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Mental Disability and Discrimination in Employment Under New Zealand's Human Rights Act 1993

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Abstract

The New Zealand Human Rights Act 1993 (HRA) prohibits discrimination in employment on the ground of disability, which includes mental illness. However, what is unclear is, if an employee develops a mental illness during employment and their performance is compromised, to what extent does the legislation require the employer to accommodate (or tolerate) this poor performance. The question arises — if an employee could otherwise be justifiably dismissed for poor performance, would this nevertheless be discrimination if the poor performance was due to a mental illness?

To answer this question this thesis examines the discrimination in employment provisions of the HRA, seeking to clarify the obligations and prerogatives of the employer, and the rights of the disabled employee. In addition, this thesis critically evaluates the content of the legislation in light of New Zealand's obligations under the United Nations Convention on the Rights of Persons with Disabilities (UNCRPD).

Finding that there is a lack of case law relating to disability discrimination (that might otherwise clarify the law in this area), this thesis uses the 'spiral approach' to interpretation to analyse the relevant provisions. This analysis exposes several interpretive issues within the current legislation for disability discrimination, and reveals that the legislation may not be sufficient to ensure New Zealand is meeting its obligations under the UNCRPD.

These interpretive issues arise as key terms in the legislation are not defined, and because of the inherent ambiguity and complexity of the individual provisions. Consequently, it is unclear when a disabled employee might still be 'qualified' for their position, or when their adverse treatment (such as dismissal) might be by reason of their disability, rather than due to poor performance alone.

This research also suggests that New Zealand is not meeting its obligations under the UNCRPD to ensure reasonable accommodation of disability is provided in employment. Instead, the so-called 'reasonable accommodation' provisions of the HRA merely provide a defence against a claim of discrimination, and any obligation of reasonable accommodation is only inferred from this defence.

Furthermore, despite the purpose of the HRA being to better protect human rights 'in general accordance' with United Nations Conventions on human rights, it is difficult to interpret the HRA in accordance with the UNCRPD. This thesis argues that this is because the HRA is premised on a medical model of disability, and on the idea of formal equality, whereas the UNCRPD is premised on a mixed medical-social model of disability and aims to achieve substantive equality for those with disabilities.

As a consequence, even with the best possible interpretation of the provisions, the lack of a positive duty to accommodate the disabled employee, the emphasis on formal rather than substantive equality, and the failure to utilise the social model of disability, means New Zealand legislation provides inadequate protection against discrimination in employment on the ground of mental disability.

Therefore, this thesis suggests that the HRA should be amended to clarify the law for disability discrimination in New Zealand, and proposes a series of changes that might be made to achieve this. Ultimately, this thesis contends that New Zealand's current model of law is inappropriate for disability discrimination, and contends that a new social model of disability discrimination law is required to provide better employment protection for those with disabilities.

Preface

I can only compare this PhD journey with running an ultra-marathon. At the start you cannot see most of the course, and you have no idea how, or if, you will get to the end. Midway, you know how far you have come, but you also know how much further there is to go. There is a seemingly never-ending series of high points and lows. Every climb is exhausting, but every step takes you closer to the next aid station, where sustenance and support await. Persevere long enough and the finish line looms, and miraculously, the pain is forgotten.

For my PhD, the aid stations were provided by my supervisors, family and friends, and I acknowledge the important part they have played in getting me through this event.

First and foremost I wish to thank Professor John Dawson, my primary supervisor, for his unstinting support through my thesis journey, in particular for his prompt, insightful, and thorough feedback, and for his never-ending patience. To Professor Jessica Palmer, my secondary supervisor, my grateful thanks for your unswerving support, reassurance and valuable feedback throughout this journey. Without the help of these two wonderful people, this project would not have succeeded.

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Abbreviations

Glossary of Abbreviations

Authority	Employment Relations Authority
CRT	Complaints Review Tribunal
EEOC	Equal Employment Opportunity Commission (USA)
HRC	Human Rights Commission
HRRT	Human Rights Review Tribunal
ICESCR	International Covenant on Economic, Social and Cultural Rights
ILO	International Labour Organisation
IMM	Independent Monitoring Mechanism
GOQ	Genuine Occupational Qualification
PBRF	Performance Based Research Funding
PG	Personal Grievance
PIP	Performance Improvement Plan
Tribunal	Human Rights Review Tribunal
T1	Time of commencing a position
T2	Time of alleged discriminatory treatment
UDHR	Universal Declaration of Human Rights
UKEAT	United Kingdom Employment Appeal Tribunal
UNCRPD	United Nations Convention on the Rights of Persons with Disabilities
WINZ	Work and Income New Zealand

Legislation Abbreviations

ADA	Americans with Disabilities Act 1990 (United States of America)
ADA NSW	Anti Discrimination Act 1977 (New South Wales, Australia)
DDA Cth	Disability Discrimination Act 1992 (Australia)
DDA UK	Disability Discrimination Act 1995 (United Kingdom)
EA 2010	Equality Act 2010 (United Kingdom)
ERA	Employment Relations Act 2000 (New Zealand)
HRA	Human Rights Act 1993 (New Zealand)
HRCA	Human Rights Commission Act 1977 (New Zealand)
NZBORA	New Zealand Bill of Rights Act 1990 (New Zealand)

HSEA	Health and Safety in Employment Act 1992 (New Zealand)
HSWA	Health and Safety at Work Act 2015 (New Zealand)
SSA	State Sector Act 1998 (New Zealand)
USC	United States Code (USA)

Taxonomy of Terms

Mental Disability	Means all non-physical disabilities included in section 21 of the HRA
Potential accommodation provisions	Human Rights Act 1993, ss29, 35
Permitted exceptions	Human Rights Act 1993, s29
Unreasonable to provide special assistance defence	Human Rights Act 1993, s29, (1)(a)
Unreasonable risk of harm defence	Human Rights Act 1993, s29(1)(b)
Task reallocation proviso	Human Rights Act 1993, s35
Time T1	The time at which an employee commences a position.
Time T2	The time of the alleged discriminatory conduct by the employer.

Legislation Referred To

New Zealand

Crown Entities Act 2004

Disability (United Nations Convention On The Rights Of Persons With Disabilities) Bill 2008

Employment Relations Act 2000

Equal Pay Act 1972

Human Rights Act 1993

Human Rights Commission Act 1977 (repealed)

Health and Disability Commissioner Act 1994

Health and Safety in Employment Act 1992 (repealed)

Health and Safety at Work Act 2015

Holidays Act 2003

Human Rights Amendment Act 2008

Human Rights Act 1993

Immigration Act 1987

Industrial Relations Act 1973

Interpretation Act 1999

Kiwisaver Act 2006

Local Government Act 2002

Minimum Wage Act 1983

New Zealand Bill of Rights Act 1990

Official Information Act 1982

Parental Leave and Employment Protection Act 1987

Privacy Act 1993

Race Relations Act 1971(repealed)

State Sector Act 1988

Wages Protection Act 1983

International Legislation

Canadian Human Rights Act 1985 (Canada)

Constitution Act 1982 (Canada)

Americans with Disabilities Act 1990 (United States of America)

Anti Discrimination Act 1977 (New South Wales, Australia)

Disability Discrimination Act (Cth) 1992 (Australia)

Disability Discrimination Act 1995 (UK)(repealed)

Employment Equity Act 1995 (Canada)

Equality Act 2010 (United Kingdom)

Manitoba Human Rights Code 1987 (Canada)

Quebec Charter of Human Rights and Freedoms 1975 (Quebec)

Respecting Industrial Accidents and Occupational Diseases 1985 (Quebec, Canada)

Saskatchewan Human Rights Code 1979 (Saskatchewan)

International Covenants and Conventions

International Bill of Human Rights

International Covenant on Civil and Political Rights (ICCPR)

International Covenant on Economic, Social and Cultural Rights (ICESCR)

Universal Declaration of Human Rights (UDHR)

United Nations Convention on the Rights of Persons with Disabilities 2006 (UNCRPD)

International Labour Organisation Discrimination (Employment and Occupation) Convention, 1958

International Labour Organisation Vocational Rehabilitation and Employment (Disabled Persons) Convention, 1983 (No. 159), and Recommendation (No. 168), 1983.

Chapter 1: Introduction: Discrimination, Disability and Employment

1.1 Introduction

Professor Smith, a well-known and respected Professor at a prestigious University in New Zealand, develops depression. She loses motivation, cannot think clearly and has difficulty concentrating. She has memory problems and is increasingly intolerant of her students' shortcomings. Over time, her ability to research becomes compromised, and she stops submitting articles for publication. Her supervision of post-graduate students becomes desultory, and although she manages to teach her undergraduate classes, she does this by relying on her vast experience, and previous years' notes (which fortunately remain valid). Other staff members find her uncommunicative and unhelpful, and can no longer rely on her to 'pull her weight' when it comes to extra-curricular activities. Her managers at the University are aware of her depression, but have decided that her poor performance — and the impact it is having on the students and other staff members — is no longer tolerable. Therefore, they wish to 'performance manage' her out of employment.

The University knows that, for it to be lawful, the dismissal of Professor Smith must be both substantively and procedurally justified. What the University is unsure of is, whether, if Professor Smith's poor performance and conduct is due to depression — a disability under the Human Rights Act 1993 (HRA) — could this dismissal be considered discriminatory?

This type of situation is not uncommon in the workplace, and is a cause of concern for both employers and mentally disabled employees, who are unsure of their respective obligations and rights. Therefore, this thesis seeks to clarify when a dismissal (or adverse treatment) of an employee, who has a mental disability, would be discrimination. It is particularly concerned with situations in which the performance of a current employee falls during the course of their employment, due to the development of a mental disability, as in the case of Professor Smith above. Does such a person remain 'qualified' for their job? Would their dismissal constitute discrimination against them 'by reason of' their disability? To which other employee should the disabled employee's treatment be compared with? And to what extent is the employer obliged to accommodate the disabled employee? These difficult questions will be addressed in the context of New Zealand's anti-discrimination law, seeking the correct interpretation of the anti-discrimination legislation — the HRA. This thesis will evaluate whether the provisions in this Act fulfil the purposes of disability discrimination law, or whether reform is required, particularly to ensure New Zealand law is in line with the United Nations Convention on the Rights of Persons with Disabilities (UNCRPD). Thus, the aim of this thesis is to clarify the law in this contentious and difficult area, so employers may know when they are at risk of discriminating against those with a mental disability, and when their decision to dismiss would be lawful.

1.1.1 The Context: The Impact of Mental Disability on Employment

The impact of mental disability on employment is a significant issue. Worldwide, it is estimated that one-third of the population has a mental disability,[1] with conservative estimates suggesting that this includes 10-18% of the workforce.[2] In New Zealand, one in six adults (16%) has been diagnosed with a common mental disability at some time in their lives[3] and the rate of labour force participation for those with a mental health disability is reported at 52%.[4]

Although many people with mental disability work productively and competently, there are some employees who will develop a mental disability, or have a recurrence of an existing condition, in a manner that affects their performance. This may negatively impact the employer's business.

Lack of performance by the affected employee may manifest in either presenteeism or absenteeism.

Presenteeism, as a result of mental illness, may manifest as loss of productivity or impaired performance, due to diminished concentration and impaired decision-making skills, while still being present in the workplace. Depressive conditions may result in a loss of motivation, forgetfulness, tardiness, physical and mental slowness,[5] whereas mania may result in hyperactivity and inability to focus. Other conditions may manifest with paranoia, hyper-vigilance and disturbed thinking. The individual may make poor business or management decisions, and may alienate customers or contractors. All of these sequelae can impact on the individual's ability to perform effectively in many — if not all — aspects of their job. The flow-on effect of this will depend upon the individual's role, but if other employees find themselves 'carrying' the individual, this may impact on their own performance, or the productivity of the business as a whole. Additionally, working alongside someone with manifest mental illness may create a stressful working environment in other ways for other employees, and may even impact their mental health.[6]

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[1] Henry G. Harder "The Scope of Mental Illness" in Shannon L. Wagner et al (eds) *Mental Illness in the Workplace: Psychological Disability Management* (Ashgate, Farnham, 2014).

[2] Under-reporting by affected individuals (particularly for less severe mental disability) may mean the true percentage is higher.

[3] Statistics New Zealand *Disability and the Labour Market. Findings from the 2013 Disability Survey* (Statistics New Zealand, 2014) .

[4] The Labour force participation rate is defined as the number of people in the labour force as a percentage of the number of people in the working-age population.

[5] Anne Honey "The Impact of Mental Illness on Employment: Consumers' Perspectives" (2003) 20(3) Work 267 at 271.

[6] Andrew Scott-Howman *Workplace Stress in New Zealand* (Thomson Brookers, Wellington, NZ, 2003). The wealth of literature exploring the role of workplace stress across different professions in New Zealand suggests work related stress is prevalent and increasingly recognised as a workforce issue.

In addition, mental health problems are one of the leading causes of absenteeism from work, at least across Europe.[7] Aside from being unpredictable, the absences (often lengthy) make it difficult for the employer to effectively manage the workforce, with consequent loss of productivity. In particular, stress related disorders (including anxiety and depression) are one of the major causes of absenteeism, with rates quoted internationally at 30% of all work-related absences.[8]

As with presenteeism, absenteeism may cause increased pressure and stress on remaining staff. The economic cost to the employer may be substantial with decreased productivity, the cost of sick leave entitlements or the cost of employing and training short-term replacements.[9] Therefore the employer often has good reason to want to "performance manage out" (i.e. dismiss on the grounds of poor performance) the affected employee.

Nevertheless, there are both social and economic benefits in continuing the employment of someone with a mental disability.[10] An experienced or skilled worker may be difficult to replace, and training may be time consuming and expensive. Additionally, there is anecdotal evidence suggesting that retained employees show increased loyalty to the employer.[11] Thus, supporting the employee and making suitable adjustments (such as graduated return to work, reduced or flexible hours) may be both a sound business decision and morally commendable.

Furthermore, society benefits from employing disabled employees. Alongside an increased and diverse labour pool, which might benefit employers, there are what Emens describes as attitudinal benefits, where working alongside persons with disabilities results in an improvement in attitudes toward disability and the reduction of stigma and prejudice.[12]

Nevertheless, as a result of decreased or fluctuating performance, the employer may wish to terminate the employment of the individual with a mental disability. However, this may result in a wrongful dismissal, either because the dismissal is

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[7] Harder, above n1 at 17.

[8] At 17.

[9] EEO Trust *Employing Disabled People* (EEO Trust, Auckland, 2008).

[10] Michael Ashley Stein "Labor Markets, Rationality, and Workers with Disabilities" (2000) 21(1) Berkeley J Employ Labor Law 314. Stein suggests the failure of the market to employ those with disabilities is irrational, as it is not based on accurate information.

[11] Sarah Von Schrader, Valerie Malzer and Susanne Bruyère "Perspectives on Disability Disclosure: The Importance of Employer Practices and Workplace Climate" (2014) 26 Employ Respons Rights J 237 at 237.

[12] Elizabeth F. Emens "Integrating Accommodation" (2008) 156(4) Univ Pa Law Rev 839 at 900.

substantively unjustified,[13] or because it is an unlawful to terminate employment by reason of a prohibited ground of discrimination (disability).[14]

1.1.2 Discrimination and Human Rights Law

As Gault J stated in *Quilter v Attorney-General*, discrimination defies precise definition.[15] In one sense, to discriminate is to recognise a distinction or differentiation between individuals. In human rights law, discrimination is a pejorative term denoting the unfair treatment of people on the basis of an irrelevant feature, such as race, colour or gender. There is a moral element to the judgment, as Smith explains:[16]

> Commentators… still argue about what amounts to "discrimination". It is a factual question whether people have been treated differently on certain grounds, but "discrimination" is not just differentiation. It is differentiation that does not treat all those concerned as equals. To say that a person has been discriminated against is thus to make a moral judgement as well.

According to Shin,[17] the best moral explanation of the legal concept of discrimination is that it expresses society's commitment to 'identify, disavow, and disallow' the practices and actions that perpetuate historic and persistent patterns of unjust inequalities.

The aim of anti-discrimination law, in general, is to promote equality. Equality involves treating people with equal concern and respect,[18] as all persons have equal moral status, have the same inherent value, and are equally entitled to respect and dignity.[19] Dignity can be understood as inherent human worth, and discriminatory treatment that damages or injures a person's sense of self-worth violates their dignity.[20] Dignity may also be considered in terms of respecting a

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[13] One substantive ground for dismissal is poor performance. Whether it is justified is assessed against the 'test of justification' (Employment Relations Act s103A).

[14] Human Rights Act 1993, s22; Employment Relations Act 2000, s104.

[15] *Quilter v Attorney-General* [1998] 1 NZLR 523 (CA) at 527.

[16] Nicholas Smith "A Critique of Recent Approaches to Discrimination Law" (2007) NZ L Rev 499 at 502.

[17] Patrick Shin "Is there a Unitary Concept of Discrimination" in Deborah Hellman and Sophia Moreau (eds) *Philosophical Foundations of Discrimination Law* (Oxford Scholarship Online, 2013).

[18] At 28-50.

[19] Denise Reaume "Dignity, Equality and Comparison" in Deborah Hellman and Sophia Moreau (eds) *Philosophical Foundations of Discrimination Law* (Oxford Scholarship Online, 2013) at 3.

[20] There is a general consensus that the Kantian ideal of treating man as-an-ends and not as a means forms the basis of the modern concept of human dignity and autonomy (Christopher McCrudden "Human Dignity and Judicial Interpretation of Human Rights" (2008) 19(4) EJIL 655). Nonetheless, dignity is culturally dependent and malleable. Therefore, what might be considered a violation of dignity in one culture might not be in another.

person's autonomy and liberty,[21] which are fundamental rights.[22] Thus, unequal or unfair treatment, which interferes with an individual's rights and fundamental freedoms, might be considered discriminatory.

However, whether anti-discrimination law should be grounded on ideals of equality alone, or also on ideals of dignity, autonomy or liberty is the subject of much academic writing.[23] The relevance becomes apparent when one sees how cases are decided in different jurisdictions, as the application of anti-discrimination law depends, in part, on the philosophical foundations used to define discrimination. Thus, in Canada, the Supreme Court says the purpose of anti-discrimination law is 'to prevent the violation of dignity and freedom'.[24] Therefore, if the dignity of the person is not affected, then the treatment may not amount to discrimination.[25] Alternatively, the United Kingdom (traditionally) focuses on formal equality — although equal treatment does not necessarily afford equal benefits. As Anatole France[26] famously summarised: the 'majestic even-handedness of the law forbids rich and poor alike to sleep under bridges, to beg in the streets and to steal bread.'

Nonetheless, this thesis contends that it is substantive, rather than formal equality, that is the most appropriate basis for *disability* discrimination law, as it shifts the focus away from simple equal treatment.

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[21] Denise G Reaume "Discrimination and Dignity." (2003) 63(3) La L Rev 645; Gay Moon and Robin Allan "Dignity Discourse in Human Rights Law: A Better Route to Equality?" (2006) 11 EHRLR 610.

[22] General Assembly of the United Nations *The Universal Declaration of Human Rights* (General Assembly of United Nations, 1948) .

[23] For example see Nicholas Smith *Basic Equality and Discrimination: Reconciling Theory and Law* (Ashgate, Farnham, Surrey; Burlington, VT, 2011); Kasper Lippert-Rasmussen *Born Free and Equal?: A Philosophical Inquiry into the Nature of Discrimination* (Oxford Scholarship Online, Online: January 2014. Retrieved 15 Oct. 2017, 2013); Beth Gaze "Context And Interpretation In Anti-Discrimination Law" (2002) 26 MURL 325; James J. Weisman "Dignity and Non-Discrimination: The Requirement of "Reasonable Accommodation" in Disability Law" (1995) 23 Fordham Urb LJ 1235; Anton Fagan "Dignity and Unfair Discrimination: A Value Misplaced and a Right Misunderstood" (1998) 14 SAJHR ; Reaume, above n; Sandra Fredman *Discrimination Law* (2nd ed, Oxford University Press, Oxford, United Kingdom, 2011); Marshall Cohen and others *Equality and Preferential Treatment* (Princeton University Press, Princeton NJ, 1977); Peter Vallentyne "Left Libertarianism and Private Discrimination" (2006) 43 San Diego L Rev 981; Catherine Barnard and Bob Hepple "Substantive Equality" (2000) 59 Cambridge LJ 562; Richard Arneson "What is Wrongful Discrimination?" (2006) 43 SanDiego L Rev 775; Reaume, above n21.

[24] *Miron v Trudel* [1995] 2 SCR 418 at 133.

[25] See *Gosselin v Quebec (Attorney General)* [2002] SCC 84. In this case the complainant was not discriminated against, because failing to receive a benefit that older unemployed people were entitled to was not an insult to her dignity.

[26] Le Lys Rouge (1894), in Fredman, above n23 at 1.

1.1.3 Why Disability Discrimination is Different

Compared to the other prohibited grounds of discrimination,[27] disability discrimination is different. Firstly, it may not be apparent that the complainant is disabled, and in particular the mentally disabled employee may not disclose their condition, due to the fear of prejudice, stereotyping and stigma associated with mental illness.

Secondly, disability impairment comes in many forms with differing degrees of impact on capacity, capability and needs.

Thirdly, unlike other grounds of discrimination, where different treatment is based on a feature that is generally considered to be irrelevant to a person's ability to work (such as colour or gender), with disability the feature may be relevant, because it genuinely impacts on the disabled person's[28] ability to work. Thus, the disabled employee may require additional measures or services to enable them to perform some functions. As summarised by McHugh and Kirby JJ:[29]

> Disability discrimination is also different from sex and race discrimination in that the forms of disability are various and personal to the individual while sex and race are attributes that do not vary. The elimination of discrimination against people with disabilities is not furthered by "equal" treatment that ignores their individual disabilities.

Consequently, to effectively participate in the workforce (and society), the mentally disabled employee may require different treatment, or reasonable accommodation of their disability — and disability discrimination law should reflect this. Discrimination law is therefore about ensuring the 'equal opportunity for people with disabilities to meet their own needs.'[30]

Accordingly, a philosophical approach based on formal equality, which may be appropriate for other prohibited grounds of discrimination, may not be apt for disability discrimination, as it promotes equal treatment with non-disabled persons, when the disabled employee might require different treatment.

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[27] The prohibited grounds of discrimination are set out in the Human Rights Act 1993, s21 and include sex, marital status, religious belief, ethical belief, colour, race, ethnicity, disability, age, political opinion, employment, family status and sexual orientation.

[28] This thesis refers to persons who have disabilities (as defined in the HRA) as 'disabled persons'. The use of this phrase may be contentious and some people consider the term 'persons with disabilities' to be more appropriate (John Jensen and others "Work Participation among People with Disabilities — Does the Type of Disability Influence the Outcome?" (2005) 24 Social Policy Journal of New Zealand (Online) 134; https://www.disabled-world.com/definitions/disability-disabled.php).

[29] *Purvis v New South Wales (Department of Education and Training)* [2003] HCA 62, (2003) 217 CLR 92 at [86].

[30] Weisman, above n23 at 1239.

1.2 The Problem with Discrimination Law in Employment for Disability

As Mummery LJ said:[31]

> Anyone who thinks that there is an easy way of achieving a sensible, workable and fair balance between the different interests of disabled persons, of employers and of able-bodied workers, in harmony with the wider public interest in an economically efficient workforce, in access to employment, in equal treatment of workers and in standards of fairness at work, has probably not given much serious thought to the problem.

It is not surprising then, that this thesis identifies several areas of concern for disability discrimination in employment in New Zealand. One major area of concern is the lack of clarity and certainty in the law, as the meaning and ambit of the discrimination in employment provisions in the HRA are unclear. A second area of concern is whether, under the HRA, disabled employees can hope to achieve substantive equality (a goal of disability discrimination law), through reasonable accommodation of their disability. Given the purposes of the HRA are to better protect human rights of disabled employees *and* to protect the managerial prerogative of employers, a third area of concern is how to balance these competing interests. These issues will be discussed in more depth below.

1.2.1 The Lack of Clarity and Certainty in the Law

In order to make informed decisions regarding the future employment of an under-productive employee with a mental disability, an employer needs to know and understand the law surrounding discrimination and justified dismissal. The question arises as to whether this is possible under the current law.

Ideally, the law would evince a clear and consistent position, understood by the parties, so they have certainty as to their respective positions in advance. Currently, it is submitted, the law does not provide enough clarity to meet this position. This is due in part to the interpretive difficulties arising from the discrimination in employment provisions for disability discrimination, and this is compounded by the dearth of case law on point. Furthermore, it is unclear whether, or to what extent, there is an obligation in New Zealand for an employer to reasonably accommodate the mentally disabled employee, as New Zealand's HRA does not specifically require employers to reasonably accommodate persons with disabilities. Rather the law provides the employer with a defence (or exception) against a claim of discrimination, where it would be unreasonable for them to provide certain types of accommodations that the employee might require. The precise effect of these provisions is also unclear.

Fuller[32] contends that the rules making up a legal system need to meet certain criteria, in order for them to have the status of law. He summarises these criteria in eight 'desiderata' or types of legal excellence to which a system of rules should

[31] *Clark v Novacold Ltd* [1999] ICR 951 (EWCA) at 954.
[32] Lon L. Fuller (1902-1978).

strive, which embody what he calls the inner morality of the law.[33] These desiderata include generality, promulgation, congruence between rules as formulated and their implementation, clarity, consistency, lack of contradiction, being capable of being complied with, and being non-retroactive in nature.[34] Of particular relevance for this thesis are the desiderata of clarity and consistency.

Clarity has been described as having both a linguistic facet and a legal facet. The linguistic facet is necessary for the lay-person, such as the employer, to understand the law, while the legal facet is necessary for foreseeability and to avoid arbitrariness. As Wacks summarised it, 'the judge's powers broaden to the detriment of the legislator's where vague wording is concerned'.[35] In the context of this thesis we will see that there is a lack of clarity in New Zealand law generally in this area.

In addition, consistency necessitates that change does not happen with what has been described as 'disorientating frequency'.[36] Therefore, the law should be applied consistently, with adherence to the doctrine of precedent. However, given the imponderable policy considerations and the contextual application of employment law and human rights law, this may prove difficult. For example, while it may be appropriate to apply stringent standards to a large state sector employer, the same standards may be unfair when applied to a small private employer. However, deciding such matters on a case-by-case basis may introduce retroactivity into the law, by not determining the rules that apply until after a judgment has been given, which negatively impacts on clarity and consistency in the law.

The harm of retroactive law, which is not declared until a matter comes before the court but applies to past circumstances, is that the employer may be guilty of wrongdoing that, prior to the judgment, was not known to be wrongful. Fuller accepts that retroactive application is necessary when there is no precedent and new interpretation of the law is required — as the alternative is leaving a legal vacuum with undecided cases. Furthermore, he accepts that retroactivity occurs (and may be necessary) when a Court distinguishes one case from another so the distinguished precedent no longer applies.[37] However, in our context, this raises the possibility that, by distinguishing a case, what would have been a justified dismissal becomes discrimination. Nonetheless, Fuller contends that, although there are difficulties in analysis of retroactivity, the 'difficulties and nuances should not blind us to the fact that, while perfection is an elusive goal, it is not hard to recognise blatant indecencies.'[38]

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[33] Lon L. Fuller *The Morality of Law* (Rev ed, Yale University Press, New Haven, 1969).
[34] Matthew Kramer "Scrupulousness Without Scruples: A Critique of Lon Fuller and His Defenders" (1998) 18(2) OJLS 235.
[35] Raymond Wacks *Understanding Jurisprudence: An Introduction to Legal Theory* (3rd ed, Oxford University Press, Oxford, 2012) at 15.
[36] Fuller, above n33; Kramer, above n34, at 66.
[37] Fuller, above n33, at 57.
[38] At 62.

Therefore, we should strive to attain a reasonable level of certainty and consistency in New Zealand discrimination law. The scope of uncertainty in New Zealand law in this area will therefore be canvassed, as this thesis suggests the law is not achieving that aim. In particular, the law surrounding discrimination in employment, on the prohibited ground of mental disability, is unclear. This is because, not only is the text of provisions unclear, but policy considerations — such as the purposes of employment law and human rights law, and the consideration of the conflicting interests of the employer and employee — may influence how the law in this area is interpreted. Furthermore, these considerations have a contextual element, which may influence interpretation. For example, state sector employers (who are subject to the 'good employer' provisions of the State Sector Act 1988 (SSA)),[39] or large corporate employers with substantial resources to draw upon, may find they are held to a higher standard (i.e. to be more accommodating of the disabled employee) than the small employer with limited resources. Moreover, as the discrimination in employment provision (section 22 of the HRA) is generic for all grounds of prohibited discrimination, it does not readily cope with the special nature of disability discrimination.

Therefore, the law in this area needs to be clarified to enable employers and employees to know with some certainty their respective rights, prerogatives and obligations.

1.2.2 The Failure of the HRA to Promote Substantive Equality

One major difficulty with New Zealand discrimination law, for disability, concerns the model of 'equality' upon which it appears to be based. The HRA appears to be based on a formal model of equality, when what is required for disability discrimination is a model of substantive equality, particularly if New Zealand is to meet its obligations under the UNCRPD. A fundamental aim for those with disabilities is to be able to enjoy their rights and fundamental freedoms, and participate in society on an equal basis with non-disabled persons. However, because of barriers — both physical and social (such as prejudice and stereotyping) — this goal is not easily attained. Therefore, a major aim of disability discrimination law should be to counteract these barriers.

The problem is, if discrimination law is premised on equality of treatment, or formal equality, this would require only that disabled persons be treated on an equal basis with those without disabilities. When a disabled employee is able to perform their work without the need for accommodation, then their disability is irrelevant to their work, and formal equality will prevent discrimination by ensuring they are treated equally with non-disabled persons. But when the disability affects the employee's ability to perform the duties of their position, then it is not an irrelevant consideration, and equality of treatment may not achieve the desired outcome. If, for example, an employer dismisses all employees who are tardy for work, then equality of treatment may not protect the disabled employee who is tardy, even when this tardiness is due the affects of their medication. In that case, it is not equal, but different treatment that would be required to protect the disabled employee (such as a flexible working hours).

[39] State Sector Act 1988, s56.

This different treatment (or reasonable accommodation), would allow the disabled employee to achieve the same overall outcome as non-disabled employees — full participation in the workforce and society. This achieves substantive equality.

Although the meaning of substantive equality is elusive,[40] in general the focus of substantive equality is either on achieving equality of opportunity, or equality of outcome. Both these approaches would require different and individualised treatment of disabled persons (i.e., reasonable accommodation of their disability).

The concept of equality of opportunity recognises that past discrimination and structural discrimination place individuals at a disadvantage. Thus, to equalise opportunity, their 'starting point' must be equalised (like competitors in a race), after which gains are due to individual merit. However, this concept fails to consider whether, once the starting point is equalised, the 'competitors' are genuinely able to compete on an equal basis. Therefore, equality of opportunity does not guarantee equality of results.[41] Admittedly, a person's choices, may also affect the opportunities available to them — making opportunity difficult to equalise. For example, the opportunity to work may be limited by the circumstance of having a disability, but choosing to refuse medication may also affect that person's opportunities.[42] Roemer, in his theory of distributive justice, attempts to take these personal choices into account. He models an algorithm that analyses equality of opportunity, taking into account personal responsibility — which, he argues, will reduce the debate over equality of opportunity from one of social policy, to one of individual accountability.[43]

However, substantive equality, viewed as equality of outcome (or result) looks at the end goal. Using the analogy of a race, equality of outcome looks not to equalise the starting point alone, but also to smooth out the humps and hollows in the racetrack. The outcome may be equal ability to continue working despite having, or developing, a disability during employment. This may be achieved through accommodating the disability (i.e., flattening the humps on the track).

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[40] Sandra Fredman "Substantive Equality Revisited" (2016) 14(3) International Journal of Constitutional Law 712. Fredman points out that there are various core meanings given to substantive equality including equality of results, equality of opportunity and dignity. Different jurisdictions reflect these concepts in their legislation for direct and indirect discrimination, reasonable accommodation and harassment.

[41] At 723.

[42] For a full discussion on the problem of personal choice and involuntary circumstances, see John E. Roemer *Equality of Opportunity* (Harvard University Press, Cambridge, USA, 2000) and the rebuttal in Mathias Risse "What Equality of Opportunity Could Not Be" (2002) 112(4) Ethics 720.

[43] Roemer differentiates between merit and dessert. An individual merits something because of the attributes they have (such as a high IQ, or sporting ability); dessert, however, is something given as a reward for the effort put in. In his model of distributive justice, Roemer takes into account both of these variables.

The advantage of this model of substantive equality is the intent of the discriminator is irrelevant, as it is the outcome that is important. Thus, this model applies equally to direct and indirect discrimination.[44]

Although this model of substantive equality is not without issue,[45] pragmatically, for those with disabilities, it most closely encapsulates what is sought by them, that is, the ability to participate in society and employment on an equal basis with others, through the accommodation and acceptance of their disability. However, the implication is that, to enable disabled persons to achieve equality of outcome, there must be a duty imposed on others to reasonably accommodate their disability. The HRA contains no such positive duty.

Instead, the focus on equal treatment in the HRA suggests it is premised on formal equality. Thus, as this thesis will demonstrate, it is difficult for the legislation to be interpreted in a manner that would achieve greater substantive equality for disabled employees, and for it to be interpreted in accordance with the principles of the United Nations Convention on the Rights of Persons with Disabilities (UNCRPD), which New Zealand ratified in 2008. To achieve these aims would require law reform, as the final chapter of this thesis will discuss.

1.2.3 The Competing Interests of the Employer and Employee

Another difficulty in determining the proper shape of disability discrimination law in the field of employment is the conflicting interests of the employer and employee.

As Anderson states:[46]

> At the risk of oversimplification, it is possible to say that the aim of employing labour is to extract the maximum amount of work at the least possible cost; the aim of working is to achieve the maximum return for the provision of one's labour.

Thus, for commercial businesses the employer's aim is to run a profitable enterprise. In the public sector (e.g. health, education, police), the aims are not commercial but do require the efficient use of public funds.

Therefore, the general purpose of employment is for the employee to "produce" an output, with maximal efficiency. Thus, the employer desires a satisfactorily productive employee, able to perform the requirements of the job (with minimal supervision or coercion), without upsetting the equilibrium of the workplace or negatively affecting the performance of others.

A poorly performing employee may increase the stress levels of other employees, or pose a risk of harm to others, or affect the productivity of a business. While a

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[44] Fredman, above n40 at 721.

[45] Fredman (above n40) argues that it not clear what 'results' are being sort, nor does equality of result necessarily bring about structural change, and this may perpetuate discrimination (particularly if positive discrimination or affirmative action is used). Nor, she contends, does it resolve issues of 'leveling down' (where everyone is equalized at a lower level) (at 722-724).

[46] G. J. Anderson *Reconstructing New Zealand's Labour Law: Consensus or Divergence?* (Victoria University Press, Wellington, NZ, 2011) at 13.

larger employer may have the ability to 'carry' a poorly performing employee for a period of time, for a small employer, or those working in highly specialised areas, decreased productivity can put a business at risk. Therefore, an employer may have valid concerns about employing a symptomatic mentally disabled person.

However, for the mentally disabled employee, the benefits of employment are psychological, social and financial. Even for those without mental health problems, unemployment is associated with poor health and increased psychological stress.[47] Income, time structure, social contact, being part of a collective purpose, being engaged in meaningful activities, having a social identity and social status, are benefits associated with employment.[48] For those with mental illness employment is even more important, as it aids in maintaining good mental health and promotes recovery from mental illness.[49]

Therefore, it is in the interest of the mentally disabled person to have meaningful work. However, those with mental disability encounter barriers in employment due to stigma, prejudice and discrimination.[50] Consequently, the fear of job loss or discrimination results in unwillingness to disclose the presence of mental disability to employers.[51] The fear that disclosure of their disability may put their job at risk places additional stress on the employee and may lead to further decline in mental health.[52] As a result, the employee may become increasingly unproductive, but still continue to attend work, which may impact on the employer's business (as would their absenteeism).[53]

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[47] Peter Creed and Tania Watson "Age, Gender, Psychological Wellbeing and the Impact of Losing the Latent and Manifest Benefits of Employment in Unemployed People" (2003) 55(2) Australian Journal of Psychology 95; R Bird "Employment as a Relational Contract" (2005-2006) 8 U Pa J Lab & Emp L 149.
[48] Jed Boardman and others "Work and Employment for People with Psychiatric Disabilities" (2003) 182(6) BJPsych 467 at 467.
[49] At 467.
[50] At 467; Christina Iannozzi "Mental Health & Employment, a Work-in-Progress: A Comprehensive Report on the Duty to Accommodate Mental Illness in Canadian Workplaces" (February 1, 2015). Available at SSRN: https://ssrn.com/abstract=2851152 at 4.
[51] Heather Stuart "Mental Illness and Employment Discrimination" (2006) 19(5) Current Opinion in Psychiatry. 522; Von Schrader, Malzer and Bruyère, above n11; Iannozzi, above n50.
[52] Honey, above n5 at 270.
[53] A recent study in the UK estimated that poor mental health costs UK employers £33bn–£42bn each year. This is made up of absence costs of £8bn, presenteeism costs ranging from £17bn – £26bn and turnover costs of £8bn (Elizabeth Hampson and others *Mental Health and Employers: The Case for Investment. Supporting Study for the Independent Review* (Deloitte, 2017) at 01). Data does not appear to be available for the situation in New Zealand, although the "Wellness in the Workplace Survey 2017" found that more than 40% of staff turn up for work when physically or mentally ill and approximately 20% of illness related absences were due to stress, anxiety or depression (Business New

The employer, whose interest lies in maintaining their businesses productivity, may then, when confronted with an employee with decreased productivity, initiate a performance improvement programme (PIP), with dismissal a potential outcome if the employee's performance does not improve. This dismissal may be justified if performance were the only measure.

Thus, employment law attempts to balance the interests of the parties, and does so by usually allowing an employer to justifiably dismiss an employee when their productivity has diminished significantly. The employee's interests are protected by the requirement to substantively and procedurally justify the dismissal.

However, if the employer knows (or believes or suspects)[54] the employee has a mental disability, then the question arises: — would such a dismissal still be lawful, if the poor performance was due to mental disability? Could the disability be considered the reason for the dismissal, and would therefore constitute discrimination? That is, how does the HRA balance the competing interests of the parties in this situation?

1.2.4 Conclusion: The Focus of this Thesis

Therefore the question is: in the situation where, due to poor performance, the employee's dismissal would normally be substantively justifiable — what are the implications when that poor performance is due to a mental disability?

Accordingly, the central question this study seeks to answer is:

When an employee is dismissed on performance grounds, in a seemingly justifiable manner, could this nevertheless be unlawful discrimination if the poor performance is due to the employee's mental disability?

The focus of this thesis is, therefore, on the disabled employee who develops a mental disability (or has a recurrence of a pre-existing condition) during employment, but continues to attend work. The issue is one of presenteeism rather than absenteeism.[55] In particular, the thesis addresses the situation where

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Zealand and Southern Cross Health Society *Wellness in the Workplace 2017* (Business New Zealand, 2017)).

[54] The Human Rights Act 1993 s21(2)(b)(ii) states disability is a prohibited ground of discrimination if it 'is suspected or assumed or believed to exist or to have existed by the person alleged to have discriminated'. This raises issues around when an employer might 'assume' or 'suspect' the employee has a mental disability. There are further issues around when (and if) the employee should disclose the presence of a mental disability to their employer, or potential employer. As this is a vast topic, this thesis is limiting its scope to current employees, who develop or have a recurrence of a mental disability, which is disclosed to their employer.

[55] As the law surrounding dismissal for absenteeism seems less controversial, this thesis is not addressing it specifically. However, many of the issues that are discussed regarding the interpretation of the discrimination in employment provisions in the situation of employee presenteeism, would apply equally to an employee who is dismissed for absenteeism. In general, however, when an

the mentally disabled employee's performance drops to the extent that, under employment law, a dismissal might be substantively justified on the grounds of poor performance. What, then, if the poor performance is due to mental disability?[56]

This thesis examines the question largely in the context of New Zealand law, and ultimately argues that for disability, the HRA, with its multiple interpretive difficulties, lacks the clarity to answer this question with any certainty.

Furthermore, the HRA, with its focus on equality of treatment, does not adequately protect those with a mental disability from dismissal when their performance is compromised. In particular, the lack of a specific requirement for employers to accommodate disability leaves the employee vulnerable. Permitting them to be treated in the same manner as poorly performing, non-disabled employees may mean their dismissal is justifiable — despite their poor performance being due to their disability.

Although it has been suggested that a duty of reasonable accommodation may be inferred from the defences that the law grants the employer to a claim of discrimination,[57] this thesis contends the lack of a specific duty to reasonably accommodate the employee means the law is uncertain. That is, even if an obligation to reasonably accommodate a disabled employee may be inferred from the defences, the ambit of this obligation is unclear.

Thus, this thesis argues, the current law needs to be reformed to both adequately protect the disabled employee, and to provide clarity so all parties can understand their respective rights, obligations and prerogatives.

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employee has not been attending work, and has no clear prospect of returning to work, the employer 'may fairly call halt' (and justifiably dismiss) the disabled employee (*Hoskin v Coastal Fish Supplies Limited* [1985] ACJ 124 (AC) at 4).

[56] In this thesis the term mental disability is used to cover all the forms of disability that fall within section 21(1)(h) of the HRA, that relate to a mental rather than physical condition, that is: psychiatric illness; intellectual or psychological disability or impairment; and loss or abnormality of psychological function. These would include significant depression, anxiety disorders, and diagnosed psychiatric illnesses (such as bipolar disorder, schizophrenia and dementia). A full study of the scope of the term disability as used in the Human Rights Act would require another thesis. It is, for example, unclear if alcoholism and substance addiction would be included. The discussion in this thesis proceeds on the basis that the relevant employee is suffering from one of the well-recognized psychiatric conditions, listed above, so this aspect of the matter is not contentious.

[57] *Smith v Air New Zealand Ltd* [2011] NZCA 20. This case related to the provision of goods and services to a disabled woman. Although the HRA contains no positive obligation to supply goods or services to the disabled, the Court of Appeal held, that, as there is a defence available that it is 'too onerous' to provide certain goods or services, it can be inferred that there is a duty to provide these services when it is not too onerous to do so. Thus, a duty of reasonable accommodation is inferred from the defence.

Finally, this thesis suggests that New Zealand's current model of law does not, and cannot, adequately promote greater substantive equality for persons with disabilities. To achieve that, a new social model of disability discrimination law would be required, wherein society as a whole would become more responsible for the costs of accommodating disability in employment.

The remainder of this chapter provides an overview of the legal framework provided by the Employment Relations Act 2000 (ERA) and the HRA concerning discrimination in employment and dismissal for poor performance.

1.3 Disability Discrimination and Employment Law

1.3.1 Dismissal for Poor Performance under the ERA

In New Zealand, the cornerstone of employment law is the written employment agreement, although this is subject to various overarching statutes.[58] In addition, the employment relationship is subject to the common law and the Employment Court's equity and good conscience jurisdiction.[59]

The employer does not have unbridled power in the employment relationship, but is fettered by labour law designed to protect the employee. International covenants and domestic law recognise wrongful dismissal on a number of grounds — including being without just cause, unfair or discriminatory. The International Labour Organisation (ILO) 'Termination of Employment Convention' states:[60]

> The employment of a worker shall not be terminated unless there is a valid reason for such termination connected with the capacity or conduct of the worker or based on the operational requirements of the undertaking, establishment or service.

This means that dismissal on the grounds of incapacity is valid internationally. However, what is less clear is the level or degree of incapacity at which it becomes valid to dismiss the employee.

Generally, in New Zealand, an employee who is not fit and able to work may be justifiably dismissed.[61] However, it may be wrongful (unjustified) to dismiss an employee (regardless of their mental health status) for poor performance, if they are still able to perform the essential functions of their position. Nevertheless, when the level of poor performance reaches the stage where dismissal is what

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[58] Such as Employment Relations Act 2000; Human Rights Act 1993; Wages Protection Act 1983; Holidays Act 2003; Parental Leave and Employment Protection Act 1987; Act Minimum Wage Act 1983; Equal Pay Act 1972; Kiwisaver Act 2006; State Sector Act 1988; and others.

[59] Employment Relations Act 200, s189.

[60] C158- Termination of Employment Convention, 1982 International Labour Organisation, Article 4.

[61] *Barnett v Northern Regional Trust Board of the Order of St John* [2003] 2 ERNZ 730 (EC) at [35].

the 'fair and reasonable' employer could do, the dismissal would meet the test of being justified,[62] under the 'test of justification' provided by the ERA, as long as a fair process is followed. Following an unfair process, on the other hand, would constitute an unjustified dismissal on procedural grounds.[63]

Nevertheless, there is a second — and distinguishable — type of 'wrongful dismissal' or unlawful treatment of an employee: this is dismissal or adverse treatment based on a prohibited ground of discrimination, such as disability. When a claim of discrimination is raised, the 'test of justification' (discussed above) does not apply. The upshot is that, even if an employer has dismissed the employee for poor performance, where that poor performance is due to a disability, the mentally disabled employee may claim their dismissal was due to their disability, and therefore unlawful discrimination. They may then raise a personal grievance (PG) under the ERA[64] on the ground of discrimination, or alternatively, lay a complaint with the Human Rights Commission under the HRA for discrimination in employment.[65]

For the purposes of this thesis it is assumed that the substantive and procedural aspects of the mentally disabled employee's dismissal would be satisfied. However, for completeness a brief explanation of the law of unjustified dismissal is included.

Unjustified Dismissal: Section 103(1)(a) ERA

The ERA does not stipulate the grounds for the lawful dismissal of an employee, but, at common law, the substantive categories include misconduct, lack of capacity, poor performance and redundancy.[66] In addition, the employer must follow a fair process during the dismissal.

Once a claim of unjustified dismissal is raised as a PG, the onus is on the employer to show their actions were justified. As discussed, this is judged against the "test of justification".[67] An act is justified in this sense when, viewed objectively, it is 'what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred.'[68]

The ERA stipulates factors the Court or Authority *mus*t consider in its assessment of the employer's act. They are:[69]

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[62] The 'test of justification' in s103A of the Employment Relations Act 2000 (ERA) assesses the dismissal against this standard.
[63] Employment Relations Act 2000, s103(1)(a). An unjustified dismissal claim may be on substantive or procedural grounds.
[64] Employment Relations Act 2000, s103(1)(c).
[65] Human Rights Act 1993, s22.
[66] G Anderson and J Hughes *Employment Law in New Zealand* (Lexis Nexis Wellington, New Zealand, 2014) at 358.
[67] Employment Relations Act 2000, s103A.
[68] Employment Relations Act 2000, s103A (2).
[69] Employment Relations Act 2000, s103A (3). Although these considerations are mandatory, s103A (5) states that the employer's failure to follow procedure will not make the dismissal unjustifiable, if the defects in proceedure were minor and did not result in the employee being treated unfairly.

- Whether the employer sufficiently investigated the allegations against the employee before the dismissing them.
- Whether the employer raised the concerns the employer had with the employee before dismissing them.
- Whether the employer gave the employee a reasonable opportunity to respond to these concerns.
- Whether the employer genuinely considered the employee's explanation (if any) in relation to the allegations against the employee before dismissing them.

Plus, the Authority or Court *may* consider any other factors it thinks appropriate.[70]

These considerations apply to a dismissal on performance grounds. For example, in the context of poor performance, for the investigation of the allegations to be considered sufficient,[71] the employer must ensure that the poor performance is objectively real, not based on presumption or anecdotal evidence. To genuinely consider the employee's explanation for their performance [72] means the employer must consider the implications of the employee's mental disability. Furthermore, before instigating performance management processes for poor performance (whether or not due to disability), the employer must raise their concerns with the employee, and give the employee an opportunity to respond.[73]

Nonetheless, in certain professions (including the police, health professions and teaching (public or private)), statutory standards of competence and capability apply.[74] In these professions, if poor performance reflects a lack of competence or capability, then a (procedurally fair) dismissal is justified.

Assuming the employer has followed a procedurally sound process (including giving the employee the opportunity to improve their performance), the justifiability of the dismissal will then turn on what a fair and reasonable employer *could* have done in the circumstances.[75] Therefore, under this test, even if the poor performance was due to mental disability, if dismissal is one option that a fair and reasonable employer could have taken it would be justified.

1.3.2 Discriminatory Dismissal: The Legal Framework

The HRA is the core of anti-discrimination legislation in New Zealand, although the ERA also contains some anti-discrimination provisions.[76] In addition some HRA provisions (including exceptions that may justify otherwise discriminatory

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[70] Employment Relations Act 2000, s103A (4).
[71] Employment Relations Act 2000, s103A (3)(a).
[72] Employment Relations Act 2000, s103 (3)(d).
[73] Employment Relations Act 2000, s103A(3)(c).
[74] These standards are contained respectively in the Health Practitioners Competence Assurance Act 2003, Policing Act 2008, and Education Act 1989.
[75] This means dismissal need only be one of several options open to the employer *Angus v Ports of Auckland Ltd (No 2)* [2011] NZEmpC 160 at [23].
[76] Employment Relations Act 2000, s104 outlines the meaning of discrimination in employment.

conduct) are incorporated (by reference) into the ERA.[77] In this way, the two pieces of legislation are partly dovetailed. An employee who believes they have been the victim of discriminatory treatment must then select the Act under which to raise their complaint of discrimination. The Acts have different processes. Complaints under the HRA are made to the Human Rights Commission and may result in an investigation by the Human Rights Review Tribunal (HRRT). Appeals from the HRRT are to the High Court, Court of Appeal and Supreme Court.

A Personal Grievance (PG) on the ground of discrimination made under the ERA, on the other hand, is filed with the Employment Relations Authority, and investigated by the Authority. Appeals from this Authority then progress to the Employment Court, Court of Appeal and Supreme Court.

Generally, the grounds upon which claims of discrimination in employment may be made are very similar under the two Acts, and have the same defences or exceptions upon which an employer may rely. In both cases, the nub of the claim is that the employee has suffered adverse treatment, based on the prohibited ground of discrimination, that other employees would not suffer, and the employer has no lawful justification or excuse.

A full treatment of this subject would involve close examination of the discrimination in employment provisions of both the ERA and HRA. However, there is much overlap between the relevant provisions. Therefore, for the purposes of this thesis, to contain the analysis within reasonable bounds, the main focus will be on the provisions of the HRA.

Nevertheless, as an employee is entitled to raise a PG on the ground of discrimination under the ERA, a brief comparison of the two Acts is included in the following discussion on discriminatory dismissal.

Wrongful Dismissal on the Prohibited Ground of Discrimination

The 'test of justification' does not apply to a PG raised for discrimination.[78] This means that, even though a dismissal could be justified under s103(1)(a), it could potentially still be discriminatory under s103(1)(c), or under s22 of the HRA, if it satisfies the legal criteria for discrimination in those Acts.

Discrimination in employment (under the ERA) occurs when the employer, directly or indirectly by reason of disability, dismisses the employee in circumstances in which other employees employed by that employer on work of that description would not be dismissed.[79]

Similarly, under the HRA, it is unlawful to terminate the employment of an employee who is qualified for work, by reason of a prohibited ground of discrimination (e.g. disability), in circumstances in which other employees employed by that employer on work of that description would not have their employment terminated.[80]

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[77] Employment Relations Act 2000, ss105-106.
[78] Employment Relations Act 2000, s103 (1).
[79] Employment Relations Act 2000, s104 (1)(b).
[80] Human Rights Act 1993, s22 (1)(c).

The tests for discrimination are therefore similar — but not identical — under the two Acts. For example, the HRA also requires the employee to be 'qualified for work' whereas the ERA has no such proviso; and the ERA includes indirect discrimination in its provisions, whereas the HRA does not.[81] These, and other differences, are discussed in Chapter 2.

Nevertheless, the employee cannot raise a personal grievance for discrimination in employment with the Authority *and* lay a complaint with the Human Rights Commission on the same ground, but must proceed under one or other route.[82] Although there are good policy reasons for this requirement for the employee to choose one route or the other (such as fairness to the employer by avoiding duplication of the same complaint), the two forums have differing jurisdictions, procedures and apply somewhat different provisions.[83] This may mean there are advantages (or disadvantages) to an employee in proceeding down one route or another.

Nonetheless, regardless of forum, determining if a dismissal was discriminatory depends on whether the dismissal occurred by reason of disability in circumstances when other employees would not have been dismissed. Thus, the question arises, if the poor performance is due to disability, is the dismissal to be viewed as due to the disability — or simply due to poor performance?

To determine whether the different treatment was due to their disability, the mentally disabled employee must be compared with other employees in the same circumstances. Thus, a comparator must be selected. This choice of comparator is a contentious area, and subject to much academic and judicial debate, but when different treatment 'by reason of' disability is demonstrated, discrimination is established.[84]

However, this different treatment is still permissible under the HRA in limited circumstances (referred to in this thesis as the 'permitted exceptions'). These permitted exceptions allow different treatment of the disabled employee when special services or facilities are required and it is not reasonable for the employer to provide them, or there is a risk of harm to the employee or others and it is not reasonable to take that risk. These permitted exceptions under the

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[81] However, the HRA does have a separate provision making indirect discrimination unlawful (HRA s65).

[82] Employment Relations Act 2000, s112; Human Rights Act 1993, s79A.

[83] New Zealand is not the only country where the employee has the right of election between anti-discrimination legislation or employment legislation. In many other jurisdictions, such as Canada, the UK and some states of Australia, the complaints may be laid in both forums, but the Human Rights Commissioner (or equivalent) is able to stay proceedings where another Court or Tribunal has dealt (or is dealing with) with the same matter e.g.: Disability Discrimination Act 1992 (Australia), s13; Equality Act 2010 (UK), s114; Canadian Human Rights Act 1985, s41(2). It seems this has the potential to provide a more flexible approach, and may be particularly useful when issues relating to jurisdiction of the Tribunals arise.

[84] *Atley v Southland District Health Board* ERA Christchurch CA 153/09, 10 September 2009.

HRA are incorporated into the ERA.[85] In effect, these constitute special defences to a claim of discrimination.

However, there is still one final stage before the defence may be made out. Even if the employer meets the threshold for a permitted exception, the HRA provides a further 'qualification to exceptions' (referred to in this thesis as the 'task reallocation proviso') whereby, if some of the employee's duties fall within the permitted exceptions, but another employee is able to perform those duties without undue disruption to the business, then the permitted exception no longer applies. Different treatment or dismissal in these circumstances would then be discriminatory.

These provisions governing the permitted exceptions, and the task reallocation proviso, will be collectively described in this thesis as the 'potential accommodation' provisions.[86] Together, they specify the situations in which an employer is bound to accommodate the employee's disability, and so can make out a defence to an otherwise valid claim of discrimination.

This summarises the complex general structure of the law in this field. A major task of this thesis is to unravel the correct interpretation of these discrimination and potential accommodation provisions.

In particular, this thesis aims to determine whether the elements of discriminatory dismissal, established by the HRA, would be satisfied in circumstances where the mentally disabled employee is dismissed for poor performance, which is a result of their disability. To address this matter, several questions related to the definition of discrimination in s22 HRA require consideration. These are:

- When is an employee 'qualified for work'?
- To whom should the disabled person be compared to establish if they have suffered adverse treatment?
- When is the dismissal 'by reason of' disability (and not simply by reason of poor performance)?
- What is the scope of the permitted exceptions, upon which the employer may rely, to excuse otherwise discriminatory conduct?
- When, or to what degree, is there is requirement for the employer to accommodate the affected employee in their employment?

Answering these questions will require careful analysis of the text of the HRA, consideration of matters of policy, including the underlying purposes of employment and human rights legislation, and consideration of the balance between the competing interests of the employee and employer.

Furthermore, as the long title of the HRA states the Act is 'to provide better protection of human rights in New Zealand in general accordance with United

[85] Employment Relations Act 2000, s106(1)(f) effectively incorporates the HRA exceptions to discrimination into the ERA.
[86] As will be discussed in the following chapters, this thesis contends that the HRA does not contain a positive obligation of reasonable accommodation, and any obligation is, at best, inferred from the permitted exceptions. Thus, this thesis refers to these provisions as 'potential accommodation' provisions.

Nations Covenants or Conventions on Human Rights',[87] this thesis seeks to establish whether New Zealand is meeting its obligations in this area, and in particular, those under the UNCRPD which was ratified by New Zealand in 2008.

1.3.3 Applicability of the New Zealand Bill of Rights Act

The New Zealand Bill of Rights Act 1990 (NZBORA)[88] also grants the right to freedom from discrimination on the grounds of discrimination in the HRA.[89] However, for discrimination in employment, even when the employer is subject to the NZBORA, by virtue of Part 1A and s21A of the HRA, the provisions of the HRA apply instead. This ensures all claims for discrimination in employment are are adjudicated on the same basis.

Accordingly, this thesis will not discuss any interpretive issues arising for discrimination under the NZBORA.

1.4 Resolving the Problems: Interpret, Reform or Remodel the Law?

The central question of this thesis is: *When an employee is dismissed on performance grounds, in a seemingly justifiable manner, could this nevertheless be unlawful discrimination if the poor performance is due to the employee's mental disability*?

Thus, the main task of this thesis is to identify the correct interpretation of the discrimination provision of HRA, to determine if dismissal in circumstances where the employee has a mental disability could constitute discrimination under that Act.[90] In addition, this thesis explores the issue of whether the current law is capable of being interpreted in a manner that achieves the proper goal of disability discrimination law, which is to achieve greater substantive equability for disabled persons.

However, this thesis will demonstrate that even the 'best' interpretation of the HRA is incapable of fully clarifying the law. It therefore proposes amendments that could be made to the HRA to clarify interpretation of the discrimination in employment provisions. This could promote New Zealand's compliance with its obligations under the UNCRPD, and help promote substantive equality.

Nonetheless, even with these amendments, several issues remain. Therefore, this thesis will comment on whether the current model of law for disability discrimination is appropriate, or whether, to enable the disabled to achieve greater substantive equality, a different model of law is required.

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[87] Human Rights Act 1993, Long Title.

[88] NZBORA applies only to acts done by the legislative, executive, or judicial branches of the Government of New Zealand; or by any person or body in the performance of any public function, power, or duty conferred or imposed on that person or body by or pursuant to law (NZBORA, s3).

[89] New Zealand Bill of Rights Act 1990, s19.

[90] As the discrimination in employment provisions in the ERA and HRA are substantially similar, this thesis will focus on the HRA, as it is the core legislation dealing with discrimination in general.

1.5 The Structure of this Thesis

Chapter 2 therefore outlines in more depth the discrimination in employment provisions of the HRA, and identifies the interpretive issues that arise.

Chapter 3 examines various possible approaches to statutory interpretation, establishing the preferred approach for interpreting these particular provisions. This thesis finds this to be the spiral approach to interpretation as outlined by Justice Glazebrook of the New Zealand Supreme Court.[91]

Chapter 4, 5 and 6 then apply the preferred interpretive approach to the discrimination in employment provisions, the permitted exceptions and the task reallocation proviso. Nonetheless, as will become apparent, even using the preferred approach, uncertainties and inadequacies remain in the current discrimination provisions for mental disability in employment. The uncertainties are the result of the complex drafting of the provisions and the lack of definition of key concepts. The inadequacies revolve around the lack of a positive duty to accommodate the mentally disabled employee, the consequent failure of the legislation to fulfil the reasonable accommodation obligations of the UNCRPD, and the failure to promote substantive equality.

Thus, Chapter 7 examines whether the law needs to be clarified or reformed and provides possible solutions.

Finally, Chapter 8 summarises the findings of this thesis and draws matters to a conclusion.

[91] Susan Glazebrook J "Filling the Gaps" in Rick Bigwood (ed) *The Statute: Making and Meaning* (LexisNexis NZ, Wellington, NZ, 2004).

Chapter 2: Disability Discrimination and the Legislation: Identifying the Interpretive Issues

> "Laws should be like clothes. They should be made to fit the people they are meant to serve."
>
> Clarence Darrow

2.1 Introduction

The previous chapter outlined the difficulties that persons with mental disabilities face in the employment relationship. It identified three general problems for disability discrimination in employment. These were problems of clarity (and therefore certainty) in the law, the difficulty in achieving substantive equality, and the problem of the conflicting interests of the disabled employee and their employer.

This chapter examines the legislation, particularly the provisions of the HRA, to determine if it is clear when adverse treatment of a mentally disabled person would be unlawful. If the legislation is clear, it should determine the answer to the central question this thesis asks: *When an employee is dismissed on performance grounds, in a seemingly justifiable manner, could this nevertheless be unlawful discrimination if the poor performance is due to the employee's mental disability*?

The answer to this depends on interpretation of the discrimination in employment provisions of the HRA. So this chapter outlines the core elements of these provisions, and summarises the interpretive issues that arise, particularly in relation to disability discrimination. These issues include whether the HRA can be interpreted in accordance with New Zealand's obligations under the UNCRPD, and can be interpreted in a manner that promotes substantive equality for disabled employees.

These interpretive issues will then be discussed in more depth in the following chapters.

2.2 The HRA and Discrimination in Employment: Interpretive Issues

Section 22 of the HRA prohibits adverse treatment in employment on the prohibited ground of disability.[92] Disability includes: psychiatric illness; psychological disability or impairment; and any loss or abnormality of psychological structure or function. For the purposes of this thesis, the term 'mental disability' will cover these conditions.

As the interpretation of section 22 is central to this thesis, it is set out in full below. It reads:

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[92] Human Rights Act 1993, s21 exhaustively lists the prohibited grounds of discrimination.

22 Employment

(1) Where an applicant for employment or an employee is qualified for work of any description, it shall be unlawful for an employer, or any person acting or purporting to act on behalf of an employer,—

(a) to refuse or omit to employ the applicant on work of that description which is available; or

(b) to offer or afford the applicant or the employee less favourable terms of employment, conditions of work, superannuation or other fringe benefits, and opportunities for training, promotion, and transfer than are made available to applicants or employees of the same or substantially similar capabilities employed in the same or substantially similar circumstances on work of that description; or

(c) to terminate the employment of the employee, or subject the employee to any detriment, in circumstances in which the employment of other employees employed on work of that description would not be terminated, or in which other employees employed on work of that description would not be subjected to such detriment; or

(d) to retire the employee, or to require or cause the employee to retire or resign,—

by reason of any of the prohibited grounds of discrimination.

(2) It shall be unlawful for any person concerned with procuring employment for other persons or procuring employees for any employer to treat any person seeking employment differently from other persons in the same or substantially similar circumstances by reason of any of the prohibited grounds of discrimination.

The core elements of discrimination in employment under the HRA are established in this section. The conduct is simply described as 'unlawful', but in effect, it is unlawful discrimination.

Unlawful treatment occurs when:

i) an employee is qualified for work; and
ii) is treated adversely compared to other applicants or employees; and
iii) the treatment is 'by reason of 'disability.

However, under section 29, the treatment may be defended if one of the 'exceptions relating to disability'[93] applies (which this thesis calls the 'permitted exceptions'). These permitted exceptions are then subject to a further 'general qualification on exceptions' provision[94] (which this thesis calls the 'task reallocation proviso'). This stipulates that the employer cannot rely on the permitted exceptions when only some of the duties of the disabled employee fall

[93] Human Rights Act 1993, s29.
[94] Human Rights Act 1993, s35.

within them and another employee could carry out those duties, without unreasonable disruption to the employer's activities. The implication is that, in that situation, the employer should reallocate those duties to the other employee.

However, this thesis identifies several interpretive issues that might arise when an employer treats a mentally disabled employee adversely, who is poorly performing due to their disability. They arise when defining the core elements of discrimination, in ascertaining the ambit of the permitted exceptions, and regarding the application of the task reallocation proviso.

2.2.1 Issues in the Core Elements of Discrimination in Employment

Whether a disabled employee's dismissal is discriminatory will depend on the interpretation of the core elements of discrimination, as set out in section 22: that is, when is an employee 'qualified for work'; how to identify the correct comparator employee against whom the disabled employee's treatment will be compared; and what is meant by adverse treatment 'by reason of' disability.

'Qualified for Work'

Section 22 applies to an employee who is 'is qualified for work of any description'. If not 'qualified for work' of that description, the employee is not protected by the anti-discrimination provision.

However, what counts as being 'qualified' is not defined in the HRA, and this results in several interpretive dilemmas. Some matters are reasonably clear. The HRRT has acknowledged that 'qualified' is not limited to educational qualifications, but incorporates 'qualities or qualifications fitting or necessary for a certain office, function or purpose'.[95]

The Employment Court in *Smith v Air New Zealand Ltd* held:[96]

> …an employee is "*qualified for work of any description*" if that employee is capable of, and in the case of jobs requiring formal qualifications or training, holds those formal qualifications or has undergone the formal training which the particular work requires.

Likewise, in the Supreme Court decision of *McAlister v Air New Zealand,*[97] Tipping J held that the use of 'qualified' in the HRA is the proviso that the employee must have the appropriate qualifications for the work.

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[95] *Director of Human Rights Proceedings v Goodrum and City and Country Real Estate Limited* CRT 36/2001, 4 November 2002 (HRRT) at 16. This was a complaint for sex discrimination. The defendant had argued the operative reason for the complainant's failure to be offered the role of real estate auctioneer was that she was not qualified, in that she lacked the required 'x factor'.

[96] *Smith v Air New Zealand Ltd* [2000] 2 ERNZ 376 (EC) at [97]. Although this complaint was raised under the Employment Contracts Act 1991, the Court considered the discrimination claim under the HRA's provisions. The Court held that, if 'qualified for work of any description' included age, this would make s30 HRA (the genuine occupational qualification (GOQ) exception) redundant. Therefore age was excluded from the qualification assessment.

[97] *McAlister v Air New Zealand Ltd* [2009] NZSC 78; [2010] 1 NZLR 15367 at [63].

However, what is not clear is, if the employee can perform only some of the inherent or essential duties of the position, or perform all the duties but poorly — are they still 'qualified for work'?

Unlike other grounds of discrimination, disability may impact on the employee's *ability* to perform the duties of the position. Therefore, establishing whether the disabled employee is 'qualified for work' in that situation is vital. As Rishworth commented:[98]

> Section 22 effectively states that the Act's protections inure only for the benefit of "qualified" employees or applicants, so the question who is "qualified" is very important.

This becomes particularly relevant when the employee is poorly performing, or only part-performs the duties of the position. The question then is: does the interpretation of 'qualified' merely mean the employee needs to have the appropriate credentials for the position — or does it require the continued ability to fully perform the role?

Furthermore, once the employee is poorly performing because of their mental disability, is this the most appropriate time to assess whether they are 'qualified for work'? Taking into account the protective purpose of human rights law, it may be more appropriate to assess if the disabled employee was 'qualified for work' when commencing the position (time T1), rather than at the time of the alleged discriminatory treatment (time T2).

Thus, the time at which 'qualified' is assessed becomes relevant. If assessed at time T1 (when the employee commenced the position and was performing normally) then they would be 'qualified for work'. However, if assessed at time T2 (time of the alleged discrimination, when they are poorly performing) they may not be.

