THE DEFENCE OF INHERENT REQUIREMENTS OF THE JOB IN UNFAIR DISCRIMINATION CASES

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SUMMARY

The discrimination jurisprudence in South Africa has developed over the previous decade since the promulgation of the interim and final Constitutions. The Employment Equity Act of 1998 also gave impetus to the development of equality jurisprudence with reference to the workplace.

In terms of both the Constitution and the Employment Equity Act, unfair discrimination is forbidden. Both the Constitution and Employment Equity Act list specific grounds on which discrimination would be regarded as unfair. Although discrimination on any of the listed grounds would be regarded as automatically unfair, there is realisation that this cannot be an absolute position. The Employment Equity Act makes provision that employers be able to justify discrimination even on the listed grounds where there are justifiable reasons. In terms of the EEA, it is not unfair discrimination to differentiate between employees on the basis of an inherent requirement of the particular job. It is this defence that is considered in the present treatise.

The inherent requirements of the job as a defence in unfair discrimination cases is one, which needs to be carefully considered it in fact requires a clear understanding of what constitutes an inherent requirement. It is equally important to understand that although in one instance it may be justifiable to exclude certain employees on the basis of an inherent requirement of the job, a generalisation may give an employer difficulties under certain circumstances. An employer who is faced with a prospective employee who suffers from a particular illness that would make it impossible to do the job, could raise the defence of an inherent requirement of the job. However, the fact that a particular employee has the same illness as the previous one not employed does not give an employer an automatic right to exclude all prospective employees who suffer from the same illness without having had consideration of their circumstances as well as those of their illnesses. The defence of inherent requirements of the job is therefore valid only where the essence of the business would be undermined by employing or not employing people with certain attributes required or not required to do the job.
CHAPTER 1
INTRODUCTION

The South African society has emerged from a past that is deeply divided and ravaged by institutionalized discrimination through the system of apartheid.

The system of apartheid has had a devastating effect on all spheres of South African life. It has left deep scars on political, social, economical and cultural life of all South Africans, in particular black South Africans.

As a result of the system of apartheid, black South Africans were denied almost every right in society. Everything either economically or otherwise, that they may have access to, was seen as a privilege and there only limited access was allowed.

The education system was designed in such a way that black people would not achieve certain skills. The advancement of black employees in employment to managerial positions was never a possibility. Up to this day, South African corporate companies are still a reflection of what the system was. Even though black people constitute almost 80% of the country’s population, no more than 20% of black people occupy senior positions in South African corporations.

It is the recognition of such serious damages created by an institutionalized system of discrimination that the interim Constitution as well as the final Constitution identified the need to pay particular attention on the creation of a society where equality was highly valued and is a right.

UNFAIR LABOUR PRACTICE AND DISCRIMINATION

The generation transformation of our labour law effectively took shape after the Wiehann Commission report, and after the introduction of the Industrial Conciliation Amendment Act 94 of 1979.¹ In terms of the Industrial Conciliation Amendment Act

94 of 1979, the Industrial Court had jurisdiction to determine unfair labour practice disputes.²

It is through the introduction of the unfair labour practice concept that issues of discrimination could be addressed by the courts. Because of the nature of general legislation during that time, very few cases involving discrimination ended up in court.

The fact that the court could only deal with issues of discrimination suggests that there was no avenue necessarily available to directly address discrimination problems confronting employees. The prohibition of discrimination at work was only implied in the unfair labour practice. Although the Wiehann Commission had in its report acknowledged discrimination as a problem facing South African labour relations, and recommended that it be outlawed, the legislators of the time were not ready for this change.

The definition of the unfair labour practice at the time is often criticized for not being precise or for being indeterminate. This being the case, gave the court very wide powers to be able to challenge and make a determination on any conduct in the employment situation seen as constituting an unfair labour practice. The nature of the unfair labour practice and the fact that the court could make determinations based on equity was sufficient ground for the court to create a labour legislation with a good discrimination jurisprudence.

This discrimination jurisprudence was never development because the court did not see the need to do so. The fact that the court never set about to develop a jurisprudence on discrimination should be understood against the background of the context within which the court existed.

Although no formal discrimination jurisprudence existed, the Industrial Court did make a few determinations in areas such as unequal pay for the same work,³ sexual

² Le Roux and Van Niekerk supra.
³ In SA Chemical Workers Union v Sentrachem Ltd (1988) 9 ILJ 410 (IC). The court held that greater efforts should have been made by the employer to ensure wage parity, and issued an order calling upon the employer to remove discriminatory practices within a period of six months.
harassment\textsuperscript{4} and denial of training to employees of certain race groups.

During the period preceding the findings of the Wiehann Commission and the de-racialisation of labour relations, issues of discrimination in employment were part of the system. It was only after 1980 that more fundamental changes could be seen taking shape in labour legislation.

With the introduction of a new legislative framework in 1981 through the passing of Act 57 of 1981 came the creation of the Industrial Court. The Industrial Court had quite formidable powers to regulate both collective and individual employment relations through a broadly defined unfair labour practice jurisdiction.

The unfair labour practice concept in the years to follow was to be a tool extensively used by the Industrial Court to deal with a wide range of issues from unfair dismissal to issues of collective bargaining. It is also through the unfair labour practice that issues of racial discrimination would find their way to the Industrial Court. Even in that case it seems that the Industrial Court would be unable to deal directly with issues of discrimination other than dealing with them as issues of or through the unfair labour practice jurisdiction.

The Industrial Court was able to use the unfair labour practice jurisdiction to address issues of discrimination because of its broad definition and the fact that it was left to the courts to define.\textsuperscript{5}

As already indicated in dealing with discrimination issues, the court would have to make a determination on the unfairness of the practice brought before it. Whilst today it would be easy to bring before the court a dispute based on unfair discrimination, this would not be possible in the pre-1995 dispensation unless the dispute was brought before the court as an unfair labour practice dispute.

\textsuperscript{4} Chamber of Mines v Mineworkers Union (1989) 10 ILJ 133 (IC). In this case a racially exclusive union was the respondent and had instructed its members not to train employees who were of a different race group.

\textsuperscript{5} The Act simply declared that an unfair labour practice was any labour practice which in the opinion of the Industrial Court is an unfair labour practice. Rycroft and Jordaan \textit{South African Labour Law} (1992) 156
Although it is argued that the definition of the unfair labour practice was clumsy and elusive, it was a very useful tool in the hands of the court. As opposed to the strict application of the common law principles of lawfulness, labour law was transformed into a body governed by principles of fairness.

It is against this background that even though the conduct of an employer may have been lawful, the court would have to look at whether the conduct complies with the principles of fairness.
2.1 THE INTERIM CONSTITUTION

Equality is entrenched in the South African Constitution as a value and a right. Although it may seem to be a contradiction, the emphasis and the need for equality recognized by the interim Constitution No 200 of 1993 seem to have its roots in our very divided and discriminatory practices were the order of the apartheid system. As a result of this system, legislation which includes labour legislation would not escape the clutches of racial segregation and discrimination.

The possibility of democratic rule in South Africa made it necessary for those who created the interim Constitution to ensure that the foundations of equality were firmly laid in the interim Constitution. This was to ensure that in future equality as a value and a right is entrenched and permeates all spheres of social life or activity. This was in recognition of the fact that in order to eradicate discrimination and entrench equality, the country will have to take conscious and active steps to do so.

The preamble of the South African interim Constitution talks of the “need to create a new order”. Once more, this is a recognition of the fact that, owing to the past there is an absence of equality in South African society.

It is also against such a background that in the pre-1994 dispensation the Industrial Court would find it difficult to deal with discrimination cases purely as that, but rather under the unfair labour practice concept.

Section 8(2) of the interim Constitution provides for general anti-discrimination provision but emphasizes certain grounds on which discrimination is not permitted. Once more, it seems that these are the most common grounds on which the pre-

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6 Whereas, there is a need to create a new order in which all South Africans will be entitled to a common South African citizenship in a sovereign and democratic state in which there is equality between men and women and people of all races so that all citizens shall be able to enjoy and exercise their fundamental rights and freedom. The South African Constitution No 200 of 1993.
1994 discrimination found its expression even in employment practices. For this reason the interim Constitution seeks to ensure that a special force is put on these grounds.

