup>35</sup> This is so because an employer would be required to adapt his or her workplace in order to assist the employee with disabilities to perform his or her duties. This might even lead to the employer having to make changes in his or her workplace to accommodate the employee concerned.

It would seem that the employer has 'a duty to consult with the employee and explore ways in which the disability may be accommodated'.<sup>36</sup> 'Reasonable accommodation depends upon the employer being aware of the applicant's or the employee's disability or impairment'.<sup>37</sup> There is therefore a duty on the applicant with disabilities or employee with disabilities to inform the employer about his or her disability so that the employer can consider ways of accommodating the disability. South African jurisprudence with regard to the reasonable accommodation of persons with disabilities in the workplace does not offer much guidance. It has been suggested that in interpreting the extent of the duty to reasonably accommodate in particular circumstances, it will therefore be useful to look at the interpretation thereof of foreign countries.<sup>38</sup> Van Jaarsveld also holds a view that 'South Africa can benefit from the experience of other countries, especially those in which the phrase "reasonable accommodation" has come under sustained judicial scrutiny'.<sup>39</sup>

#### **4.2 American approach**

The main statute which aims to ensure that persons with disabilities are accorded fair employment opportunities in the United States of America is the *Americans with Disabilities Act* of 1990 (*ADA*). This legislation protects qualified individuals with disabilities from discrimination in the workplace.<sup>40</sup> In the same way as the *EEA* does, the *ADA* also requires an employer to provide reasonable accommodation to

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<sup>34</sup> Item 6.12 of the Disability Code.

<sup>35</sup> Christianson "Disability Discrimination" 186.

<sup>36</sup> Christianson "Disability Discrimination" 186.

<sup>37</sup> Christianson "Disability Discrimination" 178.

<sup>38</sup> Christianson "Disability Discrimination" 178.

<sup>39</sup> Van Jaarsveld 2002 *SA Merc LJ* 358.

<sup>40</sup> Galo 2001 [www.akingump.com](http://www.akingump.com).

qualified individuals with disabilities who are employees or applicants for employment, unless to do so would cause undue hardship.<sup>41</sup> In terms of the *ADA* there are three categories of reasonable accommodations;

- Modifications or adjustments to a job application process that enable a qualified applicant with a disability to be considered for the position such qualified applicant desires modifications or adjustments to the work environment; or
- Modifications or adjustments to the manner or circumstances under which the position held or desired is customarily performed, that enable a qualified individual with a disability to perform the essential functions of that position; or
- Modifications or adjustments that enable [an ...] entity's employee with a disability to enjoy equal benefits and privileges of employment as are enjoyed by its other similarly situated employees without disabilities.<sup>42</sup>

In *US Airways, Inc v Barnett*<sup>43</sup> the court held that a modification or adjustment is reasonable if it seems reasonable on the face of it. Further that an accommodation must also be effective in meeting the needs of the individual. A reasonable accommodation allows an employee with a disability an equal opportunity to enjoy the benefits and privileges of employment that employees without a disability enjoy.<sup>44</sup> The approach of the USA seems to be similar to that of South Africa, but I am of the view that South African courts should be cautious when considering foreign jurisprudence. Instead they should rather develop a model of reasonable accommodation which will reflect the challenges experienced by persons with disabilities in South African workplaces.

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<sup>41</sup> *US Airways, Inc v Barnett* 535 US, 122 S Ct 1516, 1523 (2002); 42 USC §§ 12101-12117, 12201-12213 of the *Americans with Disabilities Act* of 1990 (as amended).

<sup>42</sup> See US Equal Employment Opportunity Commission 2002 [www.eeoc.gov](http://www.eeoc.gov).

<sup>43</sup> *US Airways, Inc v Barnett* 535 US, 122 S Ct 1516, 1523 (2002).

<sup>44</sup> *US Airways, Inc v Barnett* 535 US, 122 S Ct 1516, 1523 (2002).

### 4.3 *International standards*

The *Convention on the Rights of Persons with Disabilities (CRPD)* was adopted by the United Nations General Assembly in December 2006 and entered into force in May 2008.<sup>45</sup> The stated purpose 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>46</sup> The preamble to the *CRPD* recognises that 'discrimination against any person on the basis of disability is a violation of the inherent dignity and worth of the human person'.