Of potential relevance is that the HRA's discrimination provisions appear to contemplate an employee being able to only part-perform a position, with some duties being reallocated to another employee. This might suggest that the matter of qualification should be assessed at time T2, and after any such task reallocation has been undertaken. This obligation to reallocate[99] applies to duties that fall within the permitted exceptions[100] (so acts as a proviso to a defence). However, it is not clear whether or not this reallocation of duties extends to the essential duties of a position, which under employment law, the employee is

[98] Paul Rishworth "The Human Rights Act 1993 and Consistency 2000" (1999) (4) NZ L Rev 457 at 464.
[99] Human Rights Act 1993, s35. This reallocation of duties applies when some of the duties fall within the permitted exceptions, providing the adjustment does not cause unreasonable disruption to the employer's activities.
[100] The defences available under section 29 are that the employee cannot perform their duties without the provision of special services or facilities, and it is not reasonable for the employer to provide them; or there is a risk of harm to the employee or others, and it is not reasonable to take this risk.

required to be able to perform.[101] Nonetheless, as the HRA appears to contemplate part-performance by the employee, this may affect the meaning of 'qualified', and when it should be assessed.

Accordingly, these considerations (whether 'qualified' simply refers to having the necessary certification or training; the time at which qualification should be assessed; and whether or not the employee must be able to perform all the essential duties of the position to be considered 'qualified') require closer examination.

Finally, there is the question whether the onus is on the employee to show they are 'qualified' for work — or on the employer to prove they are not?

These are the first set of interpretive questions that need to be unravelled, and they will be addressed in chapter 4.

Adverse Treatment Compared to Others

Another set of interpretive issues arise from the need to compare the treatment of the disabled employee with that of another employee.

Discrimination is a comparative exercise,[102] and while the HRA contains some absolute prohibitions on conduct, that do not involve a comparative element,[103] the remaining provisions require a comparator. That is, the alleged discriminatory treatment of the disabled employee must either be 'less favourable' compared to employees of similar capabilities, in the same or similar circumstances (HRA s22(1)(b)); or, the employee must be subject to 'detriment' or have their employment terminated when other employees, employed in the same or substantially similar circumstances on work of that description, would not be treated that way (HRA s22(1)(c)).

Thus, the comparator in both provisions is an employee, employed on 'work of that description', with the additional requirement in section 22(1)(b) that the comparator be an employee of 'substantially similar capabilities' (and employed in substantially similar circumstances).

One issue this raises is about the meaning of a person's 'capabilities', which may affect the selection of the comparator, and so determine whether the treatment was adverse or not.

A major question is whether, when the disabled employee is performing poorly, the comparator should be an employee who is:

i) of similar capability to the affected employee was, before they became disabled; or

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[101] An employee may be justifiably dismissed if they are unable to perform the essential duties of the position (in which case they might not be considered 'qualified for work').

[102] Paul Rishworth *The New Zealand Bill of Rights* (Oxford University Press, South Melbourne, Vic; New York, 2003).

[103] For example, in the HRA, sections 22(1)(a) and (d) are absolute prohibitions, and only require that there is an omission to employ, or requirement for the employee to resign, by reason of a prohibited ground. The ERA provisions are similar.

ii) of similar capability to the disabled employee is now.

If the 'capability' of the comparator employee is the former, then the appropriate comparator would be a normally functioning employee. Then, if that employee would not have been treated adversely, in comparison to the disabled employee, the latter's treatment (i.e., their dismissal) would be 'less favourable'.

However, if capability is assessed at the level of the employee's current poor performance, then the appropriate comparator would be an employee of equally poor performance, but absent the disability (e.g. someone who is inexperienced, new to the position, or lazy). Less favourable treatment would then only be established if that comparator employee would not be treated adversely in those circumstances. If, on the other hand, the comparator employee would also be treated adversely, then in comparison to them, the disabled employee would not be treated less favourably — and this would not be discrimination.

Alternatively, a "mirror-image comparator" may be selected. A mirror-image comparator exhibits the same manifestations or salient features as arise from the disability (that is, the poor performance) in circumstances that mirror those of the disabled employee, but without the disability being the cause. In this situation, the comparator employee would be a previously capable employee, without a mental disability, whose performance has also declined (perhaps due to laziness). If this comparator would be treated adversely, then the disabled employee's treatment would not be less favourable compared to them, so again would not be discrimination.

However, in section 22(1)(c),[104] the comparison is not with someone of similar capabilities, but is, like s22(1)(b), with an employee employed 'on work of that description'.

A comparator for 'work of that description' could encompass roles that are broadly similar in nature (e.g. café workers), or limited to work of an identical nature (e.g. baristas). Accordingly, there may be a range of possible comparator positions that might be selected. If there are different performance expectations between the possible comparator positions, this may affect whether the treatment of the disabled employee is adverse or not. That is, the level of performance at which disciplinary proceedings for poor performance might be instigated may vary between positions. Accordingly, the selection of the comparator position may determine if the disabled employee's treatment is adverse or not.

Consequently, the selection of the comparator is contentious. Necessarily, the comparator does not exhibit the prohibited ground of discrimination. However, whether the comparator should include or exclude any salient feature resulting from the prohibited ground of discrimination is controversial, as demonstrated

[104] This provision refers to dismissal or detriment. Athough 'detriment' is not defined in the HRA, section 104(2) of the ERA defines detriment as including 'anything that has a detrimental effect on the employee's employment, job performance, or job satisfaction.' Being subjected to a performance improvement plan, or disciplinary proccedings for poor performance, could have a detrimental effect on a person's job satisfaction.

in *McAlister v Air New Zealand*.[105] The circumstances there were, that, due to American flying regulations, McAlister, after reaching the age of 60 was unable to be the pilot-in-command when flying into the USA. Consequently he was demoted to First Officer, and raised a personal grievance for age discrimination. The question was: should he should be compared to a pilot under the age of 60 who was unable to fly into USA airspace for other reasons, or to a pilot under the age of 60 with no such restrictions? The Court of Appeal selected the former comparator pilot. As the comparator pilot would be unable to fly in US airspace, they would also be demoted. Therefore, in comparison to that employee, McAlister was not adversely treated. Here, the Court selected a comparator that exhibited the salient feature of the prohibited ground — i.e. inability to pilot into the USA — but without that inability being due to age. However, on appeal, the Supreme Court selected the latter comparator: a pilot with no restrictions. Such a pilot would not be demoted, thus McAlister's demotion was adverse treatment, by reason of the prohibited ground of age, and therefore discrimination.[106]

To summarise, then: whether the comparator includes or excludes the salient features of the disability (e.g. poor performance) will determine whether the employer's conduct is adverse.

For example, the comparator, for an employee with a mental disability whose performance declines over time, could be:

i) a non-disabled employee who has always been poorly performing; or
ii) a non-disabled employee whose performance becomes poor over time; or
iii) an employee with a different type of disability (e.g. a physical disability) who performance becomes poor as a result of this disability.

If the selected comparator is one of these poorly performing employees, and that employee would be subject to a PIP or dismissal in those circumstances, then, in comparison to that employee, a disabled employee would not be treated adversely if subjected to the same treatment. Thus, the treatment would not be discriminatory.

However, if the salient feature of the disability (poor performance) is excluded, the comparator could be:

i) a non-disabled productive employee (effectively the affected employee before they became unwell); or
ii) an employee with a different type of disability (e.g. physical) who is nevertheless productive.

Compared to these employees, the affected employee is treated adversely if subjected to a PIP, disciplinary procedures or dismissal (as the unaffected

[105] *McAlister v Air New Zealand Ltd*, above n97.

[106] The majority held, that, if this were not so the checks and balances provided in the statutory scheme (the s30 'genuine occupational requirement', and s35's 'general qualification to exceptions') would be redundant. Whether the same reasoning is appropriate when selecting a comparator for disability discrimination is contentious. See Chapter 4.4 below.

employees would not be subjected to those procedures, as they are performing normally).

Thus, the selection of the comparator is pivotal in determining if the employee was adversely treated. Accordingly, it has been the focus of much academic and juristic debate, and will be the focus of further analysis in chapter 4.

'By Reason Of' A Prohibited Ground of Discrimination

Nonetheless, for adverse treatment to be unlawful, it must be 'by reason of'[107] the prohibited ground of discrimination (e.g. mental disability). Thus, when the cause of the poor performance is mental disability, the issue is whether any associated dismissal is to be considered 'by reason of disability' and not solely 'by reason of' the poor performance.

The problem is that, unlike other prohibited grounds of discrimination where the characteristic (such as ethnicity) is generally irrelevant to the performance of the job, for some with a mental disability, their disability may be relevant if its manifestations cause poor performance. Under general employment law, an employer may justifiably dismiss a poorly performing employee.[108] Thus, unravelling the relationship between whether an otherwise justifiable dismissal of an employee on performance grounds could be considered adverse treatment 'by reason of' disability, is a major question this thesis seeks to answer.

Although the HRA provides no guidance as to the meaning of 'by reason of', Tipping J in *McAlister v Air New Zealand*[109] determined that the phrase meant that the prohibited ground must be a 'material' factor in the decision.

For this purpose, the manifestations or consequences of the disability (such as poor performance) might be considered part (or a feature) of the disability. If so, and the employee is treated adversely because of their poor performance, then the material reason for the treatment would be the disability. That is, as the poor performance is part of the disability, then the adverse treatment would be 'by reason of' disability — and would be discrimination.

However, if the manifestations of the disability are considered ancillary to (and not a feature of) the disability, then the real reason for the treatment of the employee would simply be their poor performance. That is, the mental disability would be considered irrelevant to, or not a material reason for, the decision. Therefore, subjecting them to disciplinary procedures would not be 'by reason of' disability and, accordingly, not unlawful discrimination.

However, as Tipping J said in *McAlister v Air New Zealand*:[110]

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[107] Contrast this to the the broad provision in the Equality Act 2010 (UK) where the test for one type of disability discrimination is 'because of something arising in consequence' of disability (s15(1)(a)).

[108] This will be justified if it is what a 'fair and reasonable employer could have done in the circumstances' following a fair procedure (section 103A ERA).

[109] *McAlister v Air New Zealand Ltd*, above n97 at [49]. Tipping J overruled previous case law that the prohibited ground must be 'a substantial and operative factor'.

[110] At [49].

> The policy of the legislation is that a prohibited ground of discrimination should play no part in the way people are treated *unless there is good cause* for it to do so (emphasis added).

Thus, even if the poor performance is considered part of the disability, this poor performance may still be considered a 'good cause' for the way the employee is treated. Further potential 'good causes' are revealed in s29 (the permitted exceptions). These 'excuse' the adverse treatment, meaning it is not unlawful discrimination, in stipulated circumstances.

Nonetheless, as there is little case law on point in New Zealand, it remains unclear when the adverse treatment is to be viewed as 'by reason of' disability and not poor performance. This issue, and the extent to which the manifestations of a mental disability should be taken into account when assessing adverse treatment of persons with mental disorders, has proven controversial internationally.[111] These issues will be covered in more depth in later chapters.

2.2.2 Issues in the Permitted Exceptions

Further interpretive difficulties are generated by the permitted exceptions.[112] These exceptions provide a defence to an employer for otherwise unlawful treatment, in certain circumstances.

There are permitted exceptions to unlawful treatment of employees for most prohibited grounds of discrimination. For disability, the exceptions are found in section 29.

> **29 Further exceptions in relation to disability**
>
> (1) Nothing in section 22 shall prevent different treatment based on disability where—
>
> (a) the position is such that the person could perform the duties of the position satisfactorily only with the aid of special services or facilities and it is not reasonable to expect the employer to provide those services or facilities; or
>
> (b) the environment in which the duties of the position are to be performed or the nature of those duties, or of some of them, is such that the person could perform those duties only with a risk of harm to that person or to others, including the risk of infecting others with an illness, and it is not reasonable to take that risk.
>
> (2) Nothing in subsection (1)(b) shall apply if the employer could, without unreasonable disruption, take reasonable measures to reduce the risk to a normal level.

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[111] See *Purvis v New South Wales* [2003] HCA 62, 217 CLR 92; *London Borough of Lewisham v Malcolm* [2008] UKHL 43 .

[112] Human Rights Act 1993, s29. This provision is entitled 'further exceptions in relation to disability'.

> (3) Nothing in section 22 shall apply to terms of employment or conditions of work that are set or varied after taking into account—
>
> (a) any special limitations that the disability of a person imposes on his or her capacity to carry out the work; and
>
> (b) any special services or facilities that are provided to enable or facilitate the carrying out of the work.

These exceptions provide a defence for otherwise unlawful treatment, in certain circumstances. That is, the employer is permitted to afford different treatment to the employee if it is unreasonable for the employer to provide special services or facilities that the employee requires, or there is an unreasonable risk of harm that cannot be reduced to normal without unreasonable disruption to the employer.

These provisions form part of what are known as the 'reasonable accommodation' provisions. However, as they act as a defence against a claim of discrimination rather than imposing a positive obligation to accommodate the employee, this thesis contends that any such obligation of accommodation is, at best, inferred. Therefore, this thesis will refer to them as the 'potential accommodation' provisions.

The ambit of section (3) is not entirely clear. Commentators suggest it is a 'belt and braces' provision to forestall a disabled employee, whose employment was facilitated by varied terms or conditions, from later raising a claim of discrimination. Alternatively, it could be to stop non-disabled employees claiming discrimination for having less favourable conditions than a disabled employee.[113]

These permitted exceptions contain several interpretive issues, outlined below.

Reasonable Provision of Special 'Services And Facilities'

One interpretive issue is the scope and meaning of 'special services or facilities', as these terms are not defined in the HRA.[114] These terms appear to lend themselves more to physical adjustments to the work place, than to adjustments the mentally disabled may require, such as a quiet or secluded workspace, noise-cancelling headphones, or the provision of written work lists. Whether 'services' or 'facilities' could incorporate other requirements, such as extra supervision, counselling sessions, or variation to work hours, is less clear.[115] More esoteric requirements — such as a temporary exemption from certain duties, redeployment, extended paid sick leave, or working from home — are difficult to characterise as either 'services' or 'facilities'.

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[113] G Anderson and others (eds) *Mazengarb's Employment Law (NZ)* (LexisNexis 2015) at [4029.8].
[114] 'Facilities' is defined in section 44 in relation to the provision of goods, services and facilities to the public. In this context, facilities includes facilities by way of insurance, banking, loans, credit or finance.
[115] An employee can, however, request an alteration to work hours under s69AA of the ERA. The employer has specified grounds on which to refuse to grant the request (s69AAF).

Furthermore, any obligation to provide special services or facilities depends on whether it is 'unreasonable' for the employer to do so. The HRA provides no guidance on this.[116] However, the Court of Appeal in *Smith v Air New Zealand*[117] held accommodation to the point of undue hardship was not required, and while excessive costs might justify a refusal to make adjustments, care had to be taken not to put 'too low a value on accommodating the disabled'.[118] Furthermore, the Authority in *Connell v Sepclean Ltd*[119] confirmed that the employer must provide objective evidence that the employee required special services or facilities, and evidence of why it is not reasonable to provide them.

Unreasonable 'Risk of Harm'

The 'risk of harm' exception poses further interpretive issues.[120] One issue is: does 'risk of harm' include psychological harm to the employee — or to other employees as a result of increased workplace stress (from 'carrying' the affected employee)?

Although 'risk of harm' is not defined in the HRA, other legislation, such as the Health and Safety at Work Act 2015 (HSWA), may provide some guidance.[121] In that legislation, 'hazard' includes a person's behaviour where that behaviour has the potential to cause death, injury, or illness to a person. So probably this could be considered a risk of harm under the HRA. Under the HSWA, the employer must mitigate such hazards to create a safe working environment.[122]

Importantly, while a risk of physical harm may be readily quantifiable, the risk of non-physical harm is not. Effectively 'carrying' an under-performing worker, or working with someone with difficult personality traits, may lead to increased

[116] Contrast this to the Disability Discrimination Act 1992 (Australia), which defines 'reasonable' adjustment as an adjustment that would not impose 'unjustifiable hardship' on the person making the adjustment (s4). Factors for determining if the hardship would be unjustifiable are listed in section 11.

[117] *Smith v Air New Zealand Ltd*, above n57. This was in the context of failing to provide goods, services and facilities to the public (s44 HRA). Discrimination on the ground of disability was claimed as Air New Zealand required the complainant to provide her own additional oxgyen on domestic flights and pay for the additional oxygen she required on international flights.

[118] At [55]-[61]. The Court noted what was required was evidential foundation of the cost, not an 'impressionistic' one.

[119] *Connell v Sepclean Ltd* [2013] NZERA Christchurch 203.

[120] Human Rights Act 1993, s29(1)(b): Nothing in section 22 shall prevent different treatment based on disability where — (b) the environment in which the duties of the position are to be performed or the nature of those duties, or of some of them, is such that the person could perform those duties only with a risk of harm to that person or to others, including the risk of infecting others with an illness, and it is not reasonable to take that risk.

[121] Health and Safety at Work Act 2015, s16. This hazardous behaviour includes behaviour that results from physical or mental fatigue, drugs, alcohol, traumatic shock, or another temporary condition.

[122] Health and Safety at Work Act 2015, s30.

workplace stress (and consequent illness) for other employees. Whether this constitutes a 'risk of harm' under the HRA is unclear.[123]

Furthermore, there is no guidance in the HRA as to what constitutes 'reasonable measures' to reduce the risk to a normal level without 'undue disruption' to the employer.

As these defences excuse the adverse treatment of the employee, even when the treatment is 'by reason of' disability, the interpretation of these uncertain elements determines the lawfulness of the employer's conduct.

Thus, to answer the central question this thesis asks — *When an employee is dismissed on performance grounds, in a seemingly justifiable manner, could this nevertheless be unlawful discrimination if the poor performance is due to the employee's mental disability* — will depend on a number of factors. Even if it is found that the dismissal of a disabled employee, on performance grounds, was less favourable treatment by reason of their disability, and hence discrimination (which might be contentious), this treatment still may not be unlawful. That is, the conduct will be excused if the permitted exceptions apply — for example, if the disabled employee, to be able to work effectively, requires a 'special service or facility', that it is not 'reasonable' for the employer to provide.

However, even if this defence is made out, it is still possible that the treatment will be unlawful. This is because these permitted exceptions are subject to section 35, the 'task reallocation proviso'.

2.2.3 Issues in the Task Reallocation Proviso

The last provision that will be discussed in this preliminary overview of the major interpretive issues is section 35's 'qualification on exceptions' (the task reallocation proviso). This provision applies should the adverse treatment by the employer fall within one of the section 29 exceptions. Then:

> **35 General qualification on exceptions**
>
> No employer shall be entitled, by virtue of any of the exceptions in this Part, to accord to any person in respect of any position different treatment based on a prohibited ground of discrimination even though some of the duties of that position would fall within any of those exceptions if, with some adjustment of the activities of the employer (not being an adjustment involving unreasonable disruption of the activities of the employer), some other employee could carry out those particular duties.

The general effect of this provision is that, if only some of the disabled employee's duties fall within the permitted exceptions, the employer cannot rely

[123] Prior to the HWSA, the Health and Safety in Employment Act 1992, s2 exhaustively defined 'harm': '(a) means illness, injury, or both; and (b) includes physical or mental harm caused by work-related stress.' With this definition of harm, the employer could argue that the poor performance of an employee is causing harm to other employees as a result of their increased workplace stress as they 'carry' that employee.

on those exceptions if, without unreasonable disruption, those duties could be reallocated to another employee.

Again, several interpretive issues arise with this provision.

'Some of the Duties of that Position'

The first issue is determining what 'duties' are encompassed by the phrase 'some of the duties of the position'. Duties of a position may be considered either essential or peripheral to the role. At common law an employee who cannot perform the essential duties of a position may be justifiably dismissed. However, it is unclear whether the 'duties' referred to in section 35 include not just peripheral duties, but also 'essential' duties of the position. As commentators point out, if essential duties are not included in the duties that could be reallocated in accordance with section 35, the employer may declare any duty that the disabled employee cannot perform as 'essential' to the position. This would absolve them of the requirement to accommodate the disabled employee.[124]

Furthermore, the HRA contemplates 'some adjustment' of the employer's activities being made to enable another employee to undertake the duties that the disabled employee cannot perform. This requirement that 'adjustments' be made may suggest that the 'duties' that would be reallocated may be more than peripheral ones.[125] However, the question that remains, is: how much of an 'adjustment' is it reasonable to expect an employer to make?

A further interpretive issue is the proportion of the duties that is meant by 'some'. If an employee only has two main duties, and cannot perform one of them, is this still 'some' of their duties? That is, what percentage, or portion, of the duties is the employer reasonably expected to reallocate? The line between what is required to accommodate the employee, and what effectively becomes a redeployment of the employee (not explicitly required by the HRA) is unclear.

However, by specifying a requirement to relocate 'some of the duties', the section does not appear to impose a duty on the employer to accommodate the employee when the employee can perform all duties, but poorly — even if other employees would be able to counter any shortfall in productivity without undue disruption to the employer.

Furthermore, the term 'some of the duties' suggests discrete duties. However, the Authority has interpreted 'some of the duties' to encompass all of the duties of a position, but for a specific period of time — such as night shifts.[126] This suggests that the Court or Authority may interpret this section liberally.

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[124] *Human Rights Law* (Westlaw NZ (Thomson Reuters), Wellington, 2008) Westlaw commentary at HR29.04 (5).

[125] Equally, commentators have suggested that this would apply only to peripheral duties of the position. See "HR35.01 Adjustment of Employer's Activities" in *Brooker's Human Rights Law* (Westlaw NZ On-line, 2008).

[126] *Atley v Southland District Health Board*, above n84. Atley had mild bi-polar disorder and was unable to work night-shifts as an emergency department nurse. The HRRT held this shift was 'some of duties of the role' that other nurses could carry out.

'Some Adjustment' and 'Unreasonable Disruption'

The scope of 'some adjustment' and 'unreasonable disruption' is also unclear. There is no guidance as to what factors should be considered when objectively assessing if the employer could have made 'some' adjustment and whether that adjustment would be an 'unreasonable disruption' to the employer's activities.

The HRRT has recognised that the term 'unreasonable' disruption is evaluative, stating:[127]

> Section 28(3) requires an evaluative analysis of the reasonableness or proportionality of the employer's response. As recognised in *Smith v Air New Zealand Ltd* at [161] (although in a slightly different context), that will ultimately involve a broad value judgment. Weight must be given to the significance of the right in question (here to manifest one's religion) and to the purpose of the Human Rights Act which is to "better protect" human rights in New Zealand in general accordance with (inter alia) the International Covenant on Civil and Political Rights.

The 'significance of the right in question' suggests a hierarchy of rights. If this is correct, then the evaluation of what is reasonable will depend on the prohibited ground of discrimination as well as the factual situation. Indeed, arguably, the prohibited grounds of discrimination in the HRA vary as to the requirements in their accommodation provisions. For example, section 28(3) (exception for the purposes of religion) imposes a positive requirement on employers to accommodate religious practices, whereas the disability exceptions in section 29 do not impose positive duties, but rather provide defences for the employer.

Thus, the significance of the right and the purpose of the HRA may impact upon the interpretation of the provision.

For disability at least, then, these interpretive difficulties may mean the task reallocation proviso (which provides the HRA's only positive obligation to reasonably accommodate the disabled in employment) will not necessarily protect the disabled employee.

Thus, a further issue also arises: in enacting and applying these provisions, is New Zealand meeting its obligations under the UNCRPD to ensure the reasonable accommodation of the employee in the workplace? This question will be the focus of chapter 7.

A further complication is that complaints of discrimination may be raised under either the ERA or under the HRA. The ERA's provisions for discrimination are similar, but not identical, to those of the HRA. This raises the question of the relevance of decisions made under one Act to the resolution of the interpretive

[127] *Nakarawa v AFFCO New Zealand Limited* [2014] NZHRRT 9 at [74.8]. Although the prohibited ground of discrimination was religion, the same section 35 'general qualification on exceptions' applies to all prohibited grounds of discrimination.

questions that arise under the other Act. The implications are discussed further below.

2.3 The ERA and Discrimination in Employment: Interpretive Issues

The discrimination provisions of the HRA are the focus of this thesis. However, for completeness, some brief comments on the provisions of the ERA are necessary.

The discrimination in employment provision in the ERA is substantially similar, but not identical to, that of the HRA. Arguably, the differences between them are semantic rather than substantive.

The discrimination provision of the ERA is set out below (emphasis in original):

> **104 Discrimination**
>
> (1) For the purposes of section 103(1)(c), an employee **is discriminated against in that employee's employment** if the employee's employer or a representative of that employer, by reason directly or indirectly of any of the prohibited grounds of discrimination specified in section 105, or involvement in the activities of a union in terms of section 107,—
>
> (a) refuses or omits to offer or afford to that employee the same terms of employment, conditions of work, fringe benefits, or opportunities for training, promotion, and transfer as are made available for other employees of the same or substantially similar qualifications, experience, or skills employed in the same or substantially similar circumstances; or
>
> (b) dismisses that employee or subjects that employee to any detriment, in circumstances in which other employees employed by that employer on work of that description are not or would not be dismissed or subjected to such detriment; or
>
> (c) retires that employee, or requires or causes that employee to retire or resign.
>
> (2) For the purposes of this section, **detriment** includes anything that has a detrimental effect on the employee's employment, job performance, or job satisfaction.
>
> (3) This section is subject to the exceptions set out in section 106.

Thus, under this provision, *prima facie*[128] discrimination in employment occurs when:

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[128] Under the HRA, the Court or the HRRT establishes that discrimination *per se* has occurred, which may then be excused or justified. Under the ERA the

i) the employee is treated differently; and
ii) the treatment is, directly or indirectly, by reason of their disability.

A finding of discrimination may then be rebutted if the employer is able to make out a defence under the 'exceptions relating to disability' in the HRA[129] (which, in turn are subject to the HRA's s35 'general qualification on exceptions'[130]).

Other relevant differences between the Acts are discussed below.

'Qualifications' and 'Capabilities'

The HRA comparator is a person with the same or substantially similar *capabilities*, whereas the comparator in the ERA is someone with the same or substantially similar *qualifications, skills or experience*.[131] However, the HRA has the initial proviso that the employee must be 'qualified for work'. The existence of this proviso may equate the provisions, making them both subject to a 'qualification' requirement. Nonetheless, this difference between the Acts was the subject of much judicial discussion by the Supreme Court in *McAlister v Air New Zealand.* The problem was that, for age discrimination, there is a defence of age being a 'genuine occupational qualification' (GOQ). However, this defence does not apply in the same manner to the equivalent provisions in the two Acts.[132] The Court compared the provisions in the HRA and the ERA, and summed up the differences in the following way:[133]

> Section 104(1)(a) [ERA] concerns the obligation to employ for particular work according to qualification. Section 22(1)(b) [HRA] is about the ability to offer diminished terms for work for which the employee is qualified.

Authority or Court establishes the occurrence of *prima facie* discrimination, which is then either confirmed or repudiated. If repudiated, it is not viewed as actual discrimination. The approach taken by the HRRT (under the HRA) reflects the wording of the Act which states that it 'shall be unlawful for the employer' to treat the employee differently on a prohibited ground of discrimination. Thus, the HRRT is looking at the lawfulness of the discrimination and focussing on the available justifications. Section 104 of the ERA, however, states that an employee 'is discriminated against' in their employment. Therefore, under the ERA, the Court or Authority for the purposes of determining a PG, looks at similar issues in the context of deciding if discrimination has occurred at all. Therefore, cases under the ERA establish *prima facie* discrimination and then confirm or rebut that finding. Overall, this difference between the Acts has little practical consequences, as under both Acts remedies are only available once unlawful discrimination has been established.

[129] Human Rights Act 1993, s29.

[130] Human Rights Act 1993, s35.

[131] Human Rights Act 1993, s22(1)(b) and Employment Relations Act 2000, s104(1)(a).

[132] *McAlister v Air New Zealand Ltd*, above n97. The discussion centred around the interpretation of ss104(1)(a) and (b) and the equivalent provisions in the HRA, as, for age discrimination, there is an inconsistency between the Acts regarding which provisions a defence of a GOQ applies to.

[133] At [32].

Potentially, then, the comparator differs between the Acts. The HRA comparator is a qualified employee of similar capabilities (arguably, this is merely another employee who is able, or capable, of performing the duties, but not necessarily highly experienced or skilled — which may affect performance expectations). For example, a comparator for a highly experienced radiologist would be another radiologist. However, this comparator radiologist only needs to have the same 'capabilities', or ability to perform the duties of the position, but not necessarily with the same level of skill or experience. Therefore, the comparator radiologist might be inexperienced, and thus less skilful — and their performance expectations would reflect this. So, although capable, for example, of reporting the same images, or performing the same procedures, they would do so more slowly. If the experienced radiologist is now, due to mental disability, working at a similar lower level of performance, then subjecting them to a PIP would be adverse treatment — as the inexperienced radiologist would not be subjected to a PIP at that level of performance.

However, the ERA comparator is a person with substantially the same qualifications, skill or experience — thus, mirroring the qualification, skill or experience of the mentally disabled employee. Therefore, for the highly experienced and skilful radiologist, the mirror-image comparator would be someone equally highly experienced and skilled. Consequently, there might be higher performance expectations from this comparator, and they might also be subjected to PIP if their performance were to diminish to the level of the mentally disabled radiologist. Thus, with this comparator, the treatment of the mentally disabled radiologist would not necessarily be adverse.

Nonetheless, given the (previously outlined) interpretive difficulties associated with the terms 'capabilities' and 'qualified' in the HRA, it is uncertain what comparator would be selected. Therefore, it is unclear whether this difference between the Acts will have a discernable impact.

The 'Same' and 'Less Favourable' Terms and Conditions

Finally, section 104(1)(a) of the ERA makes it discrimination to fail to offer or afford the disabled employee *the same* terms and conditions as the comparator employee, whereas under the HRA it is unlawful to offer or afford *less favourable* conditions.

This is potentially more than just a semantic difference, as a different term or condition may not necessarily be unfavourable. Therefore, under the ERA, different treatment of a mentally disabled employee, in comparison to another similarly situated employee, may prove discriminatory, but under the HRA it might not. For example, the employer might argue that moving a mentally disabled employee into a separate office (away from a main pool) is not a less favourable condition of work, and therefore, under the HRA is not discrimination. However, it is different condition of work, so, if the complaint was raised under the ERA, it could be considered discriminatory.

Conclusion

As seen, there are interpretive difficulties within the provisions of each Act and also potential inconsistencies between the Acts.

Although these differences appear relatively inconsequential, potentially they may affect the outcome in a particular fact scenario, and might therefore influence which Act an employee chooses to pursue their complaint under. Nonetheless, to avoid over-complicating the analysis, and because the differences appear more semantic than substantive, for the purposes of this thesis, the focus will be on the provisions of the HRA.

2.4 The HRA and Indirect Discrimination: Overview and Interpretive Issues

Until now, this thesis has not considered the issue of indirect discrimination. The central question, as posed, contemplates the adverse treatment of the poorly performing mentally disabled employee as one of direct discrimination. However, in the interests of completeness, a brief discussion follows, concerning whether performance criteria indirectly discriminate against mentally disabled employees.[134]

Indirect discrimination arises where a facially neutral process has a disproportionately negative impact[135] (or discriminatory effect) on a protected group, such as those with disabilities.

The elimination of indirect discrimination is a key element in achieving greater substantive equality, as it removes structural discrimination (that is, policies and procedures and other structurally unjust arrangements) that stop disabled persons from achieving full participation in society.[136] As Mize argues, rather than uncovering hidden intentional discrimination, indirect discrimination is aimed at removing unnecessary barriers to employment to achieve greater

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[134] Indirect discrimination is a vast topic in its own right, and generally beyond the scope of this thesis. Therefore, this discussion will merely identify some issues that may be relevant without fully exploring them in any depth. These issues may benefit from further research or consideration in the future.

[135] There are two possible approaches to assessing the negative impact of a practice or requirement on a protected group (such as the requirement for reasonable performance by employees). The first approach is that all the members of the group (i.e. all mentally disabled employees) must be affected by the requirement. This would be an extremely rare situation, making a finding of indirect discrimination virtually impossible. The second approach is that there must be a disproportionate negative effect on the mentally disabled — that is, not all mentally disabled employees must be disadvantaged, but a greater proportion of them must be, in comparison to the non-disabled population (S Mize "Indirect Discrimination Reconsidered" (2007) NZ Law Rev 27 at 37). This thesis adopts the latter approach.

[136] Thomas P Dirth and Nyla R Branscombe "Disability Models Affect Disability Policy Support through Awareness of Structural Discrimination" (2017) 73(2) Journal of Social Issues 413. Additionally, Khaitan suggests that substantive equality results because the focus of indirect discrimination is on the impact on the group rather than on the actual treatment (Tarunabh Khaitan "Indirect Discrimination" in K. Lippert-Rasmussen (ed) *Routledge Handbook of the Ethics of Discrimination* (Routledge, London, UK, 2017) at 31).

participation and equality.[137] Thus the prohibition of indirect discrimination accords with the principle of substantive equality and the philosophy of the UNCRPD. This concept is closely linked with the concept of a social construct of disability, and, as Dirth argues, adopting a social construct of disability raises awareness of the disabling effects of structural barriers for those with disabilities. This, he contends, will help eliminate indirect discrimination because most people, once they recognise the impact of those barriers, will readily eliminate them.[138]

Indirect discrimination is unlawful under the HRA. Section 65 reads:[139]

Indirect discrimination

> Where any conduct, practice, requirement, or condition that is not apparently in contravention of any provision of this Part has the effect of treating a person or group of persons differently on 1 of the prohibited grounds of discrimination in a situation where such treatment would be unlawful under any provision of this Part other than this section, that conduct, practice, condition, or requirement shall be unlawful under that provision unless the person whose conduct or practice is in issue, or who imposes the condition or requirement, establishes good reason for it.

This provision consists of a single 92-word sentence and is not a model of clarity. Nevertheless, four elements required for indirect discrimination may be distilled from it.

These elements are: firstly, the presence of a particular conduct, practice, requirement, or condition; secondly, that the conduct etc. is not apparently discriminatory; thirdly, that this conduct has the effect of treating the claimant (or group) differently (and no permitted exceptions apply[140]); and finally, that the different treatment is based on one of the prohibited grounds of discrimination.[141]

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[137] Mize, above n134 at 36. Thus the prohibition of indirect discrimination accords with the philosophy of the UNCRPD, and its creed of substantive equality.

[138] Dirth and Branscombe, above n136. This article examines the impact of changing from a medical model of disability to a social one, arguing the change in perception encourages people to voluntarily remove structural barriers to participation and therefore help achieve substantive equality.

[139] Human Rights Act 1993, s65. The Employment Relations Act 2000, s104 also prohibits indirect discrimintion when it states ‘by reason directly or indirectly of any of the prohibited grounds’. Claims of indirect discrimination have seldom been raised under the ERA.

[140] Mize, above n134 at 30.

[141] *Claymore Management Ltd v Anderson* [2003] 2 NZLR 537 (HC) at [99].

The provision, within the same sentence, also contains a defence against a complaint of indirect discrimination. This is made out if the person can establish a 'good reason' for the conduct or practice complained of.[142]

No complaints of indirect discrimination for disability appear to have come before the HRRT.[143] Therefore, any particular interpretive issues for disability have yet to be discussed by the HRRT or courts. Thus, what conduct might be considered indirectly discriminatory,[144] or what is likely to be considered 'a good reason' for it, have yet to be clarified.[145]

As indirect discrimination is founded on the disproportionate negative impact of a seemingly neutral requirement, for disability this could arise in a number of situations. For example, a compulsory early start could indirectly discriminate against mentally disabled employees, who, due to the effect of both the illness and side effects of some psychotropic medicines, struggle with early starts, and are more likely to be late for work, and therefore subject to disciplinary proceedings. However, it is unlikely that raising a complaint for indirect discrimination on these grounds would gain much traction. It is likely that, as Mize argues, to forestall 'incessant challenges' for trivial matters, the indirect discrimination provisions would not be interpreted too liberally.[146] Furthermore, as the defence of a 'good reason' is likely to be construed broadly (for example, to include commercial expediency), a claim that regular work hours are discriminatory is unlikely to be successful.[147]

In employment, the 'good reason' defence provides the balance between the human rights of the protected group and the managerial prerogative of the employer. Thus, sufficient weight must be given to an employer's reason for the

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[142] The disproportionate impact establishes *prima facie* indirect discrimination. Establishing the 'good reason for it' act as an 'end-stage proportionality analysis', which tells us whether such discrimination is justifiable (and, therefore, permissible): Khaitan, above n136.

[143] However, indirect discrimination in employment has been argued under sex discrimination (*Bullock v Department of Corrections* [2008] NZHRRT 4) and on the basis of nationality (*Northern Regional Health Authority v Human Rights Commission* [1998] 2 NZLR 218 (HC)).

[144] Mize (above, n134 at 36) recognizes that the potential breadth of indirect discrimination claims is large and could include a large number of employment practices.

[145] Although not decisive, for disability, the permitted exceptions (HRA s29) may indicate what are good reasons (Isaacus Adzoxornu "Indirect Discrimination in Employment" (1997) (6) NZLJ 216 at 218).

[146] Mize, above n134 at 37. However, Mize also notes at 49: 'In assessing "good reason", the adjudicator must balance the policy in question with the degree of discriminatory impact, and the means chosen must be justified by a reason other than discrimination. The chosen means must meet a genuine need of the enterprise, they must be suitable for attaining that objective (that is, proportional), and they must be "necessary" for achieving that purpose.'

[147] However, under s69AA ERA, the employee has the right to request a variation of their working arrangements, including the hours of work. The employer has specified grounds on which they may refuse (s69AAF).

policy or requirement. In one case, the High Court overturned a finding of indirect discrimination by the HRRT, as insufficient weight had been given to the employer's 'good reason' for their requirement that the employee work full-time.[148] In that case, the HRRT found that the requirement was indirect discrimination on the prohibited ground of family status, as employees with children were less likely to be able to work full-time, and would be unfairly disadvantaged by the requirement.[149] However, the High Court overturned this, holding there was a clear business need for the company to have a full-time employee.[150]

Another controversial issue is whether random drug testing in the workplace generates indirect disability discrimination. Drug and alcohol dependency constitute a disability. In addition, there is the possibility that therapeutic drugs for other mental illnesses may cause a positive result in a random drug test. Affected employees are therefore more likely to be subjected to disciplinary (or other) proceedings (which could be adverse treatment). Although this was raised in the *Flight Attendants* case[151] the Court did not fully explore the issue and this area of law remains unclear.[152]

Thus, like direct discrimination, the indirect discrimination provision has several interpretive issues for disability discrimination in employment, leaving the law unclear and contentious. The effect of these interpretive difficulties (for both direct and indirect discrimination) is illustrated below.

2.5 Illustrating the Issues: A Scenario

A number of the interpretive issues arising under the HRA can be usefully illustrated using the scenario raised at the start of this thesis. Using this scenario, the interpretive issues discussed above will be explored in the following chapters, to ascertain how to best interpret the HRA in relation to disability, in order to answer the central question this thesis asks: When an employee is dismissed on performance grounds, in a seemingly justifiable manner, could this nevertheless be unlawful discrimination if the poor performance is due to the

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[148] *Claymore Management Ltd v Anderson* above n141.
[149] *Anderson v Claymore Management Ltd* 6 NZELC 96, 624 (CRT) at [21]. This was a majority decision. The minority member found no indirect discrimination— finding the employer had a 'good reason' ('compelling business justification') for the requirement that the employee work full time.
[150] *Claymore Management Ltd v Anderson* above n141 at [159].
[151] *Flight Attendants & Amp Related Services Associations Inc, Aviation & Marine Engineers Association Inc, Service and Food Wokers Union Inc, Aviation Industry Officers' Union Inc, Pegasus - NZ Airline Services Society Inc, Business New Zealand Inc v Air New Zealand Ltd* AC 22/04, 13 April 2004 (EC).
[152] The Employment Court accepted that drug dependancy could be a disability. However, the Court held that, as only a small proportion of those who returned a positive test would be disabled (the rest would only be suffering from a temporary condition due to the after affects of taking drugs), the drug testing would not be discriminatory. It is submitted that this does not adequately address the issue of indirect discrimination, as the impact of this policy might be disproportionately high for disabled employees.

employee's mental disability? This thesis will then assess if various interpretations provide adequate protection for the mentally disabled employee, who is poorly performing due to their disability, in accordance with New Zealand's obligations under the UNCRPD.

The Scenario

New Zealand Universities rely on performance based research funding (PBRF), which is evaluated, among other things, on the quality and volume of research and publications made by staff. Thus, academic staff are employed to not only teach but also to engage in research and publication.

Imagine a top ranked University employs a highly qualified lecturer, Ms Smith. In addition to her teaching obligations, she is actively involved in original research, publishing frequently in well-known and respected peer-reviewed journals. Eventually she is promoted to Professor and continues in her role as a highly respected teacher and researcher, actively involved in University life and promoting her field.

However, unexpectedly Professor Smith develops depression. Her symptoms are those of presenteeism not absenteeism, and include poor concentration, loss of motivation, decreased productivity, memory problems, low mood, and irritability (with decreased tolerance of students).

Over time her academic output declines to the point that she is no longer involved in, or producing, independent research and has not submitted anything for publication for some time, and shows no sign of doing so in the foreseeable future.

However, due to her vast experience and knowledge of her core subject area, she is able to continue undergraduate teaching, using the previous years' materials — which fortunately remain current. Her student evaluations remain adequate, but not the glowing reports of previous years.

After the biannual review of staff performance, the University hierarchy become aware of her lack of engagement in research and writing. Although the University accepts she is still able to work as a lecturer, they believe that, as her job description includes the requirement for publishing and active participation in research, they are entitled to instigate a performance improvement plan (PIP), warning her that if she fails to meet specified criteria it may result in termination of her employment.

Professor Smith is unable to meet the criteria. In due course, following a fair and legitimate process, she is dismissed.

2.5.1 Interpretive Issues Arising from the Scenario

This scenario illustrates several of the interpretive issues that the discrimination in employment provisions in the HRA pose for disability discrimination.

The Issue of Qualification

Is Professor Smith still 'qualified for work'? Does 'qualified' pertain only to her academic qualifications, or does it require the continued ability to fully perform all of the duties of the role? If the former, then Professor Smith has the required

credentials for a Professorship, and is qualified for work. If the latter, then Professor Smith, while only part performing, may no longer be 'qualified'.

Additionally, the time at which 'qualified' is assessed is relevant. If assessed at time T1 (when Professor Smith commenced the position and was performing normally), then she is 'qualified for work'. However, if assessed at time T2 (time of the alleged discrimination, when she is poorly performing), she may not be.

The Issue of the Comparator

Was Professor Smith treated adversely in comparison to other employees when she was subjected to a PIP, or dismissed? This will depend on the selection of the comparator, which depends on the interpretation of the capabilities of the employee and the 'circumstances' in which other employees who are engaged 'on work of that description' would not be dismissed.

If the appropriate comparator is a Professor of Professor Smith's former capability, then Professor Smith was treated less favourably by being subjected to a PIP, when the non-disabled Professor would not be.

However, if capability is taken at Professor Smith's current poor level of performance, then the appropriate comparator is a Professor of equally poor performance, but absent the disability (e.g. someone whose performance has never been outstanding, perhaps due to laziness, or a general lack of enthusiasm). Less favourable treatment would then only be established if the comparator would not be subjected to a PIP. If the comparator would be subject to a PIP, then Professor Smith's treatment was not less favourable compared to them — and would not be discrimination.

Similarly, a mirror image comparator could be selected, and this comparator would exhibit the manifestations or salient features of the disability (that is, the poor performance) in the same manner as the mentally disabled employee's disability manifested itself. That is, for example, the comparator employee would mirror the disabled employee's diminishing performance (rather than the comparator being an employee who has never performed well). Therefore, for Professor Smith, the mirror-image comparator would be a previously highly capable Professor, without a mental disability, whose performance has declined over time (perhaps because they have lost interest in their job, or are coasting toward retirement). If this comparator would be subject to a PIP, then Professor Smith's treatment would not be less favourable compared to them, so again would not be discrimination.

'By Reason of' Disability

If the manifestation or feature of the disability (such as poor performance) is considered part of the disability, then adverse treatment because of this manifestation or feature, is adverse treatment 'by reason of' disability. As Professor Smith's depression has caused her poor performance, then poor performance is a manifestation or feature of her disability. Therefore, arguably, a PIP for poor performance would be adverse treatment 'by reason of' her disability.

However, if the manifestations of the disability are considered ancillary to (and not a feature or part of) the disability, then the real reason for instigating a PIP

was simply her poor performance, and not her disability. Thus, subjecting her to a PIP was not 'by reason of' disability and not unlawful discrimination.

The Permitted Exceptions

Could the University's treatment be lawfully excused by the permitted exceptions? For example, would providing Professor Smith with a research assistant be interpreted as a 'service or facility' that the university might provide — and could the University defend their treatment on the ground that this would be 'unreasonable'? Could the interpretation of 'special services or facilities' include such things as the provision of additional paid sick leave, or the (temporary) acceptance of her poor performance?

How does the 'risk of harm' exception apply to this scenario?[153] Does 'risk of harm' include psychological harm to the employee? If so, would imposing the pressure of full work, on top of her mental disability, be placing Professor Smith at an increased risk of harm? Furthermore, what of the effect on other employees as a result of increased workplace stress (from 'carrying' the poorly performing Professor Smith) — would this be considered as a risk of harm to others?

The Task Reallocation Proviso

Finally, should the task reallocation proviso come into play, would 'some of the duties of the position' include essential duties such as teaching or research? If so, could the University make another staff member available to take over this role? How much of an 'adjustment' would it be reasonable to expect the University to make?

Moreover, what proportion of the duties is meant by 'some' of the duties of the position? Professor Smith has two main duties — research and teaching. Thus, failure to perform research is failing to perform 50% of her duties — is this still 'some' of the duties?

Problematically, for Professor Smith, when it comes to the requirement to publish research, even if the exception applied (that is, if a temporary release from the requirement to publish was found to be a 'facility' that could be provided under section 29), a further issue arises. As no one can publish in her name, another employee cannot truly perform 'some of the duties of the position', in this regard. Thus, possibly, there is no obligation on the employer to accommodate her, and the discrimination would not be unlawful.

This scenario therefore illustrates a number of interpretive issues that may arise for the disabled employee under the current provisions of the HRA. This scenario will be drawn on in the following chapters to illustrate the effect of different interpretations of the relevant provisions.

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[153] Human Rights Act 1993, s29(1)(b): Nothing in section 22 shall prevent different treatment based on disability where — (b) the environment in which the duties of the position are to be performed or the nature of those duties, or of some of them, is such that the person could perform those duties only with a risk of harm to that person or to others, including the risk of infecting others with an illness, and it is not reasonable to take that risk.

2.5.1 Indirect Discrimination and the Scenario

Could the practice of instituting a PIP for poor performance be indirectly discriminatory? Undoubtedly, the requirement that the employee meet certain performance criteria could be considered a 'conduct, practice, requirement, or condition'. Secondly, it does appear to be facially neutral, as all employees are expected to work to the same (reasonable) level of performance. However, the third requirement – that the conduct has the effect of treating the claimant (or group) differently is more problematic.[154]

To show that performance criteria have the effect of treating mentally disabled employees differently requires an evidential foundation that disabled employees are disproportionately affected by this requirement (that is, that a higher proportion of employees with mental disability are subjected to a PIP than non-disabled employees).[155] This may be difficult to prove for several reasons. Firstly, although Statistics New Zealand does have some data[156] it may still be difficult to establish the true number of employees in the workforce who suffer from a mental disability,[157] and how many of those employees are then adversely affected by a performance requirement. Secondly, there are numerous types of mental disability. The nature and severity of these vary, and so does the extent to which they impact on the employee's ability to work. Furthermore, every individual's experience of mental illness varies, so it would be difficult to establish that even those with the same mental illness will experience the same consequences, such as poor performance (for example, someone with bipolar disorder may exhibit mild depressive symptoms that do not impact on their

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[154] The differences would need to be real and significant and not co-incidental (Mize, above n134 at 44).

[155] The comparator exercise is not as straightforward as this scenario suggests. Although the comparator group would be employees without disabilities, the pool where the group is taken from is less clear. That is, should the comparator group be the employees in the employer's workforce, or in the workforce in general (that is, all those currently employed in New Zealand)? Khaitan suggests the Court must select the relevant group by relying on the Court's ability to deem which facts would be legally acceptable, considering what data is readily available, the relative position of the party which bears the evidentiary burden, and the broader objectives that discrimination law seek to achieve (Khaitan, above n136 at 34.)

[156] The 2013 Disability Survey (Statistics New Zealand *Key Findings from the 2013 New Zealand Disability Survey* (Statistics New Zealand, 2014) showed those with psychosocial impairments have a higher workforce participation than other forms of disability, but this rate of employment is still low at 45%. Of those employed, nearly 40% report having difficulty performing duties in their job, and 30% of those with psychosocial impairments have had to change jobs because of their disability.

[157] Those in employment may prefer not to disclose the presence of a mental health problem due to fear of stigma or discrimination, including a fear of an increased likelihood of termination, reduced chance of promotion, or that disclosure will result in a lack of respect and isolation from co-workers (Von Schrader, Malzer and Bruyère, above n11).

performance, while others may have severe mania to the point they are unable to work). Thirdly, it is not clear what proportion of disabled employees must be negatively impacted before it is considered a disproportionate negative impact (i.e., if 55% of those facing PIPs for poor performance are mentally disabled and only 45% non-disabled, is this disproportionate enough?).[158] The answer is not clear from the legislation or case law in New Zealand.

Finally, the last requirement for a claim of indirect discrimination is that the different treatment be based on one of the prohibited grounds of discrimination. The same interpretive issues arise as those for direct discrimination — for example, whether the consequences arising from the disability are considered a feature of the disability, or not.

Moreover, even if the requirement is found to have a discriminatory impact, the employer still has a defence if there is a 'good reason' for the requirement. The High Court held in in *Claymore Management Ltd v Anderson* that the correct approach for assessing a good reason is:[159]

> …weighing on the one hand an employer's economic, administrative, and operational imperatives and assessing the extent to which they are genuine against, on the other hand, an alleged ground of discrimination.

Thus, the existence of a good business reason for the conduct may provide a defence. In a situation of poor performance, it is likely that this defence would be successful, as poor performance will affect the employer's profitability and operational matters. Restricting the employer's right to set performance criteria might impact unduly on their business efficacy.[160] Nonetheless, in *Northern Regional Health Authority* the High Court held that a 'good reason' for the practice would be insufficient if there was a non-discriminatory mechanism that would meet the employer's objective.[161] However, without additional support provided to an employer, it is difficult to imagine a non-discriminatory means of retaining business efficiency with poorly performing disabled employees.

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[158] An alternative view is that a small disproportion, with a persistent effect over a long time, is enough to establish disparate impact (Barnard and Hepple, above n23 at 571). The authors also discuss other issues with statistical evidence that the UK Courts, and the European Court of Justice, have struggled with.

[159] *Claymore Management Ltd v Anderson* above n141 at 125. Nonetheless, in *Northern Regional Health Authority v Human Rights Commission*, above n143 at 217 the High Court held, that a economic factors alone are not enough, a policy '… must none the less be based on objectively justified factors which are unrelated to any prohibited form of discrimination…otherwise any prohibited form of discrimination could be justified by claims of economic necessity.'

[160] As will be discussed in the following chapters, one of the purposes of the HRA is to maintain the employer's managerial prerogative. A finding of indirect discrimination in this scenario would result in it being unlawful for the employer to institute PIPs for poor performance, which would unduly fetter the managerial prerogative, contrary to the purposes of the Act.

[161] *Northern Regional Health Authority v Human Rights Commission*, above n143 at 245.

Thus, although it appears possible that the requirement to meet performance standards may form the basis of a claim of indirect discrimination by those with mental disabilities, it is unlikely such a claim would succeed. Therefore, the best approach for the mentally disabled employee is to pursue a claim of direct discrimination, if they face dismissal or adverse treatment for their disability induced poor performance.[162]

Therefore, the remainder of this thesis will concentrate on direct discrimination, under the discrimination in employment provisions of the HRA.

2.6 The Reasons for the Interpretive Difficulties

As has been identified, many questions arise regarding the correct interpretation of the discrimination in employment provisions of the HRA (and ERA) in relation to mental disability. It is worth summarising the reasons why these interpretive issues arise.

2.6.1 The Complexity of the Text, Scheme and Purpose of the Legislation

Two reasons are the complexity of the drafting of the individual provisions (for example, section 22(1) is a somewhat convoluted 192 word sentence), and the lack of definitions of key terms or phrases. Furthermore, the scheme of the HRA reveals a complex interweaving of the provisions, so the interpretation of a later provision may influence the meaning of an earlier one. The implications of this will be discussed in the following chapters.

Additionally, the HRA has dual purposes — to protect the managerial prerogative and to protect the human rights of the disabled employee. These dual purposes may be conflicting, and balancing the interests of the parties when interpreting the legislation may lead to uncertainty.

2.6.2 The Lack of Relevant Case Law

A further source of uncertainty regarding the correct interpretation of the various provisions is the dearth of case law in New Zealand relating to mental disability discrimination. This means that much of the HRA has not yet been subjected to close judicial attention and interpretation.[163] Furthermore, case law on other grounds of discrimination may only provide limited assistance.

Disability is not the only prohibited ground of discrimination that may develop or become relevant during employment, and affect how an employee performs the duties of their position. For example, an employee who becomes religious

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[162] Mize (above n134 at 33-34) argues that there are few examples where there would be a finding of both direct and indirect discrimination. It may arise when the factual background is unclear, or when the 'neutral' ground is closely identified with prohibited grounds.

[163] Bernstein points out that issues of interpretation usually arise when litigants put the statutory terms at issue, rather than when the adjudicator raises issues: Anya Bernstein "Before Interpretation" (2017) 84(2) U Chi L Rev 567. Therefore, even when a case comes before the Court or HRRT, not all interpretive issues will be addressed.

may be unable to work certain days,[164] or a pilot may turn 60 and then not be able to be pilot-in-command in some situations.[165] However, they are not truly analogous to disability, as, in general, such characteristics do not affect the *actual* performance of the duties, just when or where they can be performed. Therefore, how the Court has interpreted the discrimination in employment provisions for these other prohibited grounds of discrimination may not be relevant to disability.

Furthermore, the exceptions (or defences) available under the HRA for age and religious discrimination differ to those of disability, and this may influence interpretation of the provisions. For example, the HRA imposes a positive duty on the employer to accommodate religious practice (to the point of unreasonable disruption).[166] This may influence how 'some of the duties' in the task reallocation proviso is interpreted, so that it might mean all of the duties of a given day. This exception may also affect how the term 'qualified' is interpreted — so the employer cannot claim that being 'qualified' for work' of that 'description' means the employee must be able to work certain days (e.g. Saturdays). Similarly, age discrimination has a defence, where being a certain age is a 'genuine occupational qualification', and this may also affect how 'qualified for work' is interpreted in section 22. Because of this defence, it may mean that a salient feature of this prohibited ground (e.g. turning 60) cannot be relied upon to determine whether an employee is 'qualified').[167]

Accordingly, matters of interpretation are complicated by the fact that the Court's interpretation concerning the other prohibited grounds of discrimination may not be applicable to disability discrimination. Therefore, if the text is unclear for disability discrimination, other approaches to statutory interpretation will need to be utilised.

2.6.3 A Different Goal for Disability Discrimination Law — Achieving Substantive Equality

A final point, before proceeding to discuss the interpretive issues in more depth, is to consider the ultimate aim, or goal, of disability discrimination law — as this will also influence how the provisions should be interpreted.

For those with disabilities, the goal of anti-discrimination law is substantive equality, or equality of outcome, with the non-disabled population. For the disabled employee to achieve this, what is sought is not only equal treatment

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[164] For example, in *Meulenbroek v Vision Antenna Systems Ltd* [2014] NZHRRT 51, the employee rediscovered his faith and was unable to work Saturdays.

[165] There may be flying restrictions imposed on Pilots over a certain age flying to certain countries, such as the USA. See *McAlister v Air New Zealand Ltd*, above n97.

[166] Human Rights Act 1993, s28(3).

[167]*McAlister v Air New Zealand Limited* AC 65/06, 24 November 2006 (EC); *McAlister v Air New Zealand Ltd*, above n97.

with non-disabled employees, but tolerance, or individualised reasonable accommodation of their disability. As McHugh and Kirby JJ stated:[168]

> The elimination of discrimination against people with disabilities is not furthered by "equal" treatment that ignores their individual disabilities.

However, the focus of the discrimination in employment provisions of the HRA[169] is equal treatment of all employees. This is because section 22 applies to all prohibited grounds of discrimination, and generally, regarding the other prohibited grounds, equal treatment will eliminate discrimination.

For those with disabilities, however, this underlying emphasis on equal treatment may not achieve the desired outcome of substantive equality. An example, discussed earlier, illustrates this. If a non-disabled employee's performance diminishes, they may be subjected to a PIP. Then, if, as a result of their disability, a disabled employee's performance also diminishes, equal treatment would suggest that they too could be subjected to a PIP. To avoid this outcome, it is not equal treatment with their non-disabled colleagues that is required, but accommodation of their disability-induced performance issues.

However, despite the focus on equal treatment, a stated purpose of the HRA is to better protect human rights in general accordance with United Nations Conventions.[170] The UNCRPD promotes substantive equality. The Convention recognises the disabled person's right to work, and imposes an obligation on member parties to ensure the reasonable accommodation of the disabled in employment.[171] Reasonable accommodation involves making necessary and appropriate adjustments, where needed, to ensure persons with disabilities enjoy or exercise all human rights on an equal basis with others.[172] Thus, for employment, the UNCRPD requires more than equal treatment of the disabled employee. It requires positive acts in the form of reasonable accommodation in the workplace, which helps achieve greater substantive equality. Therefore, this thesis argues that, in accordance with the underlying philosophy of the UNCRPD, where possible, the provisions of the HRA should be interpreted to achieve greater substantive equality for those with disabilities.

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[168] *Purvis v New South Wales (Department of Education and Training)* above n29 at [86].

[169] Human Rights Act 1993, s22.

[170] Human Rights Act 1993, Long Title.

[171] United Nations Convention on the Rights of People with Disabilities (2006), Article 27(h).

[172] At Article 2. The full definition is: '"Reasonable accommodation" means necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms'.

Nonetheless, as will be discussed in the following chapters, it is difficult to reconcile the text of the HRA with the obligations imposed by the UNCRPD.[173] Therefore, another issue this thesis seeks to clarify is whether New Zealand is meeting its obligations under that Convention.

2.6.4 Textual Differences between the ERA and HRA

Another potential source of interpretive difficulties arises from the slightly differing discrimination in employment provisions of the ERA and HRA. Consequently, interpretation of a provision under one piece of legislation might not provide appropriate guidance for the interpretation of the similar, but not identical, provision in the other Act. However, if interpreted differently, this raises the possibility of different outcomes being reached under the different Acts for similar provisions — leading to additional uncertainty.

2.7 Conclusion: The Need for a Disability Specific Interpretation of the Provisions

This thesis therefore seeks to establish the most appropriate interpretation of the discrimination provisions for mental disability, taking into account the purposes of the HRA, the goal of substantive equality, and New Zealand's obligations under the UNCRPD. Accordingly, the next chapter will consider the relevant principles of statutory interpretation that should be adopted in this analysis discussing several possible approaches, before deciding on the most appropriate method.

This method will then be used to interpret the different sections in the HRA in the following chapters, to determine the 'best' interpretation for disability discrimination.

[173] Sections 29 and 35 are said to serve as the 'reasonable accommodation' provisions for disability in employment in the HRA. The interpretive difficulties and limitations of these will be discussed in Chapters 5 and 6.

Chapter 3: Approaches to Statutory Interpretation

> "…the meaning of a sentence may be more than that of the separate words, as a melody is more than the notes, and no degree of particularity can ever obviate recourse to the setting in which all appear, and which all collectively create"
>
> Hand, Learned in *Helvering v Gregory* 69F 2d 809, 810-811

3.1 Introduction

The previous chapter identified, in brief, certain issues concerning the interpretation of the HRA's discrimination in employment provisions, when applied to disability. One aim of this thesis is to try to establish the 'best' interpretation of the discrimination in employment provisions of the HRA for disability discrimination. This chapter examines how different interpretive approaches may assist (or hinder) their correct interpretation (for, as Greenberg said, 'what makes a method of legal interpretation correct is that it accurately identifies the law'[174]).

The chapter concludes that each approach examined has limitations and, on its own, might not sufficiently clarify the interpretation of a term, phrase or provision. Therefore, multiple approaches might be required. Although adopting several approaches to interpretation risks finding conflicting meanings of a term or phrase, this thesis concludes that, overall, a composite method is more likely to yield the 'best' interpretation.

3.2 Issues in Statutory Interpretation

Statutory interpretation involves the application of the law to the particular fact situation. However, ambiguity arises when provisions, seemingly clear in the abstract, dissolve into uncertainty in an unforeseen fact situation.[175] Thus, interpretation of the discrimination in employment provisions of the HRA, which may seem clear for other grounds of discrimination, may become uncertain for disability discrimination. That is, it might be clear that the adverse treatment of a poorly performing employee could not be considered discrimination because of the employee's ethnicity or religion (which could not cause poor performance), but it becomes unclear whether the same adverse treatment of a poorly performing employee is discrimination, when that poor performance is due to their mental disability.

Interpretation of legislation starts with the text of the provisions, and, unless ambiguity results, the words and the provisions should be given their ordinary

[174] Mark Greenberg "What Makes a Method of Legal Interpretation Correct? Legal Standards vs. Fundamental Determinants" (2017) 130(4) Harvard Law Review Forum 105 at 106.

[175] J. F. Burrows and R. I. Carter *Statute Law in New Zealand* (4th ed, LexisNexis NZ Limited, Wellington, 2009) at 179.

meaning.[176] However, words may be interpreted individually (an 'additive' approach) so that the meaning of each word within a phrase retains its full meaning irrespective of other words within that phrase; or a 'consolidated' approach may be taken, treating the phrase as an integral whole, generally narrowing the meaning of individual words.[177] Consequently, depending on the approach taken, the meaning of a term or phrase may differ.

Furthermore, a provision's linguistic meaning may differ from the intended meaning or content of the law.[178] The latter requires knowledge of the legal intention (or purpose) of the Legislature when promulgating it. In New Zealand, the Court's main role in interpretation is to discover, and give effect to, that intention.[179] To ascertain this, several different approaches to interpretation may be adopted. These include the purposive, contextual, schematic and spiral methods.

3.2.1 The Current Approaches Taken by the Courts and HRRT

Interpretation of New Zealand legislation is guided by the Interpretation Act 1999.[180] This Act adopts a hybrid approach, stating the meaning of an enactment is ascertained from its text (a schematic approach) and in light of its purpose (a purposive approach).[181] In addition to these 'twin pillars' of statutory interpretation,[182] whenever possible interpretation should be consistent with the rights and freedoms contained in the NZBORA.[183]

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[176] At 202.

[177] Bernstein, above n163 at 582, 589. Bernstein uses the example of the phrase: 'use of a firearm'. An additive approach would allow the word 'use' to have a wide meaning, allowing the phrase to mean trading the firearm for money. A consolidated approach however, limits the meaning of 'use' to that for which a gun is usually employed. Thus, 'use of a firearm' would be restricted to activities related to firing the weapon.

[178] Greenberg, above n174 at 109. Greenburg argues (at 111) that only when the intention of the Legislature is unclear should the legal meaning be obtained from the semantic content of the text. This emphasis differs to the approach specified by New Zealand's Interpretation Act 1999, which states the meaning legislation is ascertained from its text and in light of purpose.

[179] Interpretation Act 1999. An alternate (and controversial) view of statutory interpretation (associated with the Realist school of jurisprudence) is that the judiciary identify the most appropriate outcome in the circumstances, and, taking into account what the legislature enacted, weigh up the relevant considerations (identified using statutory interpretation rules) to reach the appropriate outcome. Thus, assessing and weighing the relevant considerations, and choosing which outcome is best, is the function of the judge. Ruth Sullivan *Statutory Interpretation* (2nd ed, Irwin Law, Toronto, 2007) at 38.

[180] Interpretation Act 1999, s2.

[181] Interpretation Act 1999, s5.

[182] J. F. Burrows *Statutory Interpretation* (New Zealand Law Society, Wellington, NZ, 2001) at 13.

[183] New Zealand Bill of Rights Act 1990, s6.

There has been considerable debate over the interpretation of the discrimination provision in the NZBORA. Likewise, interpretation of the discrimination provisions in the HRA and ERA has not been without controversy. This was demonstrated in *McAlister v Air New Zealand,*[184] where the Supreme Court judgments demonstrate substantial disagreement as to interpretation of the provisions (in both the ERA and HRA) in relation to age discrimination.[185]

The HRRT has adopted a purposive and contextual approach toward interpretation, emphasing application of the principles of international covenants. In *Nakarawa v AFFCO,*[186] the HRRT considered the approach recommended by the UN Human Rights Committee to interpretation of Article 18 of the International Convenant on Civil and Political Rights (ICCPR),[187] before examining the HRA in this context. As the High Court acknowledged in *Northern Regional Health Authority v Human Rights Commission*:[188]

> Where internationally enunciated principles are the foundation for domestic legislation, the logical path to follow is that which will provide the international framework and understanding which will illuminate and assist local decision making.

Nonetheless Cartwright J then went on to say:[189]

> Any such assistance as can be derived is just that: assistance. None of the principles or statements are binding on New Zealand Courts. They do, however, paint a backdrop against which New Zealand's obligations and compliance can be placed. Moreover, when the ancestry of the New Zealand legislation is understood it is inevitable that it must be read as broadly as is necessary to comply with the overarching themes promoting and protecting human rights.

The Employment Court has also considered the correct approach to interpreting human rights legislation.[190] Judge Colgan, in *Smith v Air New Zealand Ltd,*

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[184]*McAlister v Air New Zealand Ltd*, above n97.
[185] The Justices used differing approaches to interpretation of the ERA and HRA for the application of the genuine occupational qualification exception for age discrimination. This led to differing conclusions as to the intent of Parliament and the meaning of the legislation. Interestingly, Tipping and McGrath JJ, who both looked to the legislative history of the Acts and other extrinsic evidence such as select committee reports, both concluded the ERA contained a drafting error, but differed as to what the error was (thus finding different intent behind the legislation). In contrast, the majority held that although the drafting was 'hardly a model of clarity,' the legislative history was of no assistance. On their interpretation there was no drafting mistake (as the provisions were aimed at differing circumstances).
[186] *Nakarawa v AFFCO New Zealand Limited*, above n127, at [53]–[59]. This was a case of religious discrimination.
[187] Article 18 deals with the right to religious freedom.
[188] *Northern Regional Health Authority v Human Rights Commission*, above n143 at 234.
[189] At 235.

agreeing with the approach taken by the High Court in *Northern Regional Health Authority,*[191] held that such legislation should construed 'beneficially and not narrowly.'[192]

Although the interpretive approach is not often addressed in decisions of the Authority or Employment Court,[193] the approach taken by them, the HRRT and higher courts appears generally consistent.

Thus, the current interpretive approach is to give the legislation a broad and liberal interpretation, consistent with the protection of fundamental human rights.[194]

Nonetheless, the Authority has, on occasion, taken a different approach.[195] When assessing a claim for discrimination under the ERA at the same time as one for unfair dismissal, the interpretation of the discrimination provision was influenced by the interpretation of the 'test of justification'. While the Authority acknowledged that there appeared to be two different standards against which to judge the conduct (i.e. the reasonableness standard, for accommodating the disability, where the issue is one of discrimination under s103(1)(c) ERA; and what the fair and reasonable employer could have done, for the claim of disadvantage in employment, under s103(1)(b)ERA), it held that, for practical purposes, the test was the same. Thus, the test of justification for the unjustified disadvantage (when *could* the reasonable employer cease tolerating the on-going incapacity of the employee?) was judged as being the same standard as the requirement to reasonably accommodate the disability.