As we would see in both the Labour Relations Act of 1996, as well as the Employment Equity Act of 1998, these grounds have a special focus or are given special attention. This is reflective of the cornerstone nature to the LRA as well as the EEA of the interim Constitution.

The interim Constitution under section 8 deals with equality in general, however, equality before the law and unfair discrimination are contained in different subsections. This suggests that each one of these two terms have a slightly different role and effect. The manner in which section 8 is structured would have an influence on how an applicant to the labour court may choose to bring his case as either the denial of equality before the law or an instance of unfair discrimination.

For this reason it is necessary that when one has regard to equality or discrimination cases, one has to have a proper and correct understanding of the Constitution as the basis of our labour law. Section 8(3)(a) of the interim Constitution can be seen as the foundation of the Employment Equity Act and the affirmative action measures required to achieve equity in the workplace. It recognizes the disadvantages that may have been experienced by certain categories or groups of our society and affords an opportunity for fair discrimination on the very grounds mentioned in subsection 2. Of importance here is the objective of achieving equity, hence discrimination would be regarded as not being unfair.

2.2 THE FINAL CONSTITUTION

The South African Constitution is regarded as the supreme law of the land. All other forms of legislation are in some way subordinate to it. The Labour Relations Act of 1996 identifies as one of its objectives the “giving effect and regulation of the fundamental rights conferred by section 23 of the Constitution”.

The Employment Equity Act of 1998 also has its foundation in the Constitution. Section 9 of the South African Constitution is particularly relevant to the development of anti discrimination jurisprudence. The South African Constitution sees equality as a value upon which democracy is founded. It is a value which the Constitution seeks to ensure its promotion through every aspect or sphere of law including labour law. The Constitution recognizes the fact that the entrenchment of equality as both a value and a right in the Constitution may not be enough to achieve the objectives it sets itself.

For this reason it talks of a possibility to take up or implement measures that are intended to protect or “advance persons or categories of persons disadvantaged by unfair discrimination”. There should be not doubt about the fact that the Constitution through section 9 recognised the lack of equality in our society as a result of the pre-1994 dispensation. The Constitution also recognizes the fact that without a conscious effort to prohibit unfair discrimination our society will continue to be plagued by issues of discrimination.

On the other hand, the Constitution as both a foundation for equality and further legislation to promote equity, it recognizes the fact that equality is not an abstract concept and therefore as a right cannot be seen as an absolute right. The fact that the Constitution clearly frowns upon discrimination of any form, but also talks of fair discrimination is a recognition of the fact that those who create law and apply it must play a balancing act.

Equality includes the full and equal enjoyment of all rights and freedoms, to promote the achievement of equality, legislative and other measures designed to protect or advance persons or categories of persons disadvantaged by unfair discrimination may be taken.

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7 See the preamble of the South African Constitution, s 5(1)(a).
8 Equality includes the full and equal enjoyment of all rights and freedoms, to promote the achievement of equality, legislative and other measures designed to protect or advance persons or categories of persons disadvantaged by unfair discrimination may be taken: The South African Constitution, 1996.
While the Constitution seeks to ensure equality and in particular create an environment where those who had in the previous dispensation been disadvantaged, it also recognizes that this right to equality like all other rights must be regulated.

For this reason, the Constitution places a limitation on all rights found in the Bill of Rights. This suggests that the Constitution envisages that these rights may be infringed depending on the reason or justification for the infringement. Obviously the basis or circumstances of the infringement of any right as envisaged by the Constitution has to be consistent with the basic principles of a democratic society, it must also be done within the context of maintaining equality.9

Although there is currently legislation governing issues of discrimination and the promotion of equality, the Constitution remains a very relevant document to rely on in interpreting issues of discrimination and equality. This suggests that the Constitution seeks to ensure that the context and the original intention of promoting anti-discrimination as well as equality is not lost in legalistic interpretations.10

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9 See s 36(1) of the South African Constitution.
10 See s 39(1)(a) of the South African Constitution – when interpreting the bill of rights a court or tribunal must promote the values that underlie an open and democratic society based on human dignity and freedom.
CHAPTER 3
PROVISIONS RELATING TO DISCIMINATION IN THE LRA AND THE EEA

In the pre-1994 period, through the system of apartheid, discrimination was institutionalized. Against this background legislation had to be repeated and a new one had to be introduced. Not only did the country have to introduce legislation that is free from the discriminatory practices of the past, but the country also had to see to it that legislation deals effectively with discrimination and ensures the promotion of equality.

3.1 THE LABOUR RELATIONS ACT

Discrimination in employment is dealt with primarily through the Labour Relations Act and the Employment Equity Act. In promoting the provisions of the Constitution, the Labour Relations Act specifically prohibits discrimination in employment or any discriminatory employment practices.

Unfair discrimination is not necessarily a subject of the Labour Relations Act, however, issues of unfair discrimination are dealt with through several provisions in the Labour Relations Act. In particular, unfair dismissals on grounds related to discrimination are dealt with through the provisions of the Labour Relations Act. Also, issues related to unfair labour practices are dealt with through the Labour Relations Act.

The Labour Relations Act, like the Constitution, plays a balancing act in section 187 by making provision for identifying and dealing with automatically unfair dismissals and also making provisions for an escape route on cases that can be seen as automatically unfair. Section 187(1)(f) of the Labour Relations Act sees dismissal based on discrimination on any of the grounds listed as being automatically unfair.

11 The preamble of the LRA states its purpose as being that of “advancing economic development, social justice, labour peace and the democratisation of the workplace by fulfilling the primary objects of this Act, which are to give effect to and regulate the fundamental rights conferred by s 27 of the Constitution. See also the Employment Equity Act 55 of 1998.
Of importance to note in section 187(i) is the fact that the Act does not just prohibit dismissal on these grounds, but what it prohibits is dismissal for an arbitrary reason related to any of the listed grounds. Section 187(2) of the Labour Relations Act provides a foundation upon which discrimination on the prohibited grounds can be done provided it is not arbitrary and sound justification can be established.

In terms of the Labour Relations Act where an employee has been dismissed for reasons related to discrimination in making a determination a number of questions have to be asked. Firstly, whether the reason for dismissal is in fact unfair? Secondly, whether the ground for discrimination is for an arbitrary reason. While the discrimination may seem to be unfair, it may not be arbitrary unless it is not justified by one of the reasons identified by section 187(2)(a) or (b). “It is, however, not automatically unfair to dismiss by reason of one or more of the listed grounds if the dismissal is occasioned by an inherent requirement of the particular job"12 or, in the case of age, if the person has reached the normal or agreed retirement age for persons employed in that capacity.”13

An employee who approaches the court for a reason of unfair dismissal based on unfair discrimination has to prove that the dismissal was discriminatory. Once it has been established that the dismissal was discriminatory, the employer has to prove that the discrimination was justified in terms of the grounds listed in section 187(2)(a) or (b), which means the reason for discrimination although may be on one of the listed grounds is not arbitrary. On the other hand while the employee has to prove that the dismissal was discriminatory it is important to note that the employee has an obligation to rebut the allegation of discrimination.14

Whilst section 187 plays some kind of a balancing act through section 187(2), it is important not to confuse this as meaning that an automatically unfair dismissal can be justified. As already suggested, the important thing to do is to prove that the

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12 S 187(2)(a).
13 S 187(2)(b). Du Toit et al.
14 In Lagadien v University of Cape Town [2001] 1 BLLR 76 (LAC), the court held that an allegation of discrimination raises a presumption of unfairness which the employer is obliged to rebut.
dismissal is justified on the basis of the provisions of section 187(2), which means that the dismissal is not automatically unfair. Once a dismissal has been proved to be automatically unfair, the determination is irreversible.

It is therefore important to understand that the provisions of section 187(2) are not a justification for automatically unfair dismissal, but rather a recognition that there may be peculiar circumstances related to the requirements inherent to the job that would not permit an employment of people affected by a certain criterion imposed by the nature of the job.

Recognition that there may be peculiar circumstances related to the requirements inherent to the job that would not permit an employment of people affected by a certain criterion imposed by the nature of the job.

