THE EFFECT OF LABOUR LEGISLATION IN THE
PROMOTION AND INTEGRATION OF PERSONS
WITH DISABILITIES IN THE LABOUR MARKET

by

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Declaration of Authenticity

I declare that:

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The effect of Labour Legislation in the Promotion and Integration of Persons with Disabilities in the Labour Market

i. The text is and contents of this treatise, unless where otherwise acknowledged and noted, is my own work;

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ACKNOWLEDGEMENTS

Thank you ...

➢ To all the people with disabilities that I had the privilege to share my life with, I have seen something special in you, your courage and desire for life has inspired me in so many ways and made me realise that we all can.

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To my Heavenly Father all the honour and glory for giving me the strength and ability to complete this, as I can do all things through Christ who strengthens me. (Philippians 4: 13).
KEY CONCEPTS

- Persons with disabilities
- Designated Group
- Designated Employer
- Decent work
- Reasonable accommodation

(Refer to Appendix A for definitions of Key Concepts)
## CONTENTS

<table>
<thead>
<tr>
<th>ABSTRACT</th>
<th>iii</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>CHAPTER 1: GENERAL OVERVIEW AND BACKGROUND</strong></td>
<td>1</td>
</tr>
<tr>
<td>1.1 Problem formulation</td>
<td>2</td>
</tr>
<tr>
<td>1.2 Purpose, goal and objectives of the research</td>
<td>4</td>
</tr>
<tr>
<td>1.3 The research approach</td>
<td>5</td>
</tr>
<tr>
<td>1.4 Definition and scope of disability</td>
<td>5</td>
</tr>
<tr>
<td>1.5 Prevalence of disability in South Africa</td>
<td>6</td>
</tr>
<tr>
<td>1.6 Limitation of the research</td>
<td>7</td>
</tr>
<tr>
<td>1.7 Hypothesis</td>
<td>8</td>
</tr>
<tr>
<td>1.8 Summary</td>
<td>8</td>
</tr>
<tr>
<td><strong>CHAPTER 2: SOUTH AFRICAN LABOUR LEGISLATION TO GIVE EFFECT TO EMPLOYMENT EQUITY FOR PERSONS WITH DISABILITIES</strong></td>
<td>9</td>
</tr>
<tr>
<td>2.1 The United Nations (UN) and the International Labour Organisation (ILO)</td>
<td>9</td>
</tr>
<tr>
<td>2.2 The International Convention on the Rights of Persons with Disabilities</td>
<td>10</td>
</tr>
<tr>
<td>2.3 The ILO Conventions specifically addressing disability in the workplace</td>
<td>13</td>
</tr>
<tr>
<td>2.3.1 Vocational Rehabilitation and Employment of Disabled Persons (No. 159) of 1983</td>
<td>13</td>
</tr>
<tr>
<td>2.3.2 ILO Code of Practice on Managing Disability in the Workplace (2002)</td>
<td>13</td>
</tr>
<tr>
<td>2.3.3 ILO Human Resources Development Recommendation (No. 195) of 2004</td>
<td>14</td>
</tr>
<tr>
<td>2.4 The Constitution of South Africa</td>
<td>15</td>
</tr>
<tr>
<td>2.5 Labour Relations Act 28 of 1956 (1956 LRA)</td>
<td>16</td>
</tr>
<tr>
<td>2.6 Labour Relations Act 66 of 1995 (LRA)</td>
<td>17</td>
</tr>
<tr>
<td>2.7 Employment Equity Act (EEA) 55 of 1998</td>
<td>19</td>
</tr>
<tr>
<td>2.8 Code of Good Practice – on the employment of people with disabilities</td>
<td>23</td>
</tr>
<tr>
<td>2.9 Technical assistance guidelines on the employment of people with disabilities</td>
<td>24</td>
</tr>
<tr>
<td>2.10 Basic Conditions of Employment Act 75 of 1997 (BCEA)</td>
<td>25</td>
</tr>
<tr>
<td>2.11 The Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (PEPUDA)</td>
<td>25</td>
</tr>
<tr>
<td>2.12 The Protected Disclosures Act (26 of 2000)</td>
<td>27</td>
</tr>
<tr>
<td>2.13 Skills Development Act 97 of 1998</td>
<td>28</td>
</tr>
<tr>
<td>2.14 Occupational Health and Safety Act 85 of 1993</td>
<td>30</td>
</tr>
<tr>
<td>2.15 Social security legislation</td>
<td>31</td>
</tr>
<tr>
<td>2.16 Summary</td>
<td>33</td>
</tr>
<tr>
<td><strong>CHAPTER 3: COMPARATIVE STUDY OF OTHER JURISDICTIONS</strong></td>
<td>35</td>
</tr>
<tr>
<td>3.1 Employment equity in Canada</td>
<td>35</td>
</tr>
<tr>
<td>3.2 The United States of America</td>
<td>37</td>
</tr>
<tr>
<td>3.2.1 The Americans with Disabilities Act of 1990</td>
<td>37</td>
</tr>
<tr>
<td>3.3 Disability legislation in the United Kingdom (UK)</td>
<td>39</td>
</tr>
<tr>
<td>3.4 Summary</td>
<td>39</td>
</tr>
</tbody>
</table>
ABSTRACT