However, what the employer 'could have done' covers a wider range of reasonable responses than what is required to accommodate an employee under the discrimination provisions. Arguably, this resulted in less liberal interpretation of the reasonable accommodation provisions for discrimination. Whether this affected the outcome is arguable, but it demonstrates the potential interpretive difficulties that may arise when justifying a dismissal and defending a claim of discrimination simultaneously.

Despite the general consistency in the approach taken to interpretation (i.e., a broad and liberal one), this approach seems imprecise. For the purposes of this thesis, a more principled and analytical approach to interpretation is desirable.

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[190] *Smith v Air New Zealand Ltd*, above n97. This case was intially raised as a breach of contract under the Employment Contracts Act 1991 (ECA) and the defendants sought to rely on the exceptions to discrimination in the HRA as a defence. It was decided under the provisions of the HRA, not the ECA. Like the ERA, the provisions of the ECA were similar but not identical to those of the HRA.

[191] *Northern Regional Health Authority v Human Rights Commission*, above n143.

[192] Citing Kirby J in *Quantas Airways Ltd v Christie* [1998] 193 CLR 280, Judge Colgan held that, although the Australian statute differed to the HRA, the general statements about interpretation and application were applicable.

[193] In particular, it appears the Authority and Employment Court seldom discuss their approach to interpretation.

[194] *Bullock v Department of Corrections*, above n143 at [83].

[195] *Nelson v Open Country Diary Limited* [2016] NZERA Auckland 29 at [37].

Therefore, several different approaches to interpretation will be examined to determine the best approach.

3.3 The Purposive Approach

A purposive approach to interpretation may help 'defeat the tyranny of language'.[196] Focussing on ascertaining the objective(s) of the Act, to give effect to Parliament's intentions, this approach is in keeping with the democratic theory that the Court should cooperate with, and not frustrate, the will of Parliament.[197]

Although the HRA does not have a specific 'objectives' section, the purpose is indicated in the long title[198] — to 'provide better protection of human rights in New Zealand in general accordance with the United Nations Covenants or Conventions on Human Rights'. Thus, under this approach, interpretation of the HRA's provisions should, where possible, be in accordance with the UNCRPD,[199] the provisions of which are discussed below. Generally, the UNCRPD suggests the HRA should be liberally construed in favour of the rights of disabled persons. Nevertheless, a close reading of the HRA suggests another purpose to the Act. This is to protect the employer's managerial prerogative. This may suggest interpretation should be less liberally construed toward the disabled employee.

This reveals a general difficulty with the purposive approach to interpretation: that an Act may have more than one purpose, and these may point in different directions in a particular fact situation. Arguably, this is the case with the discrimination in employment provisions in the HRA.

Furthermore, although the purposive approach permits reference to extrinsic materials — such as Hansard, and explanatory notes to Bills — to ascertain the intention of Parliament[200] and the purpose of a statute, in general this provides little enlightenment for interpreting New Zealand's disability discrimination provisions. This is because the debates at the time of the HRA's enactment focussed on some of the other newly added prohibited grounds of discrimination, with only cursory (and laudatory) mention of disability.[201] When the Human Rights Amendment Act 2008 was enacted on the other hand, an explanatory note to the Bill[202] stated its purpose was to ensure compliance with

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[196] Ross Carter *Statutory Interpretation Update* (Continuing Legal Education, New Zealand Law Society, 2016) 72 at 46.

[197] Burrows and Carter, above n175 at 218.

[198] The matters that may be considered in ascertaining the meaning of an enactment include the indications provided in the enactment: The Interpretation Act 1999, s5(2).

[199] New Zealand ratified the UNCRPD in 2008.

[200] Carter, above n196 at 67-68, 171.

[201] Much debate was focused on the inclusion of 'the presence in the body of organisms capable of causing illness' and 'sexual orientation' as prohibited grounds of discrimination — reflecting conflicting viewpoints about sexual orientation, and the fear of transmission of HIV/AIDS, prevalent at the time.

[202] Disability (United Nations Convention On The Rights Of Persons With Disabilities) Bill 2008. This Bill introduced changes to multiple statutes

the reasonable accommodation requirements of the UNCRPD, prior to its ratification by New Zealand.[203] Departmental reports and Hansard confirm this was Parliament's intention. Thus, for the reasonable accommodation provisions at least, a purposive approach commends interpretation in accordance with disability rights as contained in the UNCRPD.

3.3.1 Interpretation in Accordance with the UNCRPD

The UNCRPD was the first UN human rights convention to specifically protect the rights of those with disabilities. Existing human rights conventions provided general protection, but had limited success in ensuring the disabled could exercise those rights.[204] As Harpur argues, for employment, although the Universal Declaration of Human Rights (UDHR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) provided a general right to work, that right required interpretation by State Parties — which could elect the right to be inclusive or exclusive of those with disabilities.[205] However, Article 27 of the UNCRPD specifies that State Parties recognise the disabled person's right to work, and will prohibit discrimination on the basis of disability (including disability acquired during employment) in all matters concerning employment, including the continuance of employment.[206]

In addition, the UNCRPD requires State Parties to: provide the disabled with assistance in 'obtaining, maintaining and returning' to employment;[207] promote job retention;[208] promote the employment of persons with disabilities through 'incentives and other measures';[209] and to ensure 'reasonable accommodation is provided to persons with disabilities in the workforce.[210] Coupled with this is a general obligation to take 'all appropriate measures to eliminate discrimination on the basis of disability by any person, organisation or private enterprise'.[211]

Therefore, to be in accordance with the UNCRPD, the HRA should, wherever possible, be interpreted so as to protect the employment of the mentally disabled employee and require the employer to reasonably accommodate their interests.

(including the HRA) to bring them into alignment with requirements of the UNCRPD.

[203] The changes to the HRA were enacted in the Human Rights Amendment Act 2008.

[204] Paul Harpur "Embracing the New Disability Rights Paradigm: The Importance of The Convention on The Rights of Persons with Disabilities" (2012) 27(1) Disability & Society 1 at 4.

[205] At 6.

[206] United Nations Convention on the Rights of People with Disabilities (2006), Article 27 (1)(a).

[207] At Article 27 (1)(e).

[208] At Article 27 (1)(k).

[209] At Article 27 (1)(h).

[210] United Nations *Convention on the Rights of People with Disabilities* (2006) Article 27 (1)(i).

[211] At Article 4 (1)(e).

3.3.2 The UNCRPD and the Social Construct of Disability

However, taking this approach requires a clear understanding of what constitutes 'disability'. How 'disability' is conceptualised has differed over time and between jurisdictions. Historically disability was thought to represent the individual's sinfulness and moral impurity, and sufferers were often subject to segregation and punishment.[212] The impact of injured returned servicemen after the Second World War resulted in the emergence of the economic model of disability, wherein disability was assessed by the limitations placed on the individual's economic self-sufficiency.[213] Therefore, anti-discrimination laws were aimed toward promoting economic self-sufficiency and participation in the workforce of the disabled.[214] More recently, the biomedical and social models of disability have superseded this model.

The biomedical model individualises disability, viewing it as the presence of a mental or physical impairment, resulting in an objectively measurable functional incapacity. The expectation is that the disabled person requires medical amelioration and rehabilitation.[215] In this model, the individual nature of the impairment is emphasised, with no account taken of the social implications of disability, or the role of society in determining disability.

In contrast, the social model views disability as a social construct.[216] Although the impairment may be physical or mental, the social construct considers that it is the hostile or inhospitable social environment that stops the individual from enjoying full and equal participation in society that creates the disability.[217]

The UNCRPD encapsulates both the social and medical models by defining disability in the following way:[218]

> Persons with disabilities include 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.

The medical model is incorporated with the requirement for 'long term physical, mental, intellectual or sensory impairments', while the social model is embodied in the idea of reducing barriers to make society more inclusive. The preamble to the Convention emphasises the social model:[219]

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[212] Paula Berg "Ill/Legal: Interrogating the Meaning and Function of the Category of Disability in Antidiscrimination Law" (1999-2000) 18 Yale L & Pol'y Rev 1 at 5-6.
[213] Elizabeth Pendo "Disability, Doctors and Dollars: Distinguishing the Three Faces of Reasonable Accommodation" (2001-2002) 35 U C Davis L Rev 1175 at 1193.
[214] At 1192.
[215] At 1192.
[216] At 1193.
[217] Harpur, above n204 at 4.
[218] United Nations Convention on the Rights of Persons with Disabilities (2006), Article 2.
[219] At Preamble.

> e) Recognizing that disability is an evolving concept and that disability results from the interaction between persons with impairments and attitudinal and environmental barriers that hinders their full and effective participation in society on an equal basis with others.

The social model promotes a holistic approach to health and impairment, by rejecting an idea of 'normalcy' and encouraging and promoting diversity.[220]

As Pothier[221] argues, the social model of disability impacts on the meaning of 'disability' and on discrimination. The social model suggests that anti-discrimination laws should advance human rights through ensuring people with disabilities become an integral part of society and not an anomaly to normalcy. The focus is on fixing the environment, not fixing the disabled worker.[222] However, the social model of disability has been criticised for overlooking the impact of the impairment, on the individual.[223] Although removal of barriers may minimise the inconvenience of impairment it may not equalise the disabled with the non-disabled,[224] in all situations.

Nonetheless, anti-discrimination laws in employment, based on the social model, concentrate on removal of the social and physical barriers that create disability, and active promotion of reasonable accommodation of the disabled to enable their full participation in the workplace, and thus achieve greater substantive equality.[225]

Conversely, anti-discrimination laws based on the medical model define disability in solely medical terms, and the individual must fit within this medical definition to be protected by the law. Moreover, as the employee's conduct may be considered separate to, rather than part of, the disability,[226] or as the disability may not be viewed as causally connected to their conduct, it may justify dismissal. How the work environment affects the employee's conduct might not be considered, or considered sufficiently. Clough argues:[227]

> By artificially separating the conduct of an employee with BPD [bipolar disorder] from the work situation itself, courts

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[220] Pendo, above n213, at 1193. Pendo recognises that normalcy is also a social construct.
[221] Dianne Pothier "Tackling Disability Discrimination at Work: Toward a Systemic Approach" (2010-2011) 17 McGill J L & Health 17 at 21.
[222] At 37.
[223] John Swain, Sally French and Colin Cameron *Controversial Issues in a Disabling Society* (Open University Press, Buckingham, England; Philadelphia, PA, 2003); Harpur, above n204 at 4.
[224] Harpur, above n204 at 4.
[225] B. Clough "'People like that': Realising the Social Model in Mental Capacity Jurisprudence" (2015) 23(1) Med Law Rev 53.
[226] Samantha Fairclough and others "In Sickness and in Health: Implications for Employers when Bipolar Disorders are Protected Disabilities" (2013) 25(4) Employ Respons Rights J 277 at 286.
[227] Ramona Paetzold "How Courts, Employers, and the ADA Disable Persons with Bipolar Disorder" (2005) 9 Emp Rts & Emp Pol'y J 293 at 326.

> implicitly reject the social model of disability, failing to note the effect of the work culture and environment on mental disorders. In finding much employee conduct to be unacceptable, regardless of cause, both the employer and the court are rejecting BPD as an acceptable type of mental impairment to be accommodated in the workplace.

In the HRA, the meaning of disability is centred on the medical model. Disability is defined by an exhaustive list of medical conditions. This is at odds with other Government policy, including the New Zealand Disability Strategy, which adopted the social model of disability in 2001:[228]

> Disability is not something individuals have. What individuals have are impairments. They may be physical, sensory, neurological, psychiatric, intellectual or other impairments. Disability is the process which happens when one group of people create barriers by designing a world only for their way of living, taking no account of the impairments other people have.

Therefore, it appears New Zealand law in the area of employment discrimination is partly out of step with both New Zealand's social policy and the UNCRPD. Even the reasonable accommodation provisions of the HRA, which could (or should) reflect the social model, fail to do so, acting as a defence for employers against a claim of discrimination rather than imposing a positive obligation on employers to promote workforce participation,[229] and the failure to provide reasonable accommodation is not a standalone prohibited ground of discrimination.[230]

3.3.3 Dual Purpose: Respecting the Employer's Managerial Prerogative

Furthermore, a close reading of the HRA suggests it has more than one objective.[231] The HRA attempts to balance the rights of the disabled employee with the employer's managerial prerogative, and this may explain why there is no positive duty imposed on an employer to accommodate the disabled employee. Rather, while adverse treatment of the employee 'by reason of' their disability is unlawful, this treatment may be 'excepted' if, for example, it is unreasonable for the employer to provide the employee with any special services or facilities they require. Furthermore, the general qualification on exceptions[232] only requires the employer to accommodate the affected employee if it does not involve an

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[228] Ministry of Social Development *The New Zealand Disability Strategy* (Whakanui Oranga, 2001) at 1.

[229] Sylvia A. Bell, Judy McGregor and Margaret Wilson "The Convention on the Rights of Disabled Persons: A Remaining Dilemma for New Zealand?" (2015) 13 NZJPIL 277, at 286.

[230] Contrast this to the s21 of the Equality Act 2010 (UK); the Americans with Disabilities Act 1990 (USA); and section 5(2) of the Disability Discrimination Act 1992 (Australia), all of which stipulate that a person discriminates against a disabled person if they fail to provide reasonable accommodation.

[231] As Burrows states, an Act may have more than one purpose, and these may not be reflected in the long title: Burrows and Carter, above n175 at 221-222.

[232] Human Rights Act 1993, s35.

‘unreasonable disruption’ to their activities — not to the higher level of causing ‘undue hardship’ or ‘undue’ disruption.

Thus, interpreting the provisions of the HRA in accordance with its dual, and seemingly conflicting, purposes remains difficult. Therefore, additional interpretive approaches will be needed to establish if an otherwise justifiable dismissal on performance grounds will be discrimination, when the employee is mentally disabled.

3.4 The Schematic Approach

The schematic approach to interpretation involves reading specific provisions in the context of the Act as a whole, on the premise that an Act has a consistent purpose or scheme. This delivers internal interpretive consistency — as other provisions may place a gloss on the meaning of a specific word, or phrase, and thus clarify ambiguities.[233] The definitions and preamble sections provide additional information.[234] Furthermore, ambiguous or vague provisions may be clarified when read alongside other provisions of the Act. Therefore, the schematic approach may aid in the interpretation of terms and phrases such as ‘unreasonable disruption’, which appear in other provisions of the Act.

The meaning of central provisions may also be clarified by the effect, or impact, that an interpretation will have on other provisions related to it. Legal canons or maxims affirm that it would not be correct to interpret a provision so it deprives another related (or ‘on point’) provision of effect, making it redundant.[235] Interpretation should give meaning and effect to all related provisions.

When an enactment is in several parts, each part may stand on its own, with its own objectives, and be interpreted in light of those objectives.[236] The HRA has a

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[233] Carter, above n196 at 102.

[234] Michael Sinclair *Traditional Tools of Statutory Interpretation* (Vandeplas Publishing, Florida, USA, 2013) at 73.

[235] According to Macagno, arguments from linguistic pragmatics can help justify the use of legal maxims or canons for interpretation, and may help provide the best interpretation of a statute. These maxims may be seen as presumptions, the strongest of which are those that relate to the basic principles of the relationship between the lawmaker and the citizens (such as the maxim that the law cannot be meaningless or absurd). These strong presumptions may reasonably be used to aid interpretation of a statute. Macagno further argues: “While the possibility of an ambiguity needs to be established based on linguistic presumptions (can the linguistic element be expected to mean different concepts?), the presumptions underlying the specific interpretation can be ranked according to their relation to the specific context. In this sense, the so-called ‘intention of the lawmaker (or the law)’ can be regarded as a specific pragmatic presumption that in turn is grounded on contextual and factual evidence and contextual and factual presumptions”: Fabrizio Macagno, Douglas Walton and Giovanni Sartor "Pragmatic Maxims and Presumptions in Legal Interpretation" (2018) 37(1) Law and Philosophy 69 at 111.

[236] For example, in the ERA, Part 9 (dealing with PGs, disputes and enforcement) has its own objectives section.

separate Part dealing with discrimination. However, that Part does not have a separate objectives section. As other provisions relevant to discrimination are placed in other Parts of the Act — such as section 96 dealing with genuine occupational qualifications[237]— discrimination provisions should be interpreted in light of scheme of the Act as a whole and not Part 2 alone.

Nevertheless, comparison with other prohibited grounds of discrimination is of limited utility. Each ground has different requirements and exceptions, influencing how they are interpreted. Age, for example, has a 'genuine occupational qualification' defence,[238] which may impact on how the notion of 'qualified' would be interpreted in section 22. Likewise, where religion imposes a particular practice on its adherents, the employer 'must accommodate the practice' unless it unreasonably disrupts the employer's activities.[239] This is a positive duty (unlike the section 29 exception for disability discrimination, which acts as a defence), and will influence how the provisions for adverse treatment, and the section 35 proviso, are interpreted. Thus, it seems the scheme of the HRA does not treat discrimination on all grounds identically.

Nonetheless, Section 22 applies to all prohibited grounds of discrimination, proscribing different treatment by reason of the prohibited ground, so that all employees are treated equally. Thus, the scheme of the discrimination in employment provisions seems premised on equality of treatment, and this emphasis of formal equality may influence the interpretation of specific provisions. For disability discrimination this is problematic, as it is not necessarily equal treatment, but individualised treatment, or accommodation of disability (according to need), that is desired. Thus, it is possible the schematic approach to interpretation may prove deleterious for the disabled.

3.5 The Contextual Approach

Context is a fundamental cornerstone of statutory interpretation,[240] although it is a malleable concept. Context may refer to the social and political context — either currently or at the time of the statute's enactment. It may refer to the setting of the statute within a field of law — domestically or internationally, or within human rights doctrine. Finally, context may refer to the circumstances of a particular fact situation (the practical context).

3.5.1 The Social and Political Context at the Time of Enactment

Consideration of the social and political context at the time of enactment may aid interpretation of the provision. Aleinikoff refers to this as the archaeological approach to interpretation. The meaning of the statute is 'set in stone' on the date of the enactment, and it is the interpreter's task to uncover and reconstruct

[237] Section 97 enables the HRRT (on application from an employer who has had a complaint laid against them), to declare the employer's requirement was a genuine occupational qualification. This may influence how 'qualified' in section 22 is interpreted.
[238] Human Rights Act 1993, s30(1).
[239] Human Rights Act 1993, s28(3).
[240] Stephen Penk and Mary-Rose Russell *New Zealand Legal Method Handbook* (Thomson Reuters, Wellington, NZ, 2014) at 182.

that original meaning.[241] Accordingly, reference to extrinsic materials, such as earlier versions of Acts, analogous statutes, legislative history,[242] and social and political considerations, may reveal the purpose and intention of the Act, clarify ambiguous provisions, or determine if it is appropriate to apply a specific provision in a changed social context.[243]

Prior to the enactment of the HRA in 1993, disability was not a prohibited ground of discrimination. Thus, earlier Acts provide little guidance on interpretation of the discrimination in employment provisions for disability.

Furthermore, the HRA was enacted prior to the existence of the UNCRPD. Although operative UN covenants at the time required all individuals to be granted equal rights without distinction 'of any kind',[244] disability was not specifically mentioned. The NZBORA, enacted in 1990, did not originally have disability as a prohibited ground of discrimination, but did include the right to be free from discrimination on other specified grounds, including race, sex and religious belief. Later incorporation of this right reflected changing social values, as intimated by the white paper to the NZBORA:[245]

> The rights encapsulated in this article, [the right to be free from discrimination] unlike most of those protected by the Bill, are not derived from the common law. They are the offspring of the profound movement of ideas and opinions during the last 50 years, which have found their principal legislative expression in the Race Relations Act 1971 and the Human Rights Commission Act 1977.

The focus of disability issues became increasingly rights-based from the 1970s, in an era of increasing recognition of human rights.[246] Despite this, until the HRA was enacted in 1993, disability was not a prohibited ground of discrimination. Even the NZBORA, enacted only three years previously, did not recognise the rights of disabled persons. Thus, the HRA was enacted at a time of increasing recognition of — and demand for — equal rights for the disabled, including the

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[241] Alexander Aleinikoff "Updating Statutory Interpretation" (1988) 87(1) Mich L Rev 20 at 21.
[242] Penk and Russell, above n240 at 183.
[243] If the provisions do not appear to cover a situation, the social and political context at the time of enactment may indicate whether a slightly strained interpretation of a word or term is appropriate to cover the new situation that was not foreseen by the drafters of the Act (Burrows and Carter, above n175 at 388).
[244] These covenants include: ICCPR, the ICESCR, and the Universal Declaration of Human Rights (UDHR). These covenants form the International Bill of Human Rights.
[245] New Zealand Parliament *A Bill of rights for New Zealand: A White Paper* (Government Printer, Wellington, NZ, 1985) at 10.75. At the time of enactment disability was not a prohibited ground of discrimination. This changed in 1994 after the enactment of the HRA.
[246] It was this rights-based movement that led to the enactment of NZBORA in 1990 (which included a (limited) right to be free from discrimination).

recognition of the right to mainstream employment.[247] In 1994, the NZBORA was amended to include all grounds of discrimination specified in the HRA, which included disability.[248]

Given this, a rights-based interpretation of the HRA is appropriate. However, whether an employee's 'right' to be free from discrimination imposes a correlative 'duty' on employers is less clear.[249]

3.5.2 The Current Social and Political Context

Interpretation of the law occurs in the context of the current national and international social and political climate. This reflects a 'nautical' approach to interpretation, where statutory interpretation is understood as an on-going process or voyage where the shipbuilders (legislature) and subsequent navigators (judiciary) play a role.[250] As the ILO noted: [251]

> The legislation governing termination of employment, like all labour legislation, reflects societal values and labour market conditions in a given period. As these evolve, this legislation will change as well.

Although changing societal values are encapsulated in successive enactments and amendments of human rights legislation, between these legislative changes social values continue to evolve. Current values may legitimately influence interpretation of the HRA when implemented in UN conventions ratified by New

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[247] During this period many disabled people were de-institutionalized. There was also increasing recognition of the need for disabled persons to have mainstream employment. Employment was promoted by establishment of an 'under-rate' worker's permit, enabling an impaired worker to receive a wage matching their productivity (Industrial Relations Act 1973, s113): 'History of Disability in New Zealand' Office for Disability Issues, Ministry of Social Development. Accessed 6/4/17. https://www.odi.govt.nz/about-disability/history-of-disability-in-new-zealand/

[248] Until amended in 1994, the NZBORA, in s19(1), only granted the right to freedom from discrimination on the grounds of colour, race, ethnic or national origins, sex, marital status, or religious or ethical belief.

[249] The relationship between rights and duties is controversial. For example, Hogg (Martin Hogg *Obligations: Law and Language* (Cambridge University Press, Cambridge, UK, 2017) at 121 critiques W. N. Hohfield, who, in his seminal essay, 'Some Fundamental Legal Conceptions as Applied in Legal Reasoning', paired rights and duties as jural correlatives ((1913) 23 *Yale Law Journal* 16).

[250]Aleinikoff, above n241 at 21. Aleinikoff's metaphor explains that social and political changes are like changes in the weather, crew or other factors that were not identified when the ship sets sail. These factors affect the navigation of the ship and course of the voyage, but not the destination — which is determined (or limited) by the ship's construction. But, just as the shipbuilders may modify the ship, enabling different possible destinations, the legislature may amend the legislation to change its original ambit.

[251] http://www.ilo.org/dyn/terminate/termmain.home

Zealand,[252] or demonstrated in official governmental policy (such as the Disability Strategy 2001[253]). As Burrows states:[254]

> [I]f the law is to be seen as having some social relevance, rather than as a set of self-serving rules, materials ought to be admissible to place statutory provisions in their social setting.

In the current social and political context, interpretation of the HRA should therefore be in accordance with the UNCRPD, and consistent with the Disability Strategy 2016 (DS).[255] The aim of both the UNCRPD and the DS is to promote the social and physical inclusion of the disabled in society. They therefore reflect a paradigm shift toward the social construct of disability. This construct moves the focus away from formal equality of treatment toward the removal of social barriers, to promote substantive equality for the disabled. This is reflected in the current DS aim for employment, which is to ensure:[256]

> Those of us who need specialised supports and services have ready access to them to secure and sustain employment. Reasonable accommodation is understood and provided by our employers. We will have the same opportunities to progress our careers as our non-disabled peers. The additional costs of disability are met, so that we are able to enjoy the same standard of living as other workers.

In this context, ideals of substantive equality, rather than mere equal treatment of the disabled, may affect how the HRA is interpreted.

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[252] International conventions ratified by New Zealand exact influential authority on interpretation of legislation: Andrew S. Butler and Petra Butler "The Judicial use of International Human Rights Law in New Zealand" (1999) 29 VUWLR 173. See *Quilter v Attorney-General*, above n15; *Northern Regional Health Authority v Human Rights Commission*, above n143; *BHP New Zealand Steel Ltd v O'Dea* [1997] ERNZ 667 (HC); *Tavita v Minister of Immigration* [1994] 2 NZLR 257 (CA).
[253] The Disability Strategy was adopted in 2001 by the Labour Government. The forward by the Minister for Disability Issues (Leanne Dalziel) confirmed 'The Government is committed to the New Zealand Disability Strategy. Each year government departments will develop work plans which set out specific steps to implement the Strategy.' The 2001 DS aimed to increase the number of disabled in employment and implement guidelines on reasonable accommodation (Social Development, above n228). The Strategy was last reviewed in 2016 with the National Government of the time continuing to commit to it: Ministry of Social Development *The New Zealand Disability Strategy* (Whakanui Oranga, 2016) at 5.
[254] Burrows and Carter, above n175, at 262.
[255] The 2016 Disability Strategy 'outcomes for employment' aims include: having disabled employees proportionately represented at all levels of employment; having employers that are confident and willing to employ the disabled persons; ensuring disabled employees are treated with dignity and respect; and reasonable accommodation of disability is understood and provided by employers. The Action Plan includes developing reasonable accommodation guides for employers.
[256] Social Development, above n253 at 26.

However, there is a limit to how far changing social values can be implemented through interpretation of an Act.[257] There reaches a stage when the statute must be amended to introduce new perspectives. Thus, this thesis aims to examine if the HRA can be interpreted to meet the aims, objectives and requirements of the UNCRPD and the DS, or whether it requires amendment.

3.5.3 In the Context of New Zealand Human Rights Law

The HRA was enacted in 1993, to 'consolidate and amend' the Race Relations Act 1971 and the Human Rights Commission Act 1977. It added new prohibited grounds of discrimination (including disability) to those listed in the above Acts. When introducing the Bill, the Minister of Justice stated the purpose of the Bill was to 'strengthen the law relating to discrimination' and to 'endorse and enhance' the right to be free from discrimination.[258] This right is affirmed in the NZBORA.

While the NZBORA is concerned with the protection of a broad range of human rights by state actors,[259] the HRA is only concerned with discrimination,[260] and applies to both private and state actors in specified circumstances.[261] Thus, while the HRA details when different treatment on a prohibited ground of discrimination is unlawful, the NZBORA is an affirmation of fundamental human rights and freedoms in New Zealand. It establishes the minimum standards to be met by the New Zealand government in their dealings with individuals — including a general right to be free from (invidious) discrimination.

Thus, the right to be free from discrimination under NZBORA reinforces that it is unlawful to be treated differently under the HRA. Therefore, interpretation of the HRA should reflect that the disabled have a *right* not be treated adversely.

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[257] Burrows and Carter, above n175 at 258.

[258] 15 December 1992, 14 NZPD 416. The Minister stated: 'The social policies that are implemented by the Bill are likely to be of wide public interest. The Bill promotes equality of status for all New Zealanders, in accordance with our international obligations. Every person has the right to be treated equally and to enjoy freedom from discrimination. Therefore it is proper that revised legislation now endorses and enhances those rights. The Bill will be instrumental in the effort towards achieving a fully integrated, harmonious, and just society.'

[259] That is, the legislative, executive, or judicial branches of the Government of New Zealand; or by any person or body in the performance of any public function, power, or duty (New Zealand Bill of Rights Act 1990, s3).

[260] Other 'rights' are covered in additional legislation, such as the Privacy Act 1993, Official Information Act 1982, Health and Disability Commissioner Act 1994, Immigration Act 1987. Other Acts also have discrimination provisions, such as the ERA and Residential Tenancy Act 1986 (both of which require the complainant to elect whether to proceed with a complaint under that Act or via the HRA).

[261] For example, discrimination in employment, or in the provision of goods and services.

3.5.4 In the Context of International Human Rights Law

New Zealand has embraced a dualist approach to international law. Therefore, unless specifically incorporated into domestic law, international instruments do not directly alter New Zealand law.[262] The rationales for this are: international law is too flexible and general for direct application; there is the possible usurpation of parliamentary sovereignty (as the executive ratify treaties and not the legislature); and there could be unilateral introduction of international law (such as human rights norms) into domestic law without the legitimacy of democratic adoption through statutory amendments.[263]

Thus, although New Zealand has ratified many of the conventions of the ILO and United Nations (UN), unless these are incorporated into New Zealand law they have no binding force within New Zealand law. Nonetheless, it is now accepted in New Zealand that international treaties (most notably in the human rights arena) may aid interpretation of domestic legislation.[264] Where legislation specifically refers to treaties or covenants (indicating the legislative intent), the court will consider the relevant treaty and jurisprudence, treating it as influential authority. Effectively, this incorporates aspects of international employment and human rights law into domestic law for certain limited purposes.[265] Indeed, Waters argues there is a 'creeping monism' in the law, as judicial interpretation lays increasing importance on the application of international treaties.[266] Thus, the New Zealand Court of Appeal has said: [267]

> … the Courts of New Zealand will seek to develop and interpret our laws in accordance with generally accepted international rules and to accord with New Zealand's international obligations.

Where international treaties have been ratified, New Zealand law should be interpreted in accordance with them:[268]

> Although treaties are not part of domestic law, it is to be presumed that the Legislature would not enact anything inconsistent with its international obligation undertaken by treaty, so treaties are part of the legitimate context in which

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[262] Melissa A. Waters "Creeping Monism: The Judicial Trend Toward Interpretive Incorporation of Human Rights Treaties" (2007) 107(3) Colum L Rev 628 at 643.

[263] Halton Cheadle "Reception of International Labour Standards in Common-Law Legal Systems" (2012) Acta Juridica 348 at 351.

[264] Butler and Butler, above n252. See: *Nakarawa v AFFCO New Zealand Limited*, above n127; *Northern Regional Health Authority v Human Rights Commission*, above n143; *Quilter v Attorney-General*, above n15; *Tranz Rail Limited v Rail & Maritime Transport Union (Inc.)* [1999] 2 ERNZ 460 (CA).

[265] These include the ILO's C111 — Discrimination (Employment and Occupation) Convention, 1958 (No. 111).

[266] Waters, above n262. The monist approach to international law makes no sharp distinction between domestic and international law.

[267] *Tranz Rail Limited v Rail & Maritime Transport Union (Inc.)*, above n264 at [40].

[268] Burrows and Carter, above n175 at 251.

statutory provisions may be read. They cannot affect the meaning of words that are clear, but they can have an influence where several interpretations are open.

Thus, the UNCRPD — which specifically recognises and records disability rights[269] — should be a cornerstone of statutory interpretation of disability discrimination provisions.

3.5.5 The Practical Context

The context of the individual workplace must also be considered when interpreting the HRA provisions.

The size of the employer's organisation, for example, may affect the extent to which an employer is able to support an employee with poor performance — although this will depend on the nature of the work. In addition, state and public sector employers are subject to the 'good employer' provisions of the State Sector (and other) Acts.[270] These provisions include the requirement to provide good and safe working conditions, an equal employment opportunities programme, and recognition of the employment requirements of persons with disabilities.[271] In this context, the obligations on the employer may potentially be more onerous than those in the private sector. In turn, this may mean that the employee working in the state sector, or for a large corporation, may be better protected by the legislation than those in smaller private businesses. Thus, two employees, working in the same role but for different employers, may have differing degrees or levels of protection against discrimination.

Therefore, this kind of context is important in determining the extent to which an employer should accommodate the mentally disabled employee. Furthermore, in the private sector, as the financial burden for accommodating the disabled employee falls to the employer, the ability to accommodate the disabled employee is limited by the employer's resources. Thus, again employees working in the same role but for different employers may have differing levels of protection under the HRA.

It could be argued that this contextual approach, with its consideration of the employer's situation, is fairer to the employer. However, it leads to uncertainty in the law as it unclear what factors will be taken into account, or how much weight will be given to those factors, when assessing if it was unreasonable for the employer to accommodate the employee's needs.

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[269] The UNCRPD does not create additional rights for disabled people. Instead, the Convention specifies measures that States should implement to ensure disabled people can enjoy existing rights, on an equal basis with others (Departmental Report, Office for Disability Issues, July 2008).

[270] State Sector Act 1988, s56. The Crown Entities Act 2004 and Local Government Act 2002 also contain the good employer provisions.

[271] State Sector Act 1988, s56.

3.6 The Limitations of Adopting a Single Approach

As can be seen, each approach has advantages and limitations. Although a purposive approach may enable the principles of the UNCRPD to be considered when interpreting a provision, conversely, the conflicting nature of the dual purposes of the Act (protecting the managerial prerogative and protecting the human rights of disabled employees) may also paralyse the interpretative process.

Likewise, the schematic approach may ensure the interpretation of a provision or phrase fits with the general framework of the Act, but equally may not be of assistance when the phrase or term is used in different contexts within the legislation. Thus, what is considered a 'service' or 'facility' for the provision of goods and services in section 44 might not provide an appropriate definition for the type of 'service or facility' that it might be unreasonable for the employer to provide to the disabled employee in section 29.

Finally, the contextual approach is problematic, as different contextual factors might result in different interpretations. For example, the practical context (for example, a large, well resourced, employer) might suggest a high threshold for what services and facilities it is 'reasonable' for the employer to provide. Conversely, if the political or social context at the time of enactment of the legislation is considered, then this might suggest a lower threshold of 'reasonableness' as an ideology more sympathetic to the employer's prerogative may have predominated at that time. Or, if the wider international context is considered, then the accommodation of the disabled employee might be considered paramount, demanding a high level of hardship before it would be considered unreasonable for the employer to provide a service of facility.

Because of these difficulties, and the uncertainties that result, this thesis suggests that the most appropriate method of interpretation is one that uses several approaches simultaneously. When one approach cannot provide a definitive answer, this might be provided by next approach, and so forth. Furthermore, even when a particular interpretation is suggested by one approach, this might be confirmed (or refuted) working through the remaining approaches. This composite approach is outlined further below.

3.7 Conclusion: The Preferred Approach — A Composite Method

The 'spiral' approach to interpretation, as proposed by Justice Glazebrook, amalgamates a number of the above approaches.[272] It looks in sequence at four things: the text of the provision (its text and apparent purpose), the provision in the context of the Act as a whole (schematic), the legislative history (Parliament's apparent purpose, and the political and social context at the time) and finally the wider context (including that of international and overseas law).

Glazebrook J argues that this approach forestalls the temptation to interpret legislation backwards, from the desired result (which could lead to 'unwarranted leaps of logic'[273]) during the interpretive process.

[272] Glazebrook J, above n91.
[273] At 172.

The advantage of this approach is that it encompasses different approaches. Moreover, when the answer is clear, the interpretive process may stop — although, as Glazebrook J acknowledges, continuing the process acts as a 'double check' on the correctness of the interpretation.[274] Moreover, this approach provides the predictability and assurance of a logical progression of interpretation, while retaining some flexibility.

Using this approach to interpret the HRA's provisions on discrimination in employment, on the ground of mental disability, is not without difficulties, however. As discussed in the previous chapter, the ordinary meaning of the text raises interpretive issues. The lack of legislative history for disability discrimination means there is no clear indication of Parliament's intentions in this specialised area. Looking at the wider context, overseas law is of limited help, due to the differences in the provisions and schemes of the overseas Acts. In particular, unlike New Zealand, the UK has a provision specifically for discrimination arising from a consequence of a disability.[275] As will be discussed,[276] this clarifies that — in the UK — dismissal for poor performance attributable to mental disability is dismissal by reason of disability. Furthermore, unlike New Zealand, the UK imposes a duty to make adjustments to accommodate the disabled,[277] and failure to comply with that duty is a standalone ground of discrimination.[278] Australia not only makes the failure to reasonably accommodate the disabled a ground of discrimination,[279] it also has a separate Act for disability discrimination — reflecting its special nature.

Nonetheless, the spiral approach appears the most suitable for interpreting disability discrimination law. The progression through the spiral enables issues of interpretation to be fully explored in the context of both domestic and international law, and in light of the social and political climate.

Therefore, this approach is adopted here to discuss the previously identified interpretive issues arising under the HRA, which are the focus of the following chapters.

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[274] At at 174.
[275] Equality Act 2010 (UK), s15.
[276] See Chapter 7.4 for further discussion on the 'Discrimination arising from disability' provision of the EA 2010 (UK).
[277] Equality Act 2010 (UK), s20.
[278] Equality Act 2010 (UK), s21.
[279] Disability Discrimination Act 1992 (Australia), s5(2).

Chapter 4: Identifying Disability Discrimination: Interpreting Section 22

"… if a law is unjust, and if the Judge judges according to the Law, that is justice, even if it is not just."

Alan Paton *Cry the Beloved Country*

4.1 Introduction

The previous chapter discussed various approaches to statutory interpretation, selecting the spiral method[280] as the most appropriate for interpreting the disability discrimination in employment provisions of the HRA. This chapter focuses on interpreting section 22, which determines when adverse treatment of a disabled person would be considered discrimination. The question explored in this chapter is: can interpretation clarify when adverse treatment, due to disability-induced poor performance, would be considered discrimination — or are the provisions too uncertain, or too complex, to provide a predictable answer?

Accordingly, using the spiral approach, the core elements of disability discrimination in employment will be examined. These are: being 'qualified for work'; being treated adversely 'by reason of' disability; and identification of the proper comparator. From this analysis, the 'best' overall interpretation of these core elements will be proposed, with acknowledgment of certain limitations this interpretation has. The Professor Smith scenario, outlined in Chapter 2, will be used to illustrate the interpretive difficulties.

4.2 Interpreting Section 22: Issues for Disability Discrimination

Instead of defining discrimination *per se*, and making that unlawful, the HRA, in section 22, defines when the employer's treatment of an employee is unlawful, because the treatment is based on a prohibited ground of discrimination (such as disability). No legislation in New Zealand defines discrimination *per se.* For the purposes of establishing whether treatment of a disabled employee is unlawful or not under the HRA, the absence of a definition is probably of little importance. As this thesis will show, this is because the provisions of the HRA are clearly based on the concept of equal treatment, or formal equality, which signifies the model of discrimination adopted by the legislation. However, if the disabled are to achieve equality of outcome, or substantive equality, then a definition of unlawful discrimination, which recognises other barriers to substantive equality, would probably be required.

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[280]This is the approach taken by Justice Glazebrook, as outlined in her paper: Glazebrook J, above n91. The spiral approach is a combination of the schematic, purposive and contextual approaches, and looks in sequence at four things: the text of the provision, the provision in the context (or scheme) of the Act as a whole, the legislative history (to ascertain Parliament's purpose) and finally the wider context (including international and overseas law).

Nonetheless, section 22 establishes when an employer treats an employee unlawfully because of one of the prohibited grounds of discrimination, such as disability. Once this has been established, the employer may defend their treatment of the employee under the permitted exceptions. These apply where the employee would require special services or facilities that it would not be reasonable for the employer to provide, or there would be a risk of harm to the employee or others, that it would not be reasonable to take, and that risk could not be reduced to normal. However, these defences will be cancelled if only some of the employee's tasks (or duties) fall within the defences, and these tasks could have been reallocated to another employee without unreasonable disruption to the employer (this is the task reallocation proviso). Thus, proving the elements in section 22 is only the first step in a complex process of establishing if the treatment was unlawful.

To establish if the employer's treatment of the disabled employee was unlawful, the employee — who is 'qualified for work' — must prove that they were treated differently than another similarly situated employee, because of their disability.

Section 22 thus seeks to ensure that similarly situated employees are treated equally by their employer. However, this focus on formal equality fails to recognise that, for disability, equal treatment may not have the desired outcome. That is, when an employee who has a mental disability is performing poorly, and is compared to another poorly performing employee, then equal treatment may mean that both employees could be dismissed for poor performance. For the employer, this result seems equitable, as they require workers who are able to adequately perform their duties. However, for the disabled employee, this is inequitable, as they are being treated adversely because of their disability, which has caused their poor performance. Thus, formal equality fails to acknowledge the impact of disability on the disabled employee.

However, this interpretation might be contrary to the purpose of the HRA (to better protect human rights — including the right to employment). Accordingly, the correct interpretation of the provision should not completely ignore the consequences of the disabled employee's disability (such as poor performance) and its impact. The dilemma is: if we are to give effect to the legislative intention, to what extent did the legislature intend the consequences of the disability (such as poor performance) to be taken into account when assessing the treatment of the employee? This will determine when adverse treatment arising due to the consequences of the disability, will be unlawful.

Nevertheless, reviewing section 22 as a whole reveals that the provision also seeks to balance the competing interests of the disabled employee (who wishes to maintain their employment) and the employer (who wishes only to employ fully productive employees). That is, while the provision prohibits different treatment between employees due to the protected characteristic, it restricts this prohibition to employees who are 'qualified for work.' Thus, when an employee is considered 'qualified for work' is a pivotal question. This will be the first interpretive issue to be examined.

As explained in the previous chapter, the spiral approach to interpretation will be used: assessing the meaning from the text, from the scheme and purposes of

the Act, from the legislative history, and finally from the wider context of international and overseas law.

4.3 The Meaning of 'Qualified for Work'

Being 'qualified for work' acts as a gateway into section 22 — if the employee is not 'qualified' for work, adverse treatment of the employee will not be unlawful.

Section 22(1) of the HRA states:

> Where an applicant for employment or *employee is qualified for work of any description*, it shall be unlawful for an employer, or any person purporting to act on behalf of the employer,… (emphasis added).

Using the spiral approach to interpretation, the first step is to ascertain if a clear meaning can be gleaned from the text. However, 'qualified' is not defined in the HRA, and ascertaining the meaning from text[281] proves problematic.

4.3.1 The Meaning from the Text and in the Scheme of the Act

The plain, ordinary meaning of 'qualified' includes: being officially recognized as being trained to perform a particular job (i.e. eligible to perform the duties, but without formal qualification); certified or legally entitled (i.e. formally qualified); and able to satisfy the conditions or requirements for a position (i.e. able).[282]

A problem arises when two or more of the above meanings might apply to the employee. That is, their position might require both that they retain a professional certification and continue to be able to satisfy the requirements of a position. What is not clear is, if an employee retains one aspect of being qualified, but not another, does that mean they are no longer qualified? For example, if an employee remains professionally certified, but cannot satisfy the requirements of the role (to the expectations of their employer), does that mean they are no longer qualified?

This is pertinent when an employee is poorly performing, as they may still retain professional qualifications, so remain formally qualified for work. They may have the requisite training for the position, so remain eligible for the position. However, the question arises if they are still able to do the work.

When an employee would be considered able is unclear. If an employee can perform some of the essential duties of a position, but not all of them, are they still able to work? At what stage of diminished ability (or poor performance) is the employee was no longer able? If the employee is formally qualified, or eligible for a position, but not fully able, it is unclear if they remain 'qualified for work' for the purposes of section 22. In the Professor Smith scenario, it is unclear if Professor Smith is 'qualified for work' while she retains her academic qualifications (thus, is formally qualified), is still able to teach and knows how to

[281] Interpretation Act 1999, s5. Both the spiral approach and the Interpretation Act require the meaning to be taken from the text at first instance.
[282] Della Thomson (ed) *The Concise Oxford Dictionary* (9th ed, Clarendon Press, Oxford 1995).)

research (thus, is eligible[283]), but only partially performs her role (and is therefore, potentially, not 'able').

Furthermore, if there is a minimum level of performance for determining when an employee is considered 'qualified' (or able) to work, this is not prescribed in the HRA.[284] Thus, if an employee can perform all the duties of a position, but poorly, objectively they might be still able to work — although the employer may not consider them 'able enough' for their business requirements (and therefore not 'qualified' for work).

Furthermore, the different meanings of 'qualified' may reflect different points in time at which the employee is considered 'qualified'. 'Qualified' when defined as either 'formally qualified' or 'eligible' refers to skills, training or qualifications gained in the past. 'Able', however, may refer to the current ability of the employee. Thus, the point in time at which 'qualified' is assessed may influence its interpretation. 'Qualified for work' could be taken at the time of commencing the position (T1) or, alternatively, the time of the alleged discriminatory treatment (T2).

If we take the ordinary, present tense, meaning of the phrase '*is* qualified', then the point in time 'qualified' refers is T2 and this may imply 'qualified' refers to current ability (in addition to formal qualifications and eligibility). However, if taken at T1, then, arguably, this is more likely to refer to original eligibility and formal qualifications for a position, and not the employee's *current* ability.

The plain meaning of the text supports both a time T1 and a time T2 interpretation. The phrase "is" qualified (rather than 'was' qualified, or even just 'qualified') suggests time T2.[285] However, indirectly, a time T1 interpretation is also implied. If 'qualified' means 'formally qualified' or 'eligible', this refers to the skills, training and qualifications the employee had at the time of employment.

It appears, then, that ascertaining the meaning of 'qualified' from the text alone is not possible.

However, the scheme of the Act provides some enlightenment. For discrimination in employment, the HRA has the following schema: first, it must be assessed if the employee was treated adversely compared to others because of their disability under section 22; second, the employer may defend their treatment of the employee under the permitted exceptions for that ground;[286] and third, these permitted exceptions are assessed against the section 35 task reallocation proviso. Finally, in some situations, the employer may apply for the unlawful treatment to be excused as a GOQ under section 97.

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[283] As she retains the skills and training for research, she could be considered eligible to work. It is a lack of motivation or energy due to her illness that disenables her capacity to work, not a lack of competency.

[284] Contrast this to the Disability Discrimination Act 1992 (Australia), s21A which states that the employee must be able to carry out all the 'inherent requirements' of the particular work, and specifies what factors are to be taken into account to determine this.

[285] However, as will be discussed, assessment at time T2 does not necessarily fit with the overall scheme and purpose of the HRA.

[286] Human Rights Act 1993, s29 contains the exceptions relating to disability.

Thus, to establish unlawful discrimination, the scheme of the Act requires the application of multiple provisions. Accordingly, 'qualified' should be interpreted in light of these other provisions. However, ultimately, it appears that 'qualified for work' still acts as a gateway into section 22, and if the employee is not qualified, then the claim falls outside the HRA.[287]

This creates a dilemma for the correct approach to interpretation of this requirement. If 'qualified for work' is addressed at the outset, as a standalone gateway provision, then this must be satisfied before a claim of discrimination can be further investigated. However, it might be more apt to view it as one aspect of the full set of discrimination provisions that should be interpreted as a whole. Approaching things in this manner would permit the meaning of 'qualified' to be influenced by the content of other provisions.

Furthermore, if 'qualified' is interpreted narrowly (i.e. so as to exclude employees who are not fully able to perform *all* the duties of the position to a certain standard), then the disabled employee might be excluded at this first instance from being able to raise a claim of discrimination. Consequently, the employer's treatment of the employee would not be investigated to assess if it was adverse, and by reason of disability, thus depriving the remainder of the section of effect. Additionally, the adverse treatment of the employee would not be assessed against the checks and balances provided by the permitted exceptions and the task reallocation proviso,[288] also depriving those provisions of effect. This goes against the cannon that interpretation of provisions should not 'render nugatory' other parts of an Act.[289]

The task reallocation proviso stipulates that when only some of the duties of the disabled employee are excused by the permitted exceptions, the employer is required (where possible) to adjust their activities to reallocate those duties to another employee. Therefore, 'qualified' cannot be interpreted to mean that the employee must be able to perform *all* the duties of the position, or the task reallocation proviso would be moot.

Therefore, to give effect to the full scheme of the Act, when an employee, such as Professor Smith, is able, formally qualified, and eligible to perform some the duties of their position (such as teaching), or can perform all of them with special services provided (e.g. a research assistant), then they should be deemed 'qualified'.

Nevertheless, it remains unclear if overall poor performance of all tasks means the employee is no longer 'qualified' — particularly if the employee retains professional certification. For example, a radiologist who holds a current practising certificate, suffers from depression and works very slowly (but accurately), and reports only a ¼ of the normal number of films: are they still 'qualified' (able), when ¾ of the work remains undone? Following the scheme of the HRA, it is suggested they would be, and it is unlikely that any of the permitted

[287] The employee may still have a personal grievance under the ERA for unjustified disadvantage or unjustified dismissal.

[288] Collectively these provisions are referred to as the 'potential accommodation' provisions.

[289] Sinclair, above n234 at 123.

exceptions would apply, as there are no special services or facilities required, and no risk of harm to the radiologist or others. However, section 97 grants the HRRT the power to declare any 'act, omission, practice, requirement or condition' that would otherwise be unlawful, to be a GOQ.[290]

Consequently, the HRRT could, if requested, declare a minimum level of performance, or ability to perform certain essential duties, a GOQ. Although this provision is seldom utilized,[291] it adds to the contention that 'qualified' should not be construed too strictly, as the scheme of the Act allows the employer opportunities to defend or excuse their treatment of the employee.

As previously alluded to, there is also a question over the time of qualification. It is suggested the scheme of the Act implies 'qualified' should be assessed at time T1. This is because section 22(1)(a), makes it unlawful to refuse to employ an applicant for a job who is 'qualified for work', by reason of their mental disability. In this situation, 'qualified' requires assessment at time T1.

Furthermore, for those already employed, in the context of the overall scheme of the Act, time T1 may also be the most appropriate time for assessing 'qualified'. If 'qualified' is interpreted narrowly (to exclude those not fully able), then assessing 'qualified' at time T2 means the disabled employee may be excluded before the potential accommodation provisions can be utilised — depriving those provisions of effect. For example, on that view, it would not be unlawful to dismiss Professor Smith for poor performance, even though this may be temporary, and she could be reasonably accommodated by her employer.

However, if 'qualified' is taken at T1, it is likely (even with a narrow interpretation), that the employee will be deemed 'qualified' for that position — otherwise they would not have been offered the position initially. This interpretation enables all the provisions to have effect. For Professor Smith, if she proves adverse treatment, the task reallocation proviso may mean that, with some adjustment of the employer's activities, another member of staff could provide research assistance.

Nonetheless, two issues arise if interpreting 'qualified' at time T1. Firstly, it would appear to make the 'qualified' gateway moot, except for job applicants. As the legislature chose not to limit 'qualified' to job applicants, the implication is that it should apply to all subsections.

Secondly, it seems ironic that whether a person is 'qualified' for a position would depend on whether they were employed when they developed the mental

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[290] The reason for including section 97 in the HRA has been debated. One explanation is that it acts as a safety valve, to excuse conduct that is justifiable but was not anticipated when the legislation was enacted, and therefore no specific exception was included (Rishworth, above n98 at 464).

[291] It was unsuccessfully applied for in *E v L* Complaints Division, Settlement C337/98 (Human Rights Commissioner Case Note 13, 1 April 2000). The employer argued that heavy lifting was a requirement for beekeeping and therefore being male was a GOQ. However, the Proceedings Commissioner held that as some women would be able to do the heaving lifting, and some men would not be able to, being male was not a GOQ — but the ability to lift heavy items was.

disability. A lecturer who is unable to research is unlikely to be considered as someone who is 'qualified' to become a Professor. Therefore, it would be inconsistent to consider a Professor who loses the ability to research as still being 'qualified' to be a Professor.

The HRRT or Courts have not specifically addressed the point in time at which the employee is to be 'qualified' for work. However, the Supreme Court in *McAlister v Air New Zealand*[292] did briefly discuss the issue of qualification for age discrimination. Age discrimination has an exception if age is a GOQ.[293] However, this GOQ exception does not apply to s22(1)(b)-(c), the provisions concerned with the less favourable, or detrimental, treatment of the employee.[294] The Court held the s30 defence (that age is a GOQ) did not apply to those provisions as:[295]

> …s 22(1) applies only if a person is "qualified for work of any description"… Section 30 does not apply to s 22(1)(b) because an employer who is willing to employ someone as qualified for work of that description cannot nevertheless invoke the genuine qualification exception to justify less favourable terms of employment for the work.

That is, at the commencement of employment the employee would have been 'qualified for work' of that description (or they would not have been employed). Therefore, the Supreme Court appears to say, that as the employee was 'qualified' at that time of employment, the employer cannot later rely on a GOQ for excusing less favourable treatment of the employee. Therefore, for age discrimination at least, as the employee is employed when they are 'qualified', the employer cannot at a later time claim they are no longer 'qualified' due to age and treat them less favourably than other employees.[296] Thus, the time when they are to be 'qualified for work' is time T1.

However, in *McAlister* there was no issue over McAlister's performance. Turning 60 did not alter his ability to perform the duties of his position (it only affected where he could perform them: that is, not in the USA).[297] Nor did it result in a loss of certification. But, for mental disability arising in employment, the issue is the employee's change in performance. Thus, the meaning of 'qualified' — and

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[292] *McAlister v Air New Zealand Ltd*, above n97.

[293] Human Rights Act 1993, s30. This GOQ exception only applies to refusing to employ a person (s30(1)(a)), or causing an employee to retire or resign (s30(1)(d)). This is not the situation in ERA. See n185 above.

[294] The employer may cause the employee to resign with the defence that age is a GOQ, but if the employee remains employed, they cannot be treated detrimentally due to age.

[295] *McAlister v Air New Zealand Ltd*, above n97, at [31].

[296] However, this complaint was raised under the ERA, which does not have the 'qualified for work' proviso, so there was not a full evaluation of the meaning of 'qualified' for the purposes of the HRA.

[297] *McAlister v Air New Zealand Ltd*, above n97. American flying regulations meant after the age of 60 McAlister was not allowed to be pilot-in-command when flying into US airspace. As a consequence, Air New Zealand demoted him to first officer, and McAlister raised a PG for age discrimination under the ERA.

the time at which it should be assessed — is more pertinent for disability discrimination than for other prohibited grounds.

Furthermore, unlike age discrimination, disability discrimination does not have a specific exception of a GOQ.[298] Consequently, how, in the scheme of the Act, 'qualified' is interpreted for age may not apply to disability, so the reasoning in *McAlister v Air New Zealand* may not be entirely relevant.

Nonetheless, to give effect to all the provisions of the HRA, it is suggested that 'qualified' should be assessed at time T1. This would give rise to a rebuttable presumption of qualification, ensuring the mentally disabled employee is not 'screened out' too soon, before their treatment is evaluated against the remainder of the provisions, depriving them of effect. 'Qualified for work' could be rebutted if the employee's performance is so poor that they are in effect unable to perform any of the essential duties of the position.

This interpretation fits the purposes of the Act, which according to the long title, is to 'provide better protection of human rights' and 'in accordance with the United Nations Covenants or Conventions on Human Rights'.[299]

Thus, to provide 'better protection of human rights', 'qualified' needs to be interpreted liberally, ensuring the mentally disabled do not fall outside the Act at first instance. Therefore, if the employee can perform most of the essential duties of the position, or can perform all duties but poorly, they should be considered 'qualified'. This fits with a liberal and enabling approach to interpretation,[300] consistent with the purposes of the Act.

Conversely, as 'qualified' applies to all of section 22(1), a narrow interpretation may limit the application of the Act — and defeat its purpose.

However, the HRA has a dual purpose. That is, the Act attempts to both protect the employee from adverse treatment by reason of their disability, and to maintain the employer's managerial prerogative to some degree, which may explain the inclusion of the 'qualified for work' requirement. This prerogative may enable an employer to dismiss a poorly performing employee, without it being discrimination, when they are no longer able to do the job to the satisfaction of the employer.

For that purpose, a narrow interpretation of 'qualified' might be required — i.e. able to perform all of the duties of the position, to the standard required by the employer. This interpretation has been supported by the HRRT, who held 'qualified' is not limited to educational qualifications, but incorporates 'qualities

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[298] There are also genuine occupational qualification exceptions for age and sex, relating to authenticity and privacy in employment (HRA, s27).

[299] Human Rights Act 1993, Long Title. The title indicates the purpose and intention of Parliament.

[300] *Northern Regional Health Authority v Human Rights Commission*, above n143 at 234, where the HC confirmed interpretation of human rights legislation should be liberal and enabling; in *Bullock v Department of Corrections*, above n143 at [83], the HRRT confirmed human rights legislation should be given a large and liberal interpretation, not a narrow and technical one.

or qualifications fitting or necessary for a certain office, function or purpose'[301] and these required 'qualities' are determined by the employer. In this case, the HRRT accepted the employer's contention that the complainant did not have the necessary 'x-factor' required to be an auctioneer.[302] For Professor Smith, it is possible she may have lost an essential 'quality' for her job when her depression manifested as irritability and decreased tolerance for students. Furthermore, if the ability to get along with students is considered to be an essential duty of the position, then she is no longer fulfilling it.[303] Therefore she may no longer be 'qualified for work'.

Therefore, the different purposes of the Act can support either a narrow or a liberal interpretation of 'qualified for work.' To better protect the human rights of the disabled employee would suggest 'qualified for work' be interpreted widely, so the disabled employee need not be able to perform all the essential requirements of the position, or, the time at which the assessment of whether an employee was 'qualified for work' should be at the commencement of employment, not at the time of the alleged discrimination. However, to protect the managerial prerogative 'qualified for work' should be interpreted narrowly, with the employer determining whether the employee had the necessary qualities for, and was able to perform all essential duties of the position, at the time of the unfavourable treatment. Thus, the purposes of the HRA appear to point in different directions and do not clarify the meaning of 'qualified for work'. Therefore, the legislative history and wider context should be considered.

4.3.2 Consideration of the Legislative History and Wider Context

The legislative history provides little enlightenment, as disability was not a prohibited ground of discrimination under the previous legislation (Human Rights Commission Act 1977 (HRCA)). Nonetheless, the discrimination in employment provisions remain similar, except in the HRCA the 'qualified' prerequisite applied to job applicants only.[304] The rationale for changing this

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[301] *Director of Human Rights Proceedings v Goodrum and City and Country Real Estate Limited* above n95 at 16.

[302] It has been strongly argued that the majority decision demonstrates gender bias on by the HRRT (Elisabeth McDonald and others *Feminist Judgments of Aotearoa New Zealand* (Hart Publishing, Oxford; Portland, Oregon, 2017) at Chapter 15). Interestingly, as Mize noted, the main judgment does not refer to the dissenting judgment. This judgment found the 'x factor' requirement to be gender biased.

[303] In the USA, the ability to get along with others has been held to be an essential or inherent duty of a position under the ADA. As there is no reasonable accommodation that would enable the employee with a personality disorder to do get along with others, it was not discrimination to dismiss them (Deidre Smith "The Paradox of Personality: Mental Illness, Employment Discrimination, and the Americans With Disabilities Act" (2006) 17 Geo Mason U Civ Rts LJ 79 at 442. Available at SSRN: https://ssrn.com/abstract=902341).

[304] Human Rights Commission Act 1977, s15(1)(a) stated: 'To refuse or omit to employ any person on work of any description which is available and for which that person is qualified.' Additionally, s15(1)(b) stipulates a comparator as someone with the 'same or substantially similar qualifications' whereas the HRA

requirement to cover all subsections of section 22 (which includes those already employed) is not clear, and was not mentioned in the white paper or Hansard prior to enactment.

This change, which might reduce employees' rights, seems inexplicable given the purpose of the earlier HRCA was to 'promote the advancement'[305] of human rights, whereas the more recent HRA has a higher objective to 'provide better protection of human rights'.[306]

However, overseas and international law may provide some illumination as to the most appropriate interpretation. In particular, New Zealand's obligations under UN and ILO conventions should be considered.

Article 27 of the UNCRPD states:[307]

> States Parties shall safeguard and promote the realization of the right to work, *including for those who acquire a disability during the course of employment*, by taking appropriate steps, including through legislation, to, inter alia:
>
> (a) Prohibit discrimination on the basis of disability with regard to all matters concerning all forms of employment, including conditions of recruitment, hiring and employment, *continuance of employment*, career advancement and safe and healthy working conditions (emphasis added).

This implies that, whenever possible, the employment of the mentally disabled employee should be protected. In addition, the UNCRPD has a requirement for the reasonable accommodation of the disabled in employment. Thus, to give effect to the potential accommodation provisions of the HRA, 'qualified' should be interpreted in a manner that enables the full assessment of the treatment, which, if found adverse, can be assessed against these provisions. This reinforces the argument that, even in the presence of partial, or poor performance, the employee should still be considered 'qualified'.

The ILO[308] also promotes the retention of work for the disabled employee. The ILO's 'Managing Disability in the Workplace: ILO Code of Practice', includes the following objective:[309]

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stipulates employees with similar capabilities, which (arguably) encompasses a wider pool of employees.

[305] Human Rights Commission Act 1977, Long Title.

[306] Human Rights Act 1993, Long Title. In addition, NZBORA s19 confirms the right to freedom from discrimination on the prohibited grounds listed in the HRA. NZBORA is, as stated in the long title, an Act to 'affirm, protect and promote human rights'. Thus, there is a human right to be free from discrimination on the ground of disability.

[307] United Nations Convention on the Rights of People with Disabilities (2006), Article 27.

[308] New Zealand is a founding member of the ILO. The ILO has promulgated a series of international labour conventions, many of which New Zealand has ratified.

> improving employment prospects for persons with disabilities by facilitating recruitment, return to work, *job retention* and opportunities for advancement (emphasis added).

Furthermore, the ILO Code states performance requirements may need to be reviewed when an existing employee acquires a disability.[310]

Therefore, in the context of international conventions, retention of work and reasonable accommodation are of paramount consideration. Nonetheless, neither the ILO nor the UNCRPD discuss the matter of qualification or how this would impact on the employability of the mentally disabled employee.

Overseas law provides little guidance. Australia, Canada and the UK do not have a 'qualified for work' proviso. However, the Americans with Disabilities Act 1990 (ADA) prohibits discrimination against a 'qualified' individual. A 'qualified individual' means:[311]

> …an individual who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires.

Thus, the ADA ties 'qualified' to the ability to perform the essential functions of the position.[312] Being unable to perform a single essential duty, no matter how infrequently that duty would arise, would then seem to deem the employee not 'qualified' for work.

This is a narrower interpretation than could be proposed for the HRA (which would allow for the part-performance of essential functions). However, under the ADA, the ability to perform the essential functions of the position is evaluated

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[309] International Labour Organisation *Managing Disability in the Workplace: ILO Code of Practice* (International Labour Organisation, 2002) 1.1(b). The principles that inform the code are the international labour standards, including the Vocational Rehabilitation and Employment (Disabled Persons) Convention, 1983 (No. 159), and Recommendation (No. 168), 1983. Article 7 of that Convention states: 'The competent authorities shall take measures with a view to providing and evaluating vocational guidance, vocational training, placement, employment and other related services to *enable disabled persons to secure, retain and advance in employment; existing services for workers generally shall, wherever possible and appropriate, be used with necessary adaptations*' (emphasis added).

[310] At at 7.2.5.

[311] Americans with Disabilities Act 42 USC §12111(8). The provision continues: 'For the purposes of this subchapter, consideration shall be given to the employer's judgment as to what functions of a job are essential, and if an employer has prepared a written description before advertising or interviewing applicants for the job, this description shall be considered evidence of the essential functions of the job.'

[312] The 'qualification standards' may include a requirement that the individual not pose a direct threat to the health and safety of other individuals in the work place. It may be a defence to a discrimination charge when a qualification standard is 'job-related and consistent with business necessity, and such performance cannot be accomplished by reasonable accommodation' (ADA 42 USC §12113).

after the employee has been reasonably accommodated, and, furthermore, the ADA specifies the reasonable accommodation requirements,[313] making the failure to reasonably accommodate the disabled employee, to the point of 'undue hardship', a ground of discrimination.[314] Given these safeguards, this narrower interpretation of 'qualified' is apposite.

However, the situation is not the same under the HRA, where there is no distinction between the essential and non-essential duties of a position, and no positive obligation of reasonable accommodation of the mentally disabled employee is imposed on the employer. Therefore, a more liberal interpretation of what it means to be 'qualified' may be required. This might mean that the interpretation should focus on whether the employee was qualified for work at time T1.

4.3.3 'Qualified for Work: Conclusion

The wider context of overseas law, with its focus on the reasonable accommodation of the employee, supports a narrow interpretation of 'qualified'. That is, to be qualified, the employee must be able to perform the essential duties of the position to the standard required by the employer. However, the employee must be reasonably accommodated before the assessment of 'qualification' is made. Conversely, as the HRA contains no positive obligation of reasonable accommodation, a more liberal interpretation of 'qualified' is required — else the disabled employee risks falling outside the HRA, before the remainder of the provisions are given effect.

Therefore, the best interpretation of 'qualified for work' is that the employee should be considered 'qualified' unless they are unable to perform most of the essential duties of the position. This interpretation enables the treatment of the employee to be assessed against the remainder of section 22, and utilises the checks and balances of the permitted exceptions (which provide the employer with a defence against a claim of discrimination) and task reallocation proviso. How these provisions may then affect the meaning of 'qualified for work' is discussed in Chapter 5.

A consequence of this reasoning is that, although it is the employer's managerial prerogative to establish the level of performance required by employees (below which their dismissal will be substantively justified), it is possible that, at that level of performance, the employee may still be considered 'qualified for work' under the HRA. Thus, it appears that what might constitute a justified dismissal of a disabled employee for poor performance under the ERA may still be a discriminatory one under the HRA.

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[313] Americans with Disabilities Act 42 USC §12111(9)(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.

[314] Americans with Disabilities Act 42 USC § 12112 (5).

Nevertheless, when the employee's performance is so poor they are not, in reality, performing most of the essential duties of the position, then they can no longer be 'qualified' for the purposes of the HRA. How to determine when this will be so remains unclear.[315]

4.4 Identifying the Correct Comparator

The next core element of discrimination posing interpretive difficulties is the identification of the proper comparator employee. This is a crucial 'step in the process',[316] as how the comparator employee would be treated in the same circumstances determines if the disabled employee's treatment was adverse or not. If it is established that the treatment of the disabled employee was adverse (compared to the treatment of the comparator employee), the next step is to determine if the reason for the adverse treatment was the protected ground (in this case, disability). If so, then the treatment would be unlawful (unless the employer is able to defend their actions under the permitted exceptions).

Sections 22(1)(b)-(c) of the HRA require comparator employees. This is because it is unlawful under Section 22(1)(b):

> to offer or afford the applicant or the employee less favourable terms of employment, conditions of work…. than are made available to applicants or employees of the same or substantially similar capabilities employed in the same or substantially similar circumstances on work of that description;

and, under s22(1)(c):

> to terminate the employment of the employee, or subject the employee to any detriment in circumstances in which the employment of other employees employed on work of that description would not be terminated, or in which other employees employed on work of that description would not be subjected to such detriment.

There are, then, three components within these provisions that involve comparison.

First, both provisions require the comparison of the mentally disabled employee with another employee who is also employed on 'work of that description'.