3.2 THE EMPLOYMENT EQUITY ACT

The Employment Equity Act has its foundation firmly in the Constitution and the need for social transformation. It is a recognition of the need to put in place mechanisms that will deal decisively with institutionalized discrimination of the past and ensure the advancement of those previously disadvantaged. Employment equity should therefore be seen as a project to achieve social transformation rather than legislation that will remain a permanent feature of our society. As can be seen in the Act, this project cannot be successfully taken up without regard to other interests that shape our society.

If employment equity is to achieve equity taking into account other requirements of a democratic society as identified by the Constitution, such as human dignity and non-racialism, it has to ensure a balance between the need to advance previously disadvantaged groups on the one side and the greater needs of ensuring social or national integration.

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15 Recognising that as result of apartheid and other discriminatory laws and practices, there are disparities in employment, occupation and income within the national labour market, and that those disparities create such pronounced disadvantages for certain categories of people that they cannot be redressed simply by repealing discriminatory laws: the preamble of the Employment Equity Act 55 of 1998.
For this reason, employment equity has to ensure that the needs of society as a whole are taken into account. If for instance, an economic need has to override the requirements of employment equity in order to achieve a greater societal need that has to be accommodated. It is in this context the employment equity suggest a distinction between fair and unfair discrimination. In other words, it is recognized that not all discrimination is unfair. Therefore, the reason and context within which discrimination is taking place is important.

The Act seeks to implement and achieve the objectives enshrined in the preamble and section 9 of the Constitution of South Africa. This, the Act does through the prohibition of all forms of discrimination in employment or the workplace. The Act also requires employers to implement measures designed to ensure the removal of barriers that could inhibit the advancement of groups previously disadvantaged. It also requires employers or designated employers to implement measures that will ensure advancement of previously disadvantaged groups to achieve equality.\textsuperscript{16}

In placing an obligation of employers to deal with unfair discrimination, the Act adopts a positive approach by requiring employers to promote equal opportunity. Equal opportunity is promoted through the elimination of unfair discrimination in all employment policies and practices. The Act does not only seek to eliminate existing discriminatory practices and policies, but also seek to ensure that steps are taken to prohibit any possibility of unfair discrimination.

The act of discrimination is a factor measured on its impact as well as the differential treatment of one or more employees, against another one or more employees. The test of whether there is discrimination or not does not require proof of intent on the part of the person practicing discrimination. It also does not suggest that those negatively affected by discrimination are or have lost anything (in the strict sense) as a result of the discriminatory practice.

\textsuperscript{16} S 9(2) of the Constitution states that equality includes the full and equal enjoyment of all rights and freedom. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons disadvantaged by unfair discrimination may be taken.
The test therefore becomes an objective one in the sense of objective factors determining whether there is discrimination or not.

The basic purpose of employment equity is the achievement of the goals of equality as set out in the Constitution. The fact that employment equity requires implementation of affirmative action measures to be implemented is in itself a recognition of the fact that our past dispensation has inflicted upon our society deep fractures of inequality. It therefore stands to reason that before it can be expected that all in society will run the same race equally, all must have the same starting blocks. Equality cannot be achieved by merely treating people the same, who in any event are not equal in a number of ways.17

3.3 APPLICANTS FOR EMPLOYMENT

For purposes of the Act, the term employee includes applicants for employment. Whilst the term employee generally includes applicants for employment, there are limitations to this definition of an employee. Where the issue is an alleged unfair dismissal or unfair labour practice, it may not be suitable to define a job applicant as an employee. For example, an employment practice related to promotion or demotion may not be applicable to job applicants. Dismissal can only take place where there is an employment relationship between employer and employee. In the case of a job applicant it seems the only thing that can be said is the fact that the act of applying for the job is in itself a process by which the applicant seeks to create an employment relationship.

It is not the intention of this analyses to argue whether the judgment in Woolworths v Whitehead18 was correct or not, however, it does serve as a good reference in illustrating the ambiguity on whether a job applicant is indeed an employee. In this case the Labour court held that Ms Whitehead had not been dismissed because a

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17 In Minister of Finance v Van Heerden [2004] 12 BLLR 1181 (CC) the court held that, the conception of equality as per the Constitution goes beyond mere formal equality and non-discrimination which requires identical treatment, irrespective of the starting point. Substantive equality recognises that systematic under-privilege still persists; the Constitution requires the causes of continuing inequality to be dismantled and to prevent the creation of new patterns of disadvantage).

person who has not yet commenced working under a contract of employment is not an employee within the meaning of the term in the Act.

It seems that the inclusion of a job applicant as part of an employee for purposes of the Employment Equity Act is with the intention of extending the protection to job applicants the protection against unfair discrimination. It is within the ambit of unfair discrimination resulting from non-appointment that job applicants have instituted proceedings against employers.

Whilst applicants for a job may institute proceedings against non-appointment due to alleged unfair discrimination, the court will not easily intervene. The court does not see its role as substituting that of an employer, however, its duty is to afford protection against unfair discrimination as such to ensure unfair discrimination is dealt a heavy blow.

It can be argued that the employment process is by its very nature a discriminatory process. The advertisement of a job sets out a criteria against which applicants will be evaluated. The important thing about this process is the relevance of the criteria to the job in question, as the Act requires these criteria cannot be arbitrary as it would be tantamount to unfair discrimination.
CHAPTER 4
INHERENT REQUIREMENTS OF THE JOB AS A DEFENCE

As can be seen in the provisions of the Constitution, the Labour Relations Act and the Employment Equity Act, unfair discrimination in the workplace is not allowed and the courts would not hesitate to act against proven cases of unfair discrimination. Wherever unfair discrimination is alleged, the employer has a number of defenses available to him. In the first instance, an employee alleging unfair discrimination has a task to show the court he or she has been discriminated against.

This suggests that the employer’s first take could be to show the court that the act or omission did not amount to discrimination at all.

It is not all the time and certainly not in all cases that a differential treatment of employees amounts to unfair discrimination. The management of employees in general is the function of the employer and so is the management of their performance. Where a performance management is in place, it is acceptable that owing to the differences in employees’ performance levels the employees, although doing the same job, could be rewarded differently. Obviously, an objective tool to determine the employee’s performance would have been used. This is clearly a case of differential treatment of employees, but one which does not amount to discrimination.

Even when discrimination has been proved, the court has to satisfy itself that the employee was unfairly discriminated against. Therefore, the second defense available to employers is to prove that the act or omission did not amount to unfair discrimination. In other words, the employer could use the provision of section 6(2) which states that it is not unfair discrimination to:

(a) take affirmative action measures consistent with the purpose of this Act; or

(b) distinguish, exclude or prefer any person on the basis of an inherent requirement of a job.
Although section 6(2) provides that it is not discrimination to take affirmative action measures consistent with the purpose of the Act, employers should be cautioned that, doing so without a plan could be viewed as an arbitrary act.19

It is equally important to note that while it is necessary to implement affirmative action measures in order to achieve the objectives of the Employment Equity Act, there is a context within which this has to be done. Were it to be allowed that employers make arbitrary decisions in implementing affirmative action, unintended consequences would be achieved. In *PSA obo of Louw v Department of Roads, Transport and Public Works*,20 it was rejected that an applicant for employment should be appointed merely because he is a previously disadvantaged individual.21

The object of section 9 of the Constitution is the achievement of equity in all spheres of South African society, including the workplace. It seems therefore that equality is the destination defined in the Constitution and affirmative action therefore becomes the journey to that destination. If accepted affirmative action is what is required of employers to do in order to achieve equality, and if it is accepted implementing affirmative action is not an act of discrimination, then affirmative action is not a defense in discrimination cases in the strict sense. Only to the extent that an employer implementing affirmative action measures may be challenged on the basis of unfair discrimination, can affirmative action be raised as his or her defense.

To the extent that equality is a right and affirmative action is a means to achieve this right, it is important to always keep in mind section 39(1) of the Constitution which places a limitation to every right that there is. The right of previously disadvantaged persons has to be balanced with the rights of all other South African citizens. This would therefore suggest that even in implementing affirmative action measures, an employer should always be mindful of other employees’ rights. Affirmative action

19 In *PSA of SA obo Helberg v Minister of Safety & Security* [2005] 2 BLLR 135 (LC), the court held that, the employer could not implement any measures under affirmative action when no plan existed.


21 Affirmative action should also not be seen as a free pass to a higher paid job merely because one is black.
therefore does not suggest and erosion of other employees rights even if these employees may have been disadvantaged by the past system of institutionalized discrimination.