It is argued that a lack of adequate legislation in pre-1994 South Africa resulted in inequality in the workplace and in society in general. The new democracy intended to address this by promulgated legislation and today the South Africa Constitutional and legislative provisions promoting equality are viewed as amongst the most progressive in the world. Conversely, this progressive legislation aimed to protect against discrimination, still seems to fail the very people it intended to promote and protect.

The new legislation created awareness of the need for equality; the right of workers to employment – or at least to decent working conditions. The right to equality is accorded to everybody through the Constitution of South Africa. The Bill of Rights is based on the notion of equality before the law, and the prohibition of discrimination on various grounds.

Despite this, the perception exist that persons with disabilities as a minority group are still being marginalised and are restricted in their right to exercise the right to participate and make a meaningful contribution to the labour market. This not only seems to be in contradiction with the Constitutional right to choose an occupation, but has wider social and economic consequences. The ethos of equality legislation is to ensure that the workplace is representative of the society we live in. It is understandable that labour as a social phenomenon is not only concerned with workplace related issues but with aspects encompassing the whole of the socio-political and economic scene.

South African labour legislation drafted over the last two decades strives to align with the conventions and recommendations of the International Labour Organisations and in terms of the obligations of South Africa as a member state.

However, the question prevails: is this legislation adequate to address the discrimination and inequality experienced by persons with disability? If so, why do statistics indicate such high unemployment amongst this group? Yet, there is a growing awareness that persons with disabilities represent enormous, untapped economic potential.
According to the ILO report on The Right to Decent Work of Persons with Disabilities (1997), much has been accomplished in the international arena in recent years to improve the lives of persons with disabilities in the workplace.

This treatise will attempt to evaluate the efficacy of South African legislation in the promotion and integration of persons with disabilities in the labour market.
CHAPTER 1
GENERAL OVERVIEW AND BACKGROUND

“O wonder! How many goodly creatures are there here! How beauteous mankind is! O brave
new world that has such people in’t! ” — Shakespeare quoted by Sir Ian McKellen at the
opening of the Paralympics London 2012

Inequality and discrimination in the broader society and in the workplace are some of
the key elements of the legacy of apartheid in South Africa. In the past persons with
disabilities have been excluded from the mainstream of society and experienced
difficulties in accessing fundamental rights.¹ Considering the history of South African
labour relations, it is understandable that labour as a social phenomenon is not only
concerned with workplace related issues but also with aspects encompassing the
whole of the socio-political and economic scene. This involvement is manifest in the
approach to labour legislation in South-Africa in the post-apartheid era and the
processes through which the current legislation came about. Current labour
legislation seen against the preceding processes paints a picture of issues that
begged redress.²

Undisputedly discrimination stifles opportunities, wastes human talent needed for
economic progress, and accentuates social tensions and inequalities. Combating
discrimination forms an essential part for a long successful strategy to promote
opportunities and a fair equitable workplace that is representative of the society we
live in.