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[315] The Complaints Review Tribunal identified two possible tests for assessing if a person is qualified: the rationality test (that the decision is an honest assessment by the employer of the person's suitability to do the job) and the factual test (that the honest assessment of the employee's ability based on facts available to the employer at the time): *Proceedings Commissioner v Canterbury Frozen Meat Co Ltd* CRT 14/98, 26 November 1998 at 6. Both of these tests authorise the employer to determine if the employee is able or not.

[316] *Smith v Air New Zealand Ltd*, above n57 at [39]. The Court held that comparison with the treatment of a non-disabled person is a step in the process of determining lawfulness. The lawfulness is only determined once any defences have been addressed.

Second, section 22 (1)(b) compares the treatment of the mentally disabled employee with the treatment of other 'employees of the same or substantially similar capabilities'. That is, the comparator must have the same capabilities as the mentally disabled employee. Therefore, for section 22(1)(b), the comparator employee must be of similar capability to the disabled employee, *and* working in similar circumstances to the disabled employee, *and* on work of the same description.

Third, section 22 (1)(c) assesses the circumstances in which the mentally disabled was adversely treated. The comparison is made between the treatment of the disabled employee and another employee under those same 'circumstances'. Therefore, for section 22(1)(c), the comparator employee must be working on work of the same description, *and* their treatment is compared to that of the disabled employee under the same circumstances.

Thus, the circumstances in s22(1)(b) refer to the circumstances under which the employees are employed (for example, that both employees are employed as full-time equivalents), whereas the circumstances referred to under s22(1)(c) refers to the circumstances under which the treatment occurred (for example, both employees have been poorly performing).

The selection of the proper comparator is crucial, as different comparators will result in different outcomes. For example, in the Professor Smith scenario, if she is compared to a normally performing Professor the outcome might well be different than if she was compared with a poorly performing Professor. That is, a normally performing Professor would not be subjected to a PIP. Therefore, Professor Smith, when subjected to a PIP, is treated adversely in comparison to that other Professor.

Conversely, if Professor Smith is compared to a previously highly performing Professor, whose performance has declined for other reasons (such as laziness), and who would be subjected to a PIP, then Professor Smith's treatment is not dissimilar to the comparator's treatment, and may not be adverse.

But, in comparison to a Professor or lecturer who performs equally poorly, but is not subjected to a PIP then Professor Smith's treatment may be considered adverse. For example, if a comparator employee, despite their best efforts, had always performed poorly, and was not subjected to a PIP, then Professor Smith, who is performing at the same level, in being subjected to a PIP, would be treated adversely in comparison to them. However, the interpretation of 'capabilities' or 'circumstances' may determine if this would be an apt comparator employee. Hence, the interpretation of 'circumstances' and 'capabilities' when identifying the proper comparator is relevant.

Finally, it is possible that the comparator employee could be one with a different disability (perhaps a physical one). If they would not be subjected to a PIP when poorly performing, then, in comparison to them, Professor Smith is treated adversely. If that other employee would be subjected to a PIP, then Professor Smith's treatment would not be adverse. However, it is generally accepted that the comparator employee should not have a disability.[317]

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[317] The risk of comparison to a differently disabled employee is that that disabled employee might also be subjected to a PIP if poorly performing. In comparison to

Therefore, to identify the proper comparator, the three comparative elements require interpretation: 'work of that description'; the employee's 'capabilities'; and the 'circumstances' of the alleged treatment. These will now be examined, following the spiral approach.

4.4.1 The Comparative Elements and the Meaning From the Text

Work of that Description

Starting by analysing the text of the provision, the ordinary meaning of 'work of that description', if interpreted broadly, could encompass employees working in similar, but not identical, fields. For example, Professor Smith could be compared to employees generally involved in teaching and research, regardless of academic title. However, a narrow interpretation could restrict the meaning to employees working in the same field — or even having the same job description. Thus, Professor Smith would be compared to other Professors.

Interpreting 'work of that description' broadly would enable Professor Smith's work to be compared with a wide range of work in the teaching and research fields. Thus, the comparator employee on 'work of that description' might include newly employed, or inexperienced lecturers, or teaching fellows or researchers (rather than just senior Professors with higher performance expectations). If inexperienced lecturers or researchers would not be subjected to a PIP at the level of performance that Professor Smith is currently achieving, then subjecting Professor Smith to a PIP would be adverse treatment compared to them.

Conversely, interpreting, 'work of that description' narrowly, the Professor Smith is would be compared to the work of other Professors, with high performance expectations and where poor performance would likely trigger a PIP.

Thus, the plain meaning of the text is capable of more than one interpretation, which could affect the choice of comparator, and hence the outcome of the claim.

The Same or Substantially Similar Capabilities

In addition s22(1)(b) requires that the comparator employee must be of the 'same or substantially similar capabilities'.[318]

'Substantially similar' is an evaluative term, so who is considered to satisfy it may vary between observers. The plain meaning would suggest that the comparator's capabilities should be very close to those of the disabled employee.

However, the concept of 'capabilities' is also evaluative. Dictionary definitions of 'capability' are: 'ability'; 'power'; or 'being capable',[319] and 'capable' is defined as

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them, the treatment for Professor Smith would not be adverse. However, the treatment of both employees may be adverse by reason of their disability, and the employer is merely being consistently discriminatory.

[318] Under HRA s22(1)(b), the employer cannot afford the employee less favourable terms of employment or conditions of work than afforded to other employees of the same or substantially similar capabilities. A PIP may be considered a less favourable condition of work.

[319] Thomson, above n282.

‘competent; able; gifted’, or as ‘having the ability, fitness, or necessary quality for.’[320]

Consequently, there is a spectrum of ability (from ‘competent’ to ‘gifted’) that a comparator of ‘the same or similar capabilities’ may fall within. Thus, the potential comparator for Professor Smith ranges from the less ‘able’ (i.e. barely competent) academic to the highly performing (or ‘gifted’) Professor. As discussed above, if the comparator with ‘substantially similar capabilities’ is a highly performing Professor (who would not be subject to a PIP), then the treatment of Professor Smith is adverse. However, if the comparator of ‘substantially similar capabilities’ is a less able (so barely competent) employee, who would be subject to a PIP, then it would not be adverse treatment of Professor Smith to subject her to a PIP as well.

Alternatively, the approach could be to choose a comparator that mirrors Professor Smith in terms of capability. Then the question arises: should this mirror image comparator be Professor Smith at time T1 (when she became a Professor and was highly performing) or time T2 (when she was poorly performing and the PIP was instigated)?

As discussed previously, for mental disability, there are good policy reasons to assess the capabilities of the mentally disabled employee at T1, as this fits most closely with the objectives of the UNCRPD and HRA. This is because a more highly capable employee (like the disabled employee at time T1) would not be treated adversely. In comparison to them, subjecting the disabled employee to a PIP would be adverse treatment. However, if the comparator employee is someone of similar capability to the disabled employee at time T2 (when they were less capable), such an employee might also be subjected to a PIP. In comparison to them the disabled employee’s treatment would not be adverse — and the disabled employee falls outside the Act without it being necessary to assess if the employer could have accommodated the employee’s disability. This is inconsistent with New Zealand’s obligations under the UNCRPD for the reasonable accommodation of disability, and with the HRA’s objectives to better protect the human rights of the disabled.

Overall then, the text does not clarify what the ‘capabilities’ of the comparator should be. It is unclear from the text whether ‘capabilities’ should be construed broadly — that is, the comparator employee is someone capable of performing the duties of the position (regardless of skill level), or whether the comparator employee should be of similar skill level to the disabled employee at the time of their unfavourable treatment, or of similar skill level to the disabled employee when they were performing normally.

Again, as the text is capable of more than one meaning, this could affect the choice of the comparator, and the outcome of the claim. However, before moving on to discuss the selection of the correct comparator using the remaining interpretive approaches, there is one further comparative element to be interpreted in light of the text.

[320] Thomson, above n282.

The Circumstances

The last comparative element requiring interpretation is the 'circumstances' of the treatment. The term circumstances is used differently in s22(1)(b) than it is in s22(1)(c). In the former, it refers to the comparator employee being employed in similar circumstances — for example, both employees are employed as fulltime equivalents, or employed in the same location, or employed under the same collective contract. In this situation Professor Smith would be compared to another fulltime Professor at the same University. Used in this way, the term 'circumstances' is unlikely to prove controversial.

However, in s22(1)(c), 'circumstances' pertains to the situation under which treatment of the employee arose. That is, the argument would be that the disabled employee has been treated detrimentally, or dismissed, in a situation in which the comparator employee would not be. In this situation, the meaning of 'circumstances' might prove controversial. For example, it could be argued that the 'circumstances', or situation, that led to Professor Smith's PIP was simply that she was poorly performing. Therefore the comparison would with an employee who was also poorly performing (perhaps due to laziness). Then, if the comparator employee would be subjected to a PIP, in that 'circumstance' there would be no adverse treatment of Professor Smith.

However, it could also be argued that Professor Smith's PIP arose in the circumstances where, due to matters beyond her control, she was *unable* to work productively. Therefore, the comparative circumstances should be those in which another Professor, due to factors outside of their control was also unable (as opposed to unwilling) to work productively. Perhaps there is on-going and excessive noise from building work outside their office, or they have been allocated extra administrative work by the University, or they have other personal problems, for example, having to care for a sick child. Under these circumstances, a PIP might not be instigated against them. Thus, how 'circumstances' is interpreted will affect the choice of comparator, and in turn, impact on whether the disabled employee's treatment is adverse in comparison to them.

Potentially then, the meaning of 'circumstances' may be controversial. The problem is that, while the comparator will be an employee without a mental disability, what is unclear is whether the effects, or consequences, of the disability (such as poor performance) should be included in the circumstances — that is, should the comparator employee be in circumstances where they also perform poorly (but for another reason, such as laziness)?

If the consequence of the disability, such as the poor performance, is not included in the comparative circumstances, then the comparator employee will be performing normally, so will not be subjected to a PIP. In comparison to them, subjecting Professor Smith to a PIP or dismissal may be considered adverse treatment.

The meaning of 'circumstances', then, requires clarification. However, the text of the HRA provides no enlightenment, as it does not identify what 'circumstances' encompasses, and provides no additional guidance as to what factors should be considered.

However, the dictionary meaning of 'circumstances' is: 'a fact, occurrence or condition especially the time, place, manner, cause, occasion, etc., or surrounding of an act or event.'[321] As poor performance would be a 'condition' and the 'cause' of 'an act' this could infer that the manifestations of disability would part of the comparative circumstances.

If so, then the comparator would be a poorly performing employee without a disability. If that comparator employee would be subjected to a PIP, then Professor Smith's treatment, in comparison to them, is not adverse, as both would suffer the same treatment.

However, a further complicating factor is whether consideration should be taken of the *cause* of the circumstances. In the Professor Smith example, where other lecturers are poorly performing, this may be caused by inexperience or newness to a role. If Professor Smith is compared to such a poorly performing but inexperienced lecturer (not a Professor) who is not subjected to a PIP, then although both are poorly performing, the cause of the poor performance is different. So, although Professor Smith is treated adversely in comparison to another poorly performing lecturer, the differing causes of the 'circumstances' may explain the disparity in treatment. In these circumstances the inexperienced employee is expected to improve, whereas Professor Smith has demonstrated a loss of performance. Additionally their respective 'capabilities' differ — the comparator's capabilities may be appropriate for their level of experience, whereas Professor Smith's are not.

However, if the comparator employee's poor performance was due to laziness and they were subjected to a PIP, then it may be that the circumstances are more similar to those of Professor Smith (i.e. both of similar capability and both demonstrating a loss of performance). If the lazy Professor is subjected to a PIP, then Professor Smith's treatment, in comparison to them, is not adverse.

It is not clear from the text if the 'circumstances' include the *cause* of the poor performance (or other consequential effects of disability), or the future expected outcome. A lazy or disinterested Professor's performance is a matter of their choice, and their performance may not be expected to improve. However, like a mentally disabled Professor, an employee who suddenly has to take on extra administrative work, so that they cannot concentrate on their research and writing, has no intention or desire to be poorly performing, and will return to normal performance in time. Likewise the unwell Professor may well return to normal productivity, given time and appropriate treatment. But, the causes of the circumstances are different, and this may affect the potential outcome.

Generally, that the text does not clarify what is meant by the 'circumstances' under which the comparison will take place, yet this can affect the outcome.

Overall, the text reveals several possible interpretations for each comparative element. This means the provisions (taken as a whole) are capable of multiple interpretations. Therefore, the correct comparator cannot be ascertained from the text alone and requires further analysis.

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[321] Thomson, above n282.

4.4.2 Identifying the Comparator from the Scheme, Purposes and Judicial History

The scheme of the Act may help determine the proper comparator, as there may be interpretive indicia in other provisions.

Elias J said:[322] the Court must 'select the comparator group which best fits the statutory scheme in relation to the particular ground of discrimination that is in issue', taking into account any defences available. Accordingly, for disability discrimination, the permitted exceptions and the task reallocation proviso may provide interpretive assistance, as the scheme of the Act reveals a complex interaction between these provisions.

The role of the comparator is to ascertain if the mentally disabled employee was treated adversely in comparison to a non-disabled employee and whether this adverse treatment was by reason of disability (s22). That is, even after the comparison reveals the mentally disabled employee was treated adversely compared to other employees, discrimination is not yet proven — the employee still must demonstrate the adverse treatment was 'by reason of' disability (the crux of discriminatory treatment). At that stage the potential accommodation provisions are pertinent. That is, if the treatment was due to the disability, the employer may still defend their actions under the permitted exceptions (s29), subject to the task reallocation proviso (s35).

Therefore, in the context of the Act, the comparator should be one that enables the employee to prove whether their treatment was because of their disability. Comparison with an employee demonstrating the salient feature, or consequences arising from the disability (such as poor performance) is less likely to result in a finding of adverse treatment (as it is more likely that all poorly performing employees would be subjected to a PIP or dismissal). Consequently, whether the treatment was 'by reason of' disability would not be properly evaluated and nor would the employee's treatment be assessed against the potential accommodation provisions, depriving these provisions of effect.

In contrast, using a comparator that does not mirror the employee's circumstance (e.g. poor performance) allows the full scheme of the HRA to have effect. Thus, the comparator should not mirror the employee with the manifestation or consequence of their disability, but mirror how they were prior to the manifestation of the disability, allowing the material reasons for the adverse treatment to be established. The employer may still rely on the permitted exceptions (subject to the task reallocation proviso) to defend their adverse treatment of the employee. This allows each part of the legal scheme to play its part.

Accordingly, the scheme of the Act suggests the comparator should be a non-disabled employee without the features of the disability (i.e., the comparator should not replicate the poor performance of the disabled employee). Thus, for Professor Smith, the comparator should be the normally performing Professor.

However, this may be contrary to the purposes of the Act. While the intituled purpose of the Act is to better protect human rights of the disabled, the alternate

[322] *McAlister v Air New Zealand Ltd*, above n97 at [34].

purpose is to maintain the employer's managerial prerogative. These purposes are potentially in conflict.

To give effect to the former purpose, the comparator should be selected in a manner that does not deprive the disabled employee of their human right to work. Therefore, as discussed above, the comparator should not demonstrate the effects or manifestations of the disability, but should mirror the well employee. However, to respect the latter purpose of the Act — to protect the employer's managerial prerogative (including the prerogative to dismiss a poorly performing employee) — the comparator should be a poorly performing employee (but absent their disability). Therefore, the purposes of the Act appear conflicting and do not clarify which is the correct comparator.

Judicial history provides limited assistance in indicating the appropriate comparator for disability discrimination. However, its selection has been discussed in relation to other grounds. In *McAlister v Air New Zealand,*[323] the Supreme Court confirmed (for age discrimination at least), that the comparator should not reflect the salient feature of the protected ground. For McAlister, where, due to USA regulations, his age meant he was unable to pilot in USA airspace, the Court held that the comparator should be a pilot with no restrictions on his piloting abilities (rather than a pilot with the salient feature — i.e. the inability to fly into the USA, but for other reasons).

However, the reasoning behind the Court's choice of comparator may not apply to disability discrimination. Age discrimination, unlike disability discrimination, provides the employer with a defence for causing an employee to retire or resign. That defence is that being under (or over) a certain age is a GOQ. Thus, Air New Zealand had the potential to argue that being less than 60 years old was a GOQ for a pilot-in-command.[324] However, disability discrimination has no GOQ defence, so in the Professor Smith scenario, the University could not claim performance to a certain standard is a GOQ for her position. This changes the context in which interpretation takes place.

Secondly, McAlister's inability to pilot was due to a regulatory requirement, not poor performance. Similarly, in *Atley v Southern DHB,*[325] where a nurse had bi-polar disorder and was unable to work night shifts, there were no performance issues — merely a restriction on the shifts she was able to work. Here, the comparator selected was a nurse able to work all shifts. In comparison to such a nurse, Atley did suffer adverse treatment. Likewise in *Nakawara v AFFCO*,[326] and

[323] *McAlister v Air New Zealand Ltd,* above n97.

[324] The claim in *McAlister* was raised as a PG under the ERA discrimination in employment provisions. The ERA differs from the HRA in that the GOQ for age applies to adverse treatment (s103(1)(a)) whereas it does not in the HRA. Given this, it is possible the comparator selected by the Supreme Court may have been different had this case been argued under the HRA, where there is no GOQ exception for age for adverse treatment or dismissal.

[325] *Atley v Southland District Health Board*, above n84.

[326] *Nakarawa v AFFCO New Zealand Limited*, above n127.

Meulenbrook v Vision Antenna Systems Ltd[327] (both of which were complaints of religious discrimination), the issue was availability to work, not performance when at work. Therefore, these cases are distinguishable from cases of disability discrimination in which the employee's disability impacts on their performance at work.

Accordingly, for other prohibited grounds of discrimination, the comparator should not reflect the salient feature of that ground (e.g. the inability to work Saturday, or being unable to pilot an aircraft into USA airspace). However, it is less certain that this type of comparator (i.e., one that does not exhibit the consequence of the ground) is appropriate for disability. The difficulty with disability is that the employee's ability to perform may be compromised. The impact for the employer may be significant. It is possible, therefore, that in light of the purpose of protecting the managerial prerogative, the comparator should be a similarly poorly performing employee. However, this defeats the purpose of protecting the human rights of the disabled, and fails to give effect to the potential accommodation provisions.

This demonstrates how the current law in New Zealand pits the interests of the employer against those of the employee, and shows that the selection of the comparator will reflect where the point of balance between these competing interests lies. Thus, if interpretation of the provisions is unable to clearly establish the correct comparator, there is a risk that the interpretation selected may simply reflect current ideology or policy preferences. To avoid this, the wider context should be considered, such as international laws and conventions, which may legitimately provide some guidance to the interpretation of the HRA. Of particular relevance is the UNCRPD, which New Zealand ratified in 2008.

4.4.3 Identifying the Comparator: Consideration of the Wider Context

Interpretation in accordance with the UNCRPD requires selection of a comparator that best fits the purposes of the convention, which is to 'promote, protect and ensure the full and equal enjoyment of the human rights and fundamental freedoms'[328] for those with disabilities, including the right to work. Thus, the focus of the UNCRPD is not on equal treatment of the employee (formal equality), but on equality of outcome, i.e. the full enjoyment of their rights and freedoms (in effect, substantive equality). The UNCRPD defines discrimination as:[329]

> "Discrimination on the basis of disability" means any distinction, exclusion or restriction on the basis of disability which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise, on an equal basis with others, of all human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field. *It includes all*

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[327] *Meulenbroek v Vision Antenna Systems Ltd*, above n164. Furthermore, s29 HRA requires the employer to accommodate the employee's religious practices.

[328] United Nations Convention on the Rights of People with Disabilities (2006), Article 1.

[329]At Article 2.

> *forms of discrimination, including denial of reasonable accommodation* (emphasis added).

The UNCRPD's focus on substantive equality and the need for reasonable accommodation implies the comparator should not 'mirror' the disabled employee, as that approach focuses on formal equality. Instead the comparator should be one that promotes substantive equality. Thus, as reasonable accommodation promotes substantive equality, then, under the HRA, the comparator should be one that allows the employee's position to be assessed in light of the HRA's potential accommodation provisions, before a finding regarding unlawful treatment is made.

Nonetheless, for mental disability, overseas jurisprudence has shown this interpretation to be contentious. The manifestations of mental disability have variously been included [330] and excluded [331] from the comparator or the circumstances.

In Australia, the High Court discussed the issue of the comparator in relation to disability discrimination in a school setting:[332]

> It is one thing to say, in the case of the pupil, that his violence, being disturbed behavior resulting from a disorder, is an aspect of his disability. It is another thing to say that the required comparison is with a non-violent pupil. The required comparison is with a pupil without the disability; not a pupil without the violence. The circumstances are relevantly the same, in terms of treatment, when that pupil engages in violent behaviour. The law does not regard all bad behaviour as disturbed behaviour; and it does not regard all violent people as disabled. The fallacy in the appellant's argument lies in the contention that, because the pupil's violent behaviour was disturbed, and resulted from a disorder, s 5 always requires, and only permits, a comparison between his treatment and the treatment that would be given to a pupil who is not violent.

[330] *London Borough of Lewisham v Malcolm*, above n111.

[331] At 80; *Purvis v New South Wales*, above n29. The selection may be driven by policy decisions. For example, Grummo, Hayne, and Heydon JJ contended that the circumstances needed to be constructed in such a way as to allow for the proper interaction between State and Federal criminal law (at [83]), while Gleeson J held it would be 'unfair' to identify disability as the basis of the principal's decision as it would 'leave out of account obligations and responsibilities which the principal was legally required to take into account' (at [227]).

[332] *Purvis v New South Wales*, above n29 at [11]. The claimant was the foster father of a brain-damaged boy who was suspended and then excluded from school as a result of his violent behaviour. The majority held that exclusion of the complainant from school was not discriminatory, as other non-disabled, but similarly violent, students would be excluded. The minority held the manifestations were part of the disability, and should be excluded from the comparator and the circumstances in which the treatment occurred, and thus the expulsion was discriminatory.

> Rather it requires a comparison with the treatment that would be given, in the same circumstances, to a pupil whose behaviour was not disturbed behaviour resulting from a disorder. Such a comparison requires no feat of imagination. There are pupils who have no disorder, and are not disturbed, who behave in a violent manner towards others. …
>
> … If the person without the disability is simply a pupil who is never violent, then it is difficult to know what context is given to the requirement that the circumstances be the same.

This decision has been the subject of much academic criticism,[333] and resulted in the Australian legislature amending the Disability Discrimination Act 1992 (DDA Cth), by inserting a requirement for reasonable accommodation of the disabled.[334]

The situation in the UK has varied. Until 2008, the leading authority, decided under the Disability Discrimination Act 1995 (DDA UK), was *Clark v Novacold Ltd.*[335] Clark was dismissed as, due to disability, he was unable to perform the main functions of his position. The Court of Appeal held the comparator did not have to be in the same circumstances as the disabled employee (i.e. unable to work). The comparator would be an employee who was able to perform the main functions of the job, so they would not be dismissed. In comparison to them, Clark's dismissal for non-performance was adverse treatment.[336]

However, the House of Lords in *London Borough of Lewisham v Malcolm*[337] (decided under the DDA UK) reversed this. Malcolm's actions were the result of impaired decision-making processes (due to disability). In the House of Lords he was compared to other non-disabled individuals who acted in the same way, so in comparison to them he was not treated adversely, and hence, no discrimination had occurred. Nonetheless, Baroness Hale acknowledged the difficulties of disability discrimination law:[338]

> This raises questions about the fundamental principles underlying disability discrimination law. Is it intended simply to

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333 Colin Campbell "A Hard Case Making Bad Law: *Purvis v New South Wales* and the Role of the Comparator Under the Disability Act 1992 (Cth)" (2007) 35(6) FL Rev 111; Samantha Edwards "*Purvis* in the High Court Behaviour, Disability and the Meaning of Direct Discrimination" (2004) 26(4) Syd L Rev 639; M Thorton "Disabling Discrimination Legislation: The High Court and Judicial Activism" (2009) 15(1) AJHR 184.
334 Disability Discrimination Act 1992 (Australia), s5(2).
335 *Clark v Novacold Ltd*, above n31.
336 The case was remitted to the Tribunal to assess whether, on the facts, this treatment was unjustified (and therefore discriminatory).
337 *London Borough of Lewisham v Malcolm*, above n111. This was decided under the Disability Discrimination Act 1995 (UK). Malcolm lived in Council housing, which he did not have the right to sublet. As a consequence of impaired thinking due to mental illness, he sublet the property, and the Council moved to evict him. Malcolm appealed on the grounds of discrimination.
338 At 42.

> secure that disabled people are treated in the same way as other people who do not have their disability? Or is it intended to secure that they are treated differently from other people in order that they can play as full as possible a part in society whatever their disabilities?

Subsequently, the UK Equality Act 2010 (EA 2010) effectively restored the law to the pre-*Malcolm* position, stipulating that discrimination occurs when 'A treats B unfavourably because of something arising in consequence of B's disability'.[339]

Nonetheless, caution should be used when considering decisions from other jurisdictions for the comparator selection. As Elias CJ said, the appropriate comparator in one statutory setting may be completely inapt in another.[340]

4.4.4 The Comparator: Conclusion

The best conclusion is, therefore, that, while the text and the purposes of the Act provide little assistance in the selection of the comparator, the scheme of the Act and the wider context both suggest the comparator should not mirror the characteristics of the mentally disabled employee (i.e. they should not be poorly performing). This choice of unaffected comparator accords with the comparators selected for other prohibited ground of discrimination.

However, selecting a normally performing employee as the comparator will almost inevitably lead to a finding of adverse treatment, making a comparator moot. As provisions are not enacted to be meaningless, this result seems incorrect.

Perhaps then, there should not even be a comparator for disability discrimination? Some commentators contend that for disability discrimination the use of comparators is not appropriate,[341] as the disabled cannot be similarly situated to non-disabled persons.[342]

Furthermore, the HRRT, reflecting the sentiments of the UNCRPD, has stated that the role of the legislation is to enhance 'inclusivity in society and respect for the dignity of all human beings'.[343] Using a comparator promotes formal equality, by requiring those apparently alike to be treated alike, but does not promote inclusivity (which requires reasonable accommodation). Therefore, our current legislation may not adequately reflect the principles of the UNCRPD, nor address the need for the mentally disabled to achieve greater substantive equality.

Nonetheless, currently the HRA requires a comparator. Therefore, to interpret the HRA in accordance with the UNCRPD, the comparator should be one that does not mirror the disabled employee's circumstances, which may more readily lead to a finding that the employee was adversely treated. A comparator that does not reflect the consequential behaviours or effects that arise from the

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[339] Equality Act 2010 (UK), s15(1).

[340] *McAlister v Air New Zealand Ltd*, above n97 at [34].

[341] Aileen McColgan "Cracking the Comparator Problem: Discrimination, 'Equal' Treatment and the Role of Comparator" (2006) 11 EHRLR 650.

[342] *Purvis v New South Wales*, above n29 at [114].

[343] *Bullock v Department of Corrections*, above n143, at [28].

disability allows a finding of adverse treatment, and enables the next step of the enquiry to proceed: to assess if the treatment was 'by reason of' disability.

4.5 The Meaning of 'By Reason Of' Disability

The phrase 'by reason of' provides the 'causal connection' between the prohibited ground of discrimination and the adverse treatment that makes that treatment unlawful.[344] This is a core element of discrimination, as, even if the employee is treated adversely, and is disabled, unless the disability is the reason for the adverse treatment, the treatment is not discriminatory.

This issue of the causal connection may be more easily resolved for other grounds of discrimination, where the ground does not affect the employee's ability to perform the work. However, for disability, where the disability impacts on the employee's ability to perform, the disability and poor performance are entwined. Accordingly, it is less certain if any dismissal is due to the disability, or simply due to poor performance.

When the disabled employee's performance no longer reaches the employer's standards, the employer may have genuine business reasons to consider dismissing them, as would normally be their managerial prerogative. However, the employee, who is only under-performing due to the effects of their disability, will consider they have been dismissed because they have a disability.

The interests of the employee and employer are therefore, in conflict. If interpretation of this phrase cannot clarify whether treatment would be considered by reason of disability, and not poor performance, the risk is that the decision-making process will then rest on policy grounds. That is, how 'by reason of' is interpreted will be determined by where the balance between the competing interests of the employer and employee lie. For example, if the employer's interests have ascendancy over those of the disabled employee, then 'by reason of' disability may be interpreted so that it does not include the consequences arising from the disability. This would mean that the poor performance would be considered a separate issue to the disability. Therefore, the adverse treatment of the employee would simply be due to their poor performance, not their disability, and therefore, not discrimination. However, if the rights of the disabled are considered paramount, then the consequences of the disability, such as poor performance, might be considered part of the disability. In this situation, adverse treatment for poor performance would be adverse treatment because of their disability (which has caused the poor performance). So it would be considered 'by reason of the disability', and thus, discriminatory.

4.5.1 The Meaning from the Text, the Scheme and the Purposes of the Act

The plain meaning of the phrase by reason of' appears clear — that is, the adverse treatment is because of, or due to, the disability. The dictionary defines 'by reason of' as 'owing to', while 'reason' is defined as 'motive, cause or

[344] *New Zealand Workers Industrial Union of Workers v Sarita Farm Partnership* [1991] 2 ERNZ 347 (EC).

justification'.[345] Thus, the meaning from the text suggests that disability would be the motivating factor behind the dismissal.

Despite this, the HRRT has (although not in the employment context)[346] differentiated between motive and reason, holding that motive is irrelevant.[347]

Thus, in cases such as *Nakarawa v AFFCO*,[348] *McAlister v Air New Zealand*,[349] and *Atley v Southland District Health Board*,[350] although the motivation for the adverse treatment may have been business necessity, the reason was the prohibited ground of discrimination.[351]

If this reasoning applies to disability discrimination, where the disability impacts on the employee's actual performance, then, although the motivation may be attributed to poor performance, the reason is still the disability. However, this requires the salient feature of the disability (poor performance) to be considered part of the disability.

Problematically, the text of the HRA refers to the prohibited grounds of discrimination, which are defined in section 21. These grounds are specific and exhaustive — and do not include behaviours arising in consequence of disability (e.g. poor performance).[352] Thus, from the text it is unclear if 'by reason of'

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[345] Thomson, above n282.

[346] *Winther v Housing New Zealand Corporation* [2011] NZHRRT 18. The complainant, when facing eviction from her rental property, claimed she had been discriminated on the ground of family status. The HRRT held there must be a relevant connection between the action and the ground of discrimination, and the reason for the action must be the prohibited ground. They found Housing New Zealand's reason for evicting the tenants was the behavior of persons they believed to be living in the house, not their relationship with the complainant. At [62]: 'HNZ was not compelled to act by its belief as to the particular nature of the plaintiffs' relationships with the men; it was compelled to act because it believed that men who had been involved in serious acts of anti-social behaviour in the Pomare area were living at those three HNZ-tenanted properties. The action was taken to terminate the connection between the men and the properties.'

[347] At [58].

[348] *Nakarawa v AFFCO New Zealand Limited*, above n127.

[349] *McAlister v Air New Zealand Ltd*, above n97.

[350] *Atley v Southland District Health Board*, above n84.

[351] In *Nakarawa* it was his refusal to work weekend nights (on religious grounds) that lead to his dismissal; for *McAlister*, it was the USA imposed restrictions on flying into US airspace due to his age that lead to his demotion; and for *Atley* it was her need not to work night shifts (due to her bipolar disorder) that lead to her redeployment.

[352] Contrast this to the UK, where discrimination includes unfavourable treatment because of 'something arising in consequence' of disability (Equality Act 2010 (UK), s15). In Australia, the definition of disability includes 'a disorder, illness or disease that affects a person's thought processes, perception of reality, emotions or judgment or that results in disturbed behaviour' (Disability Discrimination Act 1992 (Australia), s4(1)).

disability would include 'by reason of' something arising in consequence of the disability.

This dilemma was discussed briefly in *B v Waitemata Health*,[353] where the Court referred to the Australian case of *Purvis v New South Wales*,[354] stating:[355]

> …the prohibited ground of psychiatric illness in s 21(1)(h)(iii) of the Human Rights Act is not expressed in a way that includes resultant behaviour as part of the ground. This means that the statutory scheme in New Zealand is lacking the feature relied upon by the minority in *Purvis*. Under s 4(1) of the Disability Discrimination Act 1992 (Cth) disability includes a disorder or illness that "results in disturbed behaviour".

Thus, if the resultant behaviour (poor performance) is not included as part of the ground of disability, then both the motivation and the reason for the adverse treatment of the mentally disabled employee might be attributed to the poor performance.

Furthermore, even accepting that disability and poor performance are entwined, the text does not clarify the degree to which disability must be the deciding factor for the alleged treatment for it to be considered 'by reason of' disability. Judicially this has been defined as 'a material' reason. However, if the overriding reason is performance, is disability still a material reason?

The scheme of the HRA is such that all claims of discrimination in employment are evaluated under section 22 (that is, section 22 applies to all the prohibited grounds of discrimination). If adverse treatment is found to be 'by reason of' a prohibited ground, the treatment is assessed against the specific permitted exceptions for that ground, and the general task reallocation proviso.[356] 'By reason of' provides the causative link between the adverse treatment and the prohibited ground of discrimination.

As section 22 applies to all prohibited grounds of discrimination, a consistent approach to interpreting 'by reason of' should be taken across all grounds. Accordingly, how 'by reason of' has been interpreted for other grounds of discrimination may help determine the meaning for disability discrimination.

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[353] *B v Waitemata District Health Board* [2016] NZCA 184. This claim was raised under s19 of the NZBORA. The Waitemata Health Board instituted a no smoking policy on hospital grounds. As those admitted to, or working in, the psychiatric intensive care unit were unable to leave the premises, they could not smoke. They raised a claim of indirect discrimination on the grounds of disablity. However, the Court held that smoking was not a disability thus the employees had no claim, and, furthermore as the policy applied to all patients it was not discriminatory against those with mental illness.

[354] *Purvis v New South Wales*, above n29.

[355] *B v Waitemata District Health Board*, above n353 at [94].

[356] Each prohibited ground of discrimination has exceptions or defences against a claim of discrimination, and the task reallocation proviso applies to all of these defences or exceptions.

For it to be 'by reason of' a prohibited ground, Tipping J, in *McAlister v Air New Zealand,*[357] determined the prohibited ground must be a 'material' factor in the decision. This shows a trend away from a restrictive interpretation of this phrase. Formerly, the Equal Opportunities Tribunal[358] held 'by reason of' to mean the prohibited ground had to be a 'substantial and operative cause' in the decision.[359] However, Tipping J held this to be 'too strong a link', and the prohibited ground need only be 'a material' reason for the treatment.[360]

This lesser test reflects the purpose of the HRA — to 'better protect human' rights — as the complainant need only show that the mental disability was one material reason in the decision. However, 'material' is an evaluative term meaning 'significant', 'important' or 'relevant'.[361] If poor performance is relevant to a decision to adversely treat an employee, then it is a material factor in a decision. But there could be more than one material factor, and in *Meulenbroek v Vision Antenna Systems Ltd*[362] the HRRT confirmed the prohibited ground need only be 'a' material reason and not 'the' material reason for the treatment.

The HRRT applied this 'material' factor test in *Nakarawa v AFFCO*[363] (religious discrimination). The defendant argued that the reason for dismissal was Mr Nakarawa's unavailability for weekend evening shifts. However, the HRRT held that, as his unavailability was due to religion, his religion was the material reason for his dismissal.

Applying this logic, if poor performance is due to mental disability, then mental disability is a material reason for the dismissal. Accordingly, for Professor Smith, as her poor performance results from mental disability, the adverse treatment would be 'by reason of' her mental disability.

However, in *Nakarawa, Meulenbroek* and *Atley,* the complainants were able to perform all the duties of the position, when at work. The issue was their availability for work. Likewise, Mr McAlister was still able to pilot aircraft. With no performance issues in play, it is not difficult to attribute a material reason for the treatment to the prohibited ground.

Disability is less straightforward, when it impacts on the employee's actual performance. As previously discussed, establishing the causative link between treatment and the disability (rather than the performance) requires the poor performance to be seen as a feature of the disability (and not a standalone issue).

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[357] *McAlister v Air New Zealand Ltd*, above n97 at [49].

[358] The Equal Opportunies Tribunal was the forerunner to the Human Rights Review Tribunal.

[359] *Human Rights Commission v Eric Sides Motors Co Ltd* (1981) 2 NZAR 447 (EOT)358 at 465. Although this was decided under the Human Rights Commission Act 1977, that Act contained the same 'by reason of' phrase as the HRA. This test was applied until the decision in *McAlister.*

[360] *McAlister v Air New Zealand Ltd*, above n97, at [49]. This was in reference to the ERA provisions. However, the HRA has the same 'by reason of' element, and the HRRT has applied the same test in cases decided subsequently to *McAlister*.

[361] Thomson, above n282.

[362] *Meulenbroek v Vision Antenna Systems Ltd*, above n164 at [115].

[363] *Nakarawa v AFFCO New Zealand Limited*, above n127 at [63].

Some prohibited grounds have permitted exceptions that indicate when treatment will be 'by reason of' that ground, and not attributable to other reasons. For example, the permitted exceptions for religion recognise some religions have practices affecting their adherent's ability to work. Furthermore, this provision requires accommodation of those practices by the employer.[364] This provision effectively (if indirectly) establishes a causative link between the consequences arising from religion (inability to work certain days) and religion.

The permitted exceptions for disability recognise the disabled employee may require 'special services or facilities', or pose a 'risk of harm' to themselves or others. However, other matters that may arise in consequence of disability (such as behavioural or performance issues) are not explicitly recognised, and the HRA does not positively impose an obligation to accommodate these consequent features of disability. Thus, unlike religion, this provision does not (directly or indirectly) link the consequent features of disability with disability itself.

Nevertheless, following the general scheme of the Act, the provisions should be interpreted similarly. Thus, in the same way that inability to work weekend shifts (a material reason for dismissal) is linked to religion ('but for' religious belief they would work weekends), poor performance (a material reason for adverse treatment) is linked with disability ('but for' the disability they would perform well). Therefore disability is a material cause of the adverse treatment.

Overall, then, the scheme of the HRA suggests 'by reason of' should include the effects of disability. However, the dual purposes of the Act make this interpretation problematic. While one purpose of the Act is to prevent the employee from being treated adversely because they have a disability, an additional purpose is to preserve the employer's managerial prerogative, enabling the employer to dismiss the poorly performing employee. The balancing point between the different (and potentially conflicting) purposes may rest — in the context of disability at least — on the interpretation of 'by reason of' disability.

Thus, while interpreting 'by reason of' to include any factor arising from the disability (such as poor performance) accords with the purpose of the Act to protect the mentally disabled employee, this interpretion sits uncomfortably with the conflicting employer's managerial prerogative to justifiably dismiss that poorly performing employee, without it being discriminatory. This may suggest the poor performance should be considered the relevant (and hence, material) reason for the treatment, and not the disability. Thus, the purposes of the Act point in different directions.

4.5.2 Consideration of the Wider Context

However, internationally it is recognised that the special nature of human rights legislation requires it to be given a fair, large and liberal interpretation, not a literal and technical one.[365] A large and liberal interpretation of 'by reason of'

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[364] Human Rights Act 1993, s28(3). The employer 'must accommodate the practice' and is obliged to adjust their activities to do so, unless the adjustment would unreasonably disrupt the employer's activities.
[365] *Coburn v Human Rights Commission* [1994] 3 NZLR 323 (HC) at 333.

would encompass adverse treatment stemming from the consequences of disability. Although this would accord with the UNCRPD interpretation of disability, it is hard to interpret the HRA along these lines. Furthermore, international jurisprudence indicates this approach is fraught with difficulties.

The difficulty of interpretation in accordance with the UNCRPD is that New Zealand legislation is premised on the medical model of disability, but the UNCRPD definition of disability is a combination of the social and medical models. The medical model of disability views disability as an impairment or condition that the individual has, that must be fixed or ameliorated to enable the disabled person to fit into 'normal' society. The HRA's exhaustively defines disability in terms of illnesses, impairments, abnormalities of anatomical structure or function, or reliance on remedial means, reflecting the medical model.[366] A social construct of disability however, recognises the disabling effect of societal barriers, including attitudinal barriers, that prevent the disabled person's full participation in society. The social construct sees these barriers to inclusion as the reason why physical or psychosocial impairments become 'disabilities'.

The UNCRPD defines disability in the following way:[367]

> Persons with disabilities include 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.

As the social construct of disability emphasizes inclusion and participation in society, this suggests that the effects or manifestations of disability, which may hinder such participation, should be considered a feature of the disability — and accommodated for. However, the exhaustive definition of disability in the HRA does not include 'things arising in consequence of disability'. Thus, interpretation in accordance with the UNCRPD requires a very 'large and liberal' interpretation of 'by reason of' disability to incorporate this.

New Zealand legislation does not define discrimination *per se,* and the HRA merely prohibits adverse treatment on the prohibited ground of discrimination. However, in the absence of a definition of discrimination, the UNCRPD may properly be used as an aid to interpretation. The UNCRPD defines discrimination on the basis of disability as:[368]

> … 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;

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[366] Human Rights Act 1993, s21.
[367]United Nations Convention on the Rights of People with Disabilities (2006), Article 1.
[368] At Article 2.

As adverse treatment, undertaken in response to the effects of disability, impairs the exercise of the human right to work, it could be considered discriminatory under the UNCRPD definition. Therefore interpreting the HRA in accordance with the UNCRPD suggests that adverse treatment of the employee for behaviours or matters attributable to the disability should be considered 'by reason of' disability.

However, overseas jurisprudence has shown just how contentious and difficult this causation issue can be. The House of Lords in *London Borough of Lewisham v Malcolm* said:[369]

> … the task of the court is to ascertain the real reason for the treatment, the reason which operates on the mind of the alleged discriminator. This may not be the reason given, and may not be the only reason, but the test is an objective one.

The Court went on to say:[370]

> Thus, for example, the reason for the dismissal of the claimant in *Taylor v OCS Group Ltd* [2006] EWCA Civ 702, [2006] ICR 1602, namely the violation of the confidentiality of a colleague's computer files, had nothing whatever to do with his disability, which was deafness. By contrast, the dismissal of the absent claimant in *Clark v Novacold* [1999] ICR 951, the refusal of entry to a blind person with a dog or the refusal of service to a customer with eating difficulties (hypothetical examples considered in that case and elsewhere), or the dismissal for slowness of a one-legged postman (a hypothetical example discussed by Lindsay J in *Heinz v Kenrick*, above), would all, in my opinion, disclose a connection between the reason for dismissal and the disability in question. But in borderline cases it will be hard to decide whether there is or is not an adequate connection.

However, in *Malcolm* the Court did not find a close enough connection between the claimant's mental illness and the Council's decision to evict him for subletting his Council owned flat.

This controversial decision is one of the reasons why the UK's Equality Act includes the 'Discrimination arising from disability' provision,[371] making it discrimination to treat someone unfavorably because of 'something arising in consequence' of disability.

In Australia, the High Court decision of *Purvis v New South Wales*[372] proved particularly contentious. The Court held the manifestation of claimant's disability (propensity to violent behaviour) was part of his disability, but then, controversially, incorporated the manifestation as part of the circumstances in

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[369] *London Borough of Lewisham v Malcolm*, above n111 at [9]. This was decided under the DDA UK (now repealed).
[370] At 10.
[371] Equality Act 2010 (UK), s15.
[372] *Purvis v New South Wales*, above n29.

which to compare the treatment. By doing so, they were able to find the decision to exclude the complainant from school was not discriminatory, as other violent students would be excluded. This case has been criticised as being an example of policy based judicial activism undermining the legislative intent of the anti-discrimination law.[373]

In response to this decision, the DDA Cth was amended — rendering the failure to make reasonable adjustments for the disabled person a ground of discrimination.[374]

In Canada, the Supreme Court in *Stewart v Elk Coal Corporation*[375] held the threshold for adverse treatment 'because of' the protected ground was met if that ground was 'a factor' (not a 'material' factor) in the treatment.[376] A 'connection' between the protected ground and the adverse treatment must be proved, not a 'causative link', which is too high a standard The Court said:[377]

> In a recent decision concerning the *Human Rights Code*, R.S.O. 1990, c. H.19, the Ontario Court of Appeal found that it is preferable to use the terms commonly used by the courts in dealing with discrimination, such as "connection" and "factor": *Peel Law Assn. v. Pieters*, 2013 ONCA 396, 116 O.R. (3d) 80, at para. 59. In that court's opinion, the use of the modifier "causal" elevates the test beyond what is required, since human rights jurisprudence focuses on the discriminatory effects of conduct rather than on the existence of an intention to discriminate or of direct causes: para. 60. We agree with the Ontario Court of Appeal's reasoning on this point.

Nonetheless, whether disability was a 'factor' in *Stewart* was not unanimous. The issue revolved around whether the employer had terminated Stewart's employment because of his cocaine addiction (which might be discrimination), or because of his breach of a Policy prohibiting drug use (a justifiable dismissal). Despite the employee breaching the policy because of his addiction, the majority held the dismissal was due to breach of policy alone and his disability was not a factor in the adverse treatment.[378]

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[373] Thorton, above n333.

[374] Disability Discrimination Act 1992 (Australia), s5(2).

[375] *Stewart v Elk Valley Coal Corp* [2017] SCC 30.

[376] At 46. The Chief Justice saw no need for adjectives, such as 'significant' or 'material' to be added to 'factor' requirement, adding 'if a protected ground contributed to the adverse treatment, then it must be material.'

[377] At [84] quoting from *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Bombardier Inc. (Bombardier Aerospace Training Center)*, 2015 SCC 39, [2015] 2 SCR 789.

[378] The decision was based on the whether the findings of the Tribunal on this issue was reasonable, and within the range of possible acceptable outcomes. The majority held a reviewing Court could not 'pay lip-service' to the Tribunal reasoning and substitute their own views [27]. Of the three Justices who found the Tribunal's findings unreasonable, (i.e., that the addiction had played no part in the employer's decision and therefore there was no discrimination) only

A 'connection' or 'factor' is a lower threshold than currently applied in New Zealand, where the prohibited ground must be a 'material factor' to act as a causative link.[379]

Thus, internationally, judicial interpretation of when adverse treatment is proscribed for being due to disability has proved problematic, and has in some jurisdictions resulted in legislative change. Although the UK and Australian legislation differs to that of New Zealand, it will not be surprising if similar issues arise here, given the lack of clarity in the current legislation. Therefore, although the interpretation that fits best the wider context would be to consider 'by reason of' means by reason of the disability *or* the consequences arising from the disability, it is by no means certain this interpretation would be adopted.

4.5.3 Conclusion: 'By Reason Of'

Statutory interpretation of adverse treatment 'by reason of' disability fails to clearly establish if adverse treatment resulting from the effects or features of disability would be deemed 'by reason of' disability in New Zealand. Thus, where the employee is poorly performing, it is not clear if subjecting them to a PIP or dismissal would be 'by reason of' disability or not. While it is likely that a large and liberal interpretation of the legislation, in accordance with the UNCRPD, would result in interpretation in favour of the employee, the dual purposes of the HRA, which support the employer's prerogative to determine the minimum acceptable performance, may suggest otherwise.

Therefore, it is submitted, clarification by the legislature is required.

4.6 Conclusion: A Degree of Uncertainty

In order to answer the central question of this thesis: — when an employee is justifiably dismissed on performance grounds, could this nevertheless be discrimination if the poor performance is due to mental disability? — this chapter sought to clarify the meaning of the core elements of discrimination, using the spiral approach to interpretation. The aim was for 'best' interpretation of section 22 for disability discrimination to be identified. However, even using this approach, this has proven difficult.

Gaston J held in favour of the appellant. Moldaver and Wagner JJ held that the employer had accommodated the employee to the point of undue hardship.

[379] *New Zealand Workers Industrial Union of Workers v Sarita Farm Partnership*, above n344. Not only is a 'material factor' a higher threshold than Canada's 'connection' between the prohibited ground and the treatment, once the connection is established, in Canada, the employer must then accommodate the disabled employee to the point of 'undue hardship'. This is a more arduous requirement that in New Zealand, where the HRA only requires accommodation that it is 'reasonable' for the employer to provide. Thus, it seems in Canada the disabled employee is better protected.

4.6.1 The "Best" Interpretation

Macagno[380] argues that the 'best interpretation' of a statute is one that best 'fits' the shared background presumptions in the context and the communicated intentions of the statute. Thus, for section 22, to maximise the protection of the mentally disabled employee, the 'best' interpretation would be one that does not screen out the employee too soon, before the treatment can be assessed against all the relevant provisions of the HRA. This allows the employer to defend themselves under the permitted exceptions, while the mentally disabled employee still garners some protection from the potential accommodation provisions. This, to some degree, balances the rights of the disabled and the prerogatives of the employer.

Thus, to avoid screening out the employee from the analysis too soon, the disabled employee should be considered 'qualified for work', unless they are unable to perform most of the essential duties of the role. Nevertheless, determining when poor performance crosses the boundary to no longer being 'qualified' (i.e. when they are not, in reality, performing the essential duties of the position) is problematic. It remains unclear if Professor Smith, who is (perhaps temporarily) unable to research, and is teaching using previous materials without checking for new developments in her field, is still qualified (i.e., still performing the 'essential' duties of her position).

Furthermore, deeming the employee qualified if they are able to perform some of the essential duties (even if poorly), would verge on making the 'qualified for work' requirement redundant (except for job applicants). This is difficult to reconcile with the usual understanding that there is a legislative intention behind the inclusion of such a requirement.

The comparator that best protects the mentally disabled employee, by allowing a full assessment of their treatment — and the employer's ability to accommodate them — is the normally performing employee, without a disability. Again, controversially, this approach almost makes the comparator moot, as almost inevitably the treatment of a poorly performing employee will be adverse in comparison to that of a normally performing employee. Moreover, some would consider that this approach unfairly fetters the employer's managerial prerogative.

Nonetheless, the adverse treatment will still be lawful if it is not 'by reason of' disability, which is the crux of disability discrimination. Whether the effects of the disability (such as poor performance) should be viewed as a feature of the disability is difficult, as it may be the poor performance and not the disability that is the salient issue for the employer. Nonetheless, the best interpretation would be to include the salient features, such as poor performance in the definition of disability, as this most closely reflects the purposes of the HRA and the UNCRPD, and is most closely aligned with overseas jurisprudence.

Therefore, from a human rights perspective, the best interpretation of section 22 is that, when the mental disability results in poor performance, the employee

[380] Macagno, Walton and Sartor, above n235 at 74. Macagno examines interpretation from the viewpoint of linguistic pragmatics, which, he argues, help justify the use of interpretive canons or maxims.

should not be dismissed, or subjected to detriment on these grounds, unless the employee can no longer perform the essential duties of the position. Nonetheless, it would be manifestly unjust to the employer if they could not, at some point, dismiss the mentally disabled employee who was still managing to perform the essential duties of the position, but very poorly, without it being discriminatory. Where this level is remains unclear.

It appears then, because of the phraseology used, and lack of definitions of key terms, that even the 'best' interpretation fails to adequately clarify (or make certain) the core elements of discrimination. This might suggest that some reformation of the law is required to resolve these issues. Nonetheless, it may be that interpretation of the potential accommodation provisions shed more light on the interpretation of the section 22, clarifying the law. Therefore, analysing these provisions will be the focus of the next two chapters.

4.6.2 Limitations of the Spiral Approach to Interpretation

Thus, even using a spiral approach, interpretive difficulties remain. This may be a consequence of following a stepping stone approach through the provisions (i.e. answering the following in order: is the employee qualified, were they treated detrimentally in comparison to others, was it by reason of disability, and if so, can the conduct be defended under the permitted exceptions, or does the task reallocation proviso apply?). The many possible permutations in interpretation at each step leads to a complex and possibly contradictory analysis.

A better approach may be for the Court to reach a single conclusion after assessing the alleged conduct against the entirety of the provisions, then determining if unlawful conduct on behalf of the employer has occurred, relying on a number of different reasons. This global assessment would fit with the purposive and schematic approaches, by taking into account the entirety of the provisions of the HRA in context.

However, even following this approach, some of the interpretive issues that have been raised would remain largely unresolved. It may be that, for disability discrimination at least, legislative reform is required to clarify this area of law. This will be discussed in chapter 7.

Chapter 5: Defending Discrimation or a Duty to Accommodate? Interpreting Section 29

5.1 Introduction

The previous chapter examined when adverse treatment of an employee may be considered discrimination on the grounds of disability, under the section 22 of the HRA: when an employee would be considered 'qualified for work'; to whom should the disabled employee be compared when deciding if their treatment was adverse; and, when would such adverse treatment would be 'by reason of' disability? These elements of the statutory requirements for discrimination were analysed using the spiral approach to interpretation, with the 'best' interpretation being suggested. Despite this, some interpretive issues remained unresolved (or uncertain). However, the spiral approach suggests that consideration of the potential accommodation provisions might illuminate these areas of uncertainty.

Furthermore, even the 'best' interpretation of section 22 suggests it is difficult for the disabled employee to achieve greater substantive equality, as the provisions are premised on the medical model of disability and a formal approach to equality. The question therefore arises: might the potential accommodation provisions[381] counteract this by inferring an obligation of reasonable accommodation on the part of the employer — or are they simply defences aimed at protecting the managerial prerogative?

To answer this question, this chapter examines the first set of potential accommodation provisions, that is, the defences that an employer may raise against a claim of discrimination that might initially seem made out. These defences are contained in what this thesis refers to as the 'permitted exceptions', which form part of the 'potential accommodation' provisions of the HRA (consisting of section 29 (the permitted exceptions) and section 35 (the task reallocation proviso)). The chapter begins by explaining why, under the HRA, the concept of reasonable accommodation is problematic. It then focuses on the interpretation of the permitted exceptions and the issues that arise. Finally, this chapter considers whether it can be inferred from the permitted exceptions that the employer has a duty or obligation to reasonably accommodate the mentally disabled employee — and whether this is the 'best' interpretation.

The following chapter will examine the task reallocation proviso in more depth and reach an overall conclusion about the effect of the potential accommodation provisions as a whole.

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[381] Commentators and the courts refer to these provisions as the 'reasonable accommodation' provisions. However, as they do not contain a positive duty of reasonable accommodation, this thesis refers to them as the 'potential accommodation' provisions.

5.2 The Potential Accommodation Provisions: Interpretive Issues

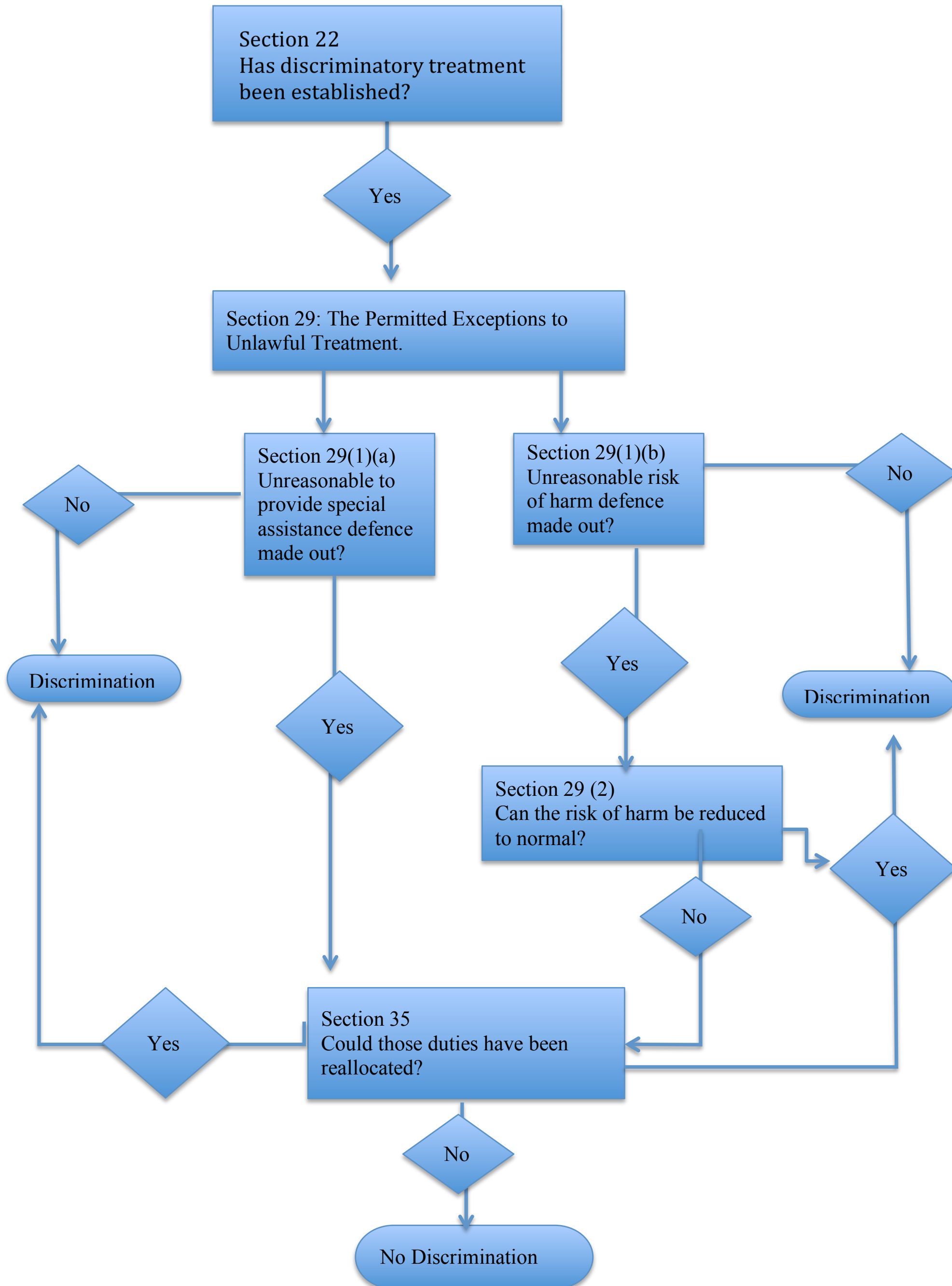
When an employer's conduct would otherwise constitute unlawful treatment on the prohibited ground of disability under section 22, the HRA provides the employer with certain defences against a claim of disability discrimination. These defences are set out in section 29, entitled 'exceptions in relation to disability'. These defences are: firstly, that the employee requires 'special services or facilities' and it is not reasonable for the employer to provide them (the 'unreasonable to provide special assistance' defence), and secondly, that the employee could only carry out their duties with a risk of harm to themselves or others and it is not reasonable to take that risk (the 'unreasonable risk of harm' defence).[382] In these circumstances the adverse treatment may be excused (that is, it will not constitute unlawful discrimination).

However, even if the defence is made out, it is subject to a further exception (thus creating an exception to an exception), under section 35. This exception, or proviso, means the defences in section 29 will not apply when only some of the duties of the disabled employee fall within the defences, and the employer could, with some adjustment to their activities (that does not cause unreasonable disruption), reallocate these duties to another employee. This will be referred to as the 'task reallocation proviso'.

The effect of these provisions can be portrayed in the following diagram.

[382] This defence will not apply if that risk of harm is able to be reduced to normal by taking reasonable measures that do not cause unreasonable disruption to the employer's activities (Human Rights Act 1993, s29(2)).

The Scheme of the Discrimination in Employment Provisions



5.2.1 Section 29: A Defence Against a Claim of Discrimination

As stated, the permitted exceptions in section 29 do not directly require accommodation of the disabled employee. Instead these provide the employer with a defence against a claim of discrimination. Section 29 reads:

> (1) Nothing in section 22 shall prevent different treatment based on disability where—
>
> (a) the position is such that the person could perform the duties of the position satisfactorily only with the aid of special services or facilities and it is not reasonable to expect the employer to provide those services or facilities;
>
> (b) the environment in which the duties of the position are to be performed or the nature of those duties, or of some of them, is such that the person could perform those duties only with a risk of harm to that person or to others, including the risk of infecting others with an illness, and it is not reasonable to take that risk.
>
> (2) Nothing in subsection (1)(b) shall apply if the employer could, without unreasonable disruption, take reasonable measures to reduce the risk to a normal level.

This section does not itself make the failure to provide reasonable accommodation a breach of the HRA. Nonetheless, the employer may not be able to escape a finding of discrimination if they have not reasonably accommodated the employee — either by providing reasonable special services or facilities or by taking a reasonable risk of harm. Only when it is 'not reasonable'[383] to provide 'special services or facilities' or take the 'risk of harm' will the employer have a defence.

Thus, although these provisions are not expressed as a positive duty on the employer to reasonably accommodate the disabled employee, the effect may be the same.

That is, if it is not unreasonable for the employer to provide the special assistance, or not unreasonable to take the risk of harm (or that risk of harm can be mitigated by taking reasonable measures that do not cause unreasonable disruption), then the defence is not made out, so the employer may then be guilty of discrimination. Thus, the employer is obliged to take certain steps to avoid that claim.[384] In either case, the employer's treatment of the disabled employee would be unlawful.

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[383] In Judy McGregor, Sylvia A Bell and Margaret Wilson *Fault Lines: Human Rights in New Zealand* (AUT University, 2015) at 7.2.1. McGregor noted that 'reasonableness' is a relatively low threshold for a defence.

[384] In Australia, under the DDA Cth (prior to the 2009 amendment), the High Court in *Purvis v New South Wales*, above n29 at [104] held: 'No doubt as a practical matter, the discriminator may have to take steps to provide the accommodation to escape a finding of discrimination. But that is different from

Interestingly, the New South Wales Anti-Discrimination Act 1977 (ADA NSW) contains a similar provision to that in the HRA, providing an exception to behaviour that would otherwise be unlawful if the employee requires 'services or facilities', which would impose unjustifiable hardship on the employer to provide.[385] Like the HRA, this provides a defence against a claim of discrimination. The New South Wales (NSW) Equal Opportunity Tribunal confirmed that the provision does not impose a positive obligation to accommodate the employee.[386] As the NSW Law Reform Commission commented in 1999:[387]

> Although the intention is reasonably clear, the phraseology gives rise to two difficulties. First, while there is an intention to require reasonable accommodation for the particular disabilities of an individual, that obligation is imposed indirectly by way of an exception to a defence.

The New South Wales Commission recommended that the legislation be reformulated 'as a positive obligation rather than as an exception to a defence'.[388] As this thesis will show, this may also be an appropriate recommendation for the HRA.

In Quebec, the failure of legislation to contain a specific duty of reasonable accommodation has led to protracted litigation concerning whether such a duty was implied in the legislation.[389]

Although in New Zealand, the provisions act as a defence or lawful excuse for what would otherwise constitute discrimination, the decision in *Smith v Air New Zealand*[390] suggests an obligation of reasonable accommodation may

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asserting that the Act imposes an obligation to provide accommodation for the disabled'.

[385] Anti-Discrimination Act 1977 (NSW), s49D.

[386] In *Laycock v Comissioner of Police* [2006] NSWADT 261 at [92] the NSW Tribunal confirmed this provision acts as a defence and does not import a positive obligation to accommodate: 'None of the substantive provisions in the Act which are relevant in this case — those in s 49D(2) — imposed obligations on the respondent to "accommodate" the applicant in the ways that he has claimed, or in any other ways.' This was confirmed on appeal (*Laycock v Commissioner of Police*) [2007] NSWADTAP 34).

[387] NSW Law Reform Commission *Report 92 (1999) Review of the Anti-Discrimination Act 1977* (1999) at 5.70.

[388] At 5.72.

[389] In Quebec, the Act 'Respecting Industrial Accidents and Occupational Diseases' contains a comprehensive scheme for treatment and rehabilitation of disabled workers, but not a positive duty of reasonable accommodation. Despite this omission, in *Quebec (Commission des normes, de l'équité, de la santé et de la sécurité du travail) v Caron* [2018] SCC 3 the Supreme Court of Canada decided that the Act should be read in accordance with the Quebec Charter of Human Rights and Freedoms 1975, so a duty of reasonable accommodation was deemed to apply.

[390] *Smith v Air New Zealand Ltd*, above n57.

nevertheless be inferred from the presence of the defence. The Court of Appeal evaluated the statutory scheme concerning discrimination in the provision of goods and services to the disabled (in this case, the supply of free supplementary oxygen to disabled airline passengers). They considered the ambit of section 52, which provides the lawful exceptions for the failure to provide services and facilities for persons with disabilities, and said:[391]

> The exception it creates applies to excuse the provision of services when that is too onerous. That suggests an inherent requirement to accommodate otherwise; that is, where accommodation is not too onerous.

For discrimination in employment, the permitted exceptions also act as a defence against the failure to provide the disabled employee with special services or facilities, or failure to mitigate a risk of harm — when it is not reasonable to do so. Thus, applying the same reasoning as the Court in *Smith v Air New Zealand*, the defence that it is not reasonable to provide the services or facilities etc. may also imply that there *is* an obligation to provide them, when it is reasonable to do so.

Nonetheless, it remains unclear from the legislation what the precise ambit of 'reasonable accommodation' is, or what it requires, particularly for mental disability. It could be argued that, as the permitted exceptions relate only to the provision of services and facilities, or the risk of harm, that these are perhaps the only areas in which the employer is obliged to make accommodations. This would substantially reduce the scope of the employer's obligations, which would not be consistent with the principles of the UNCRPD or with promoting greater substantive equality.

5.2.2 Section 35: A Limited Obligation of Reasonable Accommodation

Nevertheless, even when a permitted exception is operative, the employer is still prevented from treating the employee differently, if section 35 applies. This proviso (hereinafter referred to as the task reallocation proviso) says:[392]

> No employer shall be entitled, by virtue of any of the exceptions in this Part, to accord to any person in respect of any position different treatment based on a prohibited ground of discrimination even though some of the duties of that position would fall within any of those exceptions if, with some adjustment of the activities of the employer (not being an adjustment involving unreasonable disruption of the activities of the employer), some other employee could carry out those particular duties.

This is a convoluted 82-word sentence that provides an exception to the exceptions. The inelegant drafting creates interpretive difficulties, but the general effect is to create an express obligation of accommodation of the disabled employee in specific situations. Thus, it is the only provision that expressly obliges the employer to accommodate the disabled employee, in order to avoid

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[391] At [33].
[392] Human Rights Act 1993, s35.

discriminating against them. Its effect is that an obligation to accommodate the disabled employee exists only when 'some' of the duties of the disabled employee fall within the permitted exceptions. If these duties can be reallocated to another employee after 'some adjustment' of the employer's activities (but without 'unreasonable disruption'), then the employer is obliged to reallocate these duties to that other employee.

Thus, how the phrases 'some of the duties', 'unreasonable disruption' and 'adjustment of the employer's activities' are interpreted will determine the degree to which the employer must accommodate the employee under this provision. Furthermore, how these phrases are interpreted will depend on how the employer's managerial prerogative is balanced against protection of the rights of the disabled employee. As Singer comments:[393]

> Since every legal decision reverts to the fundamental contradiction, we have no alternative but to decide each case in the light of competing goals and interests. To make these decisions, nothing can aid us except the same moral and political arguments we use in other areas of ethical discourse. It is an illusion to think that legal reasoning is any less political and subjective than the reasoning used by legislators, voters and other political actors.

Ultimately, this means the interpretation may be influenced by social, political or economic policy preferences. This reduces certainty in the law. It may also affect the ability of disabled employees to achieve greater substantive equality, if the employer's managerial prerogative has paramountcy over the right of the disabled employee to be (reasonably) accommodated. These, and other interpretive issues, will be addressed in more depth in the following chapter.