4.1 THE MEANING OF INHERENT REQUIREMENT

Section 6(2)(b) of the Employment Equity Act states that “it is not unfair to distinguish, exclude or prefer a person on the basis of an inherent requirement of a job”.

The inherent requirement of a job therefore becomes one of statutory defenses available to employers in unfair discrimination challenges. This however, does not say what the defense exactly mean in a practical sense.

The English dictionary’s definition of the term inherent is “existing as a natural or permanent feature or quality”. This suggests that in the case of a job this has to be a characteristic that is intrinsic in the job. If inherent relates to an essential element and if it is a characteristic that is permanence in nature, it seems that this cannot just be a requirement at a particular time. It must be a characteristic that the job would be completely incapable of being fulfilled without. In Public Servants Association obo Steenkamp v South African Police Service,22 it was found that, the fact that certain attributes may be relevant to the job in question does not suggest that they are an inherent requirement of the job. It therefore means that the requirements must be an intrinsic element of the job which the job cannot be performed without.

This fact seems to have been endorsed by the court in Woolworths v Whitehead,23 where the court held that an inherent requirement means or implies “an indispensable attribute of the job which must relate to an inescapable way to the performing of the job required”. It is therefore suggested that the requirement must not only relate to the job because it would be more convenient to do the job when the requirement is met or satisfied.

22 [2003] 12 SSSBC 6.7.3.
23 Supra.
In *Woolworths v Whitehead*,\(^{24}\) the company testified that continuity for at least 12 months was essential in the job. On the other hand, the company also testified that had they not found another candidate they would have employed Ms Whitehead. It is very clear from this latter statement that more than being an indispensable requirement of the job, this is more a case of convenience.

### 4.2 THE NATURE OF THE DEFENCE OF INHERENT REQUIREMENTS

It has already been established that an inherent requirement of the job must be one without which the performance of the job would be compromised to the serious detriment of the employer. The essence of a job in an employment situation is the advancement of the business objectives of the employer. It would therefore be necessary to take this into consideration when looking at the nature of this defence.

The nature and extent of the defense of inherent requirements must be intrinsic and specific and cannot be some form of generalized perception. In *Collins v Volkskas Bank (Westonaria Branch), a Division of Absa Bank Ltd*\(^{25}\) the court stated that

> “business necessity, it would seem, is the touchstone as to what constitutes acceptable discrimination in international codes and practice: Put in another way, I would that the question whether the dismissal of a female employee in a particular case arising within the meaning of section 8(2) revolves around considerations of business necessity or operational requirements of the business. If her dismissal is justified by her employer’s operational requirements, in the sense that he cannot do without her during the period of maternity leave, then although her dismissal would be discriminatory, at least indirectly, it would not amount to unfair discrimination within the meaning of section 8”.

Our society generally speaking, holds women to be a weaker species compared to men. As a result of this generalization, society expects the more physically challenging jobs to be performed by men. However, this is nothing more than a societal stereotype and a generalization and cannot be used as an inherent requirement of the job. One of the requirements of employment equity in using the defenses in section 6(2) is the fact that the decision must not be an arbitrary one. In

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\(^{24}\) Supra.

\(^{25}\) [1994] 12 BLLR 73 (IC).
other words, rather than a generalized thinking there must be an objective basis for the justification.

It seems that the nature and extent to which the defense could be relied on can relate to time. In the case of Ms Whitehead, the court had not accepted the argument used by the company that she had to be available in her job continuously for at least 12 months. It is however, important to note that the court did not reject this justification because it did not have regard to business interests of the employer, but that the circumstances and the context did not justify the actions of the employer.

The issue which was being taken into consideration here was time. In instances where time is of essence, it may be possible to persuade the court with this argument. Whether employees are employed on a fixed term contract, they are employed because there is a specific need and the need must be fulfilled within a specified period. Therefore, time in this case is of essence and can justify a requirement to employ someone who will be in the job for that specific period. In such cases, the absence of an employee would compromise the business of the employer as the work would not be done in the time specified.

4.3 THE TEST TO BE USED

The Employment Equity Act has merely provided us with a tool to use against claims of unfair discrimination, as to how this tool is to be used, that has been left to the courts to decide on a test in determining the existence of an inherent requirement of a job.

In *Woolworths v Whitehead*, the company had justified its requirement for at least 12 months continuous work on the basis of the company’s need to have an HR generalist who would oversee a process of integration which was taking place at the time. Whilst the court found that the requirement of the company relative to its business need was rational, it found that the inability of Ms Whitehead to work continuously for at least 12 months was irrelevant. It seems that the court did not just
think this was irrelevant but had regard to the context as well as the circumstances of any other employee in permanent employment. The court held that the requirement for Ms Whitehead to work continuously for six months was not objectively justifiable.

In arriving at this decision the court applied the following test:

“In determining whether or not the discrimination complained of is based on an arbitrary ground, a good yardstick to measure whether or not discrimination is based on an arbitrary ground is to determine whether the discrimination is such that it can be sustained irrespective of the happening or non-happening of any unforeseen event.”

Clearly the court in this test takes the view that an uninterrupted guarantee of presence by any employee is not possible. It seems that the court took the view that had any other employee been appointed into the job and fallen pregnant in the course of employment, the employer would have definitely made a plan to cover her absence. This test emphasizes the importance of objectivity in the defense as well as the fact that it must be a case of can’t do without.

The court not only found that the requirement was objectively unjustifiable, it also found that it is unreasonable to expect such a guarantee from one employee when no other employee can give such a guarantee.

The judgment in *Whitehead* has put in place very important elements of the test such as, an indispensable attribute, the essence of time, etc. In stating these factors the court had the following to say:

“The provision of the Act only excuses discrimination based on an inherent requirement of the particular job. This implies that the job itself must have some particular attribute. This indispensable attribute however must relate in an inescapable way to the performing of the job required. Getting a job done within a prescribed period could well be an inherent job requirement. But to succeed on this ground a party relying thereon must satisfy the court that time was of essence. In any event the concept of inherent job requirement implies that an indispensable attribute must be job-related. To suggest that the requirement as in this case, of uninterrupted job continuity is an inherent job requirement is to distort the very concept. If the job can be performed without the requirement, as it can in this case, then it cannot be said that the requirement is inherent and therefore protected under item 2(2)(c) of schedule 7 to the Act.”
The economic or commercial rationale of the business could serve as the basis upon which the company bases its decision. For instance, where an employee is absent from work for an extended period due to ill health, the employer could engage another employee on a temporary basis. In such instances the employer would incur additional costs as they would have to pay both employees. The question is why the law would not consider the circumstances of the employer in that the employer in a known situation is taking steps to protect its economic interest by not employing someone who would cause it to incur the extra costs. It seems that the court, in evaluating the employer’s circumstances against those of the individual would look at the context within which all of this was taking place. If the employer or company’s economic need seems to undermine the constitutional objective of achieving equality, the court would tend to support the constitutional objective.

In *Hoffmann v South African Airways*\(^2^7\) the Constitutional Court looked at another angle as a means to test whether the inherent requirement of the job was satisfied. In this case the court considered whether SAA’s practice of not employing HIV positive people as cabin attendants was inconsistent with the provisions of the Bill of Rights. It therefore sought to determine whether the commercial or economic need of the company could override those of the greater society.

Whether the ground to suggest that there is an inherent requirement of a job is not an arbitrary one requires that a question must be asked whether a rational connection between the ground relied upon and a legitimate purpose exists. Where no such rational connection exists it must be concluded that an argument for the existence of an inherent requirement of the job cannot be sustained.

In *Hoffmann v South African Airways*\(^2^8\) the court suggests a three stage approach in dealing with statutory provisions such as the inherent requirement of the job, as follows:

“First, whether the provision under attack makes a differentiation that bears a rational connection to a legitimate government purpose. If the differentiation bears no such rational connection, there is a violation of section 9(1).”

\(^{2^7}\) [2000] 12 BLLR 1365 (CC).

\(^{2^8}\) *Supra.*
The court suggests that even if such connection exists, a further inquiry is necessary. The second stage inquiry is, “whether the differentiation amounts to unfair discrimination”. This inquiry does not proceed further than this stage unless it is found that the discrimination is an unfair one. The third stage inquiry is, “whether the unfair discrimination can be justified under the limitations provisions”.