Under the new democracy and in support of The Constitution³ the South African
Government promulgated the Employment Equity Act (EEA)⁴ a progressive piece of
legislation and policy interventions to give effect to section 9(3) of the Constitution
that guarantees the fundamental right to equality.

¹ Technical Assistance Guidelines on the Employment of People with Disabilities. Published by
Department of Labour 2002. Foreword M M S Mdladlana, Minister of Labour.
² Dupper, Garbers, Landman, Christianson, Basson & Strydom (ed) Essential Employment
In an attempt to protect the rights of persons with disabilities it is further supported by the Code of Good Practice on key aspects on employment of people with disabilities (Code of Good Practice) and the Technical Assistance Guidelines (TAG) that aim to promote equal opportunities and fair treatment in employment.

But the question remains: Does this progressive legislation and relevant codes and guidelines make any contribution to affirm persons with disabilities in the labour market? Does it offer any protection from discrimination or make any contribution to provide equal opportunities in the workplace?

1.1 PROBLEM FORMULATION

South African equality labour legislation is viewed as amongst the most progressive in the world. Specific emphasis is placed on ensuring equality, the right to protection and benefit before the law, *inter alia*, for persons with disabilities.

The high level of unemployment amongst this designated group, in all categories of work suggests that employers still have reservations in employing persons with disabilities. The statistics confirm that although some progress has been made in the Government sector in terms of representation very little representation has been achieved in the private sector.

The South African Government via President Jacob Zuma in the state of the nation address on 10 February 2011, declared the year of 2011 as the “year of job creation through meaningful economic transformation and inclusive growth”.¹ The government further embarked on a so called new “growth path aimed to create five million jobs by 2020 and to bring down the unemployment statistic to 15 per cent.”²

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¹ GN 1064 in GG 23718 of 19 August 2002.
In response to this the South African Minister of Finance Pravin Gordhan suggested that South Africa may have to relax its labour laws to grow jobs to achieve this growth.\(^8\)

Human beings strive for a better quality of life – alike does persons with disabilities. Employment provides not only a source of income but contributes to the improvement of quality of life of every individual in society. Victor Frankl so aptly described the meaning of work as a manner in which to improve mental health and providing sense to our existence.\(^9\)

The democratisation of South Africa has ushered in a progressive democratic awareness of the needs and rights of previously disadvantaged groups, such as persons with disabilities.

Although apt legislation is in place to give effect to the Constitution, the efficacy, application and implementation of this legislation is questionable. According to the ILO report on The Right to Decent Work of Persons with Disabilities,\(^10\) launched by the ILO on the International Day of Disabled People, 3 December 2007; much has been accomplished in the international arena in recent years to improve the working lives of persons with disabilities.

Contrary to this picture, statistics indicate that the majority of person with disabilities in South Africa still continue to suffer restrictions of their rights. In the world of work, they tend to experience high unemployment, underemployment, have lower earnings and as a result of social and economic pressures often are forced to drop out of the labour market. Unfair discrimination against persons with disabilities is continually perpetuated in other ways - in unfounded assumptions about the abilities and performance of marginalised groups - discriminatory exclusive recruitment processes and the inaccessibility of the labour market. The concepts of undue hardship and


reasonable accommodation may provide an escape “clause” for employers not to adhere to legislation. Accessibility and reasonable accommodation is also viewed as a constraint as it inhibits persons with disabilities to compete on a more equal footing.