5.2.3 The Lack of a Specific Duty of Accommodation

This thesis therefore contends that a major problem with the legislation is that the HRA contains no adequate, specified duty of reasonable accommodation. Waddington explains reasonable accommodation in employment in the following way:[394]

> A reasonable accommodation requirement in the employment context therefore prohibits an employer from denying an individual with a disability an employment opportunity by failing to take account of the characteristic, when taking account of it – in terms of changing tasks or the physical environment of the workplace – would enable the individual to do the work. Employers are required to recognize the characteristic and to consider what changes they could make to the work environment to allow an individual to carry out the work to the

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[393] Joseph William Singer "The Legal Rights Debate in Analytical Jurisprudence from Bentham to Hohfeld" (1982) 6 Wis L Rev 975 at 1059.

[394] L Waddington "Fine-Tuning Non-Discrimination Law: Exceptions and Justifications Allowing for Differential Treatment on the Ground of Disability" (2014) 15(1-2) IDJL 11 at 13.

> required standard. This implies that, '(i)nstead of requiring disabled people to conform to existing norms, the aim is to develop a concept of equality which requires adaptation and change.' (footnotes omitted).

According to Iannozzi, the principles of accommodation are to 'design society inclusively, remove existing physical barriers in the workplace, and accommodate individual needs in a way that most respects dignity'.[395]

As discussed in Chapter 2, New Zealand's obligations under the UNCRPD include ensuring reasonable accommodation of disability is provided in the workplace.[396] Although the HRA does not impose a specific duty on employers to make such 'reasonable accommodation' *per se,* the requirements imposed on employers to fit within the permitted exceptions (section 29) to defend a claim of discrimination, and the task reallocation proviso (section 35), are considered by some to fulfil this requirement for employment.[397] However, this thesis will argue that any obligation to reasonably accommodate disability is, at best, inferred from these provisions.

Nevertheless, this lack of a specific obligation means uncertainty surrounds the concept of reasonable accommodation in employment, in New Zealand. Reporting on the HRA, the Committee on the Rights of Persons with Disabilities noted regarding New Zealand's situation:[398]

> The Committee appreciates that one can infer the concept from provisions of the Act. However, the Committee is concerned about its opaqueness and lack of clarity.

Therefore, this chapter will use the spiral approach to interpret the permitted exceptions and the task reallocation proviso to see if this can clarify the law in this area, and determine whether New Zealand is fulfilling its obligations under the UNCRPD (and therefore promoting substantive equality for the disabled employee).

These provisions need to be understood as a whole, as the meaning of a term or phrase in one provision may affect the meaning of a term in another.[399] In particular, it is necessary to determine the meaning of the following concepts:

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[395] Iannozzi, above n50 at 9.

[396] United Nations Convention on the Rights of People with Disabilities (2006), Article 27(1)(i).

[397] Anderson and others, above n113 at 4029.5.

[398] Committee on the Rights of Persons with Disabilities *Concluding Observations of the Initial Report of New Zealand* (Committee on the Rights of Persons with Disabilities, 2014) at B 11. The Committee expressed concern regarding the failure to have a definition of reasonable accommodation in the HRA, and recommended it be amended to include a definition, 'in conformity with the definition of reasonable accommodation in article 2 of the Convention' (at 12).

[399] The construction of the provisions mean that once a defence is made out — for example that it is unreasonable to provide special assistance to the disabled employee — then the employer is subject to a more positive duty to accommodate the employee, through task reallocation. This formulation is counter-intuitive, as the normal expectation would be that an employer has a

1. What is meant by phrases such as ‘special services or facilities’, ‘unreasonable disruption’, ‘reasonable measures’, ‘risk of harm’, and ‘some adjustment’; and
2. What is the scope of the phrase: ‘some of the duties of the position’?

5.3 Interpreting Section 29: Issues for Disability Discrimination

A disabled employee may not be treated unfavourably by reason of their disability. However, the permitted exceptions provide the employer with a defence against a claim of discriminatory treatment of the disabled employee on two grounds. First, it is a defence if it is not reasonable for the employer to provide special services or facilities to accommodate the employee. Second, it is a defence if the employee poses an unreasonable risk of harm to themselves or others, and the employer cannot reduce this risk to normal without unreasonable disruption to their business.

These defences affect the disabled employee’s ability to achieve greater substantive equality, as they determine extent to which the employer must reasonably accommodate their disability.

5.3.1 The Meaning of ‘Reasonable’

The defences and the task reallocation proviso in the HRA rely heavily upon the concept of the ‘reasonableness’ of the employer’s conduct. In fact, throughout the Act, any requirement to accommodate the disabled is premised on whether this is ‘reasonable’ in the circumstances. For discrimination in employment, the reasonableness standard, or threshold, applies to the provision of special services or facilities,[400] to accepting or mitigating a risk of harm,[401] and to disruption of the activities of the employer.[402] As it determines whether an employer’s treatment was lawful or not, the interpretation of what is reasonable in these circumstances is of some importance.[403] Therefore this element will be considered first.

The Meaning from the Text and in the Context of the HRA

The text of the HRA is of little help, as there is no definition of, or guidelines for, assessing ‘reasonableness’. However, the purposes of the Act (to better protect the disabled employee’s human rights, and protect the employer’s managerial prerogative) may help clarify the standard of ‘reasonableness’.

According to Davidov, restricting the obligation of reasonable accommodation to the level of ‘reasonableness’ protects the managerial prerogative to some extent,

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duty to accommodate, with a defence that it would be unreasonable to do so. Nonetheless, the effect remains the same: if the employer fails to accommodate the employee through task reallocation when they are able to do so, the defence will not be made out.

[400] Human Rights Act 1993, s29(1)(a).

[401] Human Rights Act 1993, s29(1)(b).

[402] Human Rights Act 1993, s29(2).

[403] The onus is on the employer to prove on the balance of probabilities that the accommodation required (or the risk of harm posed) is unreasonable. *Meulenbroek v Vision Antenna Systems Ltd*, above n164 at [111].

as it limits the degree to which the employer must accommodate the disabled employee. Nevertheless, when coupled with a duty of good faith (which applies to both employers and employees), the combination of the reasonable accommodation obligation and the managerial prerogative, balances the interests of both parties, as compromise is made from both ends.[404] However, this purposive approach provides little assistance in determining where this balance lies. Therefore, the concept of 'reasonableness' should be considered in the scheme of the Act.

As discussed in *Smith v Air New Zealand,*[405] the scheme of the Act suggests that 'reasonableness' should generally have the same meaning (or threshold) attributed to it in related provisions of the HRA:[406]

> The word "reasonable" may of course have different meanings in different parts of the Act. However, when used in the context of exceptions to what is otherwise unlawful conduct, some consistency in approach in the Act may be expected.

The Court held that the threshold for 'reasonableness' in providing special goods or services was lower than one of undue hardship. This was because reasonableness was also used in the context of risk of harm, and the Court did not envisage that an undue hardship standard would be imposed in that context. Consistency of meaning was desirable. So the requirement of reasonableness in the provision of goods and services should be interpreted as requiring action that falls short of imposing undue hardship.[407]

Although, for clarity in the law, a consistent approach should be taken to what is 'reasonable' across all provisions, what is reasonable in each case will, according to the HRRT, 'depend on its own facts and circumstances and … come down to a determination of "reasonableness" under the unique circumstances of the particular employer-employee relationship'.[408] A further complicating factor is that, as disability is not a permanent or fixed feature but may change over time, what is reasonable may also change over time.[409] Nonetheless, it seems clear the employer should not face undue hardship.

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[404] Guy Davidov and Guy Mundlak "Accommodating All? (Or- 'Ask Not What You Can Do for the Labour Market; Ask What the Labour Market Can Do for You')" in Roger Blanpain and Frank Hendrickx (eds) *Reasonable Accommodation in the Modern Workplace: Potential and Limits of the Integrative Logics of Labour Law* (Kluwer Law International BV, The Netherlands, 2016) at 203. Davidov argues for a universal principle of reasonable accommodation — i.e. one that applies to all employees, not just those at risk of discrimination.
[405] *Smith v Air New Zealand Ltd*, above n57.
[406] At [57].
[407] At [57].
[408] *Nakarawa v AFFCO New Zealand Limited*, above n127 at [74.7]. This was in the context of the accommodation of religious belief, where religious practice must be accommodated so long as the accommodation does not 'unreasonably' disrupt the employer's activities (HRA s28(3)).
[409] *Nelson v Open Country Diary Limited*, above n195 at [34].

Furthermore, how the level of reasonableness is determined may also reflect current social and economic ideology or policy of the interpreter. That is, if the interests of the disabled employee were considered paramount, then the amount of accommodation the employer would be expected to make would be significant before it would be deemed unreasonable. This would protect the disabled employee's employment, and advance the social policy of achieving substantive equality for the disabled. This interpretation would also reflect a more pluralist ideology, which recognises and attempts to redress the imbalance of power between the employee and employer, through legislation.[410] However, if the interests of the employer were considered paramount, reasonableness would be would be interpreted at setting at a lower threshold, so that less would be required of the employer, thus protecting their managerial prerogative. This approach would reflect a more unitary ideology, which would place more emphasis on the economic and business interests of the employer (to maximise their economic benefits).[411] Which of these approaches should be taken to what is considered 'reasonable' cannot, however, be ascertained from the text, scheme and purposes of the HRA alone.

Reasonableness of Accommodation in the Wider Context

In the wider context, overseas law on the matter provides some assistance on defining what is 'reasonable', but only limited assistance as the legislation differs to that of New Zealand. In Australia, 'reasonable' adjustments are those that do not impose unjustifiable hardship on the person making the adjustment.[412] The Federal Court noted that the word 'reasonableness' is not on its own qualitative, instead acting as a 'legislative declaration' of what is outside the term. Therefore, what is unreasonable is:[413]

> … a modification or alteration which imposes unjustifiable hardship on a person, taking into account the considerations applicable to identifying hardship of that nature, which are set out in s 11 of the DDA.

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[410] Pluralists acknowledge the employee and employer have different (and often conflicting) goals. However, the pluralist approach contends that labour law should promote social justice through acceptable terms and conditions of work, provision for conflict resolution, and distributive equity in the allocation of economic benefits from employment (Anderson and Hughes, above n66 at 8).

[411] The unitary view maintains that all members of the employer's organisation should support management and ownership. An organisation should be free to contract labour in a free market on the best terms it can negotiate to pursue the organisation's goals. As labour services are a commodity, governed by the individual employment contract, the law should not be concerned with social or equity goals (Above n66, at 8).

[412] Australian Human Rights Commission "The Disability Discrimination Act" in *Federal Discrimination Law* (Lexis Nexis, on-line, 2016) at 5.2.4.

[413] *Watts v Australian Postal Corporation* [2014] FCA 370 at [22].

This is a similar approach to that taken in Canada, where the Supreme Court held what is reasonable is dependent on proof of undue hardship.[414]

In the USA, the reasonableness of an accommodation under the ADA has proven controversial. The Court of Appeal in *Vande Zande v State of Wisconsin Department of Administration*[415] considered 'reasonable' should be interpreted as it is used in negligence law — as an adjective that qualifies or weakens accommodation. Therefore, it held, reasonableness connotes an ordinary effort rather than the maximum possible.[416] Thus, the employer may claim an accommodation unreasonable when the cost of the accommodation is not proportionate to the benefit gained by the employee.[417] This cost-benefit analysis of reasonableness has been criticised for failing to take into consideration exclusion and humiliation that the disabled employee may suffer, or the potential benefits the accommodation may offer third parties.[418]

The issue of the reasonableness of the adjustments required has also arisen in the UK. It was held they must be 'objectively' reasonable,[419] but the Employment Appeals Tribunal (EAT), in *Tameside Hospital NHS Foundation Trust v Mylott,* acknowledged this was difficult to assess:[420]

> Employees with mental health conditions... can pose difficult management problems for employers. The question of what

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[414] *Central Alberta Dairy Pool v Alberta* [1990] 2 SCR 489. At 491 the Court outlined what considerations should be taken into account when determining undue hardship.

[415] *Vande Zande v State of Wisconsin Department of Administration* (1996) 44 F.3d 538 (7th Cir).

[416] At [3].

[417] In *Van Zande* the Court held that despite the employer having the financial resources to do so, the cost of lowering a kitchen sink was unreasonable. The Court held the benefit to the wheelchair bound employee was minimal as the employee could use a bathroom sink to wash their cup. De Campos notes this decision has been heavily criticized for failing to take into account the humiliation, inequality and stigmatization suffered by the employee having to wash dishes in the bathroom (Letícia de Campos Velho Martel "Reasonable Accommodation: The New Concept from an Inclusive Constitutional Perspective" (2011) 14 (8) Sur International Journal on Human Rights 84 at 93).

[418] Emens (above n12) argues that third party benefits (or costs) should be taken into account when considering what is reasonable. For example, lowering a kitchen sink would accommodate not only current but also future disabled employees. This benefits the employer as it increases the potential labour pool (as the workplace would be suitable for physically disabled persons).

[419] *The Royal Bank of Scotland v Ashton* [2010] UKEAT 0542/09/LA at [24]: 'It is an adjustment which objectively is reasonable, not one for the making of which, or the failure to make which, the employer had (or did not have) good reasons'. This was affirmed by the Court of Appeal in *Newham Sixth Form College v Sanders* [2014] EWCA Civ 734 at [8]-[9].

[420] *Tameside Hospital NHS Foundation Trust v Mylott; Mylott v Tameside Hospital NHS Foundation Trust,* [2010] UKEAT/0352/09/DM, UKEAT/0399/10/DM at [64].

> steps may be reasonable in order to adjust to their needs is a sensitive one, in which proper regard must be had to the interests of both parties…..

The tribunal therefore acknowledged the need to reach an interpretation that balanced the needs of the disabled employee and the employer. This approach would appear to be appropriate for interpretation of the more ambiguous provisions of the HRA as well, where the interests of the parties are potentially in conflict.

Conclusion

Thus, even using the spiral approach to interpretation, what is 'reasonable' cannot be definitively defined, but will depend on multiple contextual factors. Although this allows for flexibility in interpretation, it leads to uncertainty in the law, as it cannot be predicted what the Court or HRRT might consider 'reasonable' in any given circumstance, nor what factors they might take into account.

This uncertainty will affect how the potential accommodation provisions as a whole are interpreted, as they are premised on reasonableness at many points. Consequently, the interpretation might well depend on whose interests are considered paramount, and this in turn, may affect the degree to which the disabled employee can attain greater substantive equality.

Moreover, in addition to the question of reasonableness, the defences present many additional interpretive issues. These will now be examined, starting the 'unreasonable to provide special assistance' defence.

5.3.2 Unreasonable to Provide Special Assistance Defence: Section 29 (1)(a)

The first permitted exception is where an employee could only perform the duties of the position *satisfactorily* with the aid of special services or facilities. Performing 'satisfactorily' is evaluative, and determined initially by the employer (although it is likely that the employer would need to demonstrate to the Court or HRRT that the performance criteria used were objectively reasonable[421]). What is less clear is what is meant by 'special services or facilities'. Therefore the remainder of this section will concentrate on the interpretation of those terms.

Any interpretation of what is reasonable in the provision of 'special services or facilities' should probably balance protecting the human rights of the disabled employee against the employer's managerial prerogative.

Somewhat ironically, to better protect human rights, the interpretation given to the notion of 'special services or facilities' should be a narrow one — that is, it should be given a meaning where few things would be considered 'special services or facilities' that it would be unreasonable for the employer to provide. This is because there is no defence available for the employer who fails to provide things that are not 'special services or facilities'. Therefore, the employer would have fewer opportunities to raise a defence. For example, if the notion of

[421] The criteria would need to be objectively reasonable for a justified dismissal under the ERA.

‘services or facilities’ was interpreted narrowly so as to exclude toleration of poor performance, then the employer who did not tolerate poor performance might have no defence under the permitted exceptions. That is, if toleration of poor performance is not considered a ‘special service or facility’ then the employer has no defence that it was unreasonable to ‘provide’ it.

On the other hand, the more things considered ‘special services or facilities’ would provide the employer with more opportunity to defend a claim of discrimination on the basis that it was not reasonable to provide them. Thus, if tolerance of disability-induced poor performance was considered a ‘service’ provided by the employer, this would give the employer more opportunity — ironically — to defend their failure to tolerate poor performance on the ground that it was unreasonable to do so.

This broad interpretation of ‘services or facilities’ may imply the employer has a more general responsibility to reasonably accommodate the disabled employee. That is, the employer might be expected to provide a wide range of ‘special services and facilities’. However, this also means the employer has more opportunities to defend a claim of discrimination on the basis of it being unreasonable to provide them (thus protecting their prerogative). A narrow approach however, where few things are considered ‘services or facilities’ may suggest there is a limited range of things the employer is obliged to provide. Nonetheless, as outlined above, their defence is also limited as there are fewer things the employer could claim were special services or facilities that it was unreasonable to provide. Accordingly, the failure to furnish the disabled employee with things are not considered to be ‘special services or facilities’ might be considered discriminatory.

‘Special Services or Facilities’: Meaning from the Text, in the Context of the HRA and from the Legislative History

What is the ‘best’ interpretation of ‘services or facilities’ then? The text provides little assistance, as neither ‘services’ nor ‘facilities’ are defined in the HRA. The ordinary meaning suggests the phrase would mainly cover physical adjustments required to accommodate a person’s physical impairments, rather than types of adjustment needed to accommodate the psychosocial impairments of mental disability.[422]

The Oxford Dictionary defines ‘facility’ as:[423] “an opportunity, the equipment, or the resources for doing something”, “a plant, installation or establishment”.

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[422] Lawson argues that reasonable accommodation laws focus on physical impairments as they are easier to identify and solutions are more readily identifiable. There is a tendency to overlook psychosocial impairments, partly because the barriers are less easy to identify or remedy, and partly because the medical model of disability perpetuates the emphasis on curing the individual or adapting their behavior, rather than accommodating difference: Anna Lawson "People with Psychosocial Impairments or Conditions, Reasonable Accommodation and the Convention on the Rights of Persons with Disabilities" (2008) 26(2) Law in Context 62 at 68.

[423] Thomson, above n282.

'Facilities' is defined as:[424] "something designed, built, installed, etc., to serve a specific function affording a convenience or service", "something that permits the easier performance of an action, course of conduct, etc."

The meaning from the text therefore sits comfortably with providing aids required for the physically disabled, such as ramps, or modified desks, or computer programmes for the visually disabled. A broad interpretation could encompass even more, such as 'resources for doing something', or 'something that permits easier performance'. This could encompass many things, such as counselling, provision of an assistant, or even flexible work hours (permitting the easier performance of work). However, other types of accommodation that the mentally disabled may require may not even fit within these meanings. In the Professor Smith scenario, for example, the accommodation required is partly the tolerance of poor performance and part-performance of her role. It is difficult to envisage that as the provision of a 'facility'. Other potential accommodations, such as additional or extended sick leave, temporary redeployment to less stressful working environments, or working from home, also fail to fall readily within these definitions.

'Services' is a broader term. It can be defined as "the act of helping or doing work for another", "assistance or benefit given to someone"; and the "provision or system of supplying a public need e.g. transport".[425] 'Services' is defined as "an act of helpful activity; help; aid".[426]

These broad definitions could include some of accommodations required by mentally disabled employees. For example, provision of a research assistant for Professor Smith could be 'assistance or benefit given to someone'. Nonetheless, it is still not easy to define tolerance of poor performance, extended sick leave, working from home, or redeployment as provision of a 'service'.

Therefore, although the meaning of the text can encompass many forms of accommodation, others do not fit so easily, and Parliament's intention is unclear. However, the scheme of the Act may provide some clarification.

If the mentally disabled employee requires a form of accommodation that fits within the definition of special 'services or facilities', then under the permitted exceptions, the employer may defend their failure to provide them on the basis that it was not reasonable to do so. However, when only some of the duties fall within the permitted exceptions, this defence is restricted by the section 35 task reallocation proviso. This creates a limited obligation to reallocate the duties that fall within the permitted exceptions to another employee.[427] As these two provisions interact, they should be read together.

Thus, if another employee could perform a duty that the disabled employee cannot perform, this may influence how 'services or facilities' are interpreted. Take the Professor Smith scenario example. Tolerance of her failure to perform

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[424] Dictionary.com Accessed at http://www.dictionary.com/browse/facilities
[425] Thomson, above n282. 'Service' has several other meanings which are not applicable.
[426] Dictionary.com Accessed at http://www.dictionary.com/browse/sevices
[427] This only applies if the reallocation of duties requires only some adjustment to the activities of the employer, and does not cause unreasonable disruption.

all of the duties of her position would be difficult to interpret as a service. However, if the duty she is not performing (i.e. research) could be reallocated to an assistant (who could then co-author the resulting papers), then the toleration of her failure to perform research might well be defined as a 'service' that the employer could reasonably provide.

Furthermore, in the HRA, in many contexts other than the discrimination in employment provisions, many forms of conduct that might constitute discrimination have an exception in relation to disability when special 'services or facilities' are required and it is not reasonable to provide them.[428] It may be possible then to ascertain a general meaning of this phrase from the context of its use in the legislation. Nevertheless, this approach would still give the phrase a limited meaning because, throughout the Act, these 'services or facilities' appear directed toward accommodating physical impairment. For example, section 41 (exceptions in relation to vocational training bodies) refers to 'services or facilities *designed* for a specified purpose'.[429] Linking 'designed' with 'services or facilities' implies bespoke equipment, physical alterations etc., but fits less comfortably with intangible accommodations such as extended sick time, or toleration of poor performance due to disability. Nonetheless, in other contexts, such as in the provisions about discrimination in participation in organisations, positive obligations exist for the organisation to provide services or facilities to enable persons with disabilities equal access to 'benefits, facilities, or services provided by the organisation (including the right to stand for election and hold office).'[430] This implies, in this context at least, that 'services or facilities' could include intangible matters, such as the right to stand for election.[431] However, as the legislation specifically stipulates the need to provide access to these intangible matters, this may indicate it falls outside the normal interpretation of the 'services or facilities' that need to be provided. Nonetheless, for discrimination in relation to the provision of goods and services, the HRRT[432] has found that supplying oxygen to aircraft passengers is a service. This approach suggests a broad interpretation of 'services or facilities' applies.

However, as the phrase 'services or facilities' is used in differing contexts in the HRA, it seems unlikely that an interpretation of the phrase, that is correct in all

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[428] Human Rights Act 1993, s52(1) applies when the person supplying goods and services cannot supply them in a special manner. Other sections that have exceptions relating to disability are: s52 (the provision of goods and services), s60 (provision of housing and other accommodation), s43 (access to educational establishments), ss37-41 (provisions relating to discrimination by various bodies).

[429] Human Rights Act 1993, s41(7): Nothing in section 40 makes it unlawful to fail to provide special services or facilities designed for a specified purpose if those special services or facilities cannot reasonably be provided in the circumstances.

[430] Human Rights Act 1993, s37(1A)(b). This section relates to organisations of employees or employers and professional and trade associations.

[431] It is also possible to consider standing for office as a benefit, and not a service or facility.

[432] *Smith v Air New Zealand Ltd*, above n57.

contexts of the HRA, will be found. Consequently, the scheme of the Act provides little direct guidance for interpreting 'services or facilities'.

The legislative history also provides little assistance. The meaning or scope of 'services or facilities' was not discussed in debates on the introduction of the HRCA in 1977,[433] nor the HRA in 1993.[434]

Equally, the conflicting purposes of the Act do not aid in the interpretation of this phrase as a broad interpretation of 'services or facilities' fits the purpose of supporting the managerial prerogative (as it provides a wider range of possible defences), while a narrow interpretation better fits with protection of human rights (as it limits the managerial prerogative).

As the text, scheme, and purposes of the Act do not provide a definitive answer to the meaning of 'services or facilities', overseas law should be considered. Equivalent laws in Australia may provide some guidance. In particular, the ADA NSW has many similarities to the HRA and provides some persuasive authority.

Consideration of the Wider Context

Like the HRA, the ADA NSW provides the employer with a defence against a claim of discrimination, rather than imposing a positive obligation to reasonably accommodate the disabled employee. The defence is that the employee would require additional services or facilities to carry out the inherent requirements of the job, and providing these additional services or facilities would impose an unjustifiable hardship on the employer.[435]

The NSW Tribunal confirmed that 'services or facilities' in this context are things that provide assistance to perform the role — but are external to the role. Thus, 'helpful activities', such as supervision of an employee may be a 'service',[436] but altering the role or the duties of the position is not.[437] The aim of the legislation is to enable the employee to carry out the inherent duties of their role, and not to impose a general duty to accommodate the disabled employees.[438] Under this interpretation, tolerance of poor performance, or temporary redeployment, would not be considered a service or facility, as they are not external to the

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[433] The former HRCA did not have disability as a ground of discrimination. However, it was unlawful to fail to provide 'services or facilities' by reason of any of the prohibited grounds of discrimination listed at the time. The Human Rights Commission Bill 1977 did not define 'services or facilities' and the explanatory notes to the Bill did not discuss this.

[434] Neither the Justice and Law Reform Committee *Report on the Human Rights Bill* (New Zealand, 1991-1993) nor Hansard discuss this.

[435] Anti-Discrimination Act NSW 1977 (Australia), s49D.

[436] *Green v Department of Family and Community Services (NSW)* [2013] NSWADT 193 at [141].

[437] *Cosma v Qantas Airways Limited* [2002] FCA 640 at [68]. However, the failure to explore alternate positions has been held to be discrimination (*Barghouthi v Transfield Pty Ltd* (2002) 122 FCR 19).

[438] The Commission, above n412 at 243 states: '…this provision does not require the employer to alter the nature of the particular employment or its inherent requirements.'

duties of the position, and do not aid the employee in carrying out these inherent duties.

In the UK, the phrase 'services or facilities' is not used. However, the employers are under a duty to make reasonable adjustments (to alleviate 'a substantial disadvantage' arising from an employer's policy, practice or criterion).[439] The UK appears more willing to recognise such adjustments may require changes to the employee's role, not merely the provision of things external to the role. Thus, in the UK, reasonable adjustments have included time off for medical appointments, extra breaks, revoking a final written warning for misconduct,[440] increased sick leave,[441] and addressing a grievance promptly to alleviate the employee's stress.[442] However, the scope of these adjustments may reflect the fact that the provision is not worded in terms of providing certain 'services or facilities'.

Overall the wider context suggests that 'services or facilities' should be interpreted as things external to the role that may be provided to enable the employee to carry out the essential or inherent duties of the position. If the HRA is interpreted in this light, then 'services or facilities' would not include the tolerance of poor performance, or alteration of essential duties to cater for part performance, as they do not enable the mentally disabled employee to *perform* the essential duties of the role.

Special services and facilities: Conclusion

The spiral approach has clarified, to some degree, the meaning of 'services or facilities. It suggests 'services or facilities' should be things that are external to the disabled employee's position and enable the employee to carry out the essential duties of the position. This interpretation is supported by the list of possible types of accommodations, produced by the Ministry of Business, Innovation and Employment (MBIE) that employers could make for mentally

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[439] Equality Act 2010, (UK) s20(3). This is not a general duty to accommodate those with disability. In *The Royal Bank of Scotland v Ashton* above n419 at [15] the UKEAT said: "The duty, given that disadvantage and the fact that it is substantial are both identified, is to take such steps as are reasonable to prevent the provision, criterion or practice (which will, of course, have been identified for this purpose) having the proscribed effect — that is the effect of creating that disadvantage when compared to those who are not disabled. It is not, therefore, a section which obliges an employer to take reasonable steps to assist a disabled person or to help the disabled person overcome the effects of their disability, except insofar as the terms to which we have referred permit it."

[440] *General Dynamics Information Technology Ltd v Carranza* [2015] ICR 169 (UKEAT) at [44].

[441] *Royal Bank of Scotland Plc v McAdie* [2006] UKEAT 0268/06 at [4]. The EAT held that when the employer causes the employee's illness, they may have to 'go the extra mile' before dismissing them for incapacity. This infers that additional sick time, in some circumstances at least, may be a reasonable adjustment.

[442] *Tameside Hospital NHS Foundation Trust v Mylott; Mylott v Tameside Hospital NHS Foundation Trust,* [2010] UKEAT/0352/09/DM, UKEAT/0399/10/DM, above n420.

disabled employees.[443] If these types of accommodation would enable a mentally disabled employee to carry out the essential duties of their position, then they might be considered as 'services or facilities'.

However, for the phrase to carry a wider meaning would seem to require a change to the legislation. This may be necessary to ensure that the New Zealand meets its obligations of reasonable accommodation under the UNCRPD, and promotes greater substantive equality for disabled employees.

5.3.3 The Unreasonable Risk of Harm Defence: Sections 29(1)(b); 29(2)

The second defence to unlawful treatment of a disabled employee is available when the performance of the disabled employee's duties creates an unreasonable risk of harm to that employee or others. This is the unreasonable risk of harm defence. It is available when:[444]

> the environment in which the duties of the position are to be performed or the nature of those duties, or of some of them, is such that the person could perform those duties only with a risk of harm to that person or to others, including the risk of infecting others with an illness, and it is not reasonable to take that risk.

This is another long and complex provision, encompassing several elements. Firstly, the defence may apply where the duties performed by the disabled employee are in an *environment* where the performance of those duties creates a risk of harm; or, secondly, the defence may apply when the *nature* of the duties being performed by the disabled employee means they can only be performed with a risk of harm. Thirdly, the risk of harm may apply to the disabled employee or to 'others'. Fourthly, the defence may apply when only 'some of the duties' fall into either of the above categories. Fifthly, the risk of harm includes infecting others with an illness. And lastly, and most importantly, it applies when it is not reasonable to take the risk.

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[443] The Ministry of Business, Innovation and Employment on its 'Employment New Zealand' website suggests the following as possible accommodations: "let the employee wear headphones with soothing music, ear protectors to screen out noise, or install a partition; break down large jobs into smaller ones; allow shorter but more frequent breaks; allow the person to walk around and get fresh air; give the person one job at a time and write down instructions; offer flexible or shorter hours, rest breaks during the day or job sharing; allow the person to attend medical and other appointments; meet regularly to discuss progress and prioritise task reallocation and estimate completion times; with the person's consent, brief colleagues about the person's needs and organise a mentor or buddy in the workplace; provide regular chances for feedback; give plenty of notice of planned changes, with clear and full explanations of the change and reasons for it; make sure the person has the chance to be included in all activities." (https://www.employment.govt.nz/workplace-policies/employment-for-disabled-people/disability-information-and-resources-for-employers/).

[444] Human Rights Act 1993, s29(1)(b).

However, section 29(2) creates an exception to the unreasonable risk of harm defence. If the employer is able (without unreasonable disruption), to take reasonable measures to reduce the level of risk to 'normal', then the defence is not available. The provision reads:

> Nothing in subsection (1)(b) shall apply if the employer could, without unreasonable disruption, take reasonable measures to reduce the risk to a normal level.

Finally, in addition to this, the unreasonable risk of harm defence is subject to the task reallocation proviso. Therefore, only when no reasonable measures are available to the employer to reduce the risk of harm to normal, and the duties that pose the risk of harm cannot be reallocated to another employee, is the defence of unreasonable risk of harm available to the employer.

Again, how the phrase 'risk of harm' is interpreted will determine where the balance lies between the competing interests of the disabled employee and the employer. If harm is defined broadly, there is more opportunity for employers to make out the defence that it is unreasonable to take that risk of harm. Therefore, if suffering from any degree of workplace stress is defined as 'harm', then the disabled employee, who as a result of carrying out their duties is at risk of suffering from workplace stress, is at risk of harm. Thus, the employer has a defence for a dismissing the employee, as continuing work would pose a risk of harm to them, and it might be unreasonable to take that risk.[445]

However, defining harm narrowly would probably exclude "normal" workplace stress from being considered harmful. This interpretation would better protect the disabled employee. That is, if the disabled employee was only at risk of suffering from "normal" levels of workplace stress, and this was not considered to be harmful, then the employer would be unlikely to make out the defence that it would be unreasonable to take that risk.

The lower the threshold of risk — that is, the lower the point at which it is unreasonable to take a risk — then the greater the potential for the defence to be made out. Accordingly, if there need only be a minimal risk of harm occurring before it becomes unreasonable to take that risk, then the employer will benefit more. If, however, the threshold at which the risk of harm occurring is high before that risk becomes unreasonable, this would protect the disabled employee's rights to a greater degree, as higher acceptance of the risk would be required before the adverse treatment would be defendable.

Nonetheless, if the risk of harm is to 'others' this may change the threshold as to what is reasonable. While, conceivably, the disabled employee may have an autonomous right to take some personal risk, placing other employees or the unwitting public at any significant risk of harm may be unreasonable.

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[445] Workplace stress is known to precipitate depression and general anxiety disorder in healthy young workers (Maria Melchoir and others "Work Stress Precipitates Depression and Anxiety in Young, Working Women and Men." (2007) 37(8) Psychol. Med 1119). In those with existing mental illness, stress may exacerbate the condition (Harder, above n1 at 131-140).

The context or environment of the job may also influence the concept of risk. Thus, if the job is inherently risky then potentially even a small increase in risk, above what is normal in that position, may be unreasonable to take. For example, if an employee exhibits a mild degree of mania, the risk in driving a delivery van may be reasonable — but working as a driving instructor may not be. Or, there may be no inherent risk with an employee taking anti-depressants when working in an office, but this may be an unreasonable risk when allowing them to pilot commercial aircraft.

Conceptually, the notion of reducing the risk of harm to 'normal' (section 29(2)) is difficult, as 'normal' risk cannot be standardised. Different occupations pose different types of harm (that is, the harm may be physical or psychological, or both). Some occupations involve a high risk of physical harm (such as forestry or farming), while some occupations (such as providing health services or administration) will have a low risk of physical harm, but may be more prone to psychological harm or workplace stress.[446] Even within the same industry, the level of risk may vary — for example, the risks involved in logging on steep, rugged and remote terrain will be greater than on a purpose-designed, flat plantation.

Thus, establishing what a 'normal' level of risk of harm is for any industry may be difficult. This is particularly true of psychological harm, as situations that one employee may find stressful another may find stimulating.[447] To complicate matters further, for those with mental disability, it may be unclear if the mental disability (e.g. depression or an anxiety disorder)[448] has been caused by stress (even when this level of stress is considered normal in that particular industry), or whether the presence of a mental disability means the employee is simply less able to deal with the normal stresses of the job. Either way, with exposure to stress, the mentally disabled employee may be at risk of exacerbating their mental disability. Thus, when the nature of the position creates some level of stress to the individual employee, and this stress is causing them harm, then reducing this risk of harm may be difficult to achieve without adverse treatment of the employee, and risking a claim of discrimination. Even Professor Smith, whose occupation may not be considered inherently risky, may, due to her own personality, still be at risk of harm, if workplace stress is exacerbating her mental disability.[449] If so, the University may have a defence that Professor Smith is at

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[446] Hampson and others, above n53 at 9. This report analyzed the level of stress suffered by employees in different industries. Although this is taken from UK data, the same results are likely to apply in New Zealand.

[447] Aaron Martin "Foresight of Harm and Inherently Stressful Occupations" (2006) NZLJ 395 at 395.

[448] Workplace stress is associated with the development of depression and anxiety disorders (Melchoir and others, above n445).

[449] The employer cannot escape liability by arguing that an employee is less resilient than other employees. In *Gilbert v Attorney General* [2001] 1 ERNZ 332 (EC), at 384, the Employment Court held: "it was not open to the defendant to argue that Mr Gilbert's physical or mental health or personality were such that he was unable to cope with the stresses and strains of the job, whereas other employees or a different personality type may have been more resilient. The

risk of harm and it is not reasonable to take that risk. If the only means of reducing her risk is to reduce her workload (for example, removing her supervision or lecturing duties), the University may claim these are not reasonable measures, or that taking these measure would cause unreasonable disruption.

There are, then, major interpretive issues associated with the concept of 'risk of harm' and whether it is reasonable to take that risk. Following the spiral approach to interpretation, these interpretive issues will now be explored, to establish if a clear and consistent meaning can be given to the phrase.

'Risk of Harm': Meaning from the Text and in the Context of the HRA

The first interpretive approach is to ascertain the meaning of 'risk of harm' from the text of the HRA and in light of its purpose. 'Harm' is the initial term presenting difficulties, as it is not defined in the legislation. The plain meaning (as defined in the Oxford dictionary) is 'hurt' or 'damage'.[450] Whether, for the purposes of the Act, this is restricted to physical harm is not clear from the text.

'Risk' has been defined as 'a chance or possibility of danger, loss, injury or other adverse consequences'.[451] 'Chance' or 'possibility' implies a low potential or likelihood of the event occurring, suggesting that a low likelihood of either physical or psychological hurt would be sufficient to meet the criteria of a 'risk of harm' under the HRA. However, whether this interpretation fits the scheme of the HRA requires further assessment.

The scheme of the HRA shows a consistent theme for disability discrimination, in all contexts covered by the Act. This is that adverse treatment of a disabled person will not be unlawful if, due to their disability, the activity poses an unreasonable risk of harm to the disabled person (or others), and it is unreasonable to take that risk. Throughout the HRA, this exception to unlawful treatment will not apply if the risk of harm can be reduced to normal, without unreasonable disruption to the relevant person or organisation.[452] Thus, to be consistent the same approach to the interpretation of 'risk of harm' should probably apply to all its provisions.

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department was required to take Mr Gilbert as it found him: *Clarkin v ACC*. Even if… Mr Gilbert had some persistent low level mood disorder, that cannot detract from the department's liability." This finding was not overturned on appeal. Furthermore, the Court of Appeal has accepted that some occupations, such as front line social work and policing, are inherently stressful. This placed employers under greater obligations under the (now repealed) Health and Safety in Employment Act 1992 to protect the employee from hazards. See *Whelan v Attorney-General* [2004] 2 ERNZ 554 (EC); *Attorney-General v Gilbert* [2002] 2 NZLR 342 (CA). These obligations would still apply under the new HSWA 2015.

[450] Thomson, above n282.

[451] Thomson, above n282.

[452] Human Rights Act 1993, s36 (partnerships); s37 (professional and trade organisations); s39 (qualifying bodies); s43 (access to public spaces, vehicles and facilities); s60 (education).

However, the provisions apply in different contexts. That is, a risk of harm in the context of an employee driving a vehicle or piloting an aircraft is quite different to risk involved in a disabled person gaining access to a vehicle or aircraft,[453] and is different again to the risk of harm involved in obtaining admission to an educational environment.[454] This in turn will play an important part in assessing the degree to which the affected person or organisation can either reasonably take that risk, or take measures to mitigate it. Nonetheless, if the same factors or considerations (such as the degree of risk involved, the resources of the organisation, whether the disability causing the risk is a permanent or temporary condition, the number of people affected, etc.) are taken into account during the assessment, this should provide some level of predictability to the interpretation. Currently, however, the HRA provides no guidance, and there is little case law on the factors to consider in the interpretation of 'risk of harm', or what counts as an acceptable level of risk.

Furthermore, although the scheme of the HRA may suggest a consistent approach should be taken to assessing what is a reasonable risk of harm in the context of a particular provision, it is less clear how this should be applied in practice. Should the assessment relate to the risk associated with a particular aspect of the activity, or the activity as a whole?[455] For employment, given that the task reallocation proviso applies to only 'some of the duties' of a position, an analysis of the risk associated with each particular duty of the role seems required. Then, if any particular duty poses an unreasonable risk to the employee or others, further enquiry may be made regarding whether the employer could reasonably accommodate the employee in relation to that duty. Thus, in *Connell v Sepclean Limited*,[456] the employer contended that Connell was at risk of harm when working on steep muddy banks, climbing up ladders on ships, or performing other physically demanding duties as part of his role as a septic tank cleaner and tanker driver, because he had a prosthetic leg. However, this defence was not made out, as the employer failed to provide any evidence of heightened risk of harm for any of these individual duties. Nor did the employer demonstrate that special services or facilities were required to enable Connell to work safely. Therefore Connell's dismissal was discrimination.[457] Furthermore, the only duty where there was a risk of harm to Connell (or at least his prosthetic leg) was working on a barge, as the salt water would damage his prosthesis. However, even here the employer's defence failed, as the task reallocation

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[453] Human Rights Act 1993, s43.
[454] Human Rights Act 1993, s60.
[455] For example, it is not unlawful to exclude a person from a sporting event on the ground of disability due to a risk of harm. However, if it is, for example, a multi-sport event, should the risk assessment be a global assessment across all categories, or should each category be assessed separately and only some of the categories be exempted (e.g., perhaps, if the particular disability increases the risk of drowning, the exception should only apply to the swim in a triathlon and not to the run or cycle)?
[456] *Connell v Sepclean Ltd*, above n119 at [99].
[457] Assessing the risk of harm for each individual activity (or duty) may not be appropriate outside the employment context. In other contexts, it may be more appropriate to assess the overall risk of harm to the disabled person or others.

proviso applied (that is, another employee could perform the work where saltwater immersion was a possibility, without undue disruption to Sepclean).

Thus, the scheme of the Act, with the interaction between the permitted exceptions and the task reallocation proviso, suggests that the risk of harm should be assessed against individual duties of the position. However, there may be a cumulative effect of accommodating a risk of harm. That is, if all (or many of) the duties of a position contain a small risk of harm, then if those risks are assessed cumulatively, it may mean the overall risk is unreasonable. For example, if the stress of researching is only putting Professor Smith at a mild risk of psychological harm, then it might be reasonable to take the risk of her continuing to research. But, if the stress of teaching puts her at the same risk, as does the stress of supervising postgraduate students, then the cumulative effect of these mild risks of harm may be significant, and may not be reasonable to take. Therefore, the scheme of the Act does not entirely clarify how to assess risk of harm.

The History and Purposes of the Act

The legislative history is of limited assistance in the interpretation of this phrase. At the time of enactment, the emergence of AIDS was a major social issue, and discussion regarding 'risk of harm' related mainly to the threat of 'infecting others with an illness'.[458] Clearly however, other risks of harm are also covered the legislation.

Additionally, the purposes of the Act do not entirely clarify the interpretation. The managerial prerogative suggests the employer has the right to decide when an employee poses a sufficiently serious risk of harm to themselves or others to justify their adverse treatment. However, the HRA also protects the rights of the disabled employee, so the employer's prerogative is restricted. The risk of harm posed must be 'unreasonable' and there must be no 'reasonable measures' the employer could take to reduce that risk to normal without 'unreasonable disruption' to their activities.

Whether it is reasonable to take the risk of harm might appear to be based on the employer's subjective view of disability and the risk it poses. This issue was discussed in *Proceedings Commissioner v Canterbury Frozen Meat Co Ltd.*[459] The Complaints Review Tribunal (CRT)[460] confirmed that the employer's view must have a factual basis and the evidence must be current, reliable and overwhelming.[461] The degree of risk should be 'significant, appreciable or substantial'[462] — which implies it must be objectively reasonable. The HRRT has

[458] This reflected the perception, prevalent at the time, that there was high risk of acquiring AIDS (acquired autoimmune deficiency syndrome) from others.
[459] *Proceedings Commissioner v Canterbury Frozen Meat Co Ltd*, above n315.
[460] The Complaints Review Tribunal was the predecessor to the HRRT.
[461] These are the foundation of the rational and factual basis tests for assessing the suitability of an applicant for a job (*Proceedings Commissioner v Canterbury Frozen Meat Co Ltd*, above n315 at 5).
[462] At 8. The orthopaedic surgeon in this case suggested there was a 20% risk of re-injury to the complainant's elbow. This was sufficient to meet the criteria for a significant or substantial risk.

confirmed that merely assuming an employee's condition (or impairment) creates a risk of harm is not sufficient.[463]

In addition, the Authority has interpreted 'harm' broadly. In *Lidiard v New Zealand Fire Service Commission,*[464] the failure to disclose a medical condition was seen as presenting a form of harm to others, and therefore to the employer as:[465]

> Its employment of Mr Lidiard created some risk to himself and others owed duties by NZFS without it having a chance to manage that risk. NZFS' [sic] position as an employer was, therefore, harmed.

This suggestion, that avoiding the risk of harm includes protecting others (such as members of the public, or other employees) from a risk of harm that they may be unaware of, implies there should be a liberal interpretation of 'risk of harm', with a low threshold for acceptable risk. This interpretation would maintain the managerial prerogative, as the employer would be able to treat the employee differently when they posed a low risk of harm. The rights of the disabled employee are still protected, as the employer would still have to reasonably accommodate the disabled employee, by reducing the risk of harm to normal when it is reasonable to do so, or by task reallocation, when that is possible. When other employees or members of the public are unlikely to be aware of any risk associated with the disabled employee performing their duties, it is appropriate that the threshold for acceptable risk of harm be low, to minimise their risk. This fulfils the purpose of protecting 'others' from the risk of harm, in circumstances where they might not have voluntarily, or knowingly, assumed that risk.

Thus, the purposes of the Act and the legislative history suggest it would be unreasonable to take more than a low risk of harm.

This is particularly the case as the employer has obligations under the Health and Safety at Work Act 2015 (HSWA) to eliminate or minimise risks to the health and safety of employees and other people as far as reasonably practicable.[466] Harm is not defined in the HSWA, however a 'hazard' includes:

> … a person's behaviour *where that behaviour has the potential to cause* death, injury, or *illness to a person* (whether or not that behaviour results from physical or mental fatigue, drugs, alcohol, traumatic shock, or another temporary condition that affects a person's behaviour) (emphasis added).

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[463] *McClelland v Schindler Lifts NZ Ltd* [2015] NZHRRT 45 at [78], [86]. McClelland suffered from a benign essential tremor of the hands. His employer assumed he had a disability, and assumed this posed a risk to his safety as a lift service technician. His dismissal on these grounds was found to be discriminatory, as there was no evidence the condition was either a disability or posed a risk of harm.

[464] *Lidiard v New Zealand Fire Service Commission* ERA Christchurch CA 51/10, 8 March 2010.

[465] At [27].

[466] Health and Safety at Work Act 2015, s30.

If other employees are 'carrying' a mentally disabled employee, or if a mentally disabled employee (as a result of their disability) exhibits difficult behaviours, this may lead to increased workplace stress for other employees and result in their illness. Is this then a hazard for the purposes of the HSWA? If so, elimination of this hazard may require the employer to dismiss (or at least redeploy) the mentally disabled employee, if that adverse treatment was the only way to eliminate the hazard posed by the employee.

Therefore, this same 'hazard' created by the employee's behaviour may be one that poses a 'risk of harm' to others, under the HRA. This implies that 'risk of harm' should be interpreted to include the negative psychological affects on other employees (such as increased workplace stress) caused by the mentally disabled employee's disability. Thus, this potential 'risk of harm' to other employees may be enough to excuse the employer's adverse treatment of the mentally disabled employee under the permitted exceptions.

Consideration of the Wider Context

Interestingly, the UK, Australian and Canadian legislation do not specifically address the possibility of a disability causing a 'risk of harm' to the employee or others. However, the legislation in Australia and Canada has been interpreted to cover such situations.

In Australia, if, after reasonable adjustments, an employee cannot perform the inherent requirements of the position safely, the employer may dismiss them. The High Court of Australia has held:[467]

> In most employment situations, the inherent requirements of the employment will also require the employee to be able to work in a way that does not pose a risk to the health or safety of fellow employees.

However, it is not clear if the same reasoning applies when the risk is only to the health or safety of the disabled employee. Nor is it clear whether a minimal risk to the health and safety of others is sufficient to excuse a dismissal, or whether there a level of risk which might be acceptable.

In the USA, it is a defence to a claim of discrimination that the employee poses a direct threat to the health and safety of others in the workplace.[468] For interpretive guidance as to the meaning of a direct threat, the Equal Employment Opportunity Commission (EEOC) has adopted a four-stage test: the duration of the risk; the nature and severity of the risk; the likelihood that the harm will occur; and the imminence of the potential harm.[469] The EEOC stated there must be a significant risk or a high probability of substantial harm before the defence

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[467] *X v Commonwealth* [1999] HCA 63; 200 CLR 177. The High Court of Australia held that an inherent requirement for a soldier was to be able to 'bleed safely', and therefore it was not discrimination to dismiss a solider who was HIV positive.

[468] Americans with Disabilities Act 42 USC §12113(b).

[469] Americans with Disabilities Act 29 CFR §1630 (r).

is made out.[470] Again, this direct threat applies to 'other individuals', however it has been interpreted to include risk to the employee, as otherwise the employer may be liable under health and safety legislation.[471] As this is a defence to a claim of discrimination, it bears some similarity to the New Zealand legislation, although, unlike the HRA, this defence does not include a 'reasonableness' component. Presumably, however, when a risk is significant, it would not be reasonable to have to bear it.

In Canada, the employer must reasonably accommodate the employee to the point of undue hardship, but the refusal to accommodate may be justified on the grounds of safety.[472] The Supreme Court elaborated:[473]

> Where safety is at issue, both the magnitude of the risk and the identity of those who bear it are relevant considerations. I note that risk can only be considered in the context of an undue-hardship analysis, not as an independent justification of discrimination.
>
> … To meet the test of undue hardship, the risk must be "serious". The use of the term undue infers that some hardship is acceptable; it is only "undue" hardship that satisfies the test (footnotes omitted).

Thus, in Canada, the degree of risk that must exist before the employer can refuse to accommodate the mentally disabled employee is 'serious'. Furthermore, the employer is not entitled to set 'standards higher than necessary for workplace safety or irrelevant to the work required'.[474] However, in New Zealand the employer is only expected to take 'reasonable measures' to accommodate the employee that do not cause 'unreasonable disruption' to the employer's activities. As a high level of risk is more likely to require the employer to take significant measures to accommodate the risk, it is more likely that these measures will either be unreasonable, or will cause unreasonable disruption. Accordingly, the 'reasonableness' threshold implies that any risk that has to be undertaken should be of a lower magnitude than the 'serious' threshold applied in Canada.

In general, then, overseas jurisdictions only provide limited assistance in interpreting the meaning of 'risk of harm' in the HRA.

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[470] These factors were adopted from the case law, in particular *School Board of Nassau Count v Airline,* 480 US 273 (1987). See Stephen Befort "Direct Threat and Business Necessity: Understanding and Untangling Two ADA Defenses" (2018) 39 Berkeley J Emp & Lab L (2018) Forthcoming. Available at SSRN: https://ssrn.com/abstract=3055913 at 6.

[471] At 9.

[472] *British Columbia (Public Service Employee Relations Commission) v BCGSEU* (1999) 3 SCR 3; *Lane v ADGA Group Consultants Inc.* [2007] HRTO 34 at [119], which was upheld by the Ontario Superior Court of Justice (*Adga Group Consultants Inc. v Lane* 91 OR (3d) 649; 295 DLR (4th) 425; [2008] OJ No 3076).

[473] *Adga Group Consultants Inc. v Lane*, above n472 at [116]-[117].

[474] *British Columbia (Superintendent of Motor Vehicles) v British Columbia (Council of Human Rights)* [1999] 3 SCR 868 at [21].

Risk of Harm: Conclusion

Overall, taking into consideration the factors addressed above, the spiral approach suggests that the best interpretation of 'harm' for the purposes of assessing unreasonable risks includes both physical and psychological damage or hurt, including the indirect hurt suffered by other employees as a consequence of the mentally disabled employee's behaviours or the manifestation of their disability (e.g. poor performance).

Additionally, for the protection of others (and to comply with the HSWA), the level of 'risk' that it may be unreasonable to bear should mean low or moderate risk, rather than substantial or serious risk. Although this is a lower threshold than suggested by overseas jurisdictions, those jurisdictions require the employer to accommodate the mentally disabled employee (and their risk of harm) to the point of undue hardship, whereas, under the HRA, the employer is only expected to take 'reasonable measures' and does not have to tolerate 'unreasonable disruption'. This suggests the threshold for the accommodation of risk will be lower (before these accommodations become unreasonable) than where accommodation is required to the point of undue hardship. Furthermore, as the employer must protect others from risks of harm, and, under the HSWA, eliminate hazardous behaviour that has the potential to cause injury or illness, the employer should be able to defend their actions on the basis of a relatively low risk for harm to others.

Although this interpretation may provide a level of certainty to the law, it does not advance substantive equality for the disabled employee, as their disability is not accommodated to a significant degree. However, this provision is subject to section 29 (2) which might provide the disabled employee with some further protection.

5.3.4 The Proviso to the Unreasonable Risk of Harm Defence: Section 29(2)

The unreasonable risk of harm defence has an exception set out in section 29(2). This exception provides that an employer cannot rely on the defence of unreasonable risk of harm if, without causing unreasonable disruption, reasonable measures could be taken to reduce that risk to normal. This provision contains two ambiguous concepts requiring interpretation. Firstly, what constitutes 'unreasonable disruption', and secondly, what are 'reasonable measures' to reduce harm? Determining the meaning of these phrases will determine the employer's potential culpability.

As well as limiting the unreasonable risk of harm defence for the employer, this exception may have an additional effect. It may also infer that the employer has a positive duty or obligation to take measures to reduce a risk of harm. That is, as the defence is only made out when there is no reasonable measure that the employer could take to reduce the level of risk to normal, this may imply the employer is under a positive duty to take any measures that are not unreasonable, including measures that incur a reasonable level of disruption to the employer's activities.

Again, interpreting 'unreasonable disruption' involves balancing the conflicting interests of the parties and may be influenced by several factors. The starting point is ascertaining the meaning from the text in light of its purpose.

The Meaning of 'Reasonable Measures' and 'Unreasonable Disruption'

Section 29(2) negates the unreasonable risk of harm defence if there are reasonable measures the employer could take 'to reduce the risk of harm to 'normal'. This is a proviso to the unreasonable risk of harm defence. Accordingly, it will be referred to as the 'harm reduction possible proviso'.

The employer has defence against failure to reduce the unreasonable risk of harm to normal where it would cause 'unreasonable disruption'. Unlike the task reallocation proviso, where the 'unreasonable disruption' is specifically stated to be to the employer's activities,[475] the wording in the unreasonable risk of harm defence does not specifically mention the employer's activities, instead stating:[476]

> Nothing in subsection (1)(b) shall apply if the employer could, without unreasonable disruption, take reasonable measures to reduce the risk to a normal level.

This may imply the 'unreasonable disruption' contemplated is to the employer in person, and not to their business activities: however, the alternative (and more likely) meaning is that the measures taken would create an unreasonable disruption to the activities of the employer (such as changes to rosters, extended breaks, excusing the employee from some duties). That is, the measures would affect the day-to-day activities of the business.

The text suggests the employer has two particular ways in which to defend their actions. They can either establish that the reasonable measures are unduly disruptive; or, even if not, that the measures themselves are not reasonable. How the measures can be distinguished may be demonstrated in the example of a nurse who has bi-polar disorder and cannot work night shifts, without a risk of harm to her health. In this situation, the measure of allowing the nurse to work only afternoon shifts may reduce that risk to normal. However, if the nurse is employed in a small hospital with a limited pool of staff, the hospital may defend their failure to allow this, on the basis that manipulating staff to cover these shifts would unreasonably disrupt their activities. Alternatively, the hospital might defend their conduct it would be an unreasonable measure to employ another staff member to cover these shifts, because of the added cost (if the disabled employee remains employed full time). Thus, a reasonable measure of manipulating staff may create an unreasonable disruption to the employer, while

[475] Human Rights Act 1993, s35 states: No employer shall be entitled, by virtue of any of the exceptions in this Part, to accord to any person in respect of any position different treatment based on a prohibited ground of discrimination even though some of the duties of that position would fall within any of those exceptions if, with some adjustment of the activities of the employer (not being an adjustment involving *unreasonable disruption of the activities of the employer*), some other employee could carry out those particular duties(emphasis added).
[476] Human Rights Act 1993, s29(2).

another option (of employing more staff) would not cause disruption, but would be an unreasonable expense.

Furthermore, it is not clear from the text whether the cumulative effects of individual measures, and the disruption they cause, should be considered. That is, should the reasonableness of the disruption to the employer be assessed only by focusing on each individual duty that poses a risk and the accommodation required for that duty and deciding if that is reasonable, or should the total effect of multiple accommodations for an individual employee (or accommodations provided for other similarly situated employees) be taken into account? The cumulative effect could relate to one employee requiring multiple measures to be taken for multiple duties, (such as not working night shifts, and, when working day shifts, requiring multiple rest breaks, requiring other staff be available for cover). Each individual accommodation may be a reasonable measure that does not unreasonably disrupt the employer, but, cumulatively, re-rostering staff to cover night duties and providing additional cover during the days may be unreasonable. In addition, conceivably, there may be more than one employee that requires accommodation. Whilst, on an individual basis, the measures required may be reasonable, the cumulative effect may be such that the disruption becomes unreasonable as a whole. For example, if two employees were unable to work night shifts, and the employer could only manage to accommodate one without unreasonable disruption, could they count on the cumulative effect to defend their action, if they decline to accommodate the second employee?[477]

Lastly, it is not clear whether the duration and intensity of the disruption should be taken into account when considering its unreasonableness. A disruption could be short term and intense (e.g. work undertaken to alter the physical environment of a site — perhaps to provide the mentally disabled employee with a quiet or secluded workspace), or less disruptive but occurring over the longer term (e.g. providing the employee with appropriate long-term supervision). It could have significant short-term financial implications (such as purchasing additional equipment) or longer term repercussions (for example, employing temporary staff to cover periods of sick leave).

Some insight may be provided by the scheme of the Act.

Meaning in the Context of the Act

Throughout the HRA, where any risk of harm defence is provided, the defence is not available if, by taking reasonable measures (that do not cause unreasonable disruption) the risk of harm can be reduced to normal.[478] How this defence has

[477] For an interesting discussion of the cumulative effects of reasonable accommodation and undue hardship see Nicole B Porter "Cumulative Hardship" (2017) (September) George Mason Law Rev (forthcoming 2018) .

[478] For example, section 41(2B) provides: 'Subsection (2A) does not apply if the organisation could, without unreasonable disruption, take reasonable measures to reduce the risk to a normal level.' Interestingly, the unreasonable disruption in s41 is not linked directly to the activities of the organisation, but to the organisation itself. This is similar to the 29(2) exception, where it is not specified that the unreasonable disruption is to the employer's activities, as the provision

been interpreted in other provisions may provide some insight into how 'unreasonable disruption' should be interpreted for this proviso.

The HRRT has addressed the meaning of 'unreasonable disruption' in the context of religious discrimination in employment, but it said: [479]

> The term "unreasonably disrupt the employer's activities" is a relative term and cannot be given a hard and fast meaning. Each case will necessarily depend on its own facts and circumstances and it will come down to a determination of "reasonableness" under the unique circumstances of the particular employer-employee relationship.

This provides little guidance. Nonetheless, the HRRT said the employer had to make 'a significant, serious and sincere effort'[480] to accommodate the employee, and an *ex post facto* justification that an accommodation would have caused 'unreasonable disruption' is unlikely to succeed. Thus, justifications offered after the event without prior efforts to accommodate the disabled employee will not be sufficient. As the HRRT said the effort required to accommodate must be significant, this suggests the disruption should also be significant before it becomes unreasonable.[481]

Other cases under similar provisions suggest the disruption can include financial or commercial impact.[482] However, the effect on the morale of other staff cannot be taken into account.[483]

The purposes of the Act suggest the interpretation reached should try to balance the competing interests of the employer and employee. This was the approach taken in *Smith v Air New Zealand,*[484] where the Court held, that for reducing a

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merely states that 'if the employer could, without unreasonable disruption, take reasonable measures to reduce the risk to normal'. However, it is likely these differences are semantic rather than substantive.

[479] *Nakarawa v AFFCO New Zealand Limited*, above n127 at [74].

[480] The employer must provide evidence that the accommodation required would cause 'unreasonable disruption' or the measures required are unreasonable, to allow for 'an evaluative analysis of the reasonableness or proportionality of the employer's response' (above n127 at [74.5]).

[481] In *Atley v Southland District Health Board*, above n84 at [21] the Authority confirmed that a minor disruption was not an unreasonable disruption. In this case, it was not an unreasonable disruption to roster other nurses to perform the nightshifts that the mentally disabled employee could not perform.

[482] *Meulenbroek v Vision Antenna Systems Ltd*, above n164 at [146].

[483] At [157]. As the claimant had every Saturday off when other employees had to work, staff morale was negatively affected. However, the HRRT considered other staff failed to appreciate the importance of religious belief, if they believed that work should have priority over the right to adhere religious practice. This, the HRRT held, is inconsistent with the human right to religious freedom which section 28(3) seeks to protect. The HRRT stated objections based on attitudes inconsistent with human rights are irrelevant. Thus the employees' morale was not a factor to be taken into consideration.

[484] *Smith v Air New Zealand Ltd*, above n57 at [57].

risk of harm the employer need not tolerate 'undue hardship'. Similarly, the HRRT has held that assessing what is reasonable involves evaluating the 'proportionality of the accommodation required against the disruption it causes.'[485]

Moreover, a measure that appears on the face of it to be reasonable and non-disruptive may still indirectly cause disruption to the activities of the employer. For example, if the measure needed to reduce a risk of harm to others would be having a second employee accompany a mentally disabled employee when working off-site, this may cause concern to customers. Take, for example, a gas-fitter or electrician who required close supervision, or was unable to drive safely, and required a second employee to accompany them on service calls. This may cause concern to customers who feel they are being charged additional costs because of the presence of a second gas-fitter. Or they may wonder if there are safety or competency issues with the gas-fitters (requiring them to double-check each other). Either way, this may affect the customer's choice to use that provider again. Thus, a seemingly reasonable measure, that in the short term causes no unreasonable disruption, may in the long-term do so.

Ultimately, the conflicting purposes of the HRA suggest that what can reasonably be expected of the employer (to reduce the risk of harm to normal at least) should not be set at such a high standard that it would cause undue hardship to the employer or their activities.

Foreign and international law, on the other hand do not provide assistance in interpreting 'reasonable measures' or 'unreasonable disruption' as the terms are not used in their legislation, nor in the UNCRPD.

Reasonable Measures and Unreasonable Disruption: Conclusions

Overall, the various approaches to interpretation suggest that taking 'reasonable measures' requires the employer to make significant efforts to accommodate the disabled employee, but does not require the employer to incur undue hardship. This interpretation balances the interests of the parties, and promotes substantive equality to some degree, as the employer must make a significant effort to accommodate the disabled employee.

5.4 Inferring a Duty of Reasonable Accommodation: A Solution?

A final area of uncertainty is whether the permitted exceptions can (or should) be interpreted as inferring a positive obligation to accommodate the disabled employee, rather than purely providing defences.

As discussed above, the Court[486] and the Committee for the UNCRPD[487] have considered that a duty of reasonable accommodation can be inferred from the

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[485] At [61]. Although this was not in the employment context, the same reasoning would apply when assessing the employer's (inferred) obligations.
[486] At [33].
[487] Disabilities, above n398.

provisions in the HRA. However, the HRRT,[488] and the Authority (assessing discrimination claims arising under the ERA)[489] have not considered this issue.

It could be argued that the permitted exceptions should, if possible, be interpreted as an obligation to reasonably accommodate the employee, as this would fulfil the dual purposes of the HRA. As the obligation to accommodate disability would be premised on what is 'reasonable', this protects both the rights of the disabled employee and the employer's managerial prerogative. It would also be consistent with the effect of some other provisions of the Act (outside the employment contest) that specifically require reasonable accommodation of disability.

Furthermore, interpreting the permitted exceptions as a inferring an obligation may be in accordance with New Zealand's obligations under the UNCRPD, which is to 'ensure that reasonable accommodation is provided to persons with disabilities in the workplace'.[490] Arguably, meeting this requirement means the disabled employee should have a *right* to reasonable accommodation.[491] This is because a positive obligation (or duty), imposed on one party (e.g. ensuring reasonable accommodation is provided in the workplace) will bestow a corresponding 'right' (to reasonable accommodation) on the recipient.[492] Rights may be considered as 'claims, enforceable by state power, that others act in a certain way toward the right-holder.'[493]

However, merely providing an employer with a defence against a claim of discrimination when it would be unreasonable to make accommodation does not confer a specific right on the disabled employee to have an accommodation made. It merely excuses the employer's behaviour. According to Hohfeld's

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[488] Interestingly, the HRRT has not yet had to consider whether there is an obligation of reasonable accommodation in employment in the context of disability discrimination. The issue of reasonable accommodation has arisen for religious discrimination. However, there is a specific duty of reasonable accommodation of religious practice in section 28(3).

[489] As yet, it has not been necessary for the Authority to consider the issue of whether the permitted exceptions infer an obligation of reasonable accommodation, although cases such as *Atley v Southland District Health Board*, above n84 and *Connell v Sepclean Ltd*, above n119 have evaluated the employers' defences under the permitted exceptions.

[490] United Nations Convention on the Rights of Persons with Disabilities, Article 27(i).

[491] Quinn argues that, as well as being a non-discrimination convention, the Convention provides a web of substantive rights. That is, it enables the disabled to enjoy human rights (such as the right to work) through the use of non-discrimination principles (Gerard Quinn "The United Nations Convention on the Rights of Persons with Disability: Toward New International Law" (2009) 15 Tex J on CL & CR 33 at 43).

[492] David Campbell and Philip A Thomas (eds) *Fundamental Legal Conceptions as Applied in Judicial Reasoning by Wesley Newcombe Hohfeld* (New ed, Ashgate, Dartmouth, UK, 2001) at 12 -13. According to Hohfeld, rights and duties are jural correlatives. Therefore, if A has a duty toward B, then B has a right against A.

[493] Singer, above n393 at 986.

analytical jurisprudence, a defence would provide the employer with an immunity (i.e., security against their legal entitlements being changed) rather than imposing a duty.[494] Thus, as no duty has been imposed on the employer, no corresponding 'right' to reasonable accommodation is conferred on the disabled employee.

Therefore, although casting the permitted exceptions as a defence may result in an *expectation* of reasonable accommodation, it cannot confer a right to it, which appears contrary to New Zealand's obligations under the UNCRPD which is to *ensure* reasonable accommodation is provided.

It is conceivable that the permitted exceptions might be interpreted in a manner that does impose a positive duty to accommodate, to give effect to New Zealand's obligations under the UNCRPD. But the question remains whether this would the 'best' interpretation for these provisions. The fact that several defences are available to the employer may suggest that any inferred obligation would be a limited one — and that the managerial prerogative is generally to be protected. Moreover, as the obligation must be inferred from the defences, the implication is that the obligation is restricted to the matters contained in the defences — that is, to the provision of 'special services or facilities' or to taking reasonable measures to reduce a risk of harm to normal. For example, if 'special services or facilities' was interpreted to mean things external to the employee's position, and necessary for them to perform the essential duties of the position, then the inferred obligation would be limited to providing such things. Consequently, any inferred duty of reasonable accommodation would not include things such as a general tolerance for poor performance, or additional sick leave. But that is exactly what ensuring the disabled employee's continued employment may require.

A better interpretation might be to view the permitted exceptions solely as a defence. Then, if the employee requires an accommodation that does not fall within the definition of 'services or facilities' (such as additional sick leave or tolerance of poor performance) the employer would have no defence for failing to accommodate them (as they were not 'special services or facilities' that it was unreasonable to provide). Thus, it would be discrimination to fail to accommodate the disabled employee in this manner. This would appear to offer better protection to the disabled employee than an inferred obligation to accommodate the employee. The inferred obligation would only require the employer to provide things that fall within the narrow category of 'services or facilities' (which would not include toleration of poor performance).