As can be seen this clearly suggest that in determining whether there is unfair discrimination against a defense of inherent requirement it may not be enough to just establish that a rational connection does not exist. It seems therefore such an involved inquiry suggest that a proper evaluation of the entire circumstance and context is necessary.

In Woolworths v Whitehead\textsuperscript{29} the court held that, “the decision had to be evaluated in the light of constitutional obligations. These precluded measuring the fairness of discrimination against the profitability or for that matter efficiency of a business enterprise”. The question arises, if the efficiency of a business is not an issue, then why is the job an issue because one exists as a result of another. Is it possible to effectively apply the test of an inherent requirement of a job without looking at the effect it would have on the efficiency of a business.

It seems that the intention is not to downplay the importance of the survival of the business, but to ensure that the constitutional obligation or requirement to achieve equality is not undermined by a mere need to achieve profit.

Where it is proved that the business survival could be compromised by a particular act, it may be possible to raise this as a reason why the employer has taken a particular action which is tantamount to unfair discrimination. The object of our Constitution is the removal of discrimination and ensuring equality not only in the workplace but in society as a whole. To the extent that customers of an employer may prefer to be served by people of a specific gender or race for an employer may want to rely on this as an inherent requirement of a job. At face value this may seem

\textsuperscript{29} Supra.
to be reasonable defense because if the employer cannot satisfy customers his business may suffer. However, such preferences by a third party do not necessarily satisfy the test for inherent requirements of the job. One thing clear is the fact that such preferences themselves may be a product or reflection of deep-seated prejudices which society does not need in any event. Of importance to note is also the fact that such preferences are in many instances generalized assumptions which cannot be objectively justified.

Privacy is a right that is protected in our law. Where privacy is a requirement to perform a job such as searchers, preference or exclusion of people of a specific gender may be an acceptable justification. For instance, people employed in a situation where they have to do physical body searches may have to be the same sex as those they have to carry searches on.

The objective reality in this instance for purposes of respecting the privacy and dignity of those to be searched is that, this job cannot be performed if people of the same sex as those to be searched were not available.

Inherent strictly speaking means part of and therefore an intrinsic value on part of the job. Therefore an inherent requirement will mean an exclusionary job requirement will only be considered valid if it is a necessary condition to perform the job. A useful, beneficial or convenient condition could not be regarded as an inherent requirement of the job. Where a condition is merely useful as opposed to being necessary it means the job can be done without.

Understandably that an employer for purposes of achieving maximum benefit out of his business he may wish to conduct it in the best possible way. Were this to be allowed, it would defeat the very essence of achieving equality and eliminating unfair discrimination.

An employer in a manufacturing company may find that male employees perform better than females because of their long and stronger physical endurance. The fact that males perform better than females does not suggest that females cannot do the job, all it means it would work much to the benefit of the company if only males were
employed. In other words, the efficiency of the business would improve with males only working in the company.

This ground may not necessarily be unreasonable, however, it is a discriminatory practice that cannot be elevated above the greater interests of the constitutional obligations. It seems that even though necessity will be the test applied, the approach the court could be somewhat lenient in that it would only require that it be shown that there is reasonable necessity. It seems that reasonable necessity would entail first, the employee proving the rational connection between the requirement and the job. Secondly, the employer must prove that it cannot accommodate the applicant and others adversely affected by the requirement without experiencing undue hardship.

In certain instances it may well be that the requirement or standard set by the employer has a degree of necessity. However, it may be necessary to do a further inquiry to establish whether the standard is both appropriate and necessary. The issue therefore becomes a question of checking whether under the circumstances a less discriminatory alternative is not available. Where a less discriminatory alternative is available, a discriminatory standard cannot be regarded as an inherent requirement of the job.

Therefore, whilst the employer only has to prove reasonable necessity, he or she also has a duty to consider a reasonable accommodation of those affected by the discriminatory standard. Therefore as opposed to lawfulness the primary consideration is fairness as the principle looked in labour relations matters. It is submitted that while the issue seems to be fairness as the primary consideration it does appear that the courts would also have regard to the reasonable employer test. The fact that in Whitehead looked at whether it was possible to expect of any employee to guarantee their presence at work for at least 12 months continuously, does seem to suggest the reasonable employer test.
CHAPTER 5
THE GENERAL FAIRNESS DEFENCE

5.1 INTRODUCTION

The basis upon which the implementation of affirmative action measures are implemented and defended is fairness. The relationship between employers and employees, more than being governed by the contract that there may be, seems to be based on fairness. Whether the relationship is governed by principles enshrined in a contract of employment or some other means, at the end of it all it must be principles that are fair. Although labour legislation decides or adjudicates labour matters on the basis of fairness, the concept of fairness on its own is not a legalistic one.

It is this very principle that has been adopted in the implementation of Employment Equity. Employment Equity suggests the creation of an equitable environment through a process that involves a form of discrimination.

The most important thing and a distinguishing factor between Employment Equity discrimination and other forms, is whether or not it is fair. In the eyes of the law the requirement of fairness suggests that there must be fairness towards both the employer and employee. There is often a mistaken belief that because of the power the employer possesses in this relationship, there must be a bias towards the employee. In deciding whether the relationship between the employer and employee is governed by fair labour practices, it is important that both parties' interests are taken into consideration. It is therefore important that no bias towards either party exists and therefore no “underdogs”.

5.2 THE MEANING OF FAIRNESS

Fairness is a concept with which the nature of the relationship between the employer and employee is judged. While labour legislation asserts fairness as a measure with
which the conduct of both employers and employees is to be evaluated, it has left the concept open ended.

The courts themselves have only attempted to define the context within which fairness has to be looked, but have refrained from defining what fairness means. In an attempt to lessen the confusion that may arise, the courts have made it clear that fairness is not the same as lawfulness. It is submitted that fairness cannot be defined in any precise terms because of its nature. The determination of fairness requires a complete analysis of the circumstances and context of each case. This suggests as already indicated, an evaluation that is completely unbiased having regard to both the circumstances of the employer and those of the employee.

In order to understand fairness it is important that one has a fair understanding of the difference between fairness and lawfulness. Because fairness must be determined by having regard to the circumstances around each specific case it is an inherently flexible concept, as opposed to lawfulness.30

In the exercise of its powers and the discretion given to it, the Industrial Court is obliged to have regard not only or even primarily to the contractual or legal relationship between the parties to a labour dispute. It must have regard to the application of principles of fairness. The objective of the labour legislation does not seem to be on the legalistic approach to the employer and employee relationship. Instead, the objective of labour legislation is the creation of equity in employment as well as the creation and maintenance of industrial peace. It is against this background that the necessity of a flexible concept such as fairness is to be required. While it is said that the decision to determine fairness is left to the discretion of the court in each specific case, caution should be exercised not to believe that the court’s discretion is exercised willy nilly.

In evaluating a particular conduct, the court has to position itself neutrally between the interests of both parties to the dispute. It is hard to think or believe that such an evaluation which in any event will include a value judgement can be exercised

without any measure of subjectivity creeping in. The counter balance to subjectivity is to keep in mind the object of the labour legislation which must be upheld at all times. Of importance in the object of labour legislation is to curtail the primary causes of industrial conflicts such as arbitrary and discriminatory employment practices which work to the disadvantage of employees. On the other hand, this must be balanced with the removal or reduction of conduct that is adverse to the employer’s business interests.

5.3 COMMERCIAL RATIONALE AND FAIRNESS

Where an employer dismisses employees on the basis of operational reasons, the consideration seems to be largely placed on the economic rationale of the employer. Likewise, where consideration is the inherent requirement of the job to prefer or differentiate between two employees, it seems the employee would have for his business interest and hence an economic rationale.

In *SACTWU v Discreto (A Division of Trump & Springbok Holdings)*\(^{31}\) the court held that

> “the function of a court in scrutinizing the consultation process is not to second guess the commercial or business efficiency of the employer’s ultimate decision (an issue on which it is, generally not qualified to pronounce upon), but to pass judgment on whether the ultimate decision arrived at was genuine and not merely a sham. The manner in which the court judges the latter issue is to enquire whether the legal requirements for a proper consultation process have been followed and if so, whether the ultimate decision arrived at by the employer is operationally and commercially justifiable on rational grounds, having regard to what emerged from the consultation process”.