Article 27 of the *CRPD* among others enjoins member states to: take appropriate steps to prohibit discrimination on the basis of disability with regard to all matters concerning all forms of employment, including conditions of recruitment, hiring and employment; 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; promote employment opportunities and career advancement for persons with disabilities in the labour market; as well as to ensure that reasonable accommodation is provided to persons with disabilities in the workplace. South Africa signed and ratified this convention in 2007.<sup>47</sup>

## 5 **The advantages of employing persons with disabilities**

Employers who heeded the legislative call to reasonably accommodate persons with disabilities have benefited a great deal from the talent and work ethic which these people possess.<sup>48</sup> I am of the view that when persons with disabilities have access to employment and training to acquire skills which are relevant to the labour market and suited to their abilities and interests, they can make a significant contribution in the workplace.<sup>49</sup> Employers are encouraged to consider and market the skills of

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<sup>45</sup> WHO 2010 [www.searo.who.int](http://www.searo.who.int).

<sup>46</sup> Article 1 *Convention on the Rights of Persons with Disabilities* (2006).

<sup>47</sup> Anon [date unknown] [www.disabled-world.com](http://www.disabled-world.com).

<sup>48</sup> Goodwill Industries International 2011 [www.prnewswire.com](http://www.prnewswire.com). See also Hasse *Perfectly Able* 9.

<sup>49</sup> ILO Skills and Employability Department 2007 [www.ilo.org](http://www.ilo.org).

applicants with disabilities. These applicants are generally judged based on their disability and not on whether they are skilled and competent to perform the job in question or not.<sup>50</sup> Persons with disabilities have an important role to play in order to make a positive contribution in the workplace. It is generally found that a person with a disability develops into a well-adjusted, productive worker in an atmosphere of acceptance, co-operation and goodwill.<sup>51</sup> Persons with disabilities are also encouraged to market themselves as suitably qualified persons capable of performing duties relevant to the job they would be applying for, with reasonable accommodation if needs be.

## 6 Dismissal on the basis of disability

Section 9(3) of the *Constitution of the Republic of South Africa*, 1996 affords protection against discrimination on the ground of disability. The right not to be discriminated against is further given effect to by codes of good practice in both the EEA and the *Labour Relations Act (LRA)*.<sup>52</sup> Persons with disabilities fall within the designated group. Discrimination on the grounds of disability is prohibited and a dismissal on a prohibited ground is automatically unfair.<sup>53</sup> Generally, in terms of the *Labour Relations Act* 66 of 1995, an employer is entitled to dismiss an employee for reasons relating to his or her misconduct, incapacity and operational requirements. However, such dismissals should be both procedurally and substantively fair.<sup>54</sup> The dismissal will be automatically unfair if the reason for the dismissal amounts to one of the listed grounds in section 187(1)(e) of the *LRA*, which include disability.

However, dismissal based on the employee's disability will be fair if it relates to the inherent requirements of the job in question.<sup>55</sup> I am of the view that the employer has to show that as a result of the employee's injury or disease, he or she cannot perform the essential functions of the job. This is different from the employee being

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<sup>50</sup> Anon [date unknown] [www.jobs.co.za](http://www.jobs.co.za).

<sup>51</sup> Department of Labour [date unknown] [www.labour.gov.za](http://www.labour.gov.za).

<sup>52</sup> Mouton 2008 [www.ens.co.za](http://www.ens.co.za).

<sup>53</sup> Chavoos 2008 [www.nortonrose.com](http://www.nortonrose.com).

<sup>54</sup> Sections 188 and 189 *Labour Relations Act* 66 of 1995.

<sup>55</sup> Section 187(2)(a) *Labour Relations Act* 66 of 1995. See also Christianson 2004 *ILJ* 879.

dismissed for reasons related to his or her capacity. 'A fair reason for dismissal related to capacity involves the employer's legitimate loss of confidence in the ability of the employee to perform in accordance with the contract of employment'.<sup>56</sup> As far as disability is concerned I submit, however, that the employer should be required to show that the employee with disabilities was unable to perform the essential functions even after reasonable measures were put in place to accommodate his or her disability. The employer should be absolved from this burden only if he or she shows that reasonable accommodation in the circumstances would impose an unjustifiable hardship his or her business.<sup>57</sup>

It is worth pointing out that disability and incapacity are two different concepts under South African labour law. It has been forcefully argued, correctly in my view, that 'disability and incapacity are not synonymous'.<sup>58</sup> Further, that being disabled does not mean that one is incapacitated even though it is possible to be both disabled and incapacitated.<sup>59</sup> The performance standard is central to any dismissal for incapacity, which might not necessarily be the case as far as disability is concerned.<sup>60</sup> The employee's incapacity may result from a lack of skill or knowledge or be due to his or her inefficiency, which is different where the employee is disabled but possesses the necessary skills and competences to do the job, in which case reasonable accommodation might be necessary.<sup>61</sup> Employees with disabilities, who are reasonably accommodated by the employer, can carry out their duties efficiently when they are provided with the necessary support which does not impose unnecessary hardships on the business of the employer. However, there is authority

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<sup>56</sup> Du Toit *et al Labour Relations Law* 412. See also the Code of Good Practice: Dismissal for Conduct and Incapacity, which is schedule 8 to the *LRA*. In terms of item 9 of this code an employer may dismiss an employee for poor work performance after such an employee has failed to meet the required performance standard, despite being aware of such standards and being given an opportunity to meet them. Furthermore, in terms of item 10 of the same code, the employer may also dismiss an employee for incapacity relating to ill health or injury, if the employee is incapable of performing the work as a result of such ill health or injury. However, the employer should also make reasonable accommodation were necessary or provide any suitable alternative work. However, such dismissals should always be both procedurally and substantively fair.