In short, if the permitted exceptions are considered to infer a duty of accommodation, as toleration of poor performance is not a 'service or facility', there would be no obligation on the employer to do so (as tolerance of poor performance is not a 'service or facility'). Therefore, the better interpretation, to

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[494] According to Hohfeld, the jural correlative of 'immunity' is 'disability' which is the absence of power to alter a legal entitlement: Campbell and Thomas (eds), above n492, Section 1 at 28.

protect the disabled employee, is to view the provisions simply as defences.[495] Then, if a disabled employee was performing poorly, the employer would have no defence for treating them adversely under the permitted exceptions, as there would be no 'service of facility' that it would be unreasonable to provide.

Furthermore, this may accord with the intent of the legislature. In 2008, prior to ratifying the UNCRPD, New Zealand's Parliament amended the HRA (and other legislation),[496] apparently to ensure it was compliant with New Zealand's obligations under the Convention. These amendments[497] were said to be aimed at ensuring the legislation did not discriminate against the disabled, and in the case of the HRA, to clarify the scope of the reasonable accommodation required.[498]

Nevertheless, although a multitude of amendments were made to the HRA, and despite there being an obligation on State Parties to ensure 'reasonable accommodation' in employment, no such specific obligation was included in the

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[495] There would be limits to what level of poor performance the employer would be expected to tolerate. This would be determined on whether the employee remained 'qualified for work'.

[496] The 2008 amendments were introduced by the Disability (United Nations Convention on the Rights of Persons with Disabilities) Bill 2008.

[497] The amendments were recommended after the completion of the National Interest Analysis in early 2008: Justice and Electoral Committee *Disability (United Nations Convention on the Rights of Persons with Disabilities) Bill (232—1) and International Treaty Examination of the Convention on the Rights of Persons with Disabilities* (2008) .

[498] Disability (United Nations Convention On The Rights Of Persons With Disabilities) Bill 2008 (232-1). The explanatory note to the Bill stated the purpose was: 'to amend the Human Rights Act 1993 to clarify the scope of its provisions enabling a person to refuse to accommodate a person's disability in certain areas of activity'. This suggests that the purpose of the amendment was to clarify lawful refusal, rather than curtail it. Ironically, the phrase "enabling a person to refuse to accommodate" implies the purpose of the legislation is to empower a person to discriminate (as the denial of reasonable accommodation is discrimination under the UNCRPD). However, the reason for instigating the legislation was to ensure New Zealand's legislation was compliant with the UNCRPD in eliminating discrimination. Interestingly, however, the Departmental Report (Office for Disablity Issues *United Nations Convention on the Rights of Persons with Disabilities and Disability (United Nations Convention on the Rights of Persons with Disabilities) Bill, Departmental Report* (Ministry of Social Development and Ministry of Justice, 2008)) stated the amendments were intended to clarify the duties and obligations of private parties to *provide* reasonable accommodation to disabled persons, not to clarify when it was lawful to refuse it. While these comments may represent both sides of a coin, the emphasis is subtly different, suggesting a different underlying perspective on the relative rights of the parties.

HRA,[499] nor was a definition of reasonable accommodation inserted,[500] although a positive duty to provide services or facilities was inserted in some contexts.[501]

This may suggest the intention of the legislature was to keep the potential accommodation provisions as a defence only, and therefore these provisions should not be interpreted as imposing a general obligation on the employer to reasonably accommodate the disabled employee.

Nonetheless, the overall effect is that a positive duty to make reasonable accommodation exists in some legal contexts but not in others — a rather inconsistent position. Although it seems clear Parliament had no intention of imposing a positive of obligation on the employer to accommodate the disabled employee, it is possible the matter was simply overlooked.[502]

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[499] The Committee, above n498 at 80 stated: 'the explicit references in the Act to the notion of reasonable accommodation are stated to be exceptions, suggesting the existence of a general duty of accommodation to which the exception can apply.' Nonetheless, they did acknowledge there was a possibility of New Zealand being criticised by the UN Committee on the Rights of the Persons with Disabilities for failing to actively meet the obligations for reasonable accommodation. However, the report then continues to say criticism was unlikely given 'the Committee is expected to examine whether New Zealand's legislative and policy provisions and practice, as a whole, are consistent with the spirit of the Convention. There are considerably more references to reasonable accommodation in the Convention than just the prohibition of discrimination. Some of these references were intended to provide qualifications and clarification around the extent of the requirement for reasonable accommodation.' Nonetheless, the initial report on New Zealand by the Committee did contain concerns about this (Disabilities, above n398 at 11-14).

[500] Furthermore, the legislature did not take the opportunity to incorporate the UNCRPD into New Zealand law, nor amend the purpose of the Act to specifically give effect to the UNCRPD. The Departmental Report (Issues, above n499 at 97-102) declined to recommend a definition of reasonable accommodation be included in the HRA, as: it would be likely to create 'greater uncertainty among private individuals regarding their rights and obligations', may have 'unintended negative impact' on other prohibited ground of discrimination due to statutory interpretation. Additionally, they stated that the HRA already provides the analysis explicitly in certain areas. Nonetheless, the Committee for the UNCRPD expressed concern regarding this lack of definition: Disabilities, above n398 at 11.

[501] These provisions make it unlawful to fail to provide special services or facilities. Provisions that include this obligation are: s36, Discrimination in partnerships; s37, Organisations of employees or employers and professional and trade associations.

[502] A National Interest Analysis (NAI) was undertaken in 2008. The purpose of an NAI is, in part, is to assess what legislative changes are required to ensure compliance for international treaties. However, McGregor (Judy McGregor, Sylvia A. Bell and Margaret A. Wilson *Human Rights in New Zealand: Emerging Faultlines* (Bridget Williams Books with the New Zealand Law Foundation, Wellington, NZ, 2016) at 121) argues that the NAI was relatively superficial, as

Overall it appears that interpreting the permitted exceptions in a way that achieves substantive equality for disabled people, and accords with the principles of the UNCRPD is, at best, difficult. Nonetheless, this thesis would suggest that the 'best' interpretation of the permitted exceptions is that they are viewed as a defence against a claim of discrimination, and not as inferring a duty of reasonable accommodation.

However, a positive general duty of reasonable accommodation (that is, one that is not limited to the provision of 'services or facilities', or reducing a risk of harm to normal) would better protect the rights of the disabled employee and promote substantive equality. Thus, to achieve this, and to fulfil New Zealand's obligations under the UNCRPD, as well as clarifying the law in this area, this thesis suggests a specific, general duty of reasonable accommodation should be incorporated into the HRA. Therefore, the HRA may require amending to both clarify the difficult interpretive issues and bring New Zealand law in line with the UNCRPD. This will be discussed in chapter 7.

5.5 The Permitted Exceptions: Conclusion

The interpretation of the permitted exceptions therefore raises a number of interpretive issues. The spiral approach resolved some of these issues to some degree, but the meaning of other provisions remain ambiguous.

The Unreasonable to Provide Special Assistance Defence

Areas of contention remain over the ambit of the 'services or facilities' that have to be provided to accommodate the disabled employee, as the terminology used better fits a requirement to make physical adjustments than those that might be required for mental disability. Even under a liberal interpretation, the concept may refer only to things that need to be provided that are external to the role of the employee, and are aimed at enabling the employee to perform the essential duties of the position, rather than creating a general obligation to deliver all forms of support that may be required to accommodate the mentally disabled employee. Read as a defence, this provision will protect the disabled employee to some degree (as the employer would have limited defences available if few things were considered 'special services or facilities'). However, if the employee required an accommodation that was not a 'special service or facility', in order to be 'qualified' for the position, the employer would be under no obligation to provide it. Thus, if the employee developed a mental disability, and performed poorly, the employer could claim, in those circumstances, that their poor performance meant they were no longer qualified for the position. This could occur even if the disabled employee was, in fact, still performing the essential duties of the position, just not to the standard required by the employer. The employee would have no comeback, as tolerance of poor performance is not a service or facility that it is reasonable for the employer to provide. This does little to promote inclusivity by removing barriers to employment.

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there was a push to ratify the UNCRPD as soon as possible. This may mean that the reasonable accommodation provisions for employment were simply overlooked.

Therefore, the unreasonable to provide special assistance defence cannot readily be interpreted in a way that endorses the social construct of disability, which would require greater effort to be made to remove barriers that inhibit disabled persons from full participation in social life. Consequently, the legislation itself, to some degree, could even be said to act as a barrier against the disabled achieving greater substantive equality. This is compounded by the unreasonable risk of harm defence.

The Unreasonable Risk of Harm Defence

A defence of this kind that is easily made out protects the employer, but curtails the protection that the HRA provides to the disabled employee, and may restrict the disabled employee's decision-making autonomy, particularly concerning risks to self. If it is the employer who decides when it is not reasonable to take a risk of harm, the employee's autonomy is compromised, as they are denied the choice (or right) to accept a level of risk in order to remain employed. Nevertheless, under health and safety in employment law, it is the employer who bears the obligation to create a safe working environment.

Nonetheless, it seems clear that the level of risk of harm taken should be relatively low in order to protect all affected parties, and that 'harm' should be interpreted broadly to include both psychological and physical harm. However, it remains unclear precisely how risk of harm should be assessed, particularly for psychological harm caused by workplace stress, as individuals react differently to stressors, and assessing the level of risk to the individual in these circumstances is difficult. Erring on the side of caution however, does little to protect the disabled employee, as it may mean that a dismissal could be easily be defended on the basis that continued employment is putting the employee at risk of harm. If the employee is poorly performing, due to mental disability, and that disability is aggravated by stress, then the employer may argue that the stress the employee is placed under by trying to work is placing them at unreasonable risk of harm.

For the purpose of the reducing of harm to normal under HRA section 29(2), the measures that need to be taken to reduce the level of harm to normal should probably be significant ones before they should be viewed as unreasonable, and any disruption incurred should fall short of undue hardship to the employer. However, it remains unclear what factors should be taken into account when assessing whether disruption would be unreasonable, leaving a lack of clarity in the law in this area.

Furthermore, it is unclear if the employer, when defending a claim of discrimination, can rely on the cumulative effect of accommodations for multiple employees to establish that the requirement would be unreasonable. On one view, when an accommodation is reasonable for one employee, it should be reasonable for another. But an employer may still view the cumulative effect of both accommodations as unreasonable, or consider it causes unreasonable disruption. The correct interpretation on this point is unclear.

Thus, even the spiral approach to interpretation is unable to resolve all of the interpretive issues in the permitted exceptions. However, analysis of the section

35 task reallocation proviso may provide further interpretive assistance and will be the subject of the following chapter.

Chapter 6: Accommodating Disability — A Limited Obligation: Interpreting Section 35

> "Equality is not simply a matter of likeness. It is, equally, a matter of difference. That those who are different should be treated differently is as vital to equality as is the requirement that those who are like are treated alike."
>
> Janet Kentridge "Equality" in *Constitutional Law of South Africa*

6.1 Introduction

The previous chapter examined the section 29 defences (the permitted exceptions) against a claim of discrimination, which are the first of the potential accommodation provisions. These permitted exceptions were analysed using the spiral approach to interpretation, and concluded that although the permitted exceptions could be interpreted to infer a limited obligation of reasonable accommodation, that this was not the 'best' interpretation of these provisions. Rather, the analysis suggests the permitted exceptions should be interpreted only as a defence.

This chapter follows a similar format to examine the remaining potential accommodation provision: that is, the section 35 'General qualification on exceptions' (which this thesis refers to as the 'task reallocation proviso'). Accordingly, the chapter starts with an overview of this provision, outlining its general intention, before identifying and discussing the interpretive issues that arise. This chapter then examines whether this provision may provide a positive duty of reasonable accommodation in some circumstances, and whether this may place a further gloss on the interpretation of the permitted exceptions, and the core elements of section 22. Finally, this chapter assesses if the best interpretation of these potential accommodation provisions adequately protects the human rights of disabled employee, in accordance with the purposes of the HRA and New Zealand's obligations under the UNCRPD.

As a result of this analysis, this thesis concludes that some of the issues in the task reallocation proviso cannot be solved through interpretation alone, and therefore contends that the way forward for clarifying the law regarding reasonable accommodation is via statutory reform. This would ensure New Zealand meets it commitments under the UNCRPD and promote substantive equality for disabled employees. How this reform might be achieved is the subject of the following chapter.

6.2 Interpreting the Task Reallocation Proviso: Issues for Disability Discrimination

The Limited Application of the Task Reallocation Proviso

As explained in the previous chapter, when discriminatory conduct has been alleged, the employer may raise a defence against this claim of discrimination

under the permitted exceptions.[503] The employer can make out the defence if the disabled employee requires special services or facilities in their work, and it is not reasonable for the employer to provide them, or there is a risk of harm to the employee or others and it is not reasonable to take that risk (and that risk cannot be reasonably reduced to normal).

However, even when these defences are made out (that is, the conduct falls with within the permitted exceptions), the employer is still prevented from treating the employee differently if the task reallocation proviso applies.

This proviso, in section 35 HRA, states:

> No employer shall be entitled, by virtue of any of the exceptions in this Part, to accord to any person in respect of any position different treatment based on a prohibited ground of discrimination even though some of the duties of that position would fall within any of those exceptions if, with some adjustment of the activities of the employer (not being an adjustment involving unreasonable disruption of the activities of the employer), some other employee could carry out those particular duties.

This convoluted 82-word sentence creates an exception to the exceptions, and cancels the defence in certain situations.

The inelegant drafting creates interpretive difficulties, but the general effect is that this provision imposes on the employer a limited, express obligation to accommodate the disabled employee, in specific circumstances.

In the case of disability discrimination, the obligation arises only after the employee has shown there has been adverse treatment on a prohibited ground of discrimination (under section 22). Next, the employer must establish that the adverse treatment complained of fell within one of the permitted exceptions, in principle. Then, the task reallocation proviso applies.

For example, Professor Smith, due to her depression is unable to carry out research and is dismissed. Therefore, she has been treated adversely by reason of her disability. Nevertheless, the unreasonable to provide special assistance defence is available to the University if it is unreasonable for it to provide Professor Smith with a 'special service or facility' (i.e., a research assistant), in these circumstances. However, the task reallocation proviso would now apply, which may void this defence.

Nevertheless, the task reallocation proviso applies only if *some* of the duties of the disabled employee fall within the defence (or permitted exception). That is, the disabled employee would not require special services or facilities (that it would not be reasonable for the employer to provide) to perform *all* duties. Thus, it would only apply if Professor Smith requires assistance for her research duties and not her teaching or supervising duties.

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[503] The previous chapter also explained how these permitted exceptions might infer a limited obligation of reasonable accommodation — the ambit of which remains unclear.

Then, *if* Professor Smith's research duty could be reallocated to another staff member, *and* this reallocation did not involve more than some adjustment to the University's activities *and* this adjustment would not cause unreasonable disruption to the University, then the defence is cancelled. The University would then be obligated to accommodate her in that manner.

Under the task reallocation proviso, the employer need not provide any unreasonable 'special services or facilities', or to take an unreasonable risk of harm. Instead, they may be obliged to reallocate certain duties.

Therefore, the task reallocation proviso performs two roles. First, it limits the defences provided by the permitted exceptions. That is, the defence will be cancelled if only some (but not all) of the duties of the employee fall within the permitted exceptions and these duties could be reallocated to another staff member. Secondly, it creates an obligation under those circumstances to accommodate the disabled employee through reallocation of those duties, rather than permitting them to be treated adversely (e.g., their dismissal for non-performance).

The Competing Interests of the Parties

However, there is only a limited obligation to reallocate the duties, as the task reallocation proviso only applies when 'some' of the duties of the position fall within the defences, and where 'some other employee' (i.e., a current employee — the employer is not expected to hire someone) could carry out those duties instead. Moreover, the use of 'could' suggests that this must be a viable option, perhaps implying that the substitute employee should be able to perform those duties without having to undergo further training.

Furthermore, the task reallocation proviso only applies if it is possible to reallocate these duties with 'some' adjustment of the activities of the employer that does not involve 'unreasonable' disruption. However, the requirement may be onerous, as the 'adjustments' are to be made to the employer's activities, and not to the employee's role. That is, the employer must adjust their business activities to keep the disabled employee in their current role, and not simply restructure the employee's position or redeploy them elsewhere.[504]

This is the only provision that expressly obliges the employer to accommodate the disabled employee (where possible), to avoid discrimination.

As a result, the task reallocation proviso places greater restrictions on the employer's managerial prerogative than the permitted exceptions — as it acts as a positive obligation to reallocate tasks when possible, and, if necessary, requires the employer to make adjustments to their activities to do so. This provision then, appears to shift the balance of the competing interests between the disabled employee and employer toward that of the disabled employee. However, the limited scope of the provision counter-balances this. It only applies

[504] Westlaw commentary (online), Human Rights Act HR29.04 at (5). The commentator adds: As a result, the phrase "duties of the position" should be read so as to require the employer to differentiate the "essential" from the "non-essential" functions of the job for the purpose of a reasonable accommodation of a disabled applicant or employee.

when 'some of the duties' fall within the permitted exceptions, and when only 'some' adjustments need be made, and making those adjustments does not involve 'unreasonable' disruption to the activities of the employer. Thus, again, the interpretation of these phrases ('some of the duties', 'some adjustment', and 'unreasonable disruption') will determine where the point of balance between the competing interests will lie, and thus, how much protection the disabled employee is afforded.

A disability-rights approach to interpretation of these phrases would be one that seeks to achieve greater substantive equality, by protecting the disabled employee's employment. For example, 'some of the duties' may be interpreted to mean a significant number of duties, including the essential duties of the position, while 'some adjustment' of the employer's activities may be interpreted to mean 'some significant' adjustment, and the threshold for 'unreasonable' disruption may be high. Conversely, if the employer's rights have considerable sway, the obligation to reallocate duties would be interpreted to mean that the obligation exists when only a few, non-essential duties fall within the permitted exceptions, while the notion of 'some' adjustment of the employer's activities would require no more minimal adjustments, and there would be a low threshold before the disruption would become unreasonable.

The lack of disability discrimination case law means it is unclear how these phrases would be interpreted (which would indicate where the current balance between interests of the disabled employee and employer would lie).[505]

The Goal of Greater Substantive Equality

As there is no positive obligation of reasonable accommodation, how the task reallocation proviso (and the potential accommodation provisions as a whole) are interpreted determines the degree to which the disabled employee will achieve substantive equality in employment.

The spiral approach to interpretation of these phrases will therefore be used to try to determine the 'best' interpretation.

6.2.1 The Meaning of 'Some of the Duties of the Position'

The task reallocation proviso applies when only 'some of the duties of that position' fall within the permitted exceptions. If this is the case, and those duties can be reallocated to another employee, then the employer's defence will be annulled. In deciding what 'some of the duties of that position' means, two issues arise. The first issue is identifying the types of duties that fall within the meaning of 'some of the duties'. The other concerns the quantum of the duties. The first arises because, in employment law, the duties of any position can be broadly

[505] The Labour led Coalition Government has indicated that it will be changing some aspects of employment law, such as: amending the 90-day trial period so it only applies to small employers; reinstating compulsory rest-breaks; repealing the Employment Relations (Film Production Work) Amendment Bill; and raising the minimum wage. This suggests the balance of interests is shifting toward protecting the employee.

categorised into essential or core elements of a job, and into non-essential duties that are peripheral to these core elements.[506] The question is: does the task reallocation proviso apply to both these essential and non-essential duties of the position? This issue arises as, in employment law, dismissal is usually justified when an employee cannot perform the inherent or essential duties.[507] Therefore, if the employer's prerogative is to be protected, the task reallocation proviso should be interpreted to exclude the essential or inherent duties of the position. This would mean it would not be discriminatory to dismiss an employee who is unable to perform all those essential duties. However, under human rights law, if the mentally disabled employee is to be better protected, the task reallocation proviso must include the essential duties of the position. Then, despite the convention that being unable to perform the essential duties of a position would normally justify dismissal, it would be unlawful to dismiss a disabled employee if those particular duties could be reallocated to another employee.

The second issue is: how many 'duties of the position' (or what proportion of the total duties) is meant by the phrase 'some' of the duties? Is it just the number of duties that matters, or is it the proportion of the total duties that the employee cannot perform? Moreover, if the duties the disabled employee cannot perform are non-essential duties, would more of those duties need to be reallocated, leaving the employee to perform only the core elements of the position?

The impact on the employer will vary depending on the interpretation of this phrase. That is, if 'some of the duties' is interpreted so as to require reallocation of essential elements of the position or a large portion of the duties, the impact may be significant.

Other issues arise: for example, if the reallocated duties are essential elements, is the employee now actually performing the position for which they were hired (and for which they are being paid)? Moreover, if a sizable proportion of the employee's duties need to be reallocated, then is the employer in effect redeploying both the disabled employee *and* the employee who takes over those duties? Additionally, there may be a domino effect, as the employee who is now undertaking the disabled employee's duties would need to have some of their own duties reallocated before they could take on those additional duties. Furthermore, is the employer still expected to accommodate a disabled employee who is no longer performing a substantial percentage of their work, and potentially sitting idle some of the time? If so, the reallocation would mean that the employer is effectively forced to employ two people to perform the same job.

Additionally, it is unclear whether 'some of the duties' could be interpreted to mean 'all of the duties, but only during some time period' — requiring the reallocation of night shifts for example. Or could it cover the situation where the

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[506] For example a barista's core element or duty is to make coffee, but peripheral duties might include clearing tables. An individual employment agreement will often specify the core elements or duties of a position.

[507] *Barnett v Northern Regional Trust Board of the Order of St John*, above n61 at [35]; *Lealaogata v Timata Hou Ltd* [2013] NZERA Wellington 1.

employee could not perform even the single essential duty of their position, but a certain time (for example, where a driver cannot drive after dusk due to a vision impairment)?

Finally, could it mean 'some of all of the duties of a position'? That is, for Professor Smith could 'some of the duties' mean some lecturing, some supervision and some research?

The meaning from the Text, in the Context of the HRA and the Legislative History

Starting with the text of the provision, the plain meaning of the phrase suggests that the task reallocation proviso applies only when some, but not all, of the employee's duties fall within the permitted exceptions. Duties can be defined as a 'job' or 'function'.[508]

Many of the issues raised above cannot be determined from the text. In particular, whether 'the duties' include the essential duties of the position, or whether 'some of the duties' can mean all of the duties but only during certain period of time — such as a particular shift within a position (e.g., a night shift). This is relevant to mental disability, where rotating shift work may destabilise some conditions, such as bipolar disorder.

Furthermore, it is unclear from the text what proportion or number of the total duties it would be reasonable to reallocate to another employee: that is, whether it could constitute a large proportion of the employee's position. For example, if Professor Smith's research duties fell within the permitted exceptions, and these comprised 30% of her role, is that still 'some of the duties' even although such a high proportion of the total? Or would the notion of 'some of the duties' simply refer to the number of duties that the employee cannot perform rather than the proportion. That is, is it still only 'some of the duties' when there are three or four duties the employee cannot perform as opposed to only one or two? And would it in turn depend on the complexity, or the total number, of duties they have to perform, e.g., a job involving 25 discrete tasks, as opposed to three?

Finally, could it be possible to interpret 'some of the duties' to be 'some of all of the duties'?

The scheme of the Act provides some indicia. The duties referred to are the duties that fall within the permitted exceptions. Therefore they are duties that the disabled employee could not perform without special services or facilities that it would not be reasonable for the employer to provide, or that they could not perform without an unreasonable risk of harm arising. As discussed previously, the provision of 'special services or facilities' is most likely to mean those services or facilities that are required to enable the disabled employee to perform the essential duties of the position. Therefore, the task reallocation proviso must also apply to these essential duties, even if only to 'some' of them.

Furthermore, the employer is expected to make 'some adjustment' to their activities to reallocate the duties that the disabled employee cannot perform. So it seems unlikely this would apply only to peripheral or non-essential duties. It is

[508] Thomson, above n282.

more likely the obligation would extend to include some (but perhaps not many) of the essential duties, as well as non-essential or peripheral duties, of the position.

Other provisions in the HRA (particularly those amended in 2008) reinforce this interpretation (that 'some of the duties' includes some of the essential duties), as they appear to have this focus.[509]

Additionally, looking at the scheme of the Act, interpretation may be aided by the manner in which the task reallocation proviso applies in relation to permitted exceptions for other prohibited grounds of discrimination.[510] For some of those grounds, employer obligations to accommodate the employee clearly apply equally to both essential duties and peripheral duties. For example, the prohibited ground of religion requires the employer to accommodate adherence to religious practice,[511] and religious practice may mean the employee cannot work certain days. Although being able to work Saturdays may be considered essential to a position (especially when it is the busiest working day for the employer), if religious practice means an employee cannot work that day, it has been held that the employer must accommodate this.[512] Age discrimination has a defence of a GOQ.[513] It clearly applies to the essential duties of the position (for example, a pilot being under a certain age to fly plane in USA airspace). But if this defence is made out, it is still subject to the task reallocation proviso.[514]

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[509] Although they apply in different contexts, it is appropriate to consider the implication of the provisions that were amended in 2008, as they were inserted to ensure compliance with the UNCRPD. The amended provisions contain positive obligations to ensure the disabled person has access to essential roles and benefits of firms and organisations to which the provisions apply. For example, firms must provide accommodation to enable the disabled employee to be accepted as a partner, and to ensure they are able to receive entitlements to shares and profits (section 36A). The ability to become a partner and participate in entitlements could be considered essential or core facets of being part of a firm or partnership. Thus, the scheme of the Act suggests that accommodation applies to the essential matters to which the provisions apply. Accordingly, for employment, the potential accommodation provisions should also apply to the essential elements or core facets of employment, including the ability to perform the essential duties of the position.

[510] The task reallocation proviso applies to all exceptions to unlawful treatment for all prohibited grounds of discrimination. For consistency, therefore, the same approach to the interpretation of these provisions should probably be taken.

[511] Human Rights Act 1993, s28(3). The employer is required to accommodate the practice unless any adjustment to the employer's activities would cause unreasonable disruption.

[512] *Meulenbroek v Vision Antenna Systems Ltd*, above n164.

[513] Human Rights Act 1993, s30.

[514] *McAlister v Air New Zealand Ltd*, above n97. The main thrust of the case before the Supreme Court was the selection of the correct comparator. However, the Court held that a defence of a GOQ was available to Air New Zealand, and referred the case back to the Employment Court to see if the employer could

Accordingly, as the exceptions apply to the essential duties of a position for these other grounds of discrimination, the task reallocation proviso for disability should be read in a similar way.

Nonetheless, this interpretation may not accord well with the purposes of the HRA. Its effect is that, if those essential duties can be reallocated, the employer must continue to employ an employee who is no longer performing all key duties of the position for which they were hired. Although this fits with the purpose to protect the rights of the disabled, it is a significant restriction on the employer's managerial prerogative.[515] Nevertheless, that prerogative is still protected to some degree because the legislation only requires 'some' adjustment that does not 'unreasonably disrupt' their activities. This limits the accommodation required. Therefore, on this interpretation, both the employer and the mentally disabled employee's rights would remain adequately protected, even when 'some of the duties' that must be relocated include the essential duties of the position.

This appears to be the approach taken in *Atley v Southland District Health Board.*[516] The Authority interpreted 'some of the duties' to mean all of the duties but only during some time periods (in this case, night shifts), despite the employer claiming that being able to work night shifts was an essential requirement of that position.

Thus, on balance, the purpose and legislative history of the HRA both suggest that the best interpretation of the 'duties of the position' would extend it to the inherent or essential duties of the position. This means, contrary to the tenets of employment law, that the disabled employee who cannot perform some of these essential duties should not be treated detrimentally if another employee is able to perform them without unreasonable disruption to the employer.

To bring the interpretation closer to the usual tenets of labour law, 'some of the duties' would need to be interpreted to mean the disabled employee must be able to perform all essential duties at least some of the time *and* perform all their remaining duties all the time. For example, if driving was an essential duty, then, if an employee who could drive in daylight, but not after dark due to visual disability, can perform this essential duty some of the time, then, providing they could perform all other duties all the time, their inability to drive after dark could be accommodated through task reallocation.

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have reasonably accommodated McAlister, as the section 35 qualification to the exceptions had not been addressed by the Employment Court previously.

[515] Significantly, this could mean that an employee, who could otherwise be justifiably dismissed on the substantive ground of non-performance of some essential element of a position, might successfully claim that their dismissal was unlawful discrimination, if those essential duties could be reallocated.

[516] *Atley v Southland District Health Board*, above n84. The employee was a nurse who suffered from mild bi-polar disorder and working night shifts would destabilize her condition. The hospital policy for emergency department nurses was that they had to work all three shifts, and they redeployed her. The HRRT found that the hospital could have reasonably accommodated her needs, as other nurses could have, without unreasonable disruption, covered her night shifts.

However, this interpretation fails to protect the disabled employee adequately. In particular, when the essential duty that the disabled employee is unable to perform (at any time) only forms a small part of their overall duties, this interpretation seems overly restrictive. For example, an employee who is employed to manually restock supermarket shelves may have a small but core duty of driving a forklift to transport the goods from the delivery truck to the storeroom on a daily basis. If the employee is unable to drive the forklift due to the effects of medication, but can still perform all other elements of the job, it would seem contrary to the purposes of the provision that this inability to perform this one small essential duty *at any time* would be enough for the task reallocation proviso not to apply. This interpretation would not protect the rights of the disabled and would be contrary to the purposes of the HRA. Thus, the permanent inability to perform an essential element should not always preclude the task reallocation proviso from applying.

Consideration of the Wider Context

This interpretation, that 'some of the duties' can include essential duties, is supported in the wider context, as it accords with the underlying principles of the UNCRPD. The obligations under the UNCRPD are posed as a general duty of accommodation. No reference is made to particular duties, or to any distinction between essential and peripheral tasks. However, the Convention requires member parties to: 'ensure that reasonable accommodation is provided to persons with disabilities in the workplace', 'promote… job retention', and provide 'assistance in… maintaining employment'.[517] Coupled with this, the UNCRPD's definition of reasonable accommodation requires adjustments to the high threshold of 'disproportionate or undue burden'.[518] This suggests a substantial degree of accommodation by the employer is required. To impose an obligation to accommodate the employee to the point of undue burden, merely to enable the employee to perform peripheral duties, seems counter-productive. The implication is, therefore, that the duty to accommodate applies to essential as well as peripheral duties of the position.

This approach also promotes substantive equality (by enabling the disabled employee to remain in work, even if they cannot perform all the essential duties of the position). Finally, this interpretation is consistent with the social construct of disability as it removes one of the barriers to employment (the barrier being the requirement that the employee must be able to perform all essential duties of the position unaided).

However, this interpretation does not align with some overseas law. In Australia, the DDA Cth specifies that if the employee cannot perform the inherent requirements (essential duties) of the position *even if reasonable adjustments have been made*, then it is not unlawful to discriminate against them.[519] Thus, in Australia, although the duty to accommodate applies to the essential duties of the position, if the employee cannot perform them after their disability has been

[517] United Nations Convention on the Rights of People with Disabilities (2006), Article 27 (1)(i)(k)(e).
[518] At Article 2.
[519] Disability Discrimination Act 1992 (Australia), s21A(1).

reasonably accommodated, then is it lawful to dismiss them. However, the DDA Cth does not have a task reallocation proviso, so provides limited assistance in interpretation.

Finally, what still remains unclear is the overall proportion of duties that could constitute 'some' of the duties. That is, is there a limit to the percentage of duties that could be reallocated before this becomes either unreasonable, or effectively amounts to a redeployment to a different position? The HRA does not require the employer to redeploy a disabled employee,[520] so there must be a limit as to how many duties (or, if it includes parts of multiple duties, what proportion of those duties) the employer is expected to substitute (before it effectively becomes redeployment). This limit may well be dependent on the answer to the next interpretive issue: the meaning of 'some adjustments of the activities of the employer'. If, for example, it takes little adjustment to reallocate several duties, then it might seem reasonable to extend the obligation to multiple duties. If for example, an employee can no longer drive, and this means they cannot do the company's banking, pick up the mail from the post office, and deliver goods to customers, but another employee could easily do all these duties with minimal adjustment to the activities of the employer, then such an interpretation would be apposite. However, if that employer would have to make large adjustments to cater for this (perhaps changing the working hours of other employees to ensure someone who can drive is available when the banks are open, or at suitable times for customer deliveries) then interpreting 'some of the duties' to encompass multiple duties may be inapposite.

Nonetheless, it seems clear that 'some of the duties' may refer to all of the duties of the position, but during a limited period of time.[521] Thus, the disabled employee should not be treated detrimentally if they are unable to work certain shifts, or even, perhaps, if they are unable to work full shifts (that is, they need reduced or flexible hours). Accommodating these limitations may require some adjustment by the employer, to the point of unreasonable disruption, which will be discussed in the next section.

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[520] Like New Zealand, the UK and Australia do not impose a general duty to redeploy an employee as part of reasonable accommodation. This seems counterintuitive, as in some circumstances redeployment would seem the most appropriate means of keeping the mentally disabled employee in employment. Liisberg considers that even contemplating redeployment would be an improvement: "Clearly, different countries have different interpretations of when a duty to place a person in a different position would constitute a disproportionate burden, but even a duty to show that reassignment to another position would constitute a disproportionate burden would be an improvement, compared to having no duty to make such an evaluation": Maria Ventegodt Liisberg "Flexicurity and Employment of Persons with Disability in Europe in a Contemporary Disability Human Rights Perspective" in *European Yearbook of Disability Law* (Intersentia, 2013) at 151.

[521] *Atley v Southland District Health Board*, above n84; *Meulenbroek v Vision Antenna Systems Ltd*, above n164; *Nakarawa v AFFCO New Zealand Limited*, above n127.

'Some of the Duties of the Position' and the Professor Smith Scenario

These interpretive issues, and the potential consequences, can be illustrated with the Professor Smith scenario.

Let us assume that Professor Smith cannot currently undertake research and publication duties without special services or facilities (in the form of a research assistant), or (potentially) without risk of harm to herself (if the stress of trying to research will exacerbate her mental disability). Following the preferred interpretation above, if another staff member could perform her research duties without undue disruption to the university, then Professor Smith should not be subjected to detriment for failure to research and publish. Nonetheless, two issues still arise. Firstly, another staff member cannot publish in Professor Smith's name, so Professor Smith's PBRF rating would still be affected, and this may impact on whether she is considered 'qualified' for work. Potentially she may be able to co-author papers, although to do so would mean that the other staff member was only taking over part of that duty. So, is sharing a particular duty (rather than reallocating that duty in its entirety to another employee) covered by the phrase 'some of the duties' that the employer is obliged to reallocate? Although unclear from the text, it seems reasonable to assume that reallocation of duties could mean 'some duties' to mean sharing duties as this fits within the general purpose of the provision. Nonetheless, while the provision of the research assistant may solve the problem for that particular duty, Professor Smith is still under-performing in her teaching and supervisory roles. Thus, even with the reallocation of her research role, the prospect of dismissal for poor performance in her teaching and supervision roles still needs to be considered. This is because, although justified under employment law, adverse treatment on these grounds may still constitute discrimination, as it is still adverse treatment by reason of her disability. Thus, unless the permitted exceptions apply, or Professor Smith is no longer 'qualified for work', the adverse treatment may be unlawful.

However, as discussed previously, it would be difficult to interpret 'tolerating poor performance' as the provision of a service or facility that it might not be reasonable to provide, in the first instance. So these duties (i.e. lecturing and supervision) may not fall under the permitted exceptions at all — and therefore would not be subject to the task reallocation proviso.[522] If the duties do not fall under the permitted exceptions, then the University would have no defence against a claim of discrimination on these grounds. However, they may have a basis to argue that Professor Smith is no longer 'qualified for work', due to her poor performance in these areas, and therefore that her treatment is not discrimination. This claim may have some force, particularly as it is uncertain whether reallocating some of these duties to another staff member (that is, some of the lecturing and some of her supervision roles) would enable Professor Smith to fulfil the remaining duties more effectively.

Even if tolerance of poor performance could be considered providing a service (and therefore fall under the permitted exceptions) this may not help. For even if the reallocation of some of her lecturing and supervision duties would improve

her performance, it still remains unclear whether 'some of the duties' could be interpreted to include 'some parts of all of her duties', and thus, whether the task reallocation proviso applies. Although this interpretation seems unlikely (that 'some' could refer to all of her duties), following a large and liberal, rights-orientated approach to interpretation, it could be possible to interpret it this way. Overall, therefore, this scenario reveals the complexity of the law and the interaction of different uncertainties in its interpretation. The result is that it remains unclear if the University has an obligation to accommodate Professor Smith in these circumstances or not.

'Some of the Duties' Conclusion

Overall, the 'best' interpretation is that 'some of the duties' includes essential duties of the position, and may include all of the duties of a position during a certain period of time. Further clarification may be added by considering the meaning of 'some adjustment' of the activities of the employer, and when this would be an 'unreasonable disruption'.

6.2.2 The Meaning of 'Some Adjustment of the Activities of the Employer'

The obligation to reallocate some of the duties of the disabled employee applies even if it requires the employer to make 'some adjustment' to their activities. Accordingly, the failure to make such an adjustment may make treatment, that would otherwise be excused under the permitted exceptions, discriminatory. 'Some' (adjustment) determines the level of effort that the employer is expected to undertake to accommodate the disabled employee — so where this level is pitched is important.

While to maintain employment and promote greater substantive equality for disabled employees significant adjustments may be required, the employer, who bears the cost of any adjustments, is likely to suggest that 'some adjustments' should be of a more minor nature.

Furthermore, what is meant by the 'activities of the employer' raises further interpretive issues.

'Some Adjustment of the Activities of the Employer': Meaning from the Text, and in the Context of the Act

The text states any adjustments that may be required apply to the activities of the employer, rather than to the position of the employee. This suggests that the adjustment should not involve redeployment of the disabled employee, but continuance in their current role (with reallocation of the duties they cannot perform). Whether the disabled employee could be required to perform alternate duties instead is not clear and may be contentious. Although the managerial prerogative would suggest that the employer has the right to insist the disabled employee undertake alternative duties to remain fully occupied, this may not be appropriate in all circumstances. For example, in the Professor Smith scenario, replacing the research component of her position with additional teaching or supervision may prove counter-productive, if she is not coping with the workload she already has.

Only 'some' adjustment to the employer's activities is required. 'Some' is an elastic term with meanings ranging from a considerable amount ('he went to some trouble to arrange a meeting'), to a minimal amount ('there was some talk of…'). The text suggests the latter meaning, as the adjustments are limited to those that do not 'unreasonably disrupt' the employer's activities — and a substantial adjustment would be more likely to do that.

The 'activities' of the employer could refer to several different things, such as: the business pursuits of the employer (e.g. educating students); the employer's administrative processes (how the university is run); or refer to the activities of positions within the organisation (e.g. teaching by academic staff). Conceivably, it could simply refer to the activities of the actual employer as an individual. From the text, adjusting the activities of the employer could, on a very broad interpretation, require the employer to adjust how their business is run (for example, changing the timing of customer deliveries to daylight hours or increasing freight transit times to accommodate an employee no longer able to drive after dark). However, it is unlikely that this level of adjustment was intended by the legislature, even if after such an adjustment, deliveries and freight transportation could still occur.

Looking within the context of the HRA, there are defences or exceptions to a claim of discrimination in employment for many of the prohibited grounds (such as age, religion or sex). Like disability, when a defence is made out for the adverse treatment of an employee for these different grounds, the task reallocation proviso applies. Therefore, in the scheme of the HRA, the task reallocation proviso acts as a general limit on the managerial prerogative, limiting the employer's ability to dismiss employees, as, even when the adverse treatment would fall within the permitted exceptions, the employer is still obliged to adjust their activities to accommodate the employee (by means of task reallocation) when this is reasonable.

Nevertheless, unreasonably restricting the managerial prerogative is counter to the purposes of the HRA. To mitigate this, the task reallocation proviso should be interpreted so the obligation imposed on the employer is not unduly onerous. Thus, the correct interpretation of 'some adjustments' cover those that are more than minimal, but less than major (e.g. adjustments that do not require a major rearrangement or redeployment of other staff).

In the Professor Smith scenario, multiple staff members might be required to accommodate her needs (that is, a research assistant, a lecturer and a postgraduate supervisor). This may require substantial adjustments of an employer's activities. The adjustment for the University might involve rearranging lecturing schedules so that Professor Smith's lectures could be reallocated to other staff, or diverting research assistants away from other projects to aid her. Altering the duties of multiple staff members is likely to cross the threshold of 'some adjustment', and is unlikely to be achieved without 'unreasonable disruption', as it would affect other staff members, students (who may have to adapt to a new supervisor) and administrative staff who schedule lectures etc.

Thus, interpreting the adjustments as more than minimal but less than major, may mean that, a poorly performing employee like Professor Smith, may not be protected by the task reallocation proviso.

Consideration of the Wider Context

The wider context of international and overseas law may further illuminate the level of adjustments that an employer should make. The obligation to make 'some adjustments' to the activities of the employer corresponds with the UNCRPD definition of reasonable accommodation —"necessary and appropriate modifications and adjustments… where needed in a particular case".[523]

However, the UNCRPD obligation is more robust than that of the HRA task reallocation proviso. Under the UNCRPD, the adjustment is to occur to the point of 'disproportionate or undue burden', whereas the HRA has the lower threshold of no 'unreasonable disruption' to the employer's activities. To interpret the task reallocation proviso in accordance with the UNCRPD, the disruption required would need to be significant (i.e. to the point of imposing an undue burden on the employer), before it becomes unreasonable. However, this interpretation does not sit well within the scheme of the HRA, nor with the multiple purposes of the Act.

As such, interpreting the task reallocation proviso in accordance with New Zealand's obligations under the UNCRPD remains difficult.

Other jurisdictions also impose an obligation of reasonable adjustment. The DDA Cth requires the employer to make reasonable adjustments, and an adjustment is considered reasonable unless it would impose an unjustifiable hardship on the employer.[524] How unjustifiable hardship is to be determined is stipulated in the Act,[525] and provides a means of balancing the divergent interests of the parties. However, the HRA does not incorporate this balancing act in the task reallocation proviso. Instead, it appears to focus on the effect of the adjustment on the employer, not the benefit of such adjustment to the employee (or third parties).[526]

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[523] United Nations Convention on the Rights of Persons with Disabilities (2006), Article 2.

[524] Disability Discrimination Act 1992 (Australia), s4 defines a reasonable adjustment as one that would not impose unjustifiable hardship on the employer. Furthermore, section 21B excuses discrimination, if avoiding the discrimination would impose unjustifiable hardship on the discriminator.

[525] Disability Discrimination Act 1992 (Australia), s11. All the relevant circumstances in the particular case are taken into account, including: the nature of the benefit or detriment likely to accrue to, or to be suffered by, any person concerned; the effect of the disability of any person concerned; the financial circumstances, and the estimated amount of expenditure required to be made, by the first person; the availability of financial and other assistance to the first person; and any relevant action plans given to the Commission under section 64.

[526] Adjustments made for the disabled employee may also benefit third parties, such as other employees. For example, the employee taking over the reallocated duties may benefit from a change in working hours, or the hedonistic benefit of undertaking a new duty, or having more variety in their duties because of the

Although the focus of the DDA Cth may appear different to the HRA, arguably the legislation has the same effect. Under the DDA Cth, the duty to make reasonable adjustments focuses on whether the failure to make the reasonable adjustment would treat the disabled employee less favourably than other employees without the disability, and therefore would be discrimination. The focus of the HRA's task reallocation proviso is to limit when the permitted exceptions, which excuse discrimination, apply. The effect of this is that it ensures the employee who cannot perform some duties is not treated less favourably than the non-disabled employee, when those duties could be reallocated. Both statutes, therefore, require adjustment of the employer's activities to ensure the employee is not treated less favourably than non-disabled employees.

Some Adjustment of the Activities of the Employer: Conclusion

The best interpretation of this phrase, then, is that 'some adjustments' are those that would be more than minimal but would not impose an undue burden on the employer. The effect on other staff, clients or consumers may be factors in determining this.

However, this interpretation does little to enable the disabled employee to gain greater substantive equality. Furthermore, the adjustments required are only to those that do not cause 'unreasonable disruption' to the employer's activities.

6.2.3 The Meaning of 'Unreasonable Disruption'

The duties of the disabled employee need only be reallocated if this does not involve unreasonable disruption to the activities of the employer. Once again, this limitation balances the employer's managerial prerogative and the disabled employee's rights.

Unreasonable disruption was discussed in the previous chapter, in the context of reducing a risk of harm to normal.[527] The analysis in that section concluded the disruption need not impose undue hardship on the employer before it would be unreasonable.[528] The test is lower than that, but establishing a more precise meaning is difficult. In *Nakarawa v AFFECO* the HRRT, rather unhelpfully, said:[529]

> The term "unreasonably disrupt the employer's activities" is a relative term and cannot be given a hard and fast meaning. Each case will necessarily depend on its own facts and circumstances and it will come down to a determination of "reasonableness"

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reallocation. Emens argues that these third party benefits should be taken into account when considering the reasonableness of an accommodation (Emens, above n12 at 844.

[527] See 5.3.3.

[528] The previous chapter discussed interpretation of 'some disruption' using the spiral approach and is not repeated here. Instead, the focus of this section is on substantive issues that arise as a result of the indeterminacy of its meaning.

[529] *Nakarawa v AFFCO New Zealand Limited*, above n127 at [74.7]. Although this was referring to accommodation of religious belief under the HRA s28(3), the same reasoning should apply to s35 (which the HRRT did not need to address in this case).

> under the unique circumstances of the particular employer-employee relationship.

Unreasonable disruption, in the context of the task reallocation proviso, may focus on two main areas of concern for the employer: first, the financial cost of reallocating duties, and second the impact this reallocation of duties may have on other employees, customers or consumers.

The financial cost and impact on consumers was discussed in *Meulenbroek v Vision Antenna Systems Ltd.* The HRRT acknowledged the impact of these:[530]

> We do not doubt the commercial imperative that Vision take into account the need to perform to the standards agreed to with its largest client. Nor do we doubt the need for Vision to take into account any financial burden that may be involved in accommodating a practice…

Nonetheless, short of undue hardship, it is unclear how much financial cost the employer is expected to bear before it becomes unreasonable. Although the employer is not expected to hire additional employees to enable the reallocation of duties,[531] there may still be costs associated with reallocation. For example, it is not clear whether the disabled employee is expected to undertake other duties in lieu of the ones they cannot perform. Arguably, as the adjustments to be made apply to the activities of the employer and not the activities of the disabled employee, it may be that substitution of work is not required. In this case, there will be costs to the employer, as the employer may then be employing someone who is idle, or non-productive, part of the time, and consequently not producing an income for the employer, and yet remains on a full wage.

The corollary is that, in the absence of work substitution, the disabled employee's reallocated duties become additional work that must be catered for. That is, either some other employee is expected to work 'over capacity', to complete the reallocated task as well as their own job, or some of their duties must be reallocated, perpetuating the problem.[532] This is likely to be considered an unreasonable disruption to the employer's activities.

Accordingly, to avoid reallocation being an unreasonable disruption, it would seem that the disabled employee must replace the work they cannot perform with other duties. The problem to avoid is the multiple reshuffling of duties between several employees which might constitute an unreasonable disruption to the employer's activities.

Furthermore, even if such shuffling of work could be implied into the task reallocation proviso, depending on the nature of the disabled employee's disability, this may not be appropriate (for example, when the additional stress

[530] *Meulenbroek v Vision Antenna Systems Ltd*, above n164.

[531] As the task reallocation proviso applies when 'some other employee' could perform the task, this must mean other current employees.

[532] For example, if the disabled employee does not perform 20% of their duties, then either another staff member works at 120%, or some of their duties must be apportioned to other staff (creating a domino effect).

of taking on new tasks might aggravate the disabled employee's anxiety disorder or depression).

How the reallocation of duties will affect other employees is also a consideration for the employer.[533] There must be situations where the impact of reallocation of duties on other employees is enough to be an unreasonable disruption to the employer's business. Take, for example, reallocating night driving duties. The impact on the person taking over the duty may be significant (for them and their family) if they do not usually work nights, and may influence whether they wish to remain employed at that workplace.[534] Furthermore, if the disabled employee now must perform some of the other employee's duties, they may be less efficient or effective as they learn the new tasks, which may cause consumers or clients to take their business elsewhere (adversely affecting the reputation of the business). This could also be viewed as unreasonable disruption to the employer's business.

Thus, it seems that the threshold for reallocation of duties becoming 'unreasonable' may easily be met, and may substantially limit the obligation of reasonable accommodation that the task reallocation proviso appears to grant the disabled employee.

6.2.4 Conclusion: A Limited Obligation

The spiral approach to interpretation suggests that the task reallocation proviso, while requiring the employer to accommodate the mentally disabled employee through partial task reallocation, requires only limited accommodation, and so provides only minimal protection for the mentally disabled employee. The employer seems only required to make modest adjustments to their activities, and the threshold for unreasonable disruption is set relatively low. Furthermore, the HRA does not explicitly require that the benefit to the mentally disabled employee be a factor when considering the adjustments to make. Instead, it merely suggests that when the employer can, with minor disruption, substitute another employee to perform some of the disabled employee's duties, they must do so.

Nonetheless, the adjustments required should extend to some of the essential duties of the position, or at least to the essential duties during some period of time. This approach does provide the disabled employee with more protection than is available under the usual rules of employment law. Additionally, a large and liberal interpretation may enable the provision to be interpreted so that employees may be excused from working some shifts, or certain hours. However, for employees who require tolerance of poor performance in general, rather than substitution of certain duties, it does not provide additional protection.

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[533] The HRRT has held that concerns of others based on attitudes inconsistent with human rights are irrelevant (*Meulenbroek v Vision Antenna Systems Ltd*, above n164 at [157]).

[534] The impact must effect more than the morale of the other employee, as the HRRT has held that the morale other staff is not a consideration (*Meulenbroek v Vision Antenna Systems Ltd* above n164 at [151]).

Therefore, while this provision might seem to balance the interests of the parties fairly, it does little to further the disabled employee's aim to achieve greater substantive equality. It may be then, that for the disabled employee to achieve this, a different model of law is required, where the interests of the employer and disabled employee do not have to be balanced in such a manner. This will be discussed in the final chapter.

Nonetheless, what needs to be examined next is the effect and limitations of the permitted exceptions and the task reallocation proviso, taken as a whole.

6.3 The Potential Accommodation Provisions as a Whole

Having identified the 'best' interpretation (and its limitations) for the permitted exceptions and task reallocation proviso individually, the final matter is the overall effect of these provisions, as a whole. This is because it is the whole of the statute that ultimately requires interpretation.

6.3.1 The Potential Impact on the Meaning of 'Qualified for Work'

The first issue concerns the effect of the potential accommodation provisions on the interpretation of one of the earlier matters considered in this thesis: the meaning of 'qualified for work' in section 22.

As discussed in Chapter 4, a narrow interpretation of 'qualified for work' could require the employee to be able to perform all the essential duties of the position, and this approach is consistent with general employment law. However, this thesis argues that 'qualified for work' should be interpreted liberally: that is, the disabled employee need not be able to perform *all* the essential duties of the position to be considered 'qualified'. Assessing whether the disabled employee was 'qualified for work' at time T1, will give rise to a rebuttable presumption of qualification (as an employee who is not qualified is unlikely to have been offered the position initially).[535] This approach means the employee is not screened out from cover by section 22 before their treatment is assessed against the potential accommodation provisions of the HRA. This gives effect to the full scheme of the HRA. The effect of the accommodation provisions on the meaning of 'qualified' can be illustrated below.

The task reallocation proviso for example, implies that the employee may still be considered 'qualified' for work, even when they are unable perform some of the duties of the position — including, as argued above, some of the essential duties of the position — if those duties could be reallocated. Taking this into consideration, the scheme of the HRA suggests that whether an employee is 'qualified for work' should be assessed *after* the employee's disability has been reasonably accommodated by the provision of special services or facilities, or by the reallocation of some duties. Nevertheless, if the employee cannot be accommodated in this way, then their inability to perform some essential duties of the position could mean that they are no longer qualified for work (that is, the presumption of qualification would be rebutted).

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[535] This presumption would be rebutted if the disabled employee's performance was so poor that they are in effect not performing the essential duties of their position. For further discussion see 4.3.

So the correct interpretation of 'qualified for work' would be that an employee is qualified for work, when, after the provision of reasonable services or facilities, or task reallocation, they are able to perform the (remaining) essential duties of the position.

Nevertheless, this does not clarify the problem of the proportion of the essential duties that the employee must be able to perform without reallocation, or how much disruption the employer must tolerate. Consequently, establishing whether the employee is 'qualified' may still be controversial.

Accordingly, the meaning of 'qualified for work' may also benefit from legislative reform, via statutory definition, or guidelines.

6.3.2 The Lack of Clarity and Certainty

Thus, even using the spiral approach, there are numerous interpretive difficulties remain with the potential accommodation provisions of the HRA. These arise in part because the permitted exceptions are expressed as defences and not as a specific obligation of reasonable accommodation, and in part due to the inelegant drafting of the legislation.[536] Consequently, for disability at least, the discrimination in employment provisions of the HRA lack clarity and certainty.

The failure to define key terms results in uncertainty. Furthermore, the complex, interweaving nature of the provisions means phrases in one may influence or determine the meaning of another, earlier, provision. Consequently, the risk is that, unless the disabled employee's treatment is evaluated against the whole scheme of the Act, they may be screened out under section 22, even when their employer could have accommodated them.

Terms such as 'qualified for work', 'services' or 'facilities', are capable of multiple meanings, and the ambit of these terms remains unclear, even using the spiral approach. Phrases such as 'risk of harm', 'unreasonable disruption', 'reasonable measures', 'some adjustment', and 'some of the duties' of the position' are elastic, and the threshold for each is difficult to predict.

Furthermore, the drafting of the provisions is convoluted and long-winded. The task reallocation proviso particularly, by qualifying the permitted exceptions, constitutes an exception to an exception. This means a complicated analysis is required to assess firstly if the employer has a valid defence, and secondly if this defence then fails, because the employee could have been accommodated. A simpler approach would be to have a standalone provision requiring reasonable accommodation for the disabled in employment.

The most problematic issue for the potential accommodation provisions is, however, that the permitted exceptions are defences to a claim of discrimination, and not a positive obligation. An obligation of reasonable accommodation might be inferred from these defences, but interpretive issues then arise over whether

[536] The Supreme Court in *McAlister v Air New Zealand Ltd*, above n97 at [26] when assessing the application of the GOQ for age discrimination, commented that the drafting of the discrimination in employment provisions in the ERA as "hardly a model of clarity". These provisions are essentially similar to the HRA.

this inferred obligation only applies to the subject matter of the defences (i.e., to the unreasonable provision of 'special services or facilities', and taking measures to reduce a 'risk of harm' to normal), or if it creates a more general obligation.

Thus, for clarity, a clear positive duty of reasonable accommodation is required. This will ensure the employer (and the disabled employee) are aware of the employer's obligations, as well as ensuring that New Zealand meets its obligations under the UNCRPD.

6.3.3 The Uncertain Ambit of Reasonable Accommodation

Even so, it is possible to infer a limited obligation of reasonable accommodation from the totality of the provisions. Such an inferred obligation to accommodate the disabled employee would fulfil the dual purposes of the HRA by striking a fair balance between the two.

Nonetheless, it is uncertain whether this approach reflects the legislative intent. The legislature did not specifically incorporate a positive obligation of reasonable accommodation into the employment provisions at the time of enactment of the HRA, and nor has it elected to do so since. Even when New Zealand amended the HRA, to ensure compliance with the UNCRPD prior to its ratification in 2008, it chose not to amend the discrimination in employment provisions. This may suggest the intention was to keep the potential accommodation provisions as a defence only.

Arguably, in some circumstances, the general effect of the potential accommodation provisions may be the same, regardless of whether they are viewed as an obligation or as a defence. This is because the unreasonable to provide special assistance defence, or the unreasonable risk of harm defence, will not be made out if reasonable 'services or facilities' could have been provided, or reasonable measures could have been taken to reduce a risk of harm to normal. The effect is that the employer will be viewed as acting unlawfully, whether it is viewed as the failure to meet a duty of accommodation, or due to a failure to establish a defence to a valid claim of discrimination. In either case, remedies might lie against them.

However, a disabled employee might be better protected if, in addition to the defences, there was a more general duty of reasonable accommodation in the HRA. A general duty could be more wide ranging in effect — it may oblige the employer to act positively to accommodate the employee beyond the provision of what might be narrowly defined as 'services or facilities'. It could include things like toleration of poor performance (for a period of time at least), reducing workloads, providing extended sick leave, etc. Even electing not to institute a PIP when performance drops due to mental disability might be considered a reasonable accommodation.[537]

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[537] In *Quebec (Commission des normes, de l'équité, de la santé et de la sécurité du travail) v Caron*, above n389 at [92] the Supreme Court of Canada held that 'inflexibility, short of undue hardship, in the application of an employer's employment standards is a failure to accommodate and, consequently, a discriminatory practice'.

6.3.4 Potential Consequences: The Choice of Comparator

Furthermore, it could be argued, imposing a positive duty of reasonable accommodation on the employer would confer a corresponding right to receive reasonable accommodation on the disabled employee.[538] Thus, the employee would not need to raise an initial claim of disadvantage or discrimination in order to be accommodated, but instead could assert their enforceable right to accommodation from the outset.

The problem with failure to have a specific duty (and corresponding right) to accommodate was amply demonstrated in DDA Cth, prior to its amendment in 2009. As the report on the Act stated:[539]

> Until recently, it had been presumed that the DDA obliged affected organisations to make 'reasonable adjustments' to accommodate the needs of people with disabilities. Although the term 'reasonable adjustment' does not appear in the DDA, various features of the Act seemed to imply such an obligation. However, a recent High Court decision questioned this presumption and appears to have narrowed significantly the protection that the Act was previously thought to provide.

This report was referring to *Purvis v NSW*,[540] where, controversially, the High Court selected a comparator that included the manifestation of the claimant Daniel's disability (which was a propensity for violence). Accordingly, the Court found that, as the school would have treated another violent student in the same way, there was no discrimination when Daniel was excluded from school. It has been suggested that the choice of comparator was influenced by the lack of a positive obligation of reasonable accommodation accompanied with a defence of undue hardship. Without a defence of undue hardship for the school to rely on, majority of the High Court appeared to select a suitable comparator to reach the desired outcome.[541] The corollary was, however, that this choice of comparator effectively reduced the protections of the Act for the disabled. That is because, when the manifestations of the disability were implied into the comparator, it

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[538] Jeremy Bentham argues that rights and obligations are inseparable so that 'it is not possible to create a right in favour of one, except by creating a corresponding obligation imposed upon the other' (J Bentham "Rights and Obligations" in *Theory of Legislation.* (Routledge Kegan Paul London, 1931) at 94). It seems logical that the reverse is true, that where an obligation exists, there is a corresponding right created. However, this relationship between rights and obligations is contested (Hogg, above n249. A full discussion of this is beyond the scope of this thesis.

[539] Productivity Commission *Review of the Disability Discrimination Act 1992* (Australian Government, 2004) at XL. The case referred to was *Purvis v New South Wales,* above n29, where the High Court held there was no positive obligation to accommodate the student's disability.

[540] *Purvis v New South Wales*, above n29.

[541] Jacob Campbell "Using Anti-Discrimination Law as a Tool of Exclusion — A Critical Analysis of the Disability Discrimination Act 1992 and *Purvis v NSW*" (2005) 5 Macquarie LJ 201 at 218.

was difficult for adverse treatment of the disabled person to be considered discriminatory (as those without disabilities who demonstrated the same behaviours, would also be treated adversely).[542]

In their dissenting judgment, Kirby and McHugh JJ, despite suggesting the Act contained 'recognition' of reasonable accommodation, held there was no legal duty to accommodate the disabled in the DDA Cth,[543] and declined to imply a one into the Act. Kirby and McHugh JJ found that if accommodations had been provided to Daniel then he would not have been treated less favourably (as he would have behaved), and therefore the school's treatment of Daniel would not have been discriminatory.[544] This implies that under the DDA Cth, to escape a finding of discrimination, reasonable accommodation may need to be provided. However, as Campbell points out, the problem with this approach is that it provides no guidance on when reasonable accommodation should be provided.[545]

The same situation could arise in New Zealand, as there is no positive obligation of reasonable accommodation. Thus, it is possible that, as in the decision in *Purvis*, the Court or HRRT might, in situations where the permitted exceptions do not apply, select a comparator to achieve a desired outcome. For example, in the case of mental disability, where there may be some sympathy for an employer who is dealing with an employee with behavioural or performance issues, selecting a comparator who presents the same issues may lead to the conclusion that adverse treatment of the disabled employee is not discriminatory. In the Professor Smith example, she is still 'qualified for work' but performing poorly. As toleration of poor performance is not a service or facility, the University has no defence under the permitted exceptions. It is possible the Court or HRRT, putting the interests of the University above those of Professor Smith, might select a comparator Professor who demonstrates equally poor performance due to laziness (and who would also be dismissed), and thereby avoid a finding of discrimination. Using this type of comparator would significantly reduce the protection of the HRA for disabled employees. A positive obligation of reasonable accommodation would, however, remove this risk.

This reinforces the need for the law to be clarified or reformed. This will be the subject of the following chapter.

6.3.5 Conclusion — Inadequacy of the Current Law

The spiral approach to interpretation confirms that it is possible to infer a duty of reasonable accommodation from the potential accommodation provisions, but this thesis argues that is not the 'best' interpretation. This is because the inferred obligation only provides limited, and uncertain, protection to the disabled employee. Moreover, this inferred obligation does not necessarily fulfil New Zealand's obligations under the UNCRPD. Thus, the current law does not promote substantive equality for disabled employees.

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[542] Above n541.
[543] *Purvis v New South Wales*, above n29 at [105].
[544] At [136].
[545] Campbell, above n333 at 213.

As interpretation fails to adequately resolve the difficulties identified by this thesis, legislative reform is probably required, either by amendment of the HRA, or by enacting new disability discrimination legislation. This will be the subject of the following chapter.

Chapter 7: Accommodating Disability: The Need to Clarify or Reform the Law

> 'Manifestly judicial reform is no sport for the short-winded or for lawyers who are afraid of temporary defeat. Rather must we recall the sound advice given by General Jan Smuts to the students at Oxford: "When enlisted in a good cause, never surrender, for you can never tell what morning reinforcements in flashing armour will come marching over the hilltop".'

Vanderbilt, Arthur T. *Minimum Standards of Judicial Administration* (The Law Centre of New York University, 1949) p xix[546]

7.1 Introduction

The previous chapters have highlighted some of the interpretive difficulties in the HRA for disability discrimination in employment. These difficulties arise in part because of the uncertainty of the language employed, and because of the lack of a positive obligation to reasonably accommodate the disabled in employment. This chapter assesses two possible solutions for these problems: enacting new disability specific legislation or amending the current legislation. It concludes the latter is the best approach. Various amendments to the HRA are then suggested with the aim of clarifying the law in this difficult area, ensuring the HRA fulfils its purposes, and New Zealand meets its obligations under the UNCRPD. This is followed by a brief discussion of the limitations of such amendments, including whether they are capable of achieving the ultimate goal of discrimination law — providing greater substantive equality for the disabled employee.

7.2 Why Interpretation is Not Enough

The analysis in the previous chapters suggests that, even using the 'best' interpretation of the discrimination in employment provisions, adverse treatment of a mentally disabled employee, who is considered to be performing poorly, may still be lawful, even when their poor performance is due to their mental disability. Thus, it may be that, in some situations, the rights of the disabled are not being protected by the legislation. Furthermore, the analysis also suggests that New Zealand may not be fully meeting its obligations under the UNCRPD.

7.2.1 Unresolvable Issues in the Current Legislation

Four main overlapping areas of concern have been identified:

1. It is difficult to interpret the provisions in accordance with the UNCRPD

There are several reasons for this. Firstly, the UNCRPD largely utilises the social construct of disability, whereas the HRA is based on the medical model of disability, which was the dominant view of disability when the HRA was enacted.

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[546] In Eugene Gerhart *Quote It! Memorable Legal Quotations* (Williams S Hein & Co., New York, 1987).

Accordingly, the HRA defines disability in terms of medical conditions, and fails to recognise the disabling impact of social barriers.[547] The focus of the medical model is on amelioration of the person's impairments. Any duty to accommodate disability is aimed simply at amelioration of the effects of these impairments, and does not take into account attitudinal or social barriers, which may be equally disabling. However, the UNCRPD endorses the social construct of disability, which contends that it is not only the person's impairment that causes disability, but the barriers created by an inhospitable society. Thus, the accommodations visualised by the UNCRPD's obligation of reasonable accommodation aim to remove these societal barriers, including attitudinal ones, to enable greater substantive equality for those with disabilities.

Secondly, the focus of the UNCRPD is on achieving greater substantive equality for the disabled (so the actual outcomes, such as maintaining employment, would be the same for the disabled person as for those without disabilities), whereas the HRA is premised on the concept of formal equality, which only requires the disabled employee and non-disabled employee to be treated the same. Interpreting the provisions to achieve greater substantive equality is therefore difficult, as substantive equality may require different, not equal, treatment of the disabled employee.

Thirdly, the HRA does not contain a positive general duty of reasonable accommodation in employment as required by the UNCRPD and, as discussed below, interpreting the potential accommodation provisions in accordance with the positive obligation of reasonable accommodation in the UNCRPD is very difficult.

2. The HRA is premised on formal equality, or equal treatment

Although no clear philosophy underpins New Zealand antidiscrimination law, as discussed above, the HRA appears to be premised on the notion of formal equality (that is, equality of treatment), rather than substantive equality (or equality of outcome).[548] The problem with formal equality is that it compares the

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[547] The New Zealand Disability Strategy states: 'Disability is the process which happens when one group of people create barriers by designing a world only for their way of living, taking no account of the impairments other people have.' (Social Development, above n228 at 1).

[548] McLean suggests that the HRA is concerned with equality of outcome and not merely equal treatment, citing both the reasonable accommodation provisions and the section 73 'measures to achieve equality' as evidence of this (Grant Huscroft and Paul Rishworth *Rights and Freedoms: The New Zealand Bill of Rights Act 1990 and the Human Rights Act 1993* (Brooker's, Wellington, NZ, 1995) at 267). Affirmative action is permitted by section 73, for any group in need of assistance to achieve an equal place with others in the community. Thus, the aim is to achieve equality of outcome. However, to satisfy section 73, evidence about the need for special assistance, and to establish that the action proposed would achieve this end is required (*Amaltal Fishing Company Ltd v Nelson Polytechnic* [1996] NZAR 97 (CRT)). This limits the scope of this provision. Furthermore, this thesis contends that the potential accommodation provisions are too limited to promote any significant steps toward greater substantive equality.

treatment of the mentally disabled employee with that of another similarly situated employee, to ensure they have been treated equally. This may be appropriate for other protected grounds of discrimination (e.g. sex or ethnicity or political belief) where the relevant feature is generally irrelevant to the person's ability to perform the job. However, for disability, where the disabled person's work may be affected by their disability, this comparison may result in a finding that the disabled employee has not been adversely treated compared to a similarly situated one (i.e. one whose ability to work is also compromised). Therefore, the disabled employee may not be protected by the discrimination in employment provisions, even when the reason for their poor performance is their mental disability.

Without clarification of the correct comparator, and clarification that disability includes the consequences or manifestations (such as poor performance) arising from the disability, there is a risk that the disabled employee could be treated adversely, without it being unlawful.