Commercial rationality does not suggest fairness to the employee. The consideration given in the above quotation more than the requirement of fairness suggests a legalistic approach to the dispute that may arise as a result of a decision taken by an employer. Two issues emerge in a situation where an economically rational decision is evaluated. Firstly, the decision arrived at by the employer has to be rational. Secondly, alternatives ought to have been given consideration.

\(^{31}\) [1998] 12 BLLR 1228 (LAC). The court looked at fairness of the decision both in terms of the process followed as well as the rational nature of the decision.
It is hard to see that an economically rational decision would not have tension between it and fairness existing. The court, in looking at the two issues does not look at whether under the circumstances the alternative chosen was the best one, what is rather looked at is the rationality of the decision that was ultimately taken.

On the other hand, it can be said that the requirement of fairness, as well as the justifiability of the decision suggest a balancing act has to be done. While the court would be reluctant to interfere with the decision making of the employer, it has a duty to ensure that a proper process which was not a sham was followed.

The court also has to consider what happened in the process of consultation between parties. Where a workable alternative is put forward and not taken by the employer, it seems it may be difficult to justify the decision arrived at.32

This therefore suggests that while a decision in terms of the employer’s business may be a correct one, it may not be fair to the affected party. It is for this reason that the court has to make a much more in-depth inquiry into the conflict. It seems that the requirement of fairness while it is a concept that is somewhat neutral, in the face of economic rational which only looks at the interests of the employer, serves to create a balance between the interests of the employer and those of the employee.

5.4 SUBSTANTIVE FAIRNESS

An employer takes a decision to terminate the services of an employee following misconduct by the said employee or the employee is unable to do the job for which he is employed. Where the employee cannot do the job, the employer is forced to look for one who can do the job as it is an inherent requirement. A dismissal based on the employee’s conduct or capacity, or the employer’s operational requirements may be fair if the employer can prove that it was valid and reason to dismiss; and the

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32 The Labour Appeal Court in *SA Chemical Workers Union v Afrox Ltd* (1999) 20 ILJ (LAC) asserted the role of the court more boldly. After weighing up the requirements of s 189(2), the court concluded that it can no longer be said that the court’s function in scrutinising the consultation process is merely to determine the good faith of the employer. The matter is now
employer can prove that the dismissal was conducted in terms of the statutory guidelines for procedural fairness.\textsuperscript{33}

Under such circumstances, like in all cases of dismissal, the employee is dismissed not because he has committed misconduct, but because it is in the interest of the employer that he is able to do the job. It is an obvious fact that inability to do a job runs contrary to the interests of the employer.

Although inability may not be in the interest of the employer, it does not suggest that dismissal will automatically be fair. In \textit{Pitcher v the Golden Arrow Bus Service (Pty) Ltd},\textsuperscript{34} the dismissal of the first applicant was found to be unfair after the court had regard to his long service with the employer and his unblemished record during his 24 years service with the same employer. The court had agreed that the misconduct of the employee, considering the image of the employer was of a serious nature and the employer was entitled to dismiss at the first instance. However, the court felt that the “misconduct of the employee was out of character and unlikely to be repeated”. Under such circumstances the court felt that dismissal could not be justified and therefore no fair reason to dismiss existed.

Having looked at the facts in the above case, it remains difficult to decide when exactly a decision to dismiss an employee for misconduct will or his inability to do the job is fair. In addressing the same question, Le Roux and Van Niekerk state that, “various tests have been proposed and applied but the truth is that whether a dismissal is fair will depend on the specific facts of each case and, in many instances, will involve a value judgement made by the manager concerned and, if necessary the courts, or an arbitrator”.

\textbf{5.5 PROBATIONARY EMPLOYEES AND POOR WORK PERFORMANCE}

The law allows employers to subject newly appointed employees to a probationary period, before the final confirmation of the appointment of the employee. The
The purpose of a probation period is basically to allow an employer to evaluate the employee’s competence before confirming the appointment. The probation period is not only about evaluating the competence of the employee. Where the employer has established a below standard performance by the employee, the employer must establish the reasons for the sub-standard performance. Coaching and training of the employee may be required from the employee depending on the reasons for the poor performance. It is equally important that the employer ensure that the employee is clear on the objectives and also understands the instructions issued to him.

The process as outlined somehow suggests that an employer has to ensure fairness to the employee before deciding to terminate that it is to be the eventuality. The code of good practice on probation sets out a very clear process that employers have to follow in dealing with an employee on probation. Where the employer is to dismiss an employee due to unsatisfactory performance during a probation period, the employer have to ensure that all processes of performance evaluation, coaching, counseling and training have been followed.

As can be seen the process is a more procedural one and seeks legal compliance more than fairness. In fact, it appears that fairness is proved through following the required steps. The fact that the employer under these circumstances has a somewhat reduced burden of proof may suggest that the shift of the burden be on the other side. It is however submitted that the burden has not shifted. Perhaps what is reflected here is the flexible nature of fairness. It also reflects the fact that fairness always has to be decided relative to the context of the dispute in question. It is also possible that an employer could follow all the necessary process required before dismissing an employee on probation. However, those establishing the fairness of the dispute would have to conduct an inquiry that goes beyond just the procedural requirements.

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35 It would seem that the hurdle of substantive fairness is to be set at a lower level in disputes about the dismissal of probationary employees. In other words, the burden of proof on the employer to establish the sufficiency of the proffered reasons for dismissal is lighter than is the case where a permanent employee is dismissed. Van Niekerk *Unfair Dismissal* 64-65.
The inquiry must look at whether the standard or objectives set by the employer are reasonable. It is established that the standard is not reasonable there would be no justification for the dismissal and therefore no existence of a fair reason.

5.6 PROOF ON THE BALANCE OF PROBABILITIES

Fairness is related to the proof of labour disputes on the balance of probability. Where an employer is required to prove on the balance of probabilities that his actions were justifiable and therefore fair, all that is required is to prove that he had reasonable grounds to act as he did.

The difficulty that would immediately be passed by this approach is the fact that the employer seems to be called upon to make a value judgment about a situation in which he may or may not be objective. It is however important to note that while the reasonable grounds are only in the employer’s opinion, they must be defensible, otherwise they cannot constitute a fair reason. Because of the nature of the relationship that exists in an employment situation and because only lay persons are involved in labour matters, the test applied is expected to be less stringent. It is for this reason that the application of the balance of probability test is viewed as having lessened the evidentiary border on employers.

It seems therefore that the fairness principle follows the test that is applied hence it is not a legalistic approach. The difficulty that is posed by fairness is the fact that it is no matter of logic that is applied and therefore cannot be said to be right or wrong. This therefore suggests that there could be no standard set by law to determine fairness. It therefore stands to reason that each case will be evaluated on its merits and against a standard set by the employer. It is in fact suggested that the process will be that of evaluating the reasonability of the very standard set by the employer, taking into consideration the interests of the employee, and those of the employer.
CHAPTER 6
REASONABLE ACCOMMODATION

South African society is a society with a history of deep-seated discrimination. The Employment Equity Act is a conscious effort to ensure that discrimination is eradicated. Although the Act seeks to remove discrimination in employment, it still allows fair discrimination (that is discrimination where there is a rational basis for discriminating. If the Act allows for fair discrimination, it is submitted that this also could provide for misuse of these provisions if there is no close monitoring of the situation.

One of the grounds on which discrimination in employment is prohibited is the disability of an employee or a prospective employee. The employment Equity Act specifically identifies people with disabilities as one of the designated groups. In other words people with disability are recognized as one group which has previously been discriminated against. Against this background people with disability are to be beneficiaries in the implementation of employment equity. It is therefore a requirement of the law that an employer takes reasonable steps to accommodate people with disabilities in their employment.

Depending on whether the employee with disability meets the minimum requirements of a job, where there are more applicants with some that have no disability, the employee with a disability is to be favoured.