<sup>57</sup> *Standard Bank of South Africa v Commission for Conciliation, Mediation and Arbitration* 2008 4 BLLR 356 (LC) para 95-105 (hereafter *Standard Bank*).

<sup>58</sup> Mouton 2008 [www.ens.co.za](http://www.ens.co.za).

<sup>59</sup> Mouton 2008 [www.ens.co.za](http://www.ens.co.za).

<sup>60</sup> Christianson "Disability Discrimination" 883.

<sup>61</sup> Christianson "Disability Discrimination" 883.

to the effect that the employer can fairly dismiss an employee with disabilities for incapacity if such an employee refuses the employer's offer of reasonable accommodation.<sup>62</sup>

Finally, there has been a debate on whether HIV/AIDS cases in the South African context can be treated along the lines of disability.<sup>63</sup> This is an issue that is beyond the scope of this paper, but this matter does not seem to be settled in our law. It may suffice to say that the 'South African legislation has chosen to treat HIV status as a separate ground of unfair discrimination in s 6(1) of the *EEA*'.<sup>64</sup> Christianson submits correctly in my view that 'a more careful examination is therefore required to establish at what point in the progression of the disease, HIV/AIDS may be considered to be disability'.<sup>65</sup>

## 7 Conclusion

The origin of the test for fairness towards employees and job applicants with disabilities is the *Constitution of the Republic of South Africa, 1996*.<sup>66</sup> It is noteworthy that together with the Constitution, the *EEA* and the *LRA* (including its Codes of Good Practice) protect employees with disabilities as a vulnerable group because they are a minority with attributes different from mainstream society.<sup>67</sup> The aim is their integration and inclusion in the workplace, not only in order that they may achieve equality but also to restore the dignity of persons with disabilities.<sup>68</sup> The employer therefore bears the onus of accommodating the employee with disabilities in his or her workplace and must prove that such accommodation is reasonable. Should the employer believe that accommodating the employee under the circumstances would lead to his or her corporation suffering undue hardships; the

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<sup>62</sup> *Standard Bank of South Africa Ltd v CCMA* 1998 6 BLLR 622 (LC).

<sup>63</sup> Bollinger and Stover 1999 [www.policyproject.com](http://www.policyproject.com). See also Christianson "Disability Discrimination" 893.

<sup>64</sup> Christianson 2004 *ILJ* 879.

<sup>65</sup> Christianson "Disability Discrimination" 893. See also Swartz, Scheider and Gohleder "HIV/AIDS and Disability" 113, where it is argued that 'there is an urgent need to draw together the existing expertise in the overlap between HIV and Disability, and to consider carefully the priorities for research and action'.

<sup>66</sup> Section 9(3) *Constitution of the Republic of South Africa, 1996*.

<sup>67</sup> *Standard Bank* para 61.

<sup>68</sup> See generally *President of the Republic of South Africa v Hugo* 1997 4 SA 1 (CC).

employer bears the onus of proving that reasonable accommodation is unjustifiable.<sup>69</sup>

Employers ought to recognise the value that persons with disabilities can offer in various workplaces in South Africa. They should start concentrating on recruiting such persons into their workforce and creating a working environment which will allow their reasonable accommodation in the workplace. 'An employer who refuses to make any accommodation that falls short of unjustified hardship or refuses to give reasons for not making an accommodation is irrational'.<sup>70</sup> Furthermore, it has been shown in this paper that the American jurisprudence is quite similar to the South African jurisprudence, as employers in America are also required to reasonably accommodate employees with disabilities, unless they can show that such accommodation would lead to undue hardship.<sup>71</sup>

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<sup>69</sup> *Standard Bank* para 92.

<sup>70</sup> Mouton 2008 [www.ens.co.za](http://www.ens.co.za).

<sup>71</sup> *American with Disabilities Act* of 1990 42 USC § 12112 (b)(5)(A).

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### **List of abbreviations and acronyms**

ADA	Americans with Disabilities Act
CRPD	Convention on the Rights of Persons with Disabilities
EEA	Employment Equity Act
ILJ	Industrial Law Journal
LRA	Labour Relations Act
SA Merc LJ	South African Mercantile Law Journal