3. The HRA contains no positive duty or obligation of reasonable accommodation

Whilst an obligation of reasonable accommodation might be inferred from the legislation in some circumstances, the boundaries of any such obligation remain unclear. It may be limited to the provision of reasonable services or facilities, and to reasonable measures to reduce a risk of harm. As some of the accommodations the employee may require may not easily fall within the definition of 'services or facilities', and there may be no 'risk of harm' to the employee or others, this means that the employer may not be obliged to accommodate them. In this situation, the HRA would fail to 'better protect' the rights of the disabled.

Furthermore, in many instances, the provisions of the HRA could be fairly interpreted in favour either of the employer or the disabled employee. Consequently, the outcome is uncertain, as the interpretation selected may reflect the political or socio-economic policy preferences of those adjudicating the matter.

Moreover, as this thesis outlined in Chapter 6, inferring a duty of reasonable accommodation from the potential accommodation provisions may not be the 'best' interpretation of these provisions. Thus, even the 'best' interpretation of the text may not be enough to ensure the rights of the mentally disabled employee are protected in employment, or that the principles of substantive equality which underpin the UNCRPD, can be given effect.

4. The current law creates bottlenecks in opportunity

Overall, the failure to reasonably accommodate disability in employment creates what Fishkin refers to as a 'bottleneck' in employment opportunities for the disabled (the amelioration of which, he argues, is the function of anti-discrimination law).[549] In particular, as long as the disabled employee only has

[549] Joseph Fishkin *Bottlenecks: A New Theory of Equal Opportunity* (Oxford Scholarship Online, 2014). As Areheart explains, Fishkin describes bottlenecks as narrow spaces in the opportunity structure through which people must pass if they hope to reach a range of opportunities on the other side. Some of these

the right to equal treatment from the employer, and the employer remains solely responsible for making the accommodation, accommodation of the disabled employee will be limited by the employer's resources. This creates a bottleneck in employment opportunity.

Implementation of a new model of law, based on the social construct of disability might address this bottleneck. Furthermore, by revising the view that disability in employment is solely a matter between the individual employee and employer, and recognising that the problem of accommodating disability in employment needs to be viewed as a broader societal issue, responsibility for accommodating the disabled employee could be repositioned. Then, perhaps, responsibility for accommodation could be met by providing financial support from the wider society to the employer who, in turn, could use these resources to support the disabled employee. This could remove the bottleneck in opportunity for mentally disabled employees.[550]

The above four areas of concern could perhaps be addressed though reform of the current law. The remainder of this chapter explores these suggestions further, discussing the options of enacting new disability discrimination legislation or amending the HRA, concluding that the latter is the better solution to address the interpretive issues raised. Nonetheless, this thesis ultimately concludes that even with the proposed amendments, the current model of law may be ineffective in ensuring adequate accommodation of disability. Therefore, it suggests the current model of disability discrimination law needs to be reviewed, and possibly replaced with a new, social model of disability discrimination law.

7.2.2 The Failure of New Zealand to Meet its Obligations Under the UNCRPD

The previous chapter suggested that, although it might be possible to infer a limited obligation to accommodate the disabled employee from the permitted exceptions, this was not the best interpretation of these provisions. Accordingly, the permitted exceptions act only as a defence for the employer and do not generate a general obligation of reasonable accommodation, and, although this approach might fit well enough with the statutory scheme of the HRA, and with its the dual purposes, it does not ensure that New Zealand fulfils it obligations under the UNCRPD.

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bottlenecks (or restrictions) of opportunities are reasonable (for example, limiting entry to medical school to persons capable of becoming qualified) but others are arbitrary and should be eliminated (Bradley A Areheart and Michael Ashley Stein "The Disability–Employability Divide: Bottlenecks to Equal Opportunity" (2015) 113(6) Mich L Rev 877 at 104).

[550] As a corollary, this change in attitude will also help eliminate the incorrect assumption or stereotype held by some, that disability and employability are binary concepts — that is, you are either employable or you are disabled: Areheart and Stein, above n549 at 107.

The UNCRPD requires state parties to ensure that reasonable accommodation is provided to persons with disabilities in the workplace.[551] Furthermore, the UNCRPD defines failure to reasonably accommodate the disabled as discrimination.[552] However, despite New Zealand ratifying the UNCRPD, the HRA still contains no definition of reasonable accommodation, and imposes no positive obligation on the employer to reasonably accommodate the disabled employee. Nor is failure to reasonably accommodate the disabled employee a standalone ground of discrimination. The New Zealand Government's response, when the Committee for the UNCRPD raised concerns regarding this, was:[553]

> The New Zealand Government is not considering amending section 52 of the Human Rights Act 1993. In *Smith v Air New Zealand Ltd* [2011] NZCA 20, the Court of Appeal considered the definition of "reasonable accommodation" in article 2 of the Convention and interpreted section 52 consistently with that definition. The Court found that, although there is no explicit definition of "reasonable accommodation" in the Act, the Act does apply the concept of "reasonable accommodation" in specific contexts. Once discrimination has been established, the defendant must show it would be unreasonable to require the defendant to provide the goods or services on the same terms and conditions.

Thus, although the Government appears comfortable in its belief that the HRA applies the *concept* of reasonable accommodation, the legislation itself does not appear fully compliant with the UNCRPD. Accordingly, whether New Zealand meets its obligations under the UNCRPD will depend on how the potential accommodation provisions are interpreted. As discussed, however, it appears difficult to interpret the discrimination in employment provisions of the HRA to accord with the underlying principles of the UNCRPD.

The UNCRPD defines reasonable accommodation as:[554]

> … 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.

By focussing on necessary modifications and adjustments, this definition reflects the social construct of disability, and promotes the ideal of substantive equality,

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[551] United Nations Convention on the Rights of People with Disabilities (2006), Article 27(1)(i).

[552] At Article 2.

[553] Committee on the Rights of Persons with Disabilities *List of Issues in Relation to the Initial Report of New Zealand: Addendum Replies of New Zealand to the List of Issues* (Convention on the Rights of Persons with Disabilities, 2014) at 24.

[554] United Nations Convention on the Rights of People with Disabilities (2006), Article 2.

by removing barriers and remedying the harm caused by an inaccessible workplace.[555]

The HRA is premised more on a model of formal equality[556] and on the medical model of disability,[557] which regards the disabled as having needs rather than rights. Consequently, the HRA does not mirror the underlying philosophy of the UNCRPD, and interpreting the HRA in a way that reflects the social model of disability is difficult. For example, under the HRA, disability has been interpreted as applying to only long-term conditions,[558] thus excluding those with short term or temporary disabilities — although those with short-term disability may face the same disabling barriers as those with long-term conditions.[559] This interpretation is inconsistent with the social model of disability promoted by the UNCRPD.[560] In the Professor Smith scenario, the medical model sees her depression as a medical condition that requires treatment to enable her to participate in the workplace, and an approach based on formal equality would only entitle her to be treated the same as other employees. The social model, however, recognises that intolerance of her condition has a disabling impact. Thus, an attitudinal barrier (intolerance) limits her participation in the workforce. The social model would seek to accommodate her disability by

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[555] Arlene Kanter "A Comparative View of Equality under the UN Convention on the Rights of Persons with Disabilities and the Disability Laws of the United States and Canada" (2015) 32 Windsor YB Access to Just 65 at 78. Kanter argues that Article 27 of the UNCRPD challenges traditional anti-discrimination laws and seeks to ensure greater equality for people with disabilities.

[556] Although 'equality' is not mentioned in the HRA (or in the NZBORA), the provisions in the HRA prohibit different treatment, implying the HRA is premised on formal equality.

[557] Under the HRA, unless the condition falls within the exhaustive list of disorders in section 21, the person with the impairment is not covered by the Act. This medical model does not take into consideration the disabling effect of being unable to participate fully and equally in society, which is recognised by the UNCRPD's definition of disability in Article 1. Additionally, the UNCRPD, in the Preamble, recognises that disability is an evolving concept, which permits more interpretive flexibility.

[558] *NZ Amalgamated Engineering Printing and Manufacturing Union Inc v Air New Zealand Ltd* (2004) 7 HRNZ 539 (EC). The Employment Court held that the HRA defines disability "quite widely but contemplates some affliction of a permanent or at least long-term nature, a condition that ordinary people would regard as a handicap (which may be physical or mental or psychological) as opposed to a temporary induced state of unfitness or diminution of ability" (at [213]).

[559] Bell, McGregor and Wilson, above n229 at 284. Nonetheless, as disability under the HRA has no specific duration requirement it should be possible to interpret this provision consistently with the UNCRPD.

[560] Although the definition of disability in Article 2 of the UNCRPD starts: 'Persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments ...', this is an inclusive definition and, as such, does not exclude short-term or temporary disabilities. This is reinforced by the preamble which recognises that disability is an 'evolving concept' (Preamble (e)).

encouraging tolerance of her poor performance, allowing her to maintain employment, with the aim of achieving equality of outcome.

Therefore, for New Zealand to meets its obligations under the Convention, reform of the legislation is required. As Bell comments:[561]

> Given the centrality of reasonable accommodation to the definition of disability in the Convention it is no longer possible to avoid accommodating the requirements of disabled people when it is inconvenient… This may need to involve a rethink of the Act itself — particularly the need for a general obligation to accommodate the needs of disabled people… (footnotes omitted).

The UNCRPD and Overseas Jurisdictions

Before suggesting that New Zealand should make substantial changes to the HRA, it is worth reviewing the extent to which overseas jurisdictions meet their obligations under the UNCRPD, or the problems they have encountered in achieving this.

Like New Zealand, the UK, Australia and Canada have all ratified the UNCRPD.[562] Arguably, the legislation in those countries appears more compliant with the Convention than the HRA, as they contain more clearly defined obligations on the employer to reasonably accommodate (or make 'reasonable adjustments' for) persons with disabilities. Nonetheless, the nature, scope and interpretation of the duty in these jurisdictions has not been without controversy.

In the UK, the EA 2010 contains a 'Duty to make [reasonable] adjustments'[563] and the failure to do so is discrimination.[564] Case law suggests the employee must suggest possible adjustments, leaving the employer to argue why these are not reasonable.[565]

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[561] Bell, McGregor and Wilson, above n229 at 295.

[562] New Zealand (excluding Tokelau), Australia and the UK have ratified the Optional Protocol and the Convention, while Canada has only ratified the Convention. The Optional Protocol allows the Committee on the Rights of Persons with Disabilities to receive and consider communications from individuals or groups who claim to be victims of violations of the UNCRPD in those jurisdictions.

[563] Equality Act 2010 (UK), s20. For the duty to arise s20(3) states: 'The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage'.

[564] Equality Act 2010 (UK), s21.

[565] Roger Blanpain and Frank Hendrickx (eds) *Reasonable Accommodation in the Modern Workplace* (Kluwer Netherlands, 2016). Nonetheless, the UKEAT has held that it is not always the employee who is in the best position to consider possible accommodations, and that the employer must turn their mind to it as well *Cosgrove v Messrs Caesar & Howie* [2001] UKEAT 1432/00 .

Nonetheless, these provisions have been criticised for being 'entirely reactive or responsive' in nature, requiring the employer to know of the employee's disability and of a specific 'provision, criterion or practice' (PCP) that puts the disabled employee at a 'substantial disadvantage' before the duty arises.[566] An additional criticism made is that a pragmatic and formalistic approach to interpretation of the EA 2010 has been taken, rather than a principled or purposive one.[567] Consequently, unless the employee can demonstrate a specific PCP that puts them at a 'substantial disadvantage',[568] no reasonable adjustment need be made.[569] Furthermore, the terms 'provision', 'criterion' and 'practice' pose their own interpretive difficulties, with the case law on the matter being inconsistent.[570]

As a result, it has been argued that the current UK approach makes reasonable accommodation results driven (to make the employee more useful to the employer), and not rights driven (emphasising how the employer could be more helpful to the employee).[571] Lawson argues that if the obligation was formulated as an anticipatory duty this would have greater potential to drive systemic change.[572] An anticipatory duty of accommodation would mean the employer would be obliged to make accommodations that would benefit the employee even when there was no specific disadvantageous PCP. For example, providing other employees, who will be interacting with a workmate with a psychosocial impairment, with specialised training or mentoring, would be an anticipatory reasonable accommodation. This would benefit all parties, as it may stave off

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[566] Anna Lawson "Disability and Employment in the Equality Act 2010: Opportunities Seized, Lost and Generated" (2011) 40(4) ILJ 359at 369.

[567] Colm O'Cinneide and Kimberly Liu "Defining the Limits of Discrimination Law in the United Kingdom: Principle and Pragmatism in Tension" (2015) 15(1-2) Int J Discrim Law 80 at 92.

[568] Equality Act 2010 (UK), s20(3). This provision is the most relevant to mental disability, as the other reasonable accommodation provisions relate to physical alterations or auxiliary aids. An additional hurdle the employee faces is proving they have a disability as defined in the EA 2010. For further discussion on this, see Mark Bell "Mental Health at Work and the Duty to Make Reasonable Adjustments" (2015) 44(2) ILJ 194.

[569] This reactive duty is, however, entirely consistent with the UNCRPD (Lawson, above n566 at 369).

[570] Bell, above n568.

[571] At 205.

[572] Lawson, above n566 at 369. The duty to make reasonable adjustments was discussed in *The Royal Bank of Scotland v Ashton* [2010] UKEAT 0542/09 (under the similar provision in the Disability Discrimination Act 1995). The Employment Appeals Tribunal (UKEAT) held the duty is concerned with outcomes or practical results of the measures that can be taken, and if it is objectively reasonable for the employer to make them. The UKEAT held at [22]: 'The Act when it deals with reasonable adjustments is concerned with outcomes, not with assessing whether those outcomes have been reached by any particular process, or that process is reasonable or unreasonable'.

potential problems arising from the disabled employee's difficult behaviours[573] — but it would require more than modifying an existing policy or practice.

Furthermore, commentators, such as Bell, query whether the approach adopted in the UK to the reasonable adjustment duty is consonant with the UNCRPD, which does not require the existence of a provision, criterion or practice that puts a disabled person at a 'substantial disadvantage' before the duty to accommodate arises.[574] The Convention requires reasonable accommodation be provided in the workplace, and reasonable accommodation is defined as adjustments that are made 'where needed in a particular case… to ensure the enjoyment or exercise of an equal basis of other all human rights'. The phrase 'where needed in a particular case' implies that the obligation exists whenever a disabled employee requires reasonable accommodation (to exercise the human right to work). Thus, the Convention does not restrict the obligation to make accommodation to when a PCP causes a substantial disadvantage to the disabled employee. For example, an employee with an anxiety disorder might benefit from periodic time off to reduce stress, but, unless they can identify a PCP that causes the stress, they have no recourse under the EA 2010. The UNCRPD definition, however, would suggest that accommodation would be required (for example, the provision of extra sick leave), as this would be needed, in the particular case, to enable the employee to keep working.

In addition, the 2017 'review of mental health and employers' suggests that the UK legislation does not provide sufficient protection for those with fluctuating mental health conditions, and does not impose clear accountability on employers to make reasonable adjustments.[575] It seems, therefore, that the duty of reasonable adjustment in the UK is not entirely in accordance with the UNCRPD.

In Australia, the DDA Cth specifically refers to the UNCRPD.[576] Although the Act does not contain a specific duty to accommodate, reasonable accommodation is clearly inferred, as the failure to make 'reasonable adjustments' to the point of unjustifiable hardship is discrimination, when it results in the disabled person being treated 'less favourably'.[577] The scope of the duty was discussed by the

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[573] Lawson, above n566 at 73. Lawson suggests that training of other employees is important to 'allay fears founded in ignorance and to reduce awkwardness which might otherwise be triggered by unconventional behaviour. It may also enable fellow employees to assist the employer in effecting a reasonable accommodation for the disabled person.'

[574] Bell, above n568 at 220; *The Royal Bank of Scotland v Ashton* above n419 at 38.

[575] Dennis Stevenson and Paul Farmer *Thriving at Work: The Independent Review of Mental Health and Employers* (Department for Work and Pensions and Department of Health (UK), 2017) at 50. The authors recommended legislative change to enhance the protection of the disabled employee. The report also suggested that the Equality and Human Rights Commission should take a proactive role in monitoring and taking enforcement action against employers who discriminate.

[576] Disability Discrimination Act 1992 (Australia), s12(8)(ba) (as amended).

[577] Disability Discrimination Act 1992 (Australia), s5(2). Reasonable adjustment is defined in s4(1) as: 'an adjustment to be made by a person is a *reasonable*

Federal Court in *Watts v Australian Postal Corporation.*[578] The Court held the Act should be interpreted in accordance with the UNCRPD,[579] and that the adjustment contemplated is not to the position or equipment, but is:[580]

> an alteration or modification "for" the person, which operates on the person's ability to do the work she or he is employed or appointed to do. The adjustment is to be enabling or facultative. There is… no reason in the text, context or purpose of s 5(2), read with s 4 and within the DDA as a whole, to construe the word "adjustment" in a way which might arbitrarily limit the kinds of modifications or alterations required to enable a disabled worker to perform his or her work….. An adjustment "for" a person may involve only technology, or it may involve only human interactions, or something in between. An adjustment "for" a person may change over time, and may need to be flexible and adaptable.

The aim of the adjustment is to eliminate less favourable treatment because of the disability. The Court, in *Hudson v Australian Broadcasting Corporation,* held in this context:[581]

> "*treated less favourably*" means the disadvantages the PWD [person with the disability] experiences because of his or her disability, not because the discriminator has treated the PWD differently than he or she would treat a person without a disability in circumstances that are not materially different. Subsection 5(2) defines as discrimination a person's treating a PWD no differently than he or she would treat a person who does not have a disability in circumstances where an adjustment could reasonably be made that would overcome or perhaps ameliorate the disadvantages the PWD has because of the disability when compared with persons who do not have the disability in circumstances not materially different.

Thus, it appears the obligation to make reasonable adjustments in the DDA Cth is to ameliorate disadvantage, where needed, which seems on foot with the UNCRPD definition of reasonable accommodation.

However, the ADA NSW is more controversial. In this Act, as with the HRA, the requirement of reasonable accommodation is couched in terms of an exception

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adjustment unless making the adjustment would impose an unjustifiable hardship on the person.'

578 *Watts v Australian Postal Corporation*, above n413.

579 At [20]: 'Although the phrase chosen by the Parliament is slightly different, it is clear that these amendments were made in pursuance of Australia's international obligations under the Convention. If there is a constructional choice, a construction of s 5(2), and those provisions designed to interact with it, which is consistent with those obligations should be preferred, insofar as the text and context otherwise allow'.

580 At [23]-[25].

581*Hudson v Australian Broadcasting Corporation* [2016] FCCA 917 at [29]-[30].

to a defence, rather than a positive obligation.[582] Furthermore, the failure to provide reasonable accommodation is unlawful only if the possible accommodation would enable the disabled employee to a carry out the essential duties of the position. This means the employer is under no obligation to make adjustments to enable the employee to perform peripheral tasks. The New South Wales (NSW) Law Reform Commission pointed out:[583]

> … one may ask why no provision is made for the situation where the disability makes it difficult or impossible to carry out rarely required or unimportant parts of the job, without impinging on the inherent requirements of the particular employment. Surely it is intended that reasonable accommodation of those inabilities should be provided.

This appears contrary to the UNCRPD's requirement to provide adjustments to accommodate the disabled 'where needed'.

Thus, although Australian legislation at Federal level appears generally compliant with the UNCRPD, at State level not all legislation appears compliant.[584]

The Canadian Employment Equity Act 1995 imposes a positive obligation on Federal, public sector, and large private employers[585] to make reasonable accommodations to ensure that qualified individuals from the designated groups (including the disabled) are proportionally represented in the work force (unless this would cause undue hardship to the employer).[586] This positive duty of

[582] Anti-Discrimination Act 1977 (NSW), s49D(4).
[583] Commission, above n387 at 5.70.
[584] Equal Opportunity Act 2010 (VIC), s20 has a positive obligation of reasonable accommodation, and Anti-Discrimination Act 2015 (NT), s24 makes it unlawful to refuse or fail to accommodate disability. However, Discrimination Act 1991 (ACT), s49; Anti-Discrimination Act 1991 (QLD), s35; Equal Opportunity Act 1984 (WA), s66Q; and Anti-Discrimination Act 1998 (TAS), s45 all have as a defence against a claim of discrimination that the disabled employee requires special services or facilities, or other accommodation, the provision of which would impose undue hardship on the employer.
[585] Employment Equity Act 1995 (Canada), s4. The Act applies to federal public administration employers; private employers with 100 or more employees connected with federal or Government work; and public sector employers with more than 100 employees.
[586] Employment Equity Act 1995 (Canada), s5(b). The section specifies that every employer shall implement employment equity by 'instituting such positive policies and practices and making such reasonable accommodations as will ensure that persons in designated groups achieve a degree of representation in each occupational group in the employer's workforce that reflects their representation in (i) the Canadian workforce, or (ii) those segments of the Canadian workforce that are identifiable by qualification, eligibility or geography and from which the employer may reasonably be expected to draw employees.' Furthermore the Act also requires the employer to make an employment equity

reasonable accommodation, coupled with the purpose of the Act, aims to achieve equality in the workplace and give effect:[587]

> to the principle that employment equity means more than treating persons in the same way but also requires special measures and the accommodation of differences.

This fits well with the UNCRPD obligation of reasonable accommodation and promotes substantive equality. However, commentators suggest the Act has had limited success in achieving its purposes.[588]

Additionally, some Canadian provincial human rights legislation imposes a positive duty of reasonable accommodation on the employer.[589] However, the Canadian Charter of Rights and Freedoms does not contain a duty to accommodate, nor is the failure to accommodate considered to be a ground of discrimination.[590] Thus, while Canada to some degree appears to comply with its obligations under the UNCRPD, this obligation varies between the provinces, and may depend on the employing entity.

It appears, then, that even when a positive duty to accommodate is imposed, its scope and application are not without difficulties, and that its interpretation may not be in total accordance with the UNCRPD. Furthermore, overseas jurisdictions demonstrate that, as long as the responsibility for accommodation rests on the employer, the ambit of reasonable accommodation will be contested. Therefore, any amendments New Zealand makes to the HRA, to comply with obligations under the UNCRPD, should consider these issues, and how best to resolve them. As will be discussed, the best way to achieve compliance with the UNCRPD may be to change the current model of law for disability discrimination entirely, so that the responsibility for accommodation of disability does not rest solely on the employer (who has limited resources), but on society as a whole. This would enable a far greater level of accommodation of disability to be possible.

Nonetheless, currently, the New Zealand legislation, which does not contain a positive duty to accommodate, nor treat the failure to do so as a separate ground

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plan, specifying among other things, the reasonable accommodations instituted (s10).

[587] Employment Equity Act 1995 (Canada), s2.

[588] Carol Agocs "Canada's Employment Equity Legislation And Policy, 1987 - 2000: The Gap Between Policy and Practice" (2002) 23(3) Int J Manpow 256; Harish Jain, Frank Horwitz and Christa Wilkin "Employment Equity in Canada and South Africa: a Comparative Review" (2012) 23(1) Int J Hum Resource Manag 1.

[589] For example, the Manitoba Human Rights Code 1987, s(9)(1)(d) makes the failure to reasonably accommodate the employee discrimination. This code (and several other provincial human rights codes) excuse discrimination on the grounds of a *bona fide* occupational requirement (BOR). However, the BOR does not apply to reasonable accommodation: that is, the employee must be reasonably accommodated to the point of undue hardship, before the defence of a BOR is possible.

[590] This was emphasised in *Graham v Canada Post Corporation* [2007] CHRT 40 at [83]-[84]. The Constitution Act 1982 guarantees equality before the law.

of discrimination, is out of step with the more positive obligations imposed in some overseas jurisdictions. Thus, at the very least, New Zealand should consider amending the legislation to align with those jurisdictions and the UNCRPD, and to clarify the obligation to make reasonable accommodation of disabled employees.

7.3 Potential Solutions: Amend or Replace the HRA

As discussed in the previous chapters, several provisions in the HRA contain terms or phrases that pose interpretive difficulties for disability discrimination. These include what is meant by 'qualified for work', identifying when adverse treatment is 'by reason of' disability, and the selection of the most appropriate comparator employee. Additionally, the reasonable accommodation provisions are less than clear.

Although the spiral approach has provided some indications of the 'best' interpretation of the discrimination provisions for disability, the lack of clarity in the legislation means there can be no guarantee a Court or HRRT would interpret the provisions in this way.

Clarifying the current law to solve these interpretive difficulties may be achieved though amending the current Act, or by enacting a separate Disability Discrimination Act. As will be discussed below, there are advantages and disadvantages to each approach.

7.3.1 Amend the HRA

The first option — amending the HRA — has several advantages. It may prove to be the simplest solution, as the legislation is already in place and the majority of the Act may not require alteration. More importantly, amending the HRA has the advantage of keeping discrimination law under one Act, whereas a separate Act, just for disability discrimination, may create a more piecemeal approach to discrimination law, with different Acts applying depending upon the ground of discrimination claimed. When intersectional (or multiple) grounds of discrimination are claimed (e.g. disability and sex discrimination) then assessing the treatment under different provisions, in different Acts, may be more complicated and time-consuming than assessing the treatment under a single Act. This potential problem would be compounded if the Acts had procedural differences or differing remedies.

However, there are disadvantages to simply amending the HRA. The amendments themselves may need to be substantial to meet the objectives outlined, and this could make complex legislation even more complicated. For example, to remove the aim of achieving formal equality for the disabled, and replace it with substantive equality, would require separate provisions to be drafted for disability discrimination (to, for example, remove the comparator component for assessing adverse treatment). Consequently, the HRA would end up having some provisions based on formal equality, plus provisions for disability discrimination based on substantive equality, and this may lead to new interpretive difficulties. Additionally, these new provisions may not reconcile easily with the dual purposes of the Act, as they may overly restrict the managerial prerogative.

These problems might be overcome to some extent by having a separate Part of the HRA dealing with disability discrimination (in all contexts, not just employment). This separate Part could then contain a new definition of disability (or disability discrimination), introducing the social model of disability into the legislation. The provisions for disability discrimination in employment would then be separate to those for the remaining prohibited grounds of discrimination, and the new disability provisions could be drafted to promote substantive equality: for example, by removing the need for a comparator when assessing adverse treatment. The ERA could also be amended, referring to this new Part of the HRA for all matters relating to disability discrimination. This would (for disability discrimination at least) eliminate any textual differences between the two Acts, and should promote consistency in interpretation and findings, regardless of the forum in which the claim was made.[591]

However, again, in cases of intersectional discrimination, this approach may add undue complexity to the law, as the HRRT or Court would be assessing different grounds of discrimination under different Parts of the HRA, with different underlying philosophies and different criteria for assessment. If the grounds were additive (i.e. separate instances of discrimination occurring with different grounds), this may prove to be no more than inconvenient, but for true intersectional discrimination, where the treatment cannot be separated into component parts for different grounds, deciding which ground, and therefore which Part of the Act, the claim should be brought under, would be extremely difficult.[592]

Furthermore, amending the Act to this extent (that is, placing all disability discrimination provisions in the new Part) is tantamount to creating a new Act within an existing one. Consequently, there would be no real advantage compared to creating a separate Act for disability discrimination (the disadvantages of which are outlined below).

Accordingly, this thesis suggests that, if amending the HRA, the best solution would be to amend the current provisions without making a separate Part for general disability discrimination or disability discrimination in employment.

7.3.2 Replace the HRA: A Separate Disability Discrimination Act

Although this thesis argues that the preferred option to clarify the law is amending the current HRA, there would be some advantages in having a separate Act covering all aspects of disability discrimination.

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[591] Currently there are textual differences between the ERA and HRA, which have the potential to result in different findings depending on which Act the claim was raised under. See Chapter 2.3.

[592] The HRRT and Courts have not yet had the opportunity to discuss the approach that should be taken to interpreting the HRA for intersectional grounds of discrimination, but there is nothing in the Act to suggest that the grounds have to be pleaded separately. Chen argues the lack of claims may reflect a failure to identify that the discrimination was intersectional in nature, rather than a lack of this type of discrimination occurring (Mai Chen *The Diversity Matrix: Updating What Diversity Means for Discrimination Laws in the 21st Century* (Super Diversity Centre, 2017) 1 at [64]).

Firstly, the legislation could be framed to achieve greater substantive equality (rather than formal equality) in all contexts of disability discrimination (not just employment). This would promote and protect the rights of the disabled in general, in accordance with the UNCRPD.

Secondly, disability could be redefined in keeping with the social construct of disability, or a mixed social/medical model, similar to that used in the UNCRPD definition.[593] This would reflect the government's policy as outlined in the Disability Strategy,[594] and be consistent with some overseas jurisdictions.[595]

Thirdly, the UNCRPD could be specifically incorporated into New Zealand law via reference to it in the new Act.

Lastly, the ERA could be amended, excluding disability from the s104 discrimination in employment provisions, and instead making it only subject to the provisions in the new Act. This could avoid a piecemeal approach to discrimination law that might otherwise be required in an amended HRA, where disability discrimination would apply to certain provisions, and be excluded from others.

However, there are also substantial disadvantages to having a separate Act for disability discrimination. It could lead to increased complexity for framing claims of discrimination when the claim is based on more than one ground of discrimination (e.g. both sex and disability discrimination).[596] In the same factual context, claims may have to be framed differently for each ground under the different Acts, as there may be different approaches to the question of discrimination and, conceivably, the different Acts may have different

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[593] The UNCRPD's definition of disability is: 'Persons with disabilities include 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' ("United Nations Convention and Optional Protocol on the Rights of Persons with Disabilities" (2007) 46(3) International Legal Materials 443 Article 1). This definition reflects a mixed medical/social model of disability. The reference to impairments illustrates the medical model of disability, while the reference to barriers hindering participation in society denotes the social construct.

[594] Social Development, above n228.

[595] The UK and USA have definitions of disability that are consistent with a mixed medical/social model. However, like New Zealand, the DDA Cth (Australia) and the Canadian Human Rights Act 1977 have definitions based on a purely medical model of disability.

[596] In the USA at least, studies have confirmed the multiplicative, or compounding, effects of disability and gender discrimination in employment. This multiplicative effect further disadvantages the claimant, as they are subjected to discrimination on multiple grounds. For example a disabled woman will discriminated against to a greater degree than an 'able' woman, or a disabled man, would be (David Pettinicchio and Michelle Maroto "Employment Outcomes Among Men and Women with Disabilities: How the Intersection of Gender and Disability Status Shapes Labor Market Inequality" (2017) 10(33) Research in Social Science and Disability 3).

procedures through which a claim is processed.[597] This may result in an unduly complicated process. If it became too complicated (and therefore expensive) for individuals to raise claims of discrimination on multiple grounds, this would hinder rather than further protect human rights.

Furthermore, this increased complexity in the law may have other detrimental effects. The employer, for example, would need to appreciate and understand their obligations under the HRA, the new Act, and the ERA to avoid claims of discrimination on any ground. If the obligations or provisions are subtly different under the different Acts, this will reduce their ability to know and understand their obligations and rights under the law. Likewise, it may prove confusing for the disabled employee, who has to elect the forum in which to pursue their claim of discrimination (particularly if they believe they have been discriminated against on more than one ground).

Furthermore, creating an entirely new Act, just to clarify the disability discrimination in employment provisions, would seem excessive if the remaining provisions in the HRA dealing with disability discrimination, outside of the employment context, do not require alteration.[598]

Additionally, enacting new legislation would require amendments to other Acts (as well as the current HRA). For example, the NZBORA would need to refer to both the new Act and the HRA in its dovetailed provisions about discrimination.[599]

Lastly, when interpreting the provisions of the new Act, it may not be clear whether the Courts should refer to previous case law under the HRA, or make comparison with the text of the current HRA, or whether they should start afresh. The risk is that, if the Courts or HRRT refer to previous case law then the objective of enacting the new legislation to resolve the current interpretive difficulties may be defeated. That is, the objective of attaining greater substantive equality may be subjugated, if the same decision-making approach is taken as for cases based on formal equality. If the HRA is amended the adjudicators would need to consider precisely what the legislature has changed — and why.[600] There

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[597] As discussed in Chapter 2, currently, an employee may raise a claim of discrimination under the HRA, or as a PG under the ERA. Although it would be reasonable to expect that any new disability discrimination legislation would be managed through the Human Rights Commission, following the same processes as the HRA, it is possible a separate specialist tribunal might be established to deal with disability discrimination.

[598] The provisions relating to disability discrimination in other contexts are outside the purview of this thesis and have therefore not been examined in any depth. It is noteworthy, however, that interpretive issues for reasonable accommodation of disability have been discussed in cases unrelated to employment (for example, *Smith v Air New Zealand Ltd*, above n57). This may suggest that disability discrimination law in general would benefit from review.

[599] There are at least 60 other Acts that refer to the Human Rights Act, and could, therefore, require amending.

[600] The Court will need to interpret the new provisions, which would include examining why an amendment was made, and the effect of it. The decision by

is a risk that presumptions might be made that the purpose of a new Act is to consolidate the law of disability discrimination, rather than make substantive changes to the law.

Therefore, taking into consideration all the factors outlined above, the simplest and most effective way of 'curing' the current deficiencies in the HRA for disability discrimination would be to amend its current provisions. This will be the focus of the remainder of this chapter.

7.4 Potential Amendments to the HRA

The following amendments to the HRA might cure the interpretive difficulties outlined in the previous chapters. The aim of these amendments is to cure the uncertainty in the law, to ensure the purposes of the HRA are met, and to enable New Zealand to meet its obligations under the UNCRPD. Furthermore, these amendments aim to achieve greater substantive equality for those with disabilities, by allowing them to receive 'different' treatment, producing outcomes more equivalent to those of non-disabled persons. The proposed amendments are to:

1. Remove the comparator requirement for disability.
2. Include a definition of 'qualified for work'.
3. Include the consequences arising from disability within the definition of disability.
4. Include a specific obligation of reasonable accommodation in employment.
5. Include a definition of reasonable accommodation.
6. Make the failure to reasonably accommodate the disabled a ground of discrimination.

The following discussion focuses on how these amendments would achieve these aims.

7.4.1 Remove the Need for a Comparator

As discussed in chapter 4, depending on the selection of the comparator, the treatment of the disabled employee may not be found adverse when compared to that of another similarly situated employee. This is because it is not clear whether the consequence of the disability (for example, poor performance) is to be included in the comparative circumstances. That is, would a poorly performing disabled employee be compared with another poorly performing non-disabled employee, or with a normally performing one? If the former, the disabled employer is not likely to emerge with a favourable outcome (as that poorly performing employee might also be adversely treated). Under this approach, the treatment of the disabled employee may not be considered discriminatory, even when the cause of the treatment is a mental disability.

To achieve greater substantive equality, so that the disabled employee retains their employment, this comparative element should be removed. Instead, the

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Employment Court in *Angus v Ports of Auckland Ltd (No 2)*, above n75 (when the ERA was amended to change the 'test of justification') is an example of this process.

focus should be on whether they were treated unfavourably because of their disability (or due to something arising in consequence of their disability). Removing the comparative elements of the HRA would allow the treatment to be assessed to see if it was unfavourable, and if it was due to disability (which would be discrimination).

This non-comparative approach is utilised by the UK, where 'discrimination arising from disability' occurs when 'A treats B unfavourably because of something arising in consequence of B's disability.'[601] In this situation, the claimant must show that there has been unfavourable treatment,[602] and by whom, but no question of comparison arises.[603] The finding of unfavourable treatment seldom appears to be contentious.[604] However, under the EA 2010,

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[601] Equality Act 2010 (UK), s15(1). This is a different test to that of direct discrimination, which still requires adverse treatment in comparison to other employees. The Equality Act has separate provisions for direct discrimination, indirect discrimination, and discrimination arising from disability. Therefore, it is possible under the UK law to find no direct discrimination (which requires a comparator (EA 2010, s13)), whilst simultaneously finding there is 'discrimination arising from disability', as there has been unfavourable treatment due to the consequences of disability. The UKEAT, in *IPC Media v Millar*, held there is nothing inherently wrong in this, as: "it is precisely because there is a real difference between the two types of discrimination that section 15 is included in the Act"(*IPC Media v Millar* [2013] IRLR 707 (UKEAT) at [36]).

[602] There are two steps for establishing 'unfavourable treatment' under this provision — first that the disability has a consequence arising from it (the 'something') and, secondly, that 'something' causes the treatment, i.e. a causal connection (*Weerasinghe v Basildon & Thurrock NHS Foundation Trust* [2016] ICR 305 (UKEAT) at [34]-[36]). Treatment may be considered unfavourable when it places the disabled person at a disadvantage. This, according to the UKEAT, may not always be obvious, and 'Even if an employer thinks that they are acting in the best interests of a disabled person, they may still treat that person unfavourably.' (*T-Systems Ltd v Lewis* [2015] UKEAT 0042/15/JOJ at [25].

[603] *Pnaiser v NHS England & Anor* [2016] IRLR 170 (UKEAT) at [31].

[604] However, the issue did arise in *Williams v Trustees of Swansea University Pension and Assurance Scheme and Another* [2017] EWCA Civ 1008, [2017] IRLR 882. In this case, the claimant, due to ill health, reduced his hours for several years prior to taking medical retirement. Therefore his pension scheme calculation was based upon his part-time hours. If an employee working full time retired, they would have their pension calculated on their full time wage (and therefore, receive a larger amount). The critical question for the Court of Appeal was 'whether treatment which confers advantages on a disabled person, but would have conferred greater advantages had his disability arisen more suddenly, amounts to "unfavourable treatment" within s15.' The Court held it would not. Arguably, had the claimant been compared to an individual without a disability, or the consequences arising from it, then that comparator would be an employee who had worked full time prior to falling ill and immediately retiring. With this comparator, the claimant whose disability meant he had only worked part-time, was treated less favourably by receiving a lower pension. Thus,

unfavourable treatment will not be discrimination if it is a 'proportionate measure for achieving a legitimate aim',[605] and this has been the focus of much litigation.[606]

In Australia, the Disability Discrimination Act (ACT) 1991 and Equal Opportunity Act (Vic) 2010 also define discrimination in terms of 'unfavourable' treatment — that is, treatment which is 'adverse to the complainant's interests'[607] — but without any further qualifier or limitation. In both these jurisdictions, the determination of unfavourable treatment turns on whether the treatment was aimed *toward* the individual person, and the causal connection between the treatment and the attribute.[608]

Thus, removing the comparison aspect for determining discrimination is not without precedent. However, in the New Zealand context, amending the Act to

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arguably, not having a comparator worked against the disabled employee in this instance.

[605] Equality Act 2010 (UK), s15(1)(b).

[606] *Buchanan v The Commissioner of Police of the Metropolis* UKEAT 0112/16, [2016] IRLR 918 ; *Agbakoko v Allied Bakeries* [2015] UKEAT 0340/14/0506/DM; *General Dynamics Information Technology Ltd v Carranza*, above n440; *Land Registry v Houghton & Ors* [2015] UKEAT 0149/14/BA; *IPC Media v Millar*, above n601.

[607] *Re Prezzi and Discrimination Commissioner And Quest Group Pty Ltd* (1996) 39 ALD 729 (ACTAAT) at [24]. This Australian case, decided under the Discrimination Act 1991 (ACT), s8(1) discussed the meaning of 'unfavourable treatment' as this Act defines discrimination using these terms.

[608] The Disability Discrimination Act 1991 (ACT), s8(1)(a) provides a person discriminates against another if they treat or propose to treat a person 'unfavourably' because of the attribute. Section 8(1)(b) applies when a person imposes a condition or requirement that disadvantages the person with the attribute (unless it is 'reasonable' in the circumstances). The effect was discussed in detail in *Edgley v Federal Capital Press of Australia Pty Ltd* [2001] FCA 379. The Federal Court of Australia held that under s8(1)(a) the treatment complained of (whether reasonable or not) must be aimed *toward* the person because of a attribute, whereas s8(1)(b) considers the effect of treatment, and whether it is reasonable. The Federal Court held the two provisions were mutually exclusive. In this case, the Court agreed the complainant had been treated unfavourably (by having to pay for an advertisement in person, rather than by paying on-line or by posting a cheque). However, the treatment was not aimed toward her as an individual, but was a 'requirement or condition' for all persons placing 'adult' advertisements in the paper. Therefore, as it fell under s8(1)(b), the Court did not need to discuss the interpretation of unfavourable treatment or its implications *per se*. In Victoria, the Equal Opportunity Act 2010 (Vic), s8(1) defines direct discrimination as when a person treats another unfavourably due to a protected attribute. Thus, again, the treatment must be directed specifically toward the individual (*Kuyken v Chief Cmr of Police* [2015] VSC 204). The disability need not be the sole reason for the unfavourable treatment, but it must be a substantial reason, and there must be a causal nexus between the attribute and the treatment (*Jemal v Iss Facility Services Pty Ltd* [2015] VCAT 103).

make the test for discrimination solely one of unfavourable treatment may not be straightforward. It would require separate provisions to be drafted for the treatment of employees who have a disability. This could be achieved with the insertion of new, disability specific, provisions into (or alongside) section 22; or via a separate subpart, dealing only with disability discrimination in employment.

The first approach could lead to an unduly complicated array of provisions. However, the latter approach, with a separate part for disability discrimination in employment, may result in a clearer exposition of the law. The new Part could incorporate new provisions (including, for example, the provisions for 'employment of persons with disabilities', reasonable accommodation, and a definition of qualified for work), as well as including the current section 29 permitted exceptions.

At first blush this seems a workable solution, especially as the ERA could be amended to incorporate (by reference) this Part for all claims of discrimination.[609] However, as discussed previously, where intersectional grounds of discrimination are claimed (for example, discrimination on the grounds of both sex and disability), this solution may add a level of complexity to the law, with different claims being raised under different Parts, with different assessment criteria for the alleged adverse treatment.

Furthermore, other disadvantaged groups may also benefit from a non-comparative approach to discrimination, where, like disability, equality of treatment has not achieved their desired outcome of greater substantive equality.[610] Consequently, introducing a non-comparative approach to establish discrimination, in the case of disability only may not be entirely appropriate or fair.

Finally, as has been seen in the UK and Australia, even without a comparator there are still difficulties in determining whether discrimination has occurred due to unfavourable treatment, including the difficulty in establishing the causal nexus, and whether the treatment was due to 'something arising from' disability.[611] Furthermore, given the purpose of the HRA to protect the employer's prerogative, it is likely the law would require the unfavourable treatment to be excusable in some other way, such as via a measure like the UK's EA 2010's 'proportionate means to achieve a legitimate end.' Given the vernacular of the HRA, where in general, obligations imposed on parties are

[609] This solution could (for disability at least) resolve the uncertainty that arises from the textual differences between discrimination provision of the ERA and HRA.

[610] Assessing the merits of using this non-comparative approach for other prohibited grounds of discrimination is beyond the scope of this thesis, but could be worthy of further research. Furthermore, the issue of indirect discrimination would also need to be addressed, as it is a barrier to substantive equality.

[611] Other interpretive issues that might arise include whether the disability should be a material reason, a substantial and operative reason, or the sole reason, for the treatment.

restricted to those that are 'reasonable',[612] it is likely that unfavourable treatment would be excused, if it was 'reasonable' in the circumstances.

Therefore, although the use of a comparator may not be the most appropriate means of establishing disability discrimination, removing the comparative element from the discrimination in employment provisions of the HRA for disability alone may merely introduce more uncertainty and potential unfairness into the law. Furthermore, it would not readily fit with the current scheme of the Act, which is premised on promotion of formal equality, or with the purpose of protecting the employer's prerogative. Thus, to avoid making an unclear area of law even more opaque, it may simply be better to bolster the reasonable accommodation requirements, promoting different, individualised, treatment of disabled employees and achieving greater substantive equality in that way.

Accordingly, the remainder of this chapter will concentrate on discussing other possible amendments to the HRA, as outlined in points 2-7 above.

7.4.2 Define 'Qualified for Work'

As discussed in chapter 4, the notion of being 'qualified for work' acts as a gateway into the HRA's discrimination in employment provisions. The interpretive issues identified were mostly concerned with whether, to be qualified for work, the employee had to be able to perform all the essential duties of the position without reasonable accommodation of their disability. An associated question was whether the time of 'qualification' should be assessed at time T1 (when the employee was employed in their current role), or time T2 (when the alleged adverse treatment occurs).

This study concluded that the best interpretation, aligning with the purposes of the HRA, is that 'qualified for work' should mean that the disabled employee is able to perform the essential duties of the position, after they have been reasonably accommodated (including reallocation of some essential duties if required).

Furthermore, as the disability may arise during employment, and require reasonable accommodation at that time, whether an employee is 'qualified for work' should be assessed at time T2. This means that when the employee becomes disabled, the employer must try to reasonably accommodate them before claiming that the employee is no longer 'qualified' for the position.

However, the text of the HRA does not clearly convey this meaning. Therefore, a definition should be incorporated into the HRA which clarifies this. A suitable drafting might be: *a person is qualified for work when they are able to carry out the essential duties of the position; and a person with a disability is qualified for work when, with or without reasonable accommodation of their disability, they are able to carry out the essential duties of the position*.

[612] For example, the permitted exceptions have the defences that it is not 'reasonable' to provide special services or facilities, or it is not 'reasonable' to take a risk of harm.

7.4.3 Amend the Definition of Disability

Currently it is not clear from the meaning of disability in section 21 whether the consequences arising from the disability (such as poor performance) are considered a feature of it or not. This affects both the selection of the appropriate comparator employee and whether the adverse treatment was 'by reason of' disability.

Regarding selection of the comparator, if the consequences of the disability (such as poor performance) are not considered a feature of the disability, then the appropriate comparator may be another employee who is also poorly performing. This affects the determination of whether the disabled employee was treated adversely or not.

Likewise, whether treatment was 'by reason of' disability will also depend on whether the consequences of the disability are considered a feature of the disability. If, for example, the consequential poor performance is not considered a feature of the disability, then dismissal for poor performance would not be dismissal 'by reason' of disability (and therefore it would be lawful).

On the other hand, if the manifestations or consequences of the disability are deemed part of the disability, this makes it clear that the appropriate comparator would be a non-disabled person without this conduct or behaviour. Furthermore, this would clarify that treatment of an employee, because of the manifestations of the disability, such as poor performance, should be viewed as treatment 'by reason of' disability. This should better protect the mentally disabled employee and promote greater substantive equality. Moreover, the employer's managerial prerogative is still protected, as adverse treatment will not be unlawful if the permitted exceptions apply, or if the employee is no longer 'qualified for work' (in the amended sense). Thus, for Professor Smith, as her poor performance is due to her disability (and not laziness), it would be unlawful to subject her to a PIP because of this — unless the university could show that she requires services or facilities that it is not reasonable for them to provide, or she is at an unreasonable risk of harm, or her performance has reached the level that she is, in fact, no longer 'qualified for work' (because she cannot perform the essential duties of the position, even after reasonable accommodation has been made).

The issue of whether the manifestations of disability should be considered part of the disability has arisen overseas. The UK and Australia have taken different approaches to resolve this issue.[613]

In the UK, the situation is complex. The definition of 'disability' does not itself include the consequences or manifestations of disability. Nor does the definition of direct discrimination include discrimination due to the consequences or manifestations of disability. Consequently, in *London Borough of Lewisham v*

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[613] As previously discussed, contentious decisions in both the UK (*London Borough of Lewisham v Malcolm*, above n111) and Australia (*Purvis v New South Wales*, above n29) resulted in legislative change. The legislation clarified that the features or manifestations of disability are part of the disability.

Malcolm,[614] which was a claim for direct discrimination, the Court included the manifestation, or consequences, of the disability in the comparator. This had the effect, for direct discrimination, of making it exceptionally difficult for those with disabilities to prove adverse treatment due to their disability — as the comparator would demonstrate the same feature on which the adverse treatment was based (such as poor performance).

However, the EA 2010 now establishes a further type of discrimination. This is 'discrimination arising from disability'. This occurs when unfavourable treatment is because of 'something arising from disability'.[615] If that "something" 'operated on the mind of the putative discriminator, consciously or unconsciously, to a significant extent',[616] this is discrimination arising from disability. Thus, if the employee can show that the "something" (e.g. poor performance) arises from the disability[617] (for example, the poor performance is due to disability and not simply laziness), and the unfavourable treatment was due to this "something", then the causal nexus is established — confirming discrimination arising from disability.[618] Nonetheless, the employer has the defence that the treatment was a proportionate measure to achieve a legitimate aim.[619] Accordingly, these provisions protect the disabled employee against unfavourable treatment to some extent.

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[614] *London Borough of Lewisham v Malcolm*, above n111. As a result of disability-induced impaired decision-making (the manifestation of his mental disability) Malcolm sublet his flat, against the tenancy agreement, and was evicted. The Court compared him to another individual, who, without impaired decision-making, sublet the flat. As they too would be evicted, Malcolm was not treated adversely in comparison to them.

[615] Equality Act 2010 (UK), s15(1). This was introduced as a direct response to the controversial decision in *London Borough of Lewisham v Malcolm.*

[616] *T-Systems Ltd v Lewis*, above n604 at [31].

[617] *Pnaiser v NHS England & Anor*, above n602 at 31(d).

[618] *Weerasinghe v Basildon & Thurrock NHS Foundation Trust*, above n602. In *Pnaiser v NHS England & Anor*, above n602) at [31] the EAT held: 'The 'something' that causes the unfavourable treatment need not be the main or sole reason, but must have at least a significant (or more than trivial) influence on the unfavourable treatment, and so amount to an effective reason for or cause of it'.

[619] Equality Act 2010 (UK), s15(1)(b). An example of this is the decision of *Land Registry v Houghton & Ors*, above n606. In this case, the employers operated a bonus system for performance and attendance. The entitlement to the bonus was revoked if an employee received a warning for disability-induced absences or misconduct. However, the manager had discretion to award the bonus when warnings related to misconduct had been given (if the subsequent conduct had improved). The same discretion was not available for disability-induced absence. Thus, the non-payment of a bonus was found to be unfavourable treatment arising from disability (that is, there was unfavourable treatment (loss of eligibility for the bonus), and the reason for the treatment was due to "something" arising from disability (here, disability-induced absenteeism)). The EAT held, that although the legitimate aim of the treatment was to reward good attendance, it was a disproportionate measure, as no consideration could be given for improved attendance after a warning had been given.

In Australia, the solution is more straightforward. The DDA Cth, which defines disability in a similar manner to the HRA, includes the following statement:[620]

> To avoid doubt, a ***disability*** that is otherwise covered by this definition includes behaviour that is a symptom or manifestation of the disability (emphasis in original).

Nonetheless, evidence must link the conduct of concern with the disability.[621] In *Forest v HK & WK Investments Pty Ltd,*[622] the Federal Court of Australia held that, despite the complainant having a personality disorder with behavioural problems (the reason for his adverse treatment), his behaviours were 'a manifestation of a generally disagreeable person but not a manifestation of any personality disorder the applicant suffers'.[623] However, where the link is made out, the treatment will be unlawful, unless, due to employee's disability (including its manifestations), they cannot carry out the inherent requirements of the position.[624]

However, currently in New Zealand the HRA does not include the manifestations of the disability in the definition of disability. Therefore, to promote substantive equality, clarify the law, and avoid potential controversial decisions on the matter, the HRA, like the law in Australia, should include in the definition of disability, something to the effect that:

A disability that is otherwise covered by the definition of disability includes things that arise in consequence of the disability and behaviour that is a symptom or manifestation of the disability.

This would not prevent adverse treatment of a disabled employee who is unable to perform the essential duties of the position, even after reasonable accommodation has been made, as they would no longer be 'qualified for work'. Furthermore, the permitted exceptions would still apply. Therefore, where the manifestations of the disability pose an unreasonable risk of harm, or mean that the disabled employee requires special services or facilities that it is not reasonable for the employer to provide, the employer's adverse treatment may be excused under those provisions.

7.4.4 Include a Duty of Reasonable Accommodation

As has been discussed, there is no specific duty or obligation of reasonable accommodation in the HRA, although it might be possible to infer one from the presence of the permitted exceptions. These permitted exceptions include a

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[620] Disability Discrimination Act 1992 (Australia), s4.

[621] *State of Victoria (Office of Public Prosecutions) v Grant* [2014] FCAFC 184 at [58].

[622] *Forest v HK and W Investments Pty Ltd* [2014] FCCA 209.

[623] At [43]. Furthermore, the Court held that: 'while some behaviours are a manifestation of his personality disorder, i.e [sic] the need for an assistance dog, and others are just a manifestation of the applicant as a person' (at [50]). Separating his conduct from his disorder in this way might be considered controversial, as the applicant's diagnosis was of a personality disorder, manifesting as 'anti-social, narcissistic and borderline traits' (at [35]).

[624] Disability Discrimination Act 1992 (Australia), s21A.

defence against a claim of discrimination where special services or facilities are required and it is not reasonable to provide them. This infers that there must be an obligation to provide special services and facilities — when it is reasonable to do so. However, it is possible that this inferred duty only applies to providing 'special services or facilities', and is not a general duty of reasonable accommodation. The same reasoning applies to the unreasonable risk of harm defence. Consequently, it remains unclear whether New Zealand is fully meeting its obligations under the UNCRPD that state members ensure that reasonable accommodation (in general) is provided in employment. The inclusion of a positive general obligation of reasonable accommodation would rectify this. The permitted exception would still protect the employer's managerial prerogative.

The current lack of a positive obligation of reasonable accommodation is disadvantageous to both the employer and the employee. As there is no clear obligation, the employer may be unaware of any inferred duty, or the scope of such a duty. Consequently, they might lay themselves open to a claim of discrimination for failing to provide the disabled employee with (at a minimum) special services or facilities, where it is reasonable to do so. For the employee, the lack of a positive duty means it may be unclear to them that they may have a right to (at the very least) the provision of reasonable special services or facilities. Consequently, they may not request accommodation, or may readily accept a refusal for accommodation by their employer. A clear, standalone, positive obligation would ensure that both parties were aware of their respective rights and duties, and the ambit of them (which could be outlined in a definition of reasonable accommodation).

Furthermore, such a provision fits the purposes of the Act. The main purpose of the HRA is to better protect human rights. However, aside from prohibiting direct discrimination on the ground of disability in employment, the lack of clarity around the requirement for reasonable accommodation means the legislation fails to adequately protect the mentally disabled employee's human right to work. A specified duty to accommodate would, to some degree, clarify this purpose. By keeping the duty to accommodate to the level of 'reasonableness', the HRA's other purpose — of maintaining the employer's managerial prerogative — would also be preserved, to some degree.

For these reasons, the current legislation should include a clear, positive duty of reasonable accommodation, in a provision stating that '*the employer has a duty to reasonably accommodate employees with disabilities*'.

Should There be a Definition of Reasonableness?

As discussed in the previous chapter, what is 'reasonable' is an elastic concept, influenced by surrounding provisions and the employment situation.[625] To solve this indeterminacy, what is 'reasonable' could be defined, or guidelines could be

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[625] One conventionalist concept of reasonableness is that it is reflects a community's moral standards. On this view, what is reasonable is grounded in community values, so what is reasonable would be judged by what people should actually do in a given situation, as well as what they would actually do (Kevin Tobia "Reasonableness as Normality" (February 1, 2018). Available at SSRN: https://ssrn.com/abstract=3108236).

incorporated into the HRA, suggesting the factors to take into account when considering whether accommodation is reasonable or not. Both these approaches have been utilised in overseas jurisdictions.

In Australia, 'reasonable' adjustments are those that do not impose unjustifiable hardship on the person making the adjustment.[626] Unjustifiable hardship is then determined by reference to the guidelines provided in the DDA Cth.[627]

In the USA, the ADA includes examples of reasonable accommodation,[628] and the failure to make reasonable accommodation is discrimination — unless the accommodation required would impose undue hardship on the operation of the business.[629] Thus, like Australia, reasonable measures are those that do not impose undue hardship on the employer.[630] Undue hardship is defined in the ADA and means an action requiring 'significant difficulty or expense' when considered in light of a non-exhaustive list of factors.[631] However, as there has been little litigation over reasonable accommodation in the USA, the Courts have had little opportunity to discuss either the definition of reasonableness, or the relationship between reasonable accommodation and undue hardship.[632]

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[626] Commission, above n539 at 5.2.4.

[627] Disability Discrimination Act 1992 (Australia), s11. These include: the nature of the benefit or detriment likely to accrue to, or to be suffered by, any person concerned; the effect of the disability of any person concerned; the financial circumstances, and the estimated amount of expenditure required to be made, by the first person; and the availability of financial and other assistance to the first person.

[628] Americans with Disabilities Act 42 USC §12111(9). Reasonable accommodation may include: job restructuring, part-time or modified work schedules, reassignment, 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 and making existing facilities used by employees readily accessible to and usable by individuals with disabilities.

[629] Americans with Disabilities Act 42 USC §12112(b)(5)(A).

[630] Porter, above n477 at 5.

[631] Americans with Disabilities Act 42 USC §12111 (10). The factors to be considered include: (i) the nature and cost of the accommodation needed; (ii) the overall financial resources of the facility and the number of persons employed; the effect on expenses and resources, or the impact otherwise on the operation of the facility; (iii) the overall financial resources; the overall size of the business with respect to the number of its employees; the number, type, and location of its facilities; (iv) the type of operation or operations of the entity, including the composition, structure, and functions of the workforce; the geographic separateness, administrative, or fiscal relationship of the facility.

[632] Until recently litigation for disability discrimination was focused on whether the claimant had a disability for the purposes of the ADA. However, Porter argues that with the implementation of the Americans with Disabilities Amendment Act 2008, which has clarified the meaning of disability, the focus of litigation is now

Thus, in the USA, as in Australia, the reasonableness of an accommodation is determined by linking it to another standard or limit, such as undue hardship. However, the potential accommodation provisions of the HRA do not link ‘reasonableness’ to another standard. As there is no link between ‘reasonable’ and another appropriate standard in the HRA, then, how the Australian and American Courts have approached the interpretation of reasonableness is not necessarily relevant in the New Zealand context.

Unlike other jurisdictions, the New Zealand legislation does not provide guidance on the relevant factors to take into account in assessing the reasonableness of providing services or facilities, or in determining when this would constitute unreasonable disruption to the employer. Until now, this lack of guidance has not appeared to be an issue. But, should a positive obligation of reasonable accommodation be incorporated into the HRA (as suggested by this thesis), this would be an opportune time to include guidelines that provide interpretive guidance and clarity on the issue. These guidelines could help avoid controversy as to what is ‘reasonable’. For example, the Saskatchewan Human Rights Code defines undue hardship as one that imposes an ‘intolerable financial cost or disruption to business’,[633] whereas the same term used in the ADA is pitched at what seems to be a lower level of a ‘significant difficulty or expense’.[634] Guidelines may help define where the appropriate level of ‘reasonable’ would be pitched in the New Zealand context.

Nonetheless, like the HRA, the UK’s EA 2010 does not provide guidance for assessing the ‘reasonableness’ of an accommodation. The UKEAT has indicated that what is ‘reasonable’ involves a balancing act between the interests of the employer and the employee.[635]

Regardless, if the HRA is amended to include a positive duty of reasonable accommodation, for clarity, consistency, and as an aid to interpretation, guidelines for the factors to consider when assessing the reasonableness of the required accommodation should be included. This enables the employer to ensure they have considered all relevant factors, and allows the HRRT or Court to approach assessments consistently. These factors could include the size and resources of the employer, the availability of additional government funding or support, as well as the cost to the employer, and the benefit to the disabled employee and third parties.

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more likely to shift to reasonable accommodation and undue hardship instead: Porter, above n477 at 4.

[633] The Saskatchewan Human Rights Code 1979, s2 (1)(q). The factors to take into account when assessing the intolerable financial cost or burden include the effect on the financial stability and profitability of the business, the value of amenities, the essence or purpose of the business and the employees, customers or clients.

[634] Americans with Disabilities Act 42 USC §12111 (10).

[635] *Tameside Hospital NHS Foundation Trust v Mylott; Mylott v Tameside Hospital NHS Foundation Trust,* [2010] UKEAT/0352/09/DM, UKEAT/0399/10/DM, above n420 at [64].

Should the Threshold be Reasonableness'?

However, one question does remain, and that is: should the level of accommodation be pitched at the level of what is reasonable — or should a higher standard apply?

Differing jurisdictions pitch the duty to accommodate disability at different thresholds, above which the employer is no longer obliged to accommodate the disability. The UNCRPD uses the threshold of a 'disproportionate or undue burden' on the person doing the accommodating.[636] In Australia, the threshold is 'unjustifiable hardship', and for the USA and Canada it is 'undue hardship'. The UK, however, just has a duty of reasonable adjustments, without further limitation.[637] This suggests that (aside from the UK), in general the duty to accommodate is pitched at a more onerous threshold than what it is 'reasonable' for an employer to do.

Given this, should the threshold for accommodation in the HRA remain at 'reasonable', or should a higher threshold apply, such as undue or unjustifiable hardship? Or, given our obligations under UNCRPD, should the obligation exist until it imposes a 'disproportionate or undue burden' on the employer?

Although this latter threshold of 'disproportionate or undue burden' fits the HRA's purpose of better protecting human rights, for the other purposes of the HRA (such as respecting the employer's prerogative, and protecting the public from any risk of harm), a higher threshold may not be appropriate.

Furthermore, this level of reasonableness is a just and fair one under the current model of law, where the issue of accommodating disability is seen as one purely between the employee and employer, so the burden of accommodation falls on the employer. A higher burden would be unfair, unless financial or other support was provided by society to the employer. Providing this support, however, would require a different model of law.

Additionally, throughout the HRA, the accommodation of disability is based on the reasonableness of the requirement. Even for other prohibited grounds of discrimination, the standard of reasonableness is used (including when a positive obligation to accommodate an employee is required, such as when

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[636] 'Disproportionate or undue burden' was adopted by the UNCRPD as a compromise between the phrases 'disproportionate burden', adopted in the initial draft definition of reasonable accommodation, and 'unjustifiable hardship' advocated by the National Association of Community Legal Centres (Australia) during the drafting negotiations. 'Undue' rather than 'unjustifiable' was selected as it was used in several jurisdictions, including the USA and Canada (thus providing some jurisprudence on the term); 'disproportionate' was included as it was employed by the European Union (Rosemary Kayess and Ben Fogarty "Rights and Dignity of Persons with Disabilities" (2007) 32 Alternative LJ at 24).

[637] Section 22 of the Equality Act 2010 (UK) provides that regulations may be made determining the circumstances when it is, or is not, reasonable for a person to make reasonable adjustments. However, currently there do not appear to be any such regulations.

accommodating religious practice).[638] Thus, for consistency in interpretation throughout the Act, the threshold of reasonableness should probably apply in all contexts requiring accommodation of disability.

Several other factors also imply that a higher threshold is not necessary. For example, the UNCRPD definition of reasonable accommodation includes the term 'disproportionate' and this is (arguably) a similar standard to reasonableness — as something is disproportionate when unreasonable in amount or size compared to another.[639] Furthermore, as discussed previously, the Court has suggested that the standard of undue hardship, when accommodating a risk of harm, is too high.[640] In addition, given the incremental nature of changes usually made to human rights legislation in New Zealand, it is doubtful whether the legislature would be willing to make such a major change without compelling reasons.[641] Finally, it could be argued that replacing one 'elastic' term with another may not alter the actual threshold applied by the HRRT or Courts. As the USA Court of Appeal said, 'reasonable' means less than the maximum possible.[642] Thus, 'reasonable' could still be interpreted as a high threshold (i.e. that of just less than the maximum possible), which may indeed be the point of undue burden or unjustifiable hardship.[643]

Conclusion: Reasonable Accommodation

As outlined, there are difficulties in assessing when accommodation is 'reasonable'. Nonetheless, given the above discussion, and in keeping with the statutory scheme and purposes of the HRA, as well as promoting consistency and clarity of interpretation, the threshold of 'reasonable' should remain.

However, guidelines for factors to consider when assessing if an accommodation is reasonable should be included in the HRA. While these would have to be general in nature, they would at least provide a foundation for assessment and promote consistency in interpretation.

Therefore, the provision containing an obligation of reasonable accommodation should include the following elements:

The employer has a duty to reasonably accommodate the disabled employee in employment. When assessing whether the accommodation required is reasonable the Court or Tribunal must consider -

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[638] Human Rights Act 1993, s28(3). The positive obligation to accommodate religious practice only applies if it does not 'unreasonably' disrupt the employer's activities.

[639] https://www.collinsdictionary.com/dictionary/english/disproportionate .

[640] *Smith v Air New Zealand Ltd*, above n57 at [57].

[641] In *Trevethick v The Ministry of Health* HC Wellington CIV-2007-485-2449, 1 April 2008 at [33], the High Court discussed the legislature's incremental approach to changing human rights legislation in New Zealand.

[642] *Vande Zande v State of Wisconsin Department of Administration*, above n415 at [3]. For example, in the law of negligence, 'reasonable care' is something less than the maximum possible care.

[643] A definition, or guidelines, as to what reasonable accommodation requires, may ensure interpretation is not to an overly high threshold.

(i) *The number of employees employed by the employer; and*
(ii) *The resources available to the employer; and*
(iii) *Whether the accommodation required would unreasonably disrupt the activities of the employer; and*
(iv) *The nature and cost of the accommodation; and*
(v) *The benefit accrued to the employee and others; and*
(vi) *Any other factors the Tribunal or Court think appropriate.*

The inclusion of such a provision imposing a duty of reasonable accommodation would clarify the law for employer and employee, and provide guidance and limits as to their respective rights and obligations. Furthermore, imposing a positive duty of accommodation will promote substantive equality, as it enables individualised treatment of the disabled employee, enabling them to remain employed. Making failure to reasonably accommodate disability a standalone ground of discrimination could further reinforce this duty. This will be discussed next.

7.4.5 Make Failure to Reasonably Accommodate Disability Unlawful

As well as bolstering the duty, making failure to reasonably accommodate disability a ground of discrimination accords with current international and overseas law.

Although the UNCRPD contains no specific obligation to make failure to reasonably accommodate a standalone ground of discrimination, its definition of discrimination includes the failure to reasonably accommodate the disabled person. The definitions of disability discrimination in Australia, the UK, and the USA include this requirement expressly.

Potentially, the HRA could be amended to include a definition of direct disability discrimination, and include failure to reasonably accommodate within that definition. However, the HRA does not define discrimination *per se*. Instead it prohibits specific conduct on prohibited grounds, such as disability. If disability discrimination was to be defined, defining what discrimination is may prove fraught, and raise interpretive difficulties.[644] Accordingly, it may be better to leave the provisions as they are currently structured.

It would not be possible to add failure to reasonably accommodate into the prohibited grounds of discrimination in section 21, as, unlike the other grounds of discrimination, failure to accommodate is not a characteristic of a person. Failure in reasonable accommodation cannot therefore readily be a "ground" of discrimination.

A solution could be a provision that deems failure to reasonably accommodate disability to be unlawful. This could either be inserted so it applies to all instances where reasonable accommodation is required, or restricted to the employment context. The issue of reasonable accommodation has arisen outside

[644] The meaning of discrimination has been the subject of much discussion in the Courts for claims arising under the NZBORA. See, for example, *Quilter v Attorney-General*, above n15; *Ministry of Health v Atkinson* [2012] 3 NZLR 456 (NZCA); *Heads v Attorney-General* [2015] NZHRRT 12.

the employment context,[645] but it is in employment that this requirement requires most clarification.[646]

Therefore, section 22 should include a provision to the effect that *'It shall be unlawful for the employer, or any person acting on behalf of the employer, to refuse or omit to provide reasonable accommodation to employees with disabilities'.*

7.5 Amending the HRA: Conclusions

7.5.1 Summary of the Proposed Amendments

Therefore, this thesis concludes, that, at a minimum, the following amendments should be made to the HRA.