Traditionally many work places are not designed to accommodate people with disabilities. In other words facilities that can accommodate people with disabilities are mostly non-existent. The employer is therefore required to take reasonable steps to make facilities that accommodate people with disabilities available. Although the law does not specify any way in which people with disabilities are to be accommodated, the Code of Good Practice does refer to reasonable accommodation of people with disabilities.
It is submitted that, the reference to reasonable accommodation suggests that an employer has to have in place a program that ensures that people with disabilities can be accommodated. Where one seeks employment and is not offered employment due to the fact that one has a disability that would make it impossible for him/her to perform in the job at hand, this can be seen to be a justifiable ground not to employ the person. In other words it could be argued that due to an inherent requirement of the job the person could not be employed. On the other hand it is also possible that the justification on the basis of inherent requirements of the job cannot be sustained. If the employer cannot employ a person with a disability he has to show why the person cannot be reasonably accommodated.

The Employment Equity Act requires that employers take steps to remove possible barriers for designated groups that can prohibit them from gaining employment. The unavailability of facilities to accommodate people with disabilities can be regarded as one of the barriers to employment of people with disabilities. Where the employer has not taken steps to create conditions that would allow people with disabilities to be employed, it can be argued that he/she has not taken any reasonable steps to ensure the reasonable accommodation of people with disabilities.

Other than instances of disability there are other cases where an employer may discriminate against someone on the basis of the inherent requirement of the job. Such instances could involve sex or ill health. In instances of ill health an employer may wish to terminate the services of an employee who is ill on the basis of incapacity. Where this becomes the situation the employer is required to look for alternatives such as light duty etc before terminating the services of the employee on the basis of ill health. This is so in cases where the employee is able to do other work other than the one for which he/she was originally employed. In other words the employer is required to show why he cannot reasonably accommodate the employee into an alternative position.

In terms of the Code of Good Practice reasonable accommodation is a tool intended to ensure that employers take cautious steps to go out of the way in order to accommodate certain situations. In other words reasonable accommodation suggest that it should not be “business as usual", however this still has to be done within fair
reason. In other words while the employer is expected to go out of his way to accommodate, the circumstances of the employer have to be taken into consideration. The employer cannot be expected to take steps to accommodate an employee even if such steps would be at the detriment of the employer’s business.

The Code of Good Practice defines reasonable accommodation as “the adjustment of a rule, practice, condition or requirement to take into account the specific needs of an individual or group”. The definition reinforces the fact that the employer cannot be simply content with the fact that its employment situation would allow the employment of certain people because of ill health, sex or disability. It therefore means that before deciding that one could not be employed owing the inherent requirement of the job, the employer has to first consider whether there is anything that could be done to alter the conditions so as to accommodate the employee.

At the heart of reasonable accommodation is not the undermining of the employer’s legitimate commercial or business requirements. In deciding whether or not an employee could be reasonably accommodated, one has to have regard to the business interests of the employer. However, it is important that the legitimate commercial requirements of the employer do not become an obstacle in achieving the objectives of both the Constitution and the Employment Equity Act.

Affirmative action and the accommodation of people with disability is often associated with the lowering of standard. This means that ultimately the business interests of the employer would be adversely affected. Reasonable accommodation does not suggest that when an employer requires performance at a certain level, the employee with disability must be allowed to perform below standard. Whilst it is acknowledged that disability will have an impact on one’s ability to perform certain functions, it is not suggested that these be disregarded in the interest of reasonable accommodation. It is however suggested that in certain instances the inability of a disabled person could be aggravated by physical environment. With some alterations of the physical environment the disabled person could still be able to perform at the same level as any other employee.
Reasonable accommodation can be seen as a two way process. Whilst it is intend to ensure that the employee with disability is not denied an opportunity for employment as a result of his/her disability, it is also intended to reduce the impact of the disability on the capacity of the person to fulfil the essential elements of the job.\textsuperscript{36}

In terms of the Code there are basically four areas where reasonable accommodation may be required. The following constitute the areas identified in the Code:

(i) During the recruitment and selection process.
(ii) In the working environment.
(iii) In the way work is usually done, evaluated and rewarded.
(iv) In the benefits and privileges of employment.\textsuperscript{37}

6.1 RECRUITMENT AND SELECTION

Although the process of recruitment and selection may be said to be based on an objective criteria set by the employer, it is equally possible that it may be set in a way that would exclude certain people especially those with disabilities. In setting up a selection criteria the employer should identify the basic necessities of the function to be performed. In other words the employer must identify clearly the inherent requirements of the job. Having done so the employer should ensure that there is nothing else that can be done to adapt the requirements. It would therefore be important to distinguish between those elements that are essential in the performance of the job and those elements that are part of the job because this is how the job has traditionally been structured or performed.

The recruitment process is one which starts with placing adverts or making application forms available. Equally the exclusion or discrimination could start with this very process. Where non-essential information is placed on an advert as part of

\textsuperscript{36} See para 6(1) of the Code of Good Practice on the employment of people with disabilities.
\textsuperscript{37} See para 6(3)(i), (ii), (iii) and (iv) of the Code on the employment of people with disabilities.
the requirements or criteria for selection some people may be unfairly excluded from the recruitment process.\textsuperscript{38}

In order to determine if reasonable accommodation is required the employer may enquire or the employee may disclose that to the employer. Where the applicant has indicated the need for accommodation, the employer should make the necessary arrangements which will not place an unreasonable burden on the business of the employer.\textsuperscript{39}

In terms of the Code employers who have created conditions deemed to be sufficient to accommodate an applicant with disability may make an offer of employment based on objective and fair conditions. It is important to note that these conditions should not in themselves be conditions that are intended to exclude the applicant. The conditions are meant to assist the employer to make an objective decision. Such a conditional offer may be necessary where an employer is not sure if the applicant would be able to fulfil the essential elements of the job even with reasonable accommodation.

Where the employer places a general rule that all applicants with disability must first be tested or given a conditional offer, such practice may be deemed to be unfair. The practice of testing or giving a conditional job offer to all disabled applicants could create unnecessary stereotypes about people with disabilities. It must be borne in mind that the very object of the Employment Equity Act as well as the Code is to ensure that stereotypes and prejudices that can unfairly discriminate against certain people are removed.

The employer may decide to withdraw a conditional offer of employment if any one of the following factors exist:

(i) Accommodation requirements would create unjustifiable hardship to the business of the employer.

\textsuperscript{38} Para 7 of the Code describes basic guidelines of what is required in the recruitment process in order to accommodate people with disabilities.

\textsuperscript{39} Para 6.11 of the Code.
(ii) There is an objective justification that relates to the inherent requirements of the job.

(iii) There is an objective justification that relates to health and safety.40

It is important to note that these three conditions do not have to be present all at the same time, but rather the existence of one of them would be a sufficient ground for the withdrawal.

In order to make a reasonable accommodation and possibly a conditional job offer it is of importance that the requirement for a reasonable accommodation and a conditional offer is discussed before the offer is made. Not discussing these factors in advance could create feelings of unfair discrimination on the part of the employee when the offer is withdrawn.

The discussion prior to making the offer is also important to minimize the impact of the withdrawal on the dignity and confidence of the employee. Equally important about the discussion is for the employer to show genuine interest in accommodating the applicant.

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40 Para 7.4.5 of the Code.
CHAPTER 7
GENERALISATION OR BLANKET BAN FOR MEDICAL REASONS

Employment procedures and conditions are often not specific to one situation but rather generalized rules. The problem with such generalizations in employment conditions is the fact that they tend to ignore differences in each specific situation or condition. In doing so there remains a possibility that such generalisations may lead to the exclusion of otherwise competent individuals. Grogan argues that

“an employer’s decision to limit a particular job to applicants from a group identified by one of the listed grounds is suspect when the justification for the limitation rests on nothing more than a broad generalisation regarding some purported attribute of that group”.41

Paragraph 7.4.3 of the Code of Good Practice on the employment people with disabilities states that, “an employer may test applicants with disabilities for a specific job and not require all other applicants to undergo testing”. Paragraph 7.4 states that a conditional job offer may only be made to one person at a time, not to all applicants with disabilities that may have applied for the job.

Of importance to note here is the fact that the Code emphasises the fact that one situation may be different to another. Equally the extent of disability may not be the same in all people with disabilities. It is for this reason important that each situation is judged on its merits, otherwise it could lead to unfair discrimination and/or a negative impact on the dignity of a person with a disability.

7.1 CASE LAW ON A GENERALISED BAN FOR MEDICAL REASONS

In South Africa many employers tend to impose general rules in dealing with employees of whatever a specific category they belong to. This is especially the case for people with disabilities. One possible explanation for this is that it is an easier route for employers and that they could avoid any expense of having to make accommodation for differences in employees. One of the possible reasons is the fact

41 Grogan Workplace Law 256.
that there are a few cases that have been taken to court on these basis, probably due to ignorance of the employees.

Discrimination on the basis of medical grounds is clearly unfair unless there are justifiable reasons related to that specific situation. It therefore stands to reason that a general rule would not be a suitable tool to determine whether to employ or not to employ a person because of a medical condition he/she has.

In the case of IMATU v City of Cape Town\textsuperscript{42} these principles were firmly established. In this case Mr Murdoch who had been employed by the City of Cape Town as a law enforcement officer, had applied for a position of fire fighter within the City of Cape Town. Upon having been assessed it was found that he was an insulin dependent. On these basis the City of Cape Town turned down his application for the fire fighter vacancy. Taking into consideration that under pressure the employee could suffer a debilitating hypoglycemic which could endanger him, his colleagues and the public.

The conclusion by the City of Cape Town was obviously based on a general rule applied by the employer to all insulin dependent diabetics. Although the rule could have been based on some medical evidence in a specific case, it remained a generalised assumption by the employer.

The applicant, Mr Murdoch challenge the fact that his application had been turned down on the basis that he was an insulin dependent diabetic. In terms of the Employment Equity Act it is unfair to discriminate against a person on the basis of disability or an arbitrary ground. Murdoch in challenging his employer had argued that the basis upon which he was denied the offer was stereotypical and prejudicial. He argued that he was being discriminated against on the basis of disability alternatively on an arbitrary ground.

Whilst the applicant was able to show that while he was a law enforcement officer he had volunteered to perform fire fighting functions without encountering any problems such as those claimed by the employer, on the other hand the employer was not able

\textsuperscript{42} [2005] 11 BLLR 1084 (LC).
to show that it had attempted any reasonable accommodation.

The employer had defended its action on the basis that fire fighters be not insulin dependent diabetics. It said that this was an inherent requirement of the job.

The facts of the case in so far as the applicant having been turned down on the basis of his diabetic status were not in dispute. This therefore suggests that Murdoch was discriminated against and need not prove his discrimination beyond that point. Whether the discrimination was fair or not is what was left to prove. Under such circumstances the burden of proof shifts from the applicant to the employer. The employer against whom discrimination is claimed must justify or prove that it is fair.

Although the court initially had established that the applicant had not been discriminated ground in the sense that his diabetic status could not be seen as a disability, it later concluded differently. On the basis that the discrimination had potential to impair the applicant’s dignity, the court concluded that the applicant’s condition could be seen in the same light as that of listed grounds.

This case raises a few important principles in the application of the principle of inherent requirements of the job. Firstly, the requirement of inherent requirements of the job should be applied having regard to a particular context and situation at a point in time. It therefore requires that an individual situation and personal assessment be done before arriving at a decision whether or not the inherent requirements of the job prohibit the employment of the individual.

Often when evaluating whether a person with a disability would be able to perform, we tend to focus our evaluation on the extent of the disability rather than the extent to which the individual may be able to carry out the essential elements of the function.

A blanket ban on the basis of a medical condition has the potential to condemn and impair the dignity of all people who may be affected by that particular condition. This
approach of a blanket ban goes against the grain of both the Constitution and the Employment Equity Act.\textsuperscript{43}

\textsuperscript{43} IMATU v City of Cape Town supra. In this case the court noted that, the purpose of the EEA is to achieve equity in the workplace by, \textit{inter alia}, promoting equal opportunity and fair treatment in employment through the elimination of unfair discrimination. The Act provides that it must be interpreted in compliance with the Constitution and so as to give effect to its purpose. Equality lies at the heart of the Constitution and aims to ensure that we achieve a diverse workforce with opportunities for all, including diabetics, to pursue their preferred calling.
The discrimination jurisprudence could not develop fully in South Africa due to the laws of the country that paid no particular attention to it. In fact most legislation was shaped in such a way that it supported discrimination under the guise of separate development of communities with different social, cultural and racial background.

It is the courts in a limited way through the unfair labour practice that started to address discrimination in employment. Although the courts had made an attempt of addressing discrimination in employment, they could not openly attack discrimination and address it for what it was. For any act of discrimination in employment to be addressed by the courts it had to be found to be an unfair labour practice, otherwise the court would have no grounds to address it.

Determinations that could be made by the courts in areas such as sexual harassment and equal pay for the same work are an example of discrimination into which the court could make a determination but only as a form of unfair labour practice.

The advent of democracy as well as the need of the new government to eradicate discrimination in all spheres of life in South African society, created a need to come up with legislation to specifically deal with discrimination.

For this reason the South African Constitution sees equality both as a value and a right for all the citizens of the country.

The fact that the system of discrimination was previously institutionalised and entrenched in the South African society, made it necessary that the legislators in the new South Africa had to put in place measures that actively eradicate discrimination.

The South African legislature had realized that discrimination could not be removed by the Constitution simply declaring that all are equal before the law. It is for this reason that the Employment Equity Act 55 of 1998 was enacted. It is submitted that
as such that the Employment Equity Act cannot be in existence forever. It is a kind of measure introduced to address a specific need (ie removal of discrimination and the creation of equality).

Today South Africa is a country developing discrimination jurisprudence in line with international standards. Discrimination in employment is not allowed except where it can be proved to be based on fair grounds. One of the grounds on which discrimination in employment can be justified is on the basis of an inherent requirement of a job.

The inherent requirement of a job as a defense in unfair discrimination cases is an area that is never simple or straightforward. Equally, it is an area that is still developing through determinations of the courts. The basis upon which this form of discrimination is allowed is that although it is still discrimination it is regarded as being fair. Fairness in employment is one of the cornerstones of labour legislation. This concept of fairness can sometimes be seen to be quite controversial. It is a concept that suggest that although there may be legal ground to do something but it can still be unfair. The important thing about fairness is the fact that it does not favour this or that side.

Although it is important to ensure that discrimination in all its forms has to be removed in employment, it is realised that employers too have rights and an interest to protect the continued survival of their enterprises. At the same time the courts have to ensure that the concept of an inherent requirement of the job is not abused to the detriment of the employee. For this reason the courts have crafted a very stringent criteria or definition of what constitutes an inherent requirement of the job.

The manner in which an employer evaluates the inherent requirements of the job and its obligation to do so is emphasised and highlighted in all case law. It is therefore important that when evaluating the inherent requirement of the job the employer has regard to the specific circumstances of the case in point.

It is equally important to note that a general blanket ban on the basis of medical condition is not permissible. Each case has to be judged on its merits. In other
words discrimination on the basis of illness must be evaluated and justified on an individualised basis.

Although the Code of Good Practice is not a must do by the employer, it does place an obligation on the employer. Where the court is faced with a case of differential treatment due to a claim of operational requirements, one of the considerations of the court would be whether the employer faced with the situation has had an attempt at reasonable accommodation.

In our Constitution equality is seen both a right and a value. The employment equity should be seen as a temporary measure to create conditions where the objectives of the Constitution is realised. It is a tool which is intended to ensure that right to equality is realised and enjoyed by all the citizens of the country, but above all it is a right that is upheld and valued by all.

Although the Employment Equity Act may have a limited life span, to the extent that equality is a value emanating from the Constitution, the inherent requirement of the job seems to be a permanent feature of our society.

The Employment Equity Act states that, it is not unfair discrimination to differentiate on the basis of an inherent requirement of the job. The Act however does not in any precise way define what constitutes an inherent requirement of the job. The task to unpack and to bring about an interpretation of what constitutes an inherent requirement of the job has been left to the courts.

The inherent requirement of the job give a right to employers to discriminate under justifiable grounds. In an attempt to play a balancing act between the interests of the employers and those of employees, the courts have come up with an interpretation of what constitutes an inherent requirement of the job. Although the courts have attempted to develop a definition as well as a test to apply in determining the existence of the inherent requirements it remains open with no hard and fast rules. In other words each situation has to be carefully looked at against its own merits. It is submitted that the area of inherent requirement is still to evolve.
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