The following definition of reasonable accommodation would be added to the definitions section:

Section 2 Definitions

'Reasonable accommodation of disability: *reasonable accommodation means necessary and appropriate modification and adjustments not imposing a disproportionate or unreasonable disruption, 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.'*

This definition would not just apply to disability discrimination in employment but would apply to disability discrimination in all areas traversed by the HRA.

The following clause would be added to the list of prohibited grounds of discrimination:

Section 21 Prohibited Ground of Discrimination

21 (1)(h)(viii) A disability that is otherwise covered in (i)-(vii) above includes things that arise in consequence of the disability and behaviour that is a symptom or manifestation of the disability.

The relevant section on unlawful discrimination in employment would include the following provisions:

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[645] For example, *Smith v Air New Zealand Ltd*, above n57, and *Hosking v Wellington City Transport Ltd (t:a Stagecoach Wellington)* CRT 2/95 [1992] NZCRT 7; (1995) 1 HRNZ 542 (12 June 1995) for the failure to reasonable accommodation disability in the provision of goods and services.

[646] Few cases have come before the Courts, Authority or HRRT concerning disability discrimination in employment, but in those that have, the issue of accommodation has been an important feature (for example: *Atley v Southland District Health Board*, above n84; *Connell v Sepclean Ltd*, above n119; *Aubrey v Chief Executive of the Department of Child Youth and Family Services* ERA Christchurch CA93/04, 13 August 2004; *Crozier v Idea Services Limited* [2016] NZERA Wellington 125).

Section 22 Employment

(3) For the purposes of section 22(1), a disabled person is qualified for work when, with or without reasonable accommodation, they are able to carry out the essential duties of the position.

(4) For the purposes of paragraph (3), the following factors are to be taken into account in determining whether the disabled person would be able to carry out the essential duties of the position:

(a) the disabled person's past training, qualifications and experience relevant to the particular work; and

(b) if the disabled person already works for the employer — the disabled person's performance in working for the employer; and

(c) any other factor that it is reasonable to take into account.

(5)(a) The employer has a duty to reasonably accommodate the disabled employee in employment.

(b) When assessing whether the accommodation required is reasonable in the circumstances, the Court or Tribunal must consider -

- *(i) The number of employees employed by the employer; and*
- *(ii) The resources available to the employer; and*
- *(iii) Whether the accommodation required would unreasonably disrupt the activities of the employer; and*
- *(iv) The nature and the cost of the accommodation; and*
- *(v) The benefit accrued to the employee and others.*

(c) In addition to the factors described in subsection 5(b) the Tribunal or Court may consider any other factors it thinks appropriate.

(6) It shall be unlawful for the employer, or any person acting on behalf of the employer, to refuse or omit to provide reasonable accommodation to employees with disabilities.

7.5.2 Limitations of the Proposed Amendments

These recommended amendments may help clarify the law for disability discrimination in employment, including the employer's duty to reasonably accommodate the disabled employee. However, there would still be limitations to their effectiveness in better protecting human rights, or in achieving greater substantive equality for the disabled. There are several reasons for this.

The Retention of the Requirement for Equal Treatment

Firstly, the discrimination in employment provisions would still be mainly premised on the idea of formal equality (i.e. equal treatment of employees). However, to achieve equality of outcome, what the disabled employee may require is different treatment.

However, the proposed amendments attempt to counter the effect of the HRA's requirement for equal treatment to some extent. Firstly, this is achieved by ensuring the features of — or consequences arising from — disability (such as

poor performance) are considered as part of the disability. The effect of this is that, as the consequences of disability are deemed part of the disability, the comparator, who would not have the disability, would also not have the consequences or feature of the disability. Thus, in a case of poor performance due to the consequences of disability the employee must be treated equally with an employee who is performing normally (and therefore would not be subject to adverse treatment). Thus, the disabled employee will be better protected from adverse treatment due to their disability and attain greater substantive equality. Secondly, the effect of formal equality (i.e., the requirement for equal treatment) is mitigated through the inclusion of a positive obligation to reasonably accommodate the disabled employee. Reasonable accommodation may require different treatment of the disabled employee, which will enable them to continue to work.

Nonetheless, the risk is that these measures may still prove insufficient. The proposed amendments may simply re-focus the defence against a claim of discrimination on whether the conduct of concern (such as poor performance) is a consequence of disability. This may be contentious if the poor performance occurred before the mental disability was disclosed (or became apparent) to the employer. This may occur for two reasons. First, due to the stigma of mental illness, and the fear of prejudice, a mentally disabled employee may not wish to disclose their condition;[647] and, secondly, a mentally disabled employee may not have insight into their condition, and may be unaware of their mental illness, or its affect on their conduct. It may then be difficult for the poorly performing employee to prove their poor performance was a consequence of their disability, as mere correlation between mental disability and poor performance does not prove causation.

If it cannot be shown (on the balance of probabilities) that the conduct was due to the disability, then the comparator employee will still be someone demonstrating the same feature as the mentally disabled employee (i.e., poor performance), who may be subjected to adverse treatment. On that analysis, the treatment of the disabled employee would be equal treatment to that of a similarly situated non-disabled employee. Therefore, the treatment would not be discriminatory, although the mentally disabled employee would be disadvantaged.

Thus, the amendment aimed at clarifying when treatment is 'by reason of' disability may not prove as effective as first hoped.

The Retention of the Medical Model of Disability

The second limitation of the proposed amendments is they do not address the definition of disability in the HRA, which is based on a purely medical model. Given that the New Zealand Government's social policy (in the form of the Disability Strategy) has adopted a social construct of disability, and this model is also promoted in the UNCRPD, arguably this model should be reflected in the HRA. Unlike the medical model of disability, which focuses on the amelioration of impairments so that the disabled can fit into the "normal" world, the social model of disability recognises the disabling effects of physical or mental impairments

[647] Von Schrader, Malzer and Bruyère, above n11.

are due, in part at least, to barriers (including attitudinal barriers) created by society. This model emphasises the inclusion and participation in society, including through employment, of individuals who have disabilities.

The medical model of disability focuses on 'fixing' the impairment, rather than achieving full inclusion and participation. Under this paradigm, reasonable accommodation acts only to ameliorate the impairment allowing the disabled person to fit into an "able" society (and workplace).

The social model, however, implies that more accommodation is required than what is merely needed to ensure the employee can perform the essential duties of a position. Rather, under this model, the focus shifts to ensuring the employee can fully participate in all aspects of employment, so reasonable accommodation would apply to all aspects of the job. The social model also aims to remove attitudinal barriers, including intolerance of mental disability (and potentially this could include intolerance of poor performance). The aim is to change society so that those with disabilities can participate fully in it.

The inclusion of a definition of reasonable accommodation would attempt to adjust for the failure to adopt a social construct of disability, by defining the required accommodation in terms of enabling the disabled person to exercise all their human rights (including the right to work).

Nonetheless, as the HRA is largely premised on the medical model of disability, this may still affect the interpretation of 'reasonable accommodation'. That is, the provisions might be interpreted as meaning that accommodation is required only to the extent that it ameliorates the disability, allowing the disabled employee to fit into the 'able' workplace, and perform the essential duties of the position. What is required, however, is a more rights based approach, where reasonable accommodation aims to ensure, not only that the disabled employee remains employed, but also enjoys full participation in all aspects of the workplace.

To address these issues, in addition to the requirement for reasonable accommodation, the definition of disability in the HRA might be replaced with one reflecting the social model of disability — or a mix of the medical and social models, such as found in the definition in the UNCRPD. Then there would be recognition of the disabling effects of barriers to participation in the workforce, and a requirement for measures to counter this.

However, this type of definition of disability, which uses language that is inclusive and open-ended,[648] is less 'precise' than one based on the medical model. The medical model's definition more clearly delineates the conditions or impairments that constitute disability. The risk of changing to a more open-ended definition is that the debate moves from whether an employee was adversely treated, or reasonably accommodated, to the question of whether the employee has a disability in the first place. That is, the employer may argue that the employee's depression is not yet 'long-term', or an employee's mild bipolar disorder does not 'hinder their participation in society' and, therefore, they are

[648] For example, the phrase used in the UNCRPD, "… impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others", lacks specificity.

not disabled. Consequently, the question of reasonable accommodation does not arise. This has been demonstrated in the USA and UK, whose definitions are more in keeping with the social model of disability (as their definitions include whether or not 'major life activities'[649] or 'day-to-day activities'[650] have been affected). Thus, to be disabled in the UK, a person must have a physical or mental impairment that has a 'substantial and long-term adverse effect' on the person's ability to 'carry out normal day-to-day activities';[651] and in the USA, the mental or physical impairment must 'substantially limit one or more major life activities'.[652] Much of the litigation in these jurisdictions focuses on whether the claimant fits within these definitions of disability, rather than on whether the treatment was discriminatory, or whether the disabled employee was reasonably accommodated. Thus, it may be that changing the definition of disability in the HRA may merely introduce new interpretive issues.

Furthermore, this type of open-textured definition would not fit comfortably with the way in which the other prohibited grounds of discrimination are defined — in a limited or exhaustive manner. This suggests the legislature prefers tighter definitions.

The Retention of the 'Reasonableness' Standard

A third limitation of the proposed amendments is the possibility that, restricting the employer's obligation to make accommodation to that which is 'reasonable' will not achieve substantive equality, as 'reasonable' is a low threshold for the employer to reach.[653] Arguably, to enable disabled employees to remain in employment, and to achieve greater substantive equality, a higher threshold is required, perhaps to the point of undue hardship.

Finally, the 'reasonableness' standard is elastic (as, admittedly, is undue hardship), and contextual in nature. Therefore, what accommodation is reasonable for one employer may not be reasonable for another. Thus, for the employee to achieve substantive equality may depend on the nature and context of the individual employment situation.

Retention of a Static Model of Disability

Fourthly, the amendments proposed are based on a 'static' model of reasonable accommodation, wherein the accommodation is viewed as a special measure undertaken for an individual employee, to enable them to participate in the

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[649] Americans with Disabilities Act 42 USC § 12102 (1)(A).
[650] Equality Act 2010 (UK), s6(1)(b).
[651] Equality Act 2010 (UK), s6(1). There is no further definition of 'substantial', 'long-term', or what constitutes 'day-to-day' activities, and, although s6(5) states a Minister may issue guidance about 'matters to be taken into account in deciding any question for the purposes of subsection (1)', this does not appear to have occurred.
[652] Americans with Disabilities Act 42 USC § 12102 (1). 'Major life activities' are defined in 42 USC § 12102 (2).
[653] McGregor, Bell and Wilson, above n383; McGregor, Bell and Wilson, above n502.

workforce.[654] This limits the ambit of any accommodation made, as it requires no more than is necessary for the individual employee to work. If the disabled employee leaves, the accommodation may cease. In contrast, a dynamic model of reasonable accommodation sees accommodation as focussing on the disabled population as a whole. Therefore measures undertaken may be more generalised and wide ranging. Emens gives the example of an employer moving early morning team meetings to later in the day, so that those taking psychotropic medications (which make it difficult to get up in the morning) can attend. This, she argues, may benefit other future disabled employees who require accommodation. In addition, other employees who are not early risers will benefit, and this may make the workplace in general happier. Thus, this dynamic model recognises that generalised accommodation measures may also benefit third parties, and the business as a whole. These benefits may be physical, material, relational, or hedonic. Another example would be that, instead of accommodating an individual with concentration problems by allowing them to use headphones, or providing uninterrupted quiet times, instituting this as an overall policy (so the measure is available to all employees), may benefit everyone, and increase productivity overall.[655] These benefits arise from the provision of effective accommodations in the workplace in general, rather than limiting the accommodation to the disabled employee. This dynamic model of accommodation fits with the social construct of disability, as the end result is to remove barriers in general, and promote an inclusive workplace, rather than limiting accommodation to an individual's requirements (which, at times, may result in the segregation of the individual).

It seems, then, that although the suggested amendments may help clarify some of the current interpretive difficulties of the HRA, they may not always result in better protection of the rights of the disabled, or achieve greater substantive equality. Additionally, there is the risk that the amendments themselves may create new interpretive difficulties.

Nonetheless, this thesis suggests that the potential advantages that would be gained from these proposed amendments would outweigh the potential limitations. Therefore, the HRA should be amended along the lines proposed, as a first step in reforming the way in which disability discrimination in employment is managed in New Zealand.

7.5.3 The Limited Benefits of the Proposed Amendments for Professor Smith

Some of the limitations of the proposed amendments outlined above can be illustrated by considering the implications for Professor Smith. Even under the amended HRA, the result would probably still be her lawful dismissal. This is because the definition of 'qualified for work' might still exclude her, and secondly, it might be found that it is not reasonable for the employer to accommodate her position.

Under the amended HRA, Professor Smith's poor performance would be considered part of her disability and the comparator employee would be a

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[654] Emens, above n12 at 894.
[655] At 851-854.

normally performing Professor. In comparison to that Professor, Professor Smith would be treated adversely, when subjected to a PIP or dismissed. Nonetheless, Professor Smith must still be 'qualified for work'; and under the suggested definition she would only be so qualified if, after reasonable accommodation, she could perform the essential duties of the position. However, currently, she is unable to carry out all the essential duties of the position — even with reasonable accommodation. That is, she is unable to independently research and publish, and, as no one else can publish solely in her name, this is not a duty that can realistically be accommodated by task reallocation or other means. Thus, as there is no accommodation available that will enable her to carry out the essential duties of the position, she is not 'qualified for work'. Moreover, potentially, her poor performance in other areas of her work might not meet the threshold of 'qualified for work' either (if 'qualified' is interpreted as 'able' or 'competent'), as the standard for this is likely to be dictated by the University.

In a similar vein, even a positive general duty of reasonable accommodation in the HRA might not assist Professor Smith. She could argue that the accommodation required should be (temporary) tolerance of her poor performance by lightening her workload; and employing a research assistant so she could jointly publish work. However, the suggested amendments limit the positive obligation of accommodation to adjustments that do not impose a 'disproportionate burden or unreasonable disruption' on the employer. The University might successfully argue that employing a research assistant would be a disproportionate financial burden, and that 'carrying' Professor Smith would unreasonably disrupt other staff members. Furthermore, changing her supervisory and teaching duties may negatively impact her students, unreasonably disrupting them, and this might be considered a disproportionate impact.

Thus, even if the amendments were to add a new general obligation of reasonable accommodation, Professor Smith's problems would not be solved. This is because, under the medical model of disability, adopted by the HRA, reasonable accommodation focuses on ameliorating the individual's condition so they can fit into an 'able' society, rather than recognising and ameliorating the disabling effects of society. Thus, for Professor Smith, the focus would be enabling her to work at the University under its current arrangements, rather than the University adapting to her disabilities to permit her to participate as they are (for example, by tolerating diminished performance).

However, if the aim was to achieve substantive equality, then her situation might be handled differently. The social construct of disability recognises that barriers to employment, such as intolerance of reduced performance, are disabling. The general duty of accommodation under this model would be at aim to change the workplace environment (or culture) to tolerate, and accommodate, reduced ability, thus, for supporting Professor Smith her in employment. This model would suggest that, temporarily at least, Professor Smith should be accommodated by an exemption from the requirement to research and publish (despite the impact on PBRF). Easing her workload might also be considered a reasonable measure, despite the short term disruption it might cause — particularly if this disruption could be mitigated by, for example, transferring students who have just started post graduate study to new supervisors, or

allocating another lecturer or senior student to take over a particular block of teaching, or even by not offering one of Professor Smith's papers in a particular semester. In this way, Professor Smith retains her employment, with its social and financial benefits, despite her disability, and greater substantive equality is achieved.

The question then arises: why then does the HRA maintain its current approach, based on the medical model of disability and formal equality, with only a limited, inferred obligation of reasonable accommodation?

7.6 The Problem of the Social and Political Context

There are several possible reasons why the HRA maintains its current approach. These include the social and political context and the lack of political will to instigate change, and the belief that the current law strikes the right balance between the rights of the employer and the disabled employee.[656]

The failure to include a positive obligation of reasonable accommodation may be explained by the social and political context when the HRA was enacted in 1993. At that time, a unitary ideology predominated in employment law, promoting the idea that the employer had the right to run their business as they thought fit. Arguably, the protection of the employer's managerial prerogative reflects this unitary ideology. Although current employment law adopts a more pluralist ideology, recent changes to legislation suggest the legislature still retains some unitary leanings.[657] This would possibly explain why the HRA discrimination in

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[656] In fact, it could be said that this failure by the legislature to introduce the social construct of disability into the HRA demonstrates an attitudinal barrier (by the government) toward impairment — the very thing that the social construct of disability seeks to remove. Indeed, one of the criticisms of the Ministry of Social Development's 'Health and Disability Long-term Work Programme' was the failure of Work and Income New Zealand (WINZ) to move from the medical model to a culture where WINZ would work in partnership with the disabled person to overcome potential workplace barriers. Participants considered the plan should be more rights-based and use the social model of disability: Health and Disability Long-term Work Programme — Supporting Disabled People and People with Health Conditions into Work' plan (2014) https://www.msd.govt.nz/about-msd-and-our-work/publications-resources/research/welfare-reform-health-disability/working-differently-with-people-with-health-conditions.html

[657] Although current New Zealand labour law generally reflects a pluralist approach, some unitary trends emerged under the recent National Government. These included the trend away from collective employment agreements, the addition of the 90-day trial period, the loss of reinstatement as the primary remedy for unjustified dismissal, and the change to the test for justification of a dismissal. Nevertheless, the pluralist approach is still recognisable in the ERA with its promotion of good faith in the employment relationship, the mutual obligations of trust and confidence, and the requirement for both procedural and substantive fairness when dismissing an employee (Anderson and Hughes, above n66 at 8). Furthermore, the current Labour-led coalition government appears to be reversing the prior unitary trends.

employment provisions remain unchanged, despite the changes in employment law. Even the amendments made immediately prior to ratification of the UNCRPD did not change these provisions — although creating a positive obligation to reasonably accommodate the disabled would have reflected a more pluralist approach. This suggests that currently the rights of the employer are prioritised over those of the employee.

If the interests of the employer are considered to have ascendancy over those of the employee, then, as even the most minimal requirements for reasonable accommodation of disability impact on the interests of the employer, any duty of accommodation is likely to be minimised. As the costs associated with presenteeism may be substantial,[658] and the employer may have difficulty in identifying any positive business benefit in continuing to support a poorly performing employee,[659] accommodating the disabled to the employer's financial or business detriment may be viewed as an anathema. This may inhibit any incentive to change the law of reasonable accommodation.

This may also explain why the social construct of disability has not been adopted into the HRA, or other legislation, as this model implies that a wider duty of accommodation is imposed on the employer.[660]

Prioritising the interests of the employer over those of the disabled is unlikely to change in the near future because, as noted by McGregor,[661] it is ministerial leadership that determines the 'ebb and flow of political will that strongly characterises New Zealand's commitment to human rights'.[662] Currently there appears to be a lack of championship to further disability rights at governmental level. Without this, there is unlikely to be legislative change to incorporate the social construct of disability into the HRA, or to strengthen the rights of the disabled in employment.[663] Even the Independent Monitoring Mechanism (IMM)

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[658] A recent report carried out for the Government in the UK estimated that the cost to the employer due to presenteeism of employees with mental health issues is up to three times that for absenteeism. However, return on investment for proactive workplace mental health interventions (rather than reactive measures after mental health problems occur), enabling employees to 'thrive at work', is overwhelmingly positive (Hampson and others, above n53).

[659] The same study noted (n53 at 5) that there are costs when an employee leaves an organization. These may be substantial: for example, the costs of employing temporary covering staff, the cost of agency and adverting fees, time taken to find a new employee, and the time and training required before the new employee is able to work at full productivity.

[660] However, in 2001, the Government adopted the social construct of disability into social policy by implementing the Disability Strategy 2001 (Social Development, above n228.

[661] McGregor, Bell and Wilson, above n502 at 121.

[662] At 121.

[663] However, the 'Statement of Intent', issued in 2017 by the Ministry of Social Development, includes a focus on employment issues for those with long term disabilities. It remains to be seen what effect the election of the Labour-Green-New Zealand First coalition government in 2017 will have on social policy for persons with disabilities.

(which monitors both disability rights and the implementation the UNCRPD) is a 'discretionary internal mechanism' — so the government can choose when and if it wishes to respond to the reports it produces.[664]

An alternative (or additional) reason why no positive duty of reasonable accommodation has been included in the HRA may simply be that the legislature believes the current legislation, with the inferred obligation of reasonable accommodation, fulfils New Zealand's commitments under the UNCRPD, and adequately balances the potentially conflicting interests of the employer and employee.

Thus, even if a positive obligation of reasonable accommodation were to be included in the HRA, the current social and political context suggests the 'reasonableness' standard of accommodation might be set at a low level.

7.7 The Problem of the Conflicting Interests of the Parties

The outcome of the current uncertainties in the law is that it is left to the HRRT or Court to interpret the legislation and determine where the balance of interests between the employer and the employee should lie.

Balancing the interests of the parties, however, inevitably involves concessions being made on both sides. For example, the employer's prerogative is restricted by the requirement to accommodate the disabled employee, when otherwise they could have dismissed them. The disabled employee's right to accommodation is limited by what it is 'reasonable' for the employer to provide. At best, the interests of both parties are compromised. At worst, in particular cases, the balance may result in what appears to be an unfair outcome for the 'losing' party — despite the result for the 'winning' party seeming to be no more than what is fair. For example, in the Professor Smith scenario, it is in the best interests of Professor Smith for her to retain the position for which she has the academic qualifications, has worked hard to obtain, has performed outstandingly well in the past, and hopes to fully perform again in the future. She has a financial interest in retaining the position (perhaps a large mortgage or family to support) as well as social reasons for wishing to stay employed (such as status, social contact, a reason to get up in the morning). Furthermore, she knows that if she loses this job, with a history of mental illness and dismissal, it will be difficult for her to obtain work of a similar nature in future. However, if Professor Smith's interests prevail, the University may be disadvantaged as their interests are diametrically opposed. They are paying a full time wage to an employee and (quite reasonably) expect her to fully perform that role. They have financial obligations and limitations, and rely on PBRF ratings for funding allocations. They have responsibilities to students to provide good teaching and supervision, and obligations under the HRA and HSWA not to cause harm to Professor Smith or others (e.g. through the effects of workplace stress).

[664] McGregor, Bell and Wilson, above n502 at 125. McGregor notes that without strong ministerial leadership from Ruth Dyson, and her successor Tariana Turia, New Zealand's pivotal role in developing the UNCRPD would not have occurred (at 113).

Accordingly, depending on where the balance of interests is found to lie, the provisions of the HRA can validly be interpreted to support either Professor Smith's position or that of the University.

That is, it may be held that it is not discrimination to dismiss Professor Smith, as she is no longer qualified for work — as she cannot perform all the essential duties of the position. Alternatively, it might be held, that although she is qualified for work, she requires special services (e.g. a research assistant) that is it not reasonable for the University to provide.

Conversely, the HRA could be interpreted to find that it is discrimination to dismiss Professor Smith, as she retains her professional qualification (so is qualified for work), and, after reasonable accommodation she would be able to perform the essential duties of the position (as the task reallocation proviso might allow someone else to perform part of her research, and allow collaborative publishing).

However, would the proposed amendments, including imposing a general duty of reasonable accommodation on the employer, positively shift the balance in favour of the disabled employee? This seems unlikely. This is because even a general duty of reasonable accommodation may be interpreted to a low threshold. So although the types of accommodation required might become broader (and hence provide some additional protection for the disabled employee), the amount of disruption, or inconvenience to the employer before that accommodation becomes 'unreasonable' might still be quite low. Whilst the employer's and disabled employee's aims are conflicting, the degree to which the employee will be accommodated will always be restricted. What is required then, is the provision of reasonable accommodation that does not place the financial burden of employing a poorly performing employee on the employer — so that their interests are no longer directly in conflict. If the employer could be supported in some manner, so they in turn can support the disabled employee, then true accommodation — and substantive equality — might be possible.

The way forward then, might be introduce a new model or approach to disability discrimination law. This will be discussed in the following chapter.

Chapter 8: Conclusion

> "True freedom requires the rule of law and justice, and a judicial system in which the rights of some are not secured by the denial of rights to others"
>
> Jonathan Sacks

8.1 The Problem of Disability Discrimination in Employment: Conclusions

The central question this thesis has asked is: *When an employee is dismissed on performance grounds, in a seemingly justifiable manner, could this nevertheless be unlawful discrimination if the poor performance is due to the employee's mental disability?* The focus has been on whether this adverse treatment, or dismissal, was direct discrimination under the HRA.

As there is little case law on point, the answer has been derived mainly from interpretation of the discrimination in employment provisions of the HRA. The thesis attempted to find the 'best' interpretation of these provisions. To do this, it revisited principles of statutory interpretation. A composite method — the "spiral approach" — was selected as the best interpretive approach. Then, utilising this approach, the provisions were re-examined to determine when adverse treatment would constitute discrimination, and what (if any) obligation the employer has to reasonably accommodate the disabled employee.

However, even the 'best' interpretation failed to fully clarify the law in this difficult area, and the conclusion has been reached that there is insufficient clarity in the law to give a predictable answer to this question. As a result, the parties cannot fully know their potential rights, prerogatives, or obligations under the law.

Furthermore, this uncertainty means it is not clear if New Zealand is meeting its obligations under the UNCRPD. It is quite possible that it is not.

Thus, this thesis sought to find a means to clarify the law in this difficult area, while ensuring that New Zealand meets its obligations under the UNCRPD, and promotes greater substantive equality for disabled employees.

A number of amendments to the HRA were suggested that might clarify the law. These include:

- defining 'qualified for work'. An employee should be considered 'qualified' when they can perform the essential duties of the position — after any necessary accommodation of their disability has been provided;
- clarifying that the comparator employee should be a similarly situated employee, without the disability — and without any of the features or consequences arising from the disability (such as poor performance);
- extending the meaning of adverse treatment 'by reason of' disability to include adverse treatment that is taken in response to the consequences or features arising from the disability (such as poor performance).

These amendments would clarify when treatment counts as unlawful treatment of a disabled employee, but would still permit the employee to be treated differently if they could not perform the essential duties of the position, even after reasonable accommodation had been made.

This thesis also argued that, to clarify the law around the reasonable accommodation of disability, a positive duty of reasonable accommodation should be included in the HRA, and the failure to meet this duty should be deemed unlawful. A definition of reasonable accommodation, aligned with the one in the UNCRPD, should also be included in the legislation.

These are therefore the primary conclusions reached in this thesis about the discrimination in employment provisions of the HRA. The remainder of this Conclusion addresses a number of remaining points. First it considers a possible objection to the general idea that the HRA's provisions are in need of reform. That argument is, that, the lack of relevant case law suggests that there is no current problem that needs to be addressed. This thesis concludes, however, that this is not the case, and actually, New Zealand law in this area needs more comprehensive reform than the proposed amendments to the HRA would provide. It will be argued, that to promote substantive equality, what is required is a new model of disability discrimination law. Finally, this chapter reflects on some of the jurisprudential threads that have permeated the analysis in this thesis: that is, the effectiveness of the 'spiral' approach to interpretation, and the difficulty in achieving clarity in this field of law.

8.1.1 Is There a Problem? The Lack of Disability Discrimination Jurisprudence

Undoubtedly part of the problem in establishing the correct interpretation of the discrimination in employment provisions of the HRA, concerning disability, is that the HRRT and Courts have had limited opportunity to address them. Accordingly, one possible response to the view advanced in this thesis (that the law requires reform) is that the dearth of case law concerning disability discrimination in employment in New Zealand indicates there no problem that needs to be addressed. That is, as employees are not pursing claims through the Courts or the HRRT on this ground, this suggests there is no general problem of discrimination on this ground. So, is this objection valid?

Indirect inferences and available research suggest otherwise.

Statistical data show that the underutilisation rate[665] in employment, for disabled persons is more than double that of non-disabled persons, and that one in five disabled persons wish to work more hours (compared to one in ten non-

[665] Underutilisation is a measure of the potential labour supply and unmet need for work. An underutilised person may be unemployed, underemployed (i.e., wanting more hours), an unavailable jobseeker, or an available potential jobseeker. http://archive.stats.govt.nz/browse_for_stats/income-and-work/employment_and_unemployment/LabourMarketStatistics_MRSep17qtr.aspx

disabled persons).[666] These types of statistics are considered to be indicators for discrimination at work.[667] Additionally, a survey of consumers of mental health services in 2011 found that 30% of respondents reported being treated 'unfairly' in work due to their mental health condition.[668]

Furthermore, disability was the main ground of complaint to the Human Rights Commission for discrimination in employment in 2015.[669] However, most formal complaints to the HRC proceed to mediation, where the majority are probably resolved. As this process is confidential, the outcomes are unknown. Moreover, claims that do not proceed to mediation, or do not settle there, may not always progress further.[670] This may be due to the difficulties for the claimant in providing evidence to prove discrimination, or it may reflect other access to justice barriers — including cost and time. The process for taking a case through the HRRT may be very protracted, and many people may not have the fortitude to persevere.[671] Lastly, it is possible that potential claimants are simply unaware of the discrimination laws, or are too unwell to consider laying a complaint in the first instance. Thus, the problem is likely to be much more prevalent than the available data currently shows.

When a claim of discrimination is laid with the HRC, mediation is usually the first step in attempting to solve the problem. For a person with a mental disability, settling a claim at mediation is a quick and cheap solution, and they may receive compensation. However, this confidential mediation process does not develop discrimination jurisprudence. For such reasons, the law around disability discrimination has rarely been considered in detail in contested proceedings before the HRRT or the courts, and important aspects of it remain unclear, despite the HRA being almost 25 years old.

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[666] Labour Market Statistics (Disability), June 2017 Quarter http://archive.stats.govt.nz/browse_for_stats/income-and-work/employment_and_unemployment/LabourMarketStatisticsDisability_HOTPJun17qtr.aspx

[667] http://tracking-equality.hrc.co.nz/#/issue/discrimination

[668] Allan Wyllie and Ralph Brown *Discrimination Reported by Users of Mental Health Services: 2010 Survey* (Ministry of Justice, 2011) .

[669] 109 out of 280 complaints of discrimination in employment were made on the ground of disability: http://tracking-equality.hrc.co.nz/#/indicator/complaints-in-employment-by-grounds-of-discrimination

[670] Undoubtedly, other claims have been raised as PGs for discrimination under the ERA and settled at mediation in that forum.

[671] Cases may take up to two years to be heard. There has been an 81% increase in cases received by the HRRT since 2014, and the current backlog of cases will take 5 years to clear (these cases include claims for breaches of privacy, discrimination (under both the HRA and the NZBORA), and breaches of the Code of Health and Disability Consumers' Rights). The Chairperson of the HRRT, Roger Haines, in a public submission to the Justice Committee, stated "for most parties, the Tribunal has ceased to function" (Roger Haines QC *Submission on the Tribunals Powers and Procedures Legislation Bill* (Human Rights Review Tribunal, 2018)

To clarify the interpretive issues, it would be helpful if more test cases could be pursued through the Courts, as occurred in *McAlister v Air New Zealand,*[672] concerning the comparator issue (in relation to age discrimination, at least). However, for this to happen, the right cases, with sufficiently well resourced employers or employees to bring them, are required.[673] This process would take some considerable time, if it happened at all.

Another alternative, to promote the jurisprudence, would be to use a similar system to that of the Privacy Commission, whereby anonymized case notes are published on all its investigations. These case notes provide a useful tool for developing jurisprudence under the Privacy Act. If instituted for discrimination cases, this approach could provide more clarity, and more transparency to the law.

Nonetheless, in the absence of suitable claims progressing through the Courts to clarify the law in this area, and to ensure New Zealand is meeting its obligations under the UNCRPD, it is suggested that amendments should be made to the current HRA, along the lines suggested.

However, even with these amendments, the goal of substantive equality may not be achieved. For that to occur, the current model of law may need reformulating.

8.1.2 The Problem of Achieving Greater Substantive Equality

This thesis has suggested the ultimate aim of anti-discrimination law is to enable persons with disabilities to achieve greater substantive equality. However, while the HRA remains premised on formal equality and the medical model of disability, the amendments suggested would create only limited opportunities for disabled employees to achieve greater substantive equality. Compounding this, the current 'two-party' model of discrimination law, in which the interests of the employer and employee are pitted against one another, restricts the duty accommodation to that which it is reasonable for the employer to provide. This is mainly because this model of law places the burden of accommodating the disabled employee solely on the individual employer. This limits the accommodations that can be made available to the disabled employee as employers have only limited resources and need to manage their businesses efficiently. This means full accommodation of disability unlikely to be achieved and that the extent of the accommodation will depend, not on the degree of the person's disability, but on the resources of the employer. This is because what is considered 'reasonable' will depend on many contextual factors, such as the size and resources of the employer. Consequently, two employees in similar jobs but in different organisations may be treated completely differently even if they develop the same mental disability. In a large government department, for example, which has 'good employer' obligations imposed on them,[674] may be

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[672] *McAlister v Air New Zealand Ltd*, above n97.

[673] The complainant may apply to the Office of Human Rights Proceedings for free representation to take a complaint to the HRRT.

[674] The State Sector Act 1988 places additional 'good employer' obligations on State and Public sector employers, including recognising the employment requirements of persons with disabilities and promoting equal opportunities (s56(2)).

able to 'carry' a poorly performing office worker, while a small business employer, faced with the same situation, cannot. For that employer, dismissal of the disabled employee may be their only viable option.[675] Accordingly, there is a lack of equality between treatment of two employees with the same disability, in the same type of work.

For this reason, this thesis argues that current disability discrimination law is incapable of promoting substantive equality for the disabled employee, as it situates the problem of disability discrimination in employment as one between the individual employer and the employee. This approach inevitably pits the rights of the disabled employees to be accommodated against the rights of employers to manage their workplace. This occurs as the HRA endeavours to protect the (competing) interests of both.

Furthermore, there is indeterminacy in the balancing required between their competing interests. This means that, where their interests are so evenly balanced (so that the case could legitimately be decided in favour of either party), a finding of disability discrimination may be influenced — and ultimately determined — by the policy preferences of the adjudicator, which may not favour the disabled employee.

Thus, while this 'two-party' model of law predominates, a fair result (that is, full accommodation of the disabled employee but without unreasonable burden on the employer) does not seem possible. Accordingly, a new concept of law is required to resolve this problem.

In addition, substantial limitations to achieving greater substantive equality are presented by issues of access to justice (which this thesis has not dealt with, but which undoubtedly exist).[676] These include the cost, time and effort required by an unwell employee to bring a claim of discrimination, which puts them at a disadvantage from the outset.

Therefore, to achieve greater substantive equality, the law of disability discrimination needs overhauling. The question is: what kind of reformulation would be required?

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[675] The Labour Market statistics for the June 2017 quarter showed that persons with disabilities were twice as likely to be unemployed, and, if employed, the average wage for the disabled person was just over half that of non-disabled employees. http://www.stats.govt.nz/browse_for_stats/income-and-work/employment_and_unemployment/LabourMarketStatisticsDisability_MRJun17qtr.aspx

[676] These issues have recently become the focus of much media attention, e.g.: https://www.stuff.co.nz/national/crime/101570737/access-to-justice-is-being-denied-to-almost-all-human-rights-review-tribunal-chairman-rodger-haines and http://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=11982110

8.2 The Solution: A New Model of Law

As discussed, although the proposed amendments might clarify the law, and ensure New Zealand is meeting its obligations under the UNCRPD, the issue of enabling disabled employees to achieve greater substantive equality remains.

Thus, the final conclusion of this thesis is that the model of law that is currently followed, wherein disability discrimination in employment is viewed as a two-party problem between the employee and employer, needs to be replaced by a social — or multi-party — model of disability discrimination. In this model, the responsibility for the accommodation of disability, and for removing barriers to meaningful employment, would be borne by society as a whole, and not solely by the individual employer. This model of law would view discrimination in employment as a multiparty problem, involving the disabled employee, the employer and society as a whole (through the government). Under this model, the economic burden would no longer rest on the employer alone. The accommodation that could then be provided to the disabled employee would be less restricted, as the employer would be afforded the resources that are necessary to support the disabled employee. As outlined below, there are many possible forms this model of law could take. It is beyond the scope of this thesis to suggest which one would be the most appropriate for New Zealand, or how to implement it. Nonetheless, some of the possible ways in which this could be implemented are discussed below. However, the first issue that needs to be addressed is what the philosophical basis underpinning this new model of law would be.

8.2.1 Philosophical Basis for the New Model

Part of the problem of interpreting current discrimination law in New Zealand arises because the legislation does not have a clear underlying philosophical basis. International jurisprudence demonstrates that a clear philosophical basis may help determine when treatment is discrimination. In Canada, for example, discrimination, under the Charter of Rights, may only be found if treatment results in an insult to an individual's dignity.[677]

Thus, any new model of disability discrimination law for New Zealand should have a clear underlying philosophy. Although, throughout this thesis the emphasis has been on the need for those with disabilities to achieve substantive equality, this is not the only philosophical basis on which a new model of law could be based. There may be good reasons to consider, for example, concepts based on respect for individual dignity or autonomy as the underlying principle.

Reaume asserts that dignity can be understood as inherent human worth, and it is damage to the sense of self-worth that violates dignity. Therefore, discrimination occurs when a person is treated without regard to their status as a fully valued, fully functioning member of society. This, she argues, provides a unifying principle to underpin discrimination law.[678]

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[677] *Law v Canada (Minister of Employment and Immigration)* [1999] 1 SCR 497; *Gosselin v Quebec (Attorney General)*, above n25.
[678] Reaume, above n21.

Current New Zealand legislation recognises the importance of dignity, as damages may be awarded for loss of dignity under the HRA and ERA.[679] According to the HRRT, the fundamental objectives of the HRA include:[680]

> enhancing equality of opportunity, inclusivity in society and respect for the dignity of all human beings.

Furthermore, the Supreme Court has held that there is a right to dignity, and that the principle of dignity is 'the key value underlying the rights affirmed in the [New Zealand] Bill of Rights'.[681]

However, whether dignity should be viewed as a right, a principle or a value is contentious.[682] Furthermore, establishing if there has been an insult to dignity requires a value judgement which may raise interpretive issues, as may the meaning of 'dignity'.[683] According to O'Mahony:[684]

> …the elusive nature of the concept has led many commentators to argue that it is, at best, meaningless or unhelpful, and at worst, potentially damaging to the protection of fundamental human rights.

Therefore, interpreting the law based on the concept of dignity may raise more issues than it solves, and, therefore, as an underlying philosophical basis for the law, it would be less than ideal. Nevertheless, whether an individual's dignity has been insulted should be a consideration when considering adverse treatment.

The principle of promoting personal autonomy as a basis for the legal regime also has drawbacks. This is because the State has the power to limit a person's autonomy in some situations (for example, by imprisonment). Therefore, as autonomy is something that can be restricted or removed, it is not an inherent or intrinsic feature of humanity, so there can be no complete 'right' to it.[685] Furthermore, the meaning of autonomy may be contentious. So this is probably not an appropriate basis on which to build discrimination law.

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679 Human Rights Act 1993, s92M(1)(c); Employment Relations Act 2000 s103(123)(1)(c)(i).

680 *Bullock v Department of Corrections*, above n143 at [28].

681 *Brooker v Police* [2007] 3 NZLR 91 (SC) at [180]. In *Quilter v Attorney-General*, above n15 at 532, the Court of Appeal also emphasized the importance of the impact on a person's dignity when establishing whether treatment is discriminatory.

682 Conor O'Mahony "There is No Such Thing as a Right to Dignity" (2012) 10(2) ICON 551; Evadne Grant "Dignity and Equality" (2007) 7(2) Hum Rts L Rev 299; McCrudden, above n20.

683 Fredman, above n40 at 725. Fredman points out that dignity may be interpreted in at least three ways: as protecting a sense of self-worth, as protecting basic choices individuals make, and as protecting individuals against harmful stereotypes.

684 O'Mahony, above n682 at 551.

685 At 566; David Feldman "Human Dignity as a Legal Value - Part 1" (1999) Public Law 683.

A general principle of equality is equally problematic. As Smith explains:[686]

> The question of disability… raises its own set of problems. Here there is a significant difference between not only the disabled and other people but also between the different forms of disability. The differences are relevant to the question of how disabled people should, variously according to the type and extent of their disability, be treated. On one hand we think disabled people should be treated the same as other people. They should be able to compete fairly on merit for prized positions in society, in employment and in public life. On the other hand we think some accommodation should be made for their disabilities.

Thus, if equality were to be the underlying philosophy for discrimination law, it would need to take into account these divergent ideas. This thesis submits that the principle of substantive equality should be able to achieve this.

However, the concept of substantive equality is not without its own problems, as its meaning is elusive, in that it can mean equality of results, equality of opportunity, or even treating people with dignity.[687]

One limited concept of substantive equality is that it means equality of opportunity. In this case, the aim would be to equalise the starting point in employment law for the disadvantaged group, and, after that, gains would be made on the individual's own merit. The difficulty is, however, ascertaining what measures are needed to equalise opportunity at the start. Would giving Professor Smith a research assistant equalise her opportunity to publish and increase her PBRF score? Furthermore, equality of opportunity does not necessarily cater for the on-going effects of disability — that is, Professor Smith may still be unable to reach her previous levels of output, or the quality of her research may not be as good. As a result she may still face disciplinary action for poor employment performance in the future. Thus, basing discrimination law on the notion of equality of opportunity has conceptual and practical difficulties for disability.

Alternatively, substantive equality may be viewed as equality of outcome. Here, the principle would be that different treatment is permitted, or even required, to achieve equal results (so, for example, Professor Smith would be excused from performing research to enable her to stay employed). Instead of focussing on consistency of treatment, this approach is concerned with the fairer distribution of benefits.[688] While this approach can be useful in addressing challenging issues concerning both direct and indirect discrimination, the problem is identifying the 'result' or 'outcome' to be equalised. For Professor Smith, the equality of outcome sought may be the ability to remain employed like others without disability. If so, redeployment to a different (lower) position might be sufficient to count as equality of outcome. If, however, the equality of outcome sought is the retention of her dignity, by retaining equal status with her non-disabled colleagues, then

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[686] Smith, above n23 at 84-85.
[687] Fredman, above n23 at 713.
[688] At 721.

the ignominy of demotion would not be equality of outcome. Thus, even equality of outcome has conceptual difficulties.

A better conception of substantive equality may be the one outlined by Fredman.[689] She suggests substantive equality should be approached as a principle with four dimensions: to address stigma and prejudice, to enhance voice and participation, to accommodate difference, and to achieve structural change.[690] Consideration of all these dimensions, she argues, allows the law to address the different facets of inequality, such as obstacles to participation, structural obstacles to equality, distributive inequality, and prejudice.[691]

Adopting this approach to substantive equality, rather than restricting it to a single concept, enables a holistic view to be taken of the disabled employee's treatment and the context in which it arises. For Professor Smith, this approach could address structural obstacles to equality. It could remove the requirement to work to certain performance criteria or be subjected to a PIP. It could counteract prejudice (there may be an underlying assumption that having a mentally disability means she is permanently incapable of functioning 'normally'). And it could remove obstacles to participation in social life (by continuing to provide the social contact which work provides, and the financial means to fully participate in social life).

Therefore, if a new model of law is adopted, it might be based on this broad concept of substantive equality.

But how will this new model achieve substantive equality? For the reasons outlined below, this thesis contends that disability discrimination should be viewed as a social issue, requiring a societal response. Thus, a new model of law will not view the issue of disability discrimination simply as one arising between the employer and employee, but view it as an issue that requires more structured and formal interaction between the employer, employee and society.

8.2.2 Disability Discrimination: A Societal Problem

The benefit of employment for those with disabilities is well documented,[692] but the benefit to the employer,[693] and to society in general, should also be recognised. Reducing the number of persons with disabilities who are unemployed indirectly benefits all of society, not only because of the decreased

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[689] At 713.

[690] At 713. Fredman contends that the right to substantive equality should be located in the social context, so it can be responsive to those who are 'disadvantaged, demeaned, excluded, or ignored.'

[691] At 728.

[692] These include income, time structure, social contact, being part of a collective purpose, being engaged in meaningful activities and having social identity and status (Boardman and others, above n).

[693] There are recruitment and training costs associated with obtaining new staff. There is also evidence to suggest that a disabled employee who retains their position is likely to be more loyal to the employer than other employees (Harder, above n1 at 26).

social welfare costs paid by the government, but also the other advantages to the economy as a whole — from the tax contribution made by wage earners, and the economic benefits of the spending of wage earners, compared with un-waged counterparts.[694] There are social benefits of increasing diversity in the workplace, including reducing the stigma and stereotyping of mental disability, encouraging tolerance of difference, and eliminating 'ableism'.[695] Therefore, employment of those with disabilities is beneficial to all society and barriers to meaningful employment should be viewed as a societal issue.[696]

However, as discussed, under the current law, the combination of the medical model of disability, and the emphasis on formal equality, means the disabled employee is viewed simply as an impaired individual — who has the right to no more than equal treatment by the employer. These factors, coupled with a limited duty of accommodation, create a 'bottleneck' in opportunity (which impedes substantive equality).[697] To remove this 'bottleneck', a new model of disability discrimination law needs to be formulated.[698]

Reasonable accommodation in this context would reflect what society as a whole can reasonably provide, rather than the resources of the individual employer. As de Asis argues, in the context of human rights law, limitations to rights should not be restricted by costs — unless those costs will prove harmful to other human rights.[699]

This approach is consistent with the social construct of disability and with the promotion of substantive equality, as it promotes the full and equal participation in society, but acknowledges certain limitations (e.g. that a certain measure might not be possible in our current level of knowledge). Using this vision of reasonable accommodation, some possible new models of disability discrimination law are discussed below.

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[694] Stein, above n10 at 326.

[695] Wasserman in Michael Connolly *Discrimination Law* (2nd ed, Sweet & Maxwell, London, 2011) at 13. Wasserman argues that the goals of equality are the realisation of the positive benefits of tolerance and diversity (recognising people as equal but different). These concepts reflect a philosophy based on compassion and human dignity, and the social model of disability.

[696] In addition, employment of those with disabilities will help eliminate the incorrect assumption or stereotype that disability and employability are binary concepts – that is, you are either employable *or* you are disabled. (Areheart and Stein, above n551 at 882).

[697] As Areheart explains, Fishkin's 'bottlenecks' are narrow spaces in the opportunity structure through which people must pass if they hope to reach a range of opportunities on the other side (at 551 at 879).

[698] This bottleneck is a direct consequence of the current two-party model of law. Fisken contends the function of anti-discrimination law is to eliminate these bottlenecks (Fishkin, above n551).

[699] Rafael de Asís Roig "Reasonableness in the Concept of Reasonable Accommodation" (2016) (6) Age of Human Rights Journal 42 at 55.

8.2.3 A Societal Solution to Disability Discrimination

A new social model of disability discrimination law would view the issue in terms of a multi-party relationship, involving the employer, the employee and the government. Therefore, it would address the valid economic concerns of the employer, by providing them with governmental (social) support.

Solutions could include providing financial incentives (such as tax credits) to continue employing persons with disabilities. This would make up for any loss of productivity from employing the disabled employee. Conceivably, as this would mean fewer were people on unemployment or sickness benefits, there might be little additional cost to the government.

Another alternative would be to 'top up' salaries for under-performing employees. That is, if the employee was only able to work at 60% productivity, then the employer would pay 60% and the government would top up the salary to 100% (perhaps with a wage cap imposed). A variation of this would be to provide the disabled employee with a top-up benefit when they were only able to work part-time. This incentivises them to work, but allows more flexibility to the work arrangements.

A further solution could be a quota-levy system. This would require employers to either employ a quota of disabled persons, or pay a levy to a special fund, which would then be funnelled to compensate other employers for additional costs incurred from employing disabled persons. Versions of this system have been successfully adopted in Germany and France.[700] This has the advantage of spreading the cost of disability employment to all employers, and not simply to those who find themselves with disabled employees. However, it still requires employers in general to shoulder the cost of accommodations.

Many other approaches have been implemented internationally for ensuring employment of the disabled, that remove the risk or cost from the employer. For example, in Denmark, local Councils must provide sheltered employment for disabled employees under the age of 65 who cannot find or maintain work. Israel requires affirmative action to integrate those with disabilities into the workplace; and in Japan the government funds a 3-month trial employment period for those with mental disability, and provides incentives for employers who permanently employ the disabled person.[701] All of these approaches have merit and could be applicable in the New Zealand situation.

Additional safeguards could be adopted, to ensure the disabled employee is reasonably accommodated, and not discriminated against in employment. For example, there could be an overseeing or administrative body, and this body could provide mediation if issues arose between the employer and the disabled employee. Furthermore, it could be stipulated in the legislation that employees

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[700] Daniel Mont *Disability Employment Policy* (Social Protection Unit, Human Development Network, The World Bank, 2004) at 21.

[701] Felicity Callard and others "Examples of Disability Legislation from Across the World" in *Mental Illness, Discrimination and the Law* (John Wiley & Sons, Ltd, 2012) Chapter 15.

with disabilities cannot be dismissed without the prior approval of this body.[702] This process would ensure the employer complies with anti-discrimination law. An independent administrative body would ensure that appropriate support measures were provided to the employer and disabled employee, while ensuring the proper allocation of public funds.

A final consideration, relevant to mental disability, is that for stress-related disorders, such as depression and anxiety, prevention would be better than cure. While this topic is outside the scope of this thesis, it is interesting to note that the UK is intending to adopt a set of 'mental health standards' to enable employees to 'thrive at work', and this, it is hoped, will substantially reduce the numbers of employees who become unwell due to work related stress.[703] New Zealand might like to consider the adoption of a similar policy.

8.2.4 A New Social Model of Disability Discrimination Law: Conclusion

While all of the above measures would help integrate the disabled into society, and further the aims of achieving greater substantive equality, they may be difficult to implement (in the short-term at least). Therefore, a multi-step process may be required, starting with amending the current HRA to better meet its objectives, and eventually instituting a new social model of discrimination law to achieve greater substantive equality for the disabled employee.

Achieving this will not be easy, as it will require a total re-evaluation of how New Zealand views both disability and discrimination. That is, it will require reconsideration of the meaning of discrimination and disability rights, and the role of employment in the social (rather than economic) context. At a minimum, it will require reform of both discrimination and employment law, with the implementation of some financial support scheme, which supports either the disabled employee or their employer to achieve these goals.

Reform of the law to enable this will involve not only legislation dealing with setting-up and managing whatever scheme is selected, but it will probably require further reform of the HRA to reflect this new paradigm. In particular, the potential accommodation provisions may cease to be so relevant, as accommodation would no longer be the sole responsibility of the employer. As the statutory context would require reconsideration and change, this could be an opportunity to use the law to promote social change (rather the law simply reacting to, or reflecting, social change).

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[702] In the Netherlands, an employer can only dismiss an employee for long-term incapacity after permission is granted from the Employment Insurance Agency. Permission will only be granted if there are reasonable grounds for dismissal, and redeployment is not possible. Furthermore, employers are obliged to pay sick employees 70% of their salaries (but not less than the minimum wage) for the first two years of their illness. http://knowledge.leglobal.org/termination-of-employment-contracts-in-netherlands/

[703] Stevenson and Farmer, above n577. This report estimated that cost of poor mental health to the UK Government at £24 billion per year, and even more to the economy in general. However, the report found adopting measures to encourage good mental health at work significantly reduced presenteeism and absenteeism rates.

Fredman suggests, for discrimination, instead of having the law directed at individual perpetrators and individual victims of discrimination (i.e. a reactive measure), the focus should shift to imposing proactive duties on bodies who are in a position to bring about change, even if they have not caused the problem.[704] For example, there could be a proactive duty (imposed on employers) to advance equal opportunity for the disabled (rather than the current prohibition of unequal treatment). This would replace an adversarial model of dispute resolution with a model of 'structural reform'. As Fredman argues, the imposition of positive duties changes the whole landscape of discrimination law, from reacting to discrimination that has occurred, to proactively promoting disability rights.[705] This concept is not without challenge, however, as the law needs to define when such proactive duties would arise, and their content. Furthermore, it would require specific aims, or the duty would be too vague to enforce. Thus, the employer might be put under a duty to consider how any position available could be adjusted to enable a disabled person to fill it.[706] If combined with incentives (such as the employer support measures previously discussed), this model of law might achieve social change. The goal of the legislation would be facilitation of change and goal setting, and the role of the judiciary would be to ensure the employer's decision-making was 'deliberative' — i.e., that they took deliberative steps to consider the disabled in employment matters, prior to any decision-making.[707] This consideration would need to go beyond procedural 'box-ticking'.

This principled, deliberative approach to decision-making is not without precedent in New Zealand, as it is similar to the approach taken (in the public arena at least) to incorporate the principles of the Treaty of Waitangi into decision-making.

Thus, a new social model of disability discrimination law, based on concepts of substantive equality, has the potential to not only protect the human rights of the mentally disabled employee, but also facilitate change in the way both disability and discrimination are viewed. This would benefit society by encouraging diversity and tolerance overall.

8.3 Jurisprudential Reflections

Finally, this thesis has raised certain issues about interpretation, and the clarity of the law. It concludes with some reflections regarding these matters.

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[704] Sandra Fredman "Breaking the Mold: Equality as a Proactive Duty" (2012) 60(1) Am J Comp L 265 at 266.
[705] At 271.
[706] This may of course raise issues about the boundary between what is a pro-active duty and what is affirmative action. Measures to advance equality are permitted by the HRA (section 73), and include measures taken for the purpose of assisting or advancing persons or groups who need assistance to achieve an equal place with others in the community.
[707] Fredman, above n704 at 276.

8.3.1 Using the Spiral Approach to Interpretation

To interpret difficult aspects of the discrimination in employment provisions of the HRA, this thesis adopted the spiral approach. This approach involves a sequential progression through a series of interpretive methods, analysing: the text of the provision, the provision in the context of the Act as a whole, the legislative history and finally the wider context (including international and overseas law).

The advantages of this approach are that many factors can legitimately be considered when finding the 'best' interpretation of the legislation. This is particularly useful when the text is ambiguous, and the purposes of the Act appear to be conflicting (as was frequently the situation when examining the discrimination in employment provisions of the HRA). Assessing the provisions in the overall scheme of the Act, and appraising how the legislative history (including amendments to the Act) may reflect a change in legislative intent over time, provided some clarification. However, for some provisions, the legislative history was unhelpful: for example, when amendments made to the HRA imposed a positive obligation of accommodation in some contexts, but not in the context of employment. It was not clear if this was legislative oversight, or if Parliament had no intention of creating a positive obligation to accommodate the disabled in employment. Nonetheless, similarly worded overseas law provided useful guidance as to how the extent of this obligation in New Zealand might be interpreted (that is, as inferring an obligation of reasonable accommodation).

Overseas law also identified issues that might arise as a consequence of certain interpretations of the law. Regarding the comparator issue, for example, the interpretations adopted in the UK and Australia, and the legislative responses to those interpretations, suggested the approach that should be taken in New Zealand. It also enabled a more complete consideration of the potential pitfalls of certain interpretations of those provisions. Furthermore, as the final step in the spiral method is to consider international law (such as New Zealand's obligations under the UNCRPD), this helped promote interpretations in accordance with that convention. In this way, the spiral approach affords a 'double check' that the interpretation selected is the most appropriate.

Nevertheless, as alluded to in Chapter Four, there are also disadvantages in using the spiral approach. This is because it adopts a stepping-stone approach to interpretation. The initial step is to focus on the individual phrases and terms within the statute's provisions. The next step is to assess them in the scheme of the Act. This is followed by consideration of the legislative history. Then terms or phrases used in the wider international context are taken into account.

Thus, the stepping-stone approach focuses on the precise words of the text of a provision, before attending to the overall purposes of anti-discrimination legislation or obligations under the UNCRPD. When interpreting the discrimination in employment provisions of the HRA, this approach risks the possibility that if discrimination is not found at first instance under section 22, then the enquiry stops — without the reasonable accommodation provisions being evaluated, even though they might influence the interpretation of section 22. For example, interpreting the text of section 22 might find that an employee is not 'qualified for work', as they could not perform an essential duty of the

position to the satisfaction of the employer. As there is then no discrimination, no further evaluation would be required — when possibly the employer could have accommodated the disabled employee, by providing them with a special facility, or reallocating an essential duty, after which they may have been 'qualified for work'.

A more appropriate method might be to take a global approach to interpretation, rather than one that proceeds step-by-step. The approach would assess the employer's treatment of the mentally disabled employee against all the provisions of the HRA. Then, instead of assessing the ability to provide special services only after finding discriminatory treatment, the employer's ability to provide the accommodation, or reallocate duties, would be assessed in the first instance and might influence whether the employee was considered qualified.

This global approach might result in a more 'just' result. By assessing the treatment against all the provisions of the HRA, including the potential accommodation provisions, a different outcome to that arrived at under the step-by-step approach may result. For example, under a global approach, the employee might be found 'qualified for work', as they could be appropriately accommodated, whereas under a stepping-stone approach, the disabled employee may be screened out before the ability to accommodate them was traversed by the Court or HRRT.

However, this global approach might risk the determination becoming more subjective. That is, it risks the HRRT or Court's assessment being based on what they think the employer ought to have done in the circumstances. This could unfairly bias the outcome.

Overall, however, although the spiral approach may have some limitations, it seems a useful approach to interpretation. It enables the interpreter to 'double-check' the correctness of their interpretation as they progress through the steps of the interpretive method. Accordingly, it may produce the most apt interpretation of a particular phrase, term or provision, taking into account the scheme of the Act, its purposes, and international jurisprudence.

8.3.2 Certainty and Clarity in the Law

As stated in chapter one, the adequacy of a law may be assessed by establishing whether it expresses a clear and consistent position, is understood by the parties, and provides them with a degree of certainty as to their respective positions in advance. A high degree of uncertainty suggests the law is not knowable. According to Doerfler,[708] laws that are not clear are also unknowable, as 'claims about "clarity" and claims about "knowledge" seem to be mutually warranting — that is, if one is warranted in claiming that something is "clear," one is warranted in claiming to "know" it, and vice versa.' Thus, both lack of clarity and lack of certainty simultaneously make law unknowable. Fuller even

[708] Ryan Doerfler "High-Stakes Interpretation" (2018) 116(4) Mich L Rev 523 at 542. However, Doerfler argues that in 'high stakes' cases, it is less likely that the Court will 'know' the law, and, therefore, it is less likely the language in the statute will be 'clear'. Thus, seemingly unambiguous terms may become ambiguous, allowing the Court greater latitude in interpretation.

contends that failure to make rules (or laws) understandable (or knowable) makes them fail.[709] For Fuller, the desideratum of clarity is 'one of the most essential ingredients of legality.'[710]

This thesis has found the current law for disability discrimination under the HRA neither clear nor certain. Consequently, its knowability is compromised. Therefore, following Fuller's reasoning, some rules in the HRA might be at risk of failure — or, at least, being inadequate for their purpose.

This lack of clarity stems from several factors.

First, there is the complexity of the drafting. The individual provisions are somewhat inelegant, as they are both long and convoluted, and incorporate multiple elements, all of which require some level of interpretation.

Second, section 22, which determines when conduct will be unlawful, covers all grounds of discrimination. Therefore, the requirements are pitched at a high level of generality, rather than being specific to a prohibited ground, such as disability. Different exceptions to these general rules are then provided for each separate ground. These exceptions are in the form of defences against a claim of discrimination (as with the permitted exceptions for disability). In turn these defences are subject to the 'general qualification on exceptions', provided by another general provision that applies to all exceptions for all grounds of discrimination. The result is a complex interweaving of provisions, some of which apply to a specific ground (e.g. disability), while others are general in nature. Consequently, there is an overall lack of clarity.

Third, it seems that terms or phrases used in later provisions may affect interpretation of earlier provisions. Consequently, even when it seems that the Court or HRRT need not enquire beyond s22, the failure to do so may mean a phrase such as 'qualified for work' may not be interpreted appositely, as determining the correct meaning might require reference to the requirement of task reallocation as in section 35.

Fourth, some key terms, such as 'qualified for work', 'services', and 'facilities' are not defined, and can have multiple meanings. Thus, the general ambit of the provisions becomes uncertain, despite their importance.

Fifth, there is no adequate guidance in the Act regarding the correct selection of the comparator employee. Thus, what is meant by "the circumstances" in which the employment of other employees would not be terminated is unclear.[711]

Lastly, there are several evaluative, or elastic, concepts in the Act, such as 'reasonableness'. There is no sufficient guidance as to how these terms should be interpreted, or what factors should be considered in assessing, whether a measure to accommodate the disabled employee could be considered 'reasonable'. The same problem arises in assessing the meaning of 'risk of harm' and 'unreasonable disruption' to the employer.

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[709] Fuller, above n33 at 39. Fuller contends there are eight ways to make a law fail, and that a total failure of any one of them would result in the failure of the legal system as a whole.

[710] At 63.

[711] Human Rights Act 1993, s22 (1)(c).

This leaves the law of disability discrimination in employment uncertain, and potentially unknowable.

Clarifying the Law

This thesis has suggested a number of solutions that might clarify the law. These include: having a separate part of the HRA for disability discrimination; providing definitions (or fuller definitions) of key terms; including factors to be considered when determining 'reasonableness' of measures; and specifying a positive duty of reasonable accommodation.

The lack of clarity that arises from the complex drafting is not easily resolved. One method would be to separate disability discrimination from other forms of discrimination and consolidate the relevant provisions into a separate Part of the Act. This might involve complete reform of some provisions — which could then be drafted more clearly and concisely. Additionally, it might be possible to redefine disability discrimination in terms that are more sympathetic to the social construct of disability, and construct the provisions in a manner that promotes greater substantive equality for disabled employees. Moreover, reforming the Act in this way might ensure there is internal consistency of concepts and terms, such as what constitutes a risk of harm, or the threshold for when something is considered 'reasonable', or the meaning of 'services or facilities', across different contexts.

Furthermore, the ERA could be amended to incorporate (by reference) this separate part of the HRA concerning disability discrimination. This would eliminate the textual differences between the two Acts, and potential problems arising. This would provide more consistency for disability discrimination law in employment as a whole.

However, for the reasons discussed in Chapter 6, although this might clarify the law for disability discrimination, it might also complicate the law for discrimination in general, particularly when intersectional or multiple grounds of discrimination were claimed. Thus, this thesis suggests that creating a separate part in the HRA for disability discrimination is not necessarily the best solution.

Accordingly, working within the parameters of the current HRA, clarity may be achieved through amendments to the current provisions. Incorporating definitions of key terms and phrases will determine their meaning and ambit. This could also solve the issue that the meaning of a phrase in one provision can be influenced by the interpretation of subsequent provisions. For example, defining the meaning of 'qualified for work' in section 22 would remove the possibility that the Court or HRRT might deem the employee not qualified without taking into account the effect of the section 35 proviso, and the (limited) duty it imposes to reallocate tasks the employee cannot perform. Furthermore, a definition of 'qualified for work' would make it clear that an employee could not be dismissed for being unable to perform all essential duties, if the employer could reasonably accommodate them. This provides the employer and employee with greater certainty regarding their obligations and rights.

The provisions may be further clarified by expanding the current definitions of some terms. Extending the definition of disability to include the manifestations

or consequences of the disability for example, could clarify the selection of the proper comparator employee, and clarify when adverse treatment is to be considered 'by reason of' disability, and not simply due to poor performance.

Nevertheless, definitions can raise their own interpretive issues. For example, if 'qualified for work' is defined in terms of being able to perform the 'essential duties' of the position, then clarification of that term might be required. It is not easy to quantify what an 'essential duty' is. To clarify this, rather than a definition, a list of factors that *must* be considered by the Court of HRRT for determining this could be included, with the addition of a catch-all phrase (such as, the consideration of 'any other factors the Authority or Court thinks appropriate'). This would improve the clarity of the law in several ways. First, by providing guidance to the Court or HRRT on the factors to consider, this indicates the importance or weightiness of those factors. Second, a list of mandatory factors should lead to a more consistent approach. This means all employers would be judged on the same basis, ensuring greater consistency and fairness, and, over time, decisions made on arguments raised concerning the different factors will provide a body of jurisprudence that should further develop, and clarify the law. But, the inclusion of a catch-all phrase still allows some flexibility, so other relevant factors can be considered. There are several places in the HRA where this type of mandatory guidance might help to clarify the law.[712]

Above all, this thesis has argued that, for disability in employment, the HRA lacks certainty because it is not clear whether, or to what extent, the employer might have a duty or obligation to reasonably accommodate the disabled employee. As discussed, this uncertainty arises because there is no positive duty of accommodation imposed by the HRA. Although it might be possible to infer such a duty from the potential accommodation provisions, this thesis argues this is not the 'best' interpretation of what are actually defences against a claim of discrimination, and a proviso to those defences. Moreover, even if such a duty were to be inferred from these provisions, the ambit of the duty remains unclear, as it applies to the provision of 'special services or facilities' and to accepting a reasonable 'risk of harm'.

The imposition of a clear positive duty of reasonable accommodation could clarify the law in this area. It would ensure the employer knows, from the outset, that they have a duty of accommodation, and the employee would know that they have a right to be reasonably accommodated. Specifying the duty in this way makes the law more 'knowable'. Furthermore, the employee would not need to prove adverse treatment in comparison to others, but could simply raise a claim that they had not been reasonably accommodated at the outset.

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[712] A list of mandatory factors to consider might be helpful for assessing whether it is 'unreasonable' to provide special services or facilities, or 'unreasonable' take a risk of harm, or when a disruption to an employer's activities would be 'unreasonable'. Should a duty of reasonable accommodation be included in the Act, it would be beneficial to include a list of factors to be considered when determining whether an accommodation would be 'reasonable'.

The obligation of reasonable accommodation could apply throughout the Act. This would have the advantage of clarifying the law in other contexts of disability discrimination, where the obligation of reasonable accommodation may be contentious.

Lastly, inserting a provision that makes the failure to reasonably accommodate the disabled unlawful would reinforce the idea that the duty of reasonable accommodation is mandatory, and, provide the parties with additional certainty.

Nonetheless, the ambit of this duty would still not be clear, or certain, without a definition of reasonable accommodation, and guidelines establishing what factors to take into account when assessing reasonableness.

Nonetheless, greater clarity and certainty (and therefore knowability) of the law could be achieved through the adoption of the suggestions above. These kinds of suggestion are particularly important in the current New Zealand context, as the jurisprudence for disability discrimination has been slow to develop.

8.4 Final Conclusion

Overall then, this thesis concludes that the current law for disability discrimination in employment is not adequate for its purposes, as it is insufficiently clear to provide employers and disabled employees with any degree of certainty as to their respective rights, obligations or prerogatives. Moreover, New Zealand may not be fulfilling its obligations under the UNCRPD, and, although the HRA could be amended to clarify many issues that have been raised, this is unlikely to be sufficient to enable persons with disabilities to attain substantive equality. Accordingly, it may be time for the Government to re-evaluate the current law of disability discrimination, to assess if there would be a better way to promote substantive equality for disabled employees, acknowledging the general social advantage and importance of including people with disabilities in the workforce. This could produce a different model of disability discrimination law.

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