Further social challenges exist in many imbalances such as widespread ignorance, fear and stereotyping of the abilities of those considered to be “different”, the lack of proper education, preparation, and integration of persons with disabilities and the lack of physical accessibility of the work place, this results in many persons with disabilities still being dependant on social security, with no regard for their dignity and self esteem.

1.2 PURPOSE, GOAL AND OBJECTIVES OF THE RESEARCH

The study will attempt to review the efficacy of labour legislation in South Africa to promote the integration of persons with disabilities into the labour market; this would be viewed against an international comparative study. Control mechanisms, sanctions, or a lack of sanctions on businesses that fail to comply will be scrutinized. The practices and incentives will be viewed against the reality of challenging economic imperatives. The economic impact of failing to integrate persons with disabilities into the labour market that results in dependency on social security structures would also be reviewed.

The changes as proposed in the new proposed amendments to Labour legislation contained in the Employment Services Bill\[^{11}\] will be reviewed; this seems to be a return to segregation instead of mainstreaming and of further degradation of this already marginalised group of dignity and self worth.

In conclusion the treatise will attempt to make a contribution to propose changes that will contribute to the efficacy and implementation of labour legislation to purpose the goals as envisaged by the employment equity act to achieve workplace equality.

\[^{11}\] Government Gazette No 35844 2 November 2012 [B38-2012].
1.3 THE RESEARCH APPROACH

The research will focus on existing literature, statistics and legislation available in South Africa. Measuring it against the status quo of the demographics of the Labour Market and this will be viewed against comparative international studies.

1.4 DEFINITION AND SCOPE OF DISABILITY

The definition is a complex one as persons with disabilities are not a homogeneous group; they may have a physical, sensory, intellectual or mental disability. The time of the onset of the disability, whether it was from birth, acquired in childhood, or later life, acquired during further education or while in employment will determine the ability to work or take part in society, or it may have a major impact, requiring considerable support or assistance.

The Employment Equity Act defines people with disabilities as “people who have a long-term or recurring physical or mental impairment, which substantially limits their prospects of entry, or advancement in, employment”.\(^{12}\)

The Code of Good Practice further elaborates on this definition which will also be the focus group of this thesis: “The scope of protection for persons with disabilities in employment focuses on the effect of a disability on the person in relation to the working environment, and not on the diagnosis of the impairment”.\(^{13}\)

It is also acknowledged in several sources amongst others Census South Africa that the definition of disability causes widespread confusion and limitations to legislation and implementation of policies and legislation.

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\(^{12}\) EEA Chapter 1 Definitions.

\(^{13}\) EEA s 5 definition of people with disabilities.
1.5 PREVALENCE OF DISABILITY IN SOUTH AFRICA

In the wake of South Africa’s democracy that increased the awareness of designated
groups, the need arose to understand the prevalence of disability in the country. According to the Integrated National Disability Strategy (INDS)\textsuperscript{14} there is a serious
lack of reliable information on the nature and prevalence of disability in South Africa. This is due to the fact that historically disability management was viewed within a health and welfare framework, leading to a failure to integrate disability into mainstream government statistical processes.

The United Nations Development Programme (UNDP) and the Central Statistical Services (CSS) made an attempt to provide some insight into this challenge. The UNDP estimated that in 1990, 5.2 per cent of the world’s population was experiencing moderate to severe disability, for South Africa the estimate figure stood at approximately 5 per cent in 1995.\textsuperscript{15}

The population census conducted during 1996 included disability as a focus area and data indicated that 6.7 per cent of the South African population was disabled.\textsuperscript{16}

The data collected in Census 2001 indicated that there were 2 255 982 people with various forms of disability. This number constituted 5 per cent of the total population enumerated in this census.\textsuperscript{17} Of this number, the African population recorded the highest number of disabled people (1 854 376 or 5.2 per cent), followed by white (191 693 or 4.5 per cent), coloured (168 678 or 4.2 per cent) and Indian/Asian (41 235 or 3.7 per cent). The number of females affected was 1 173 939, compared to 1 082 043 males.\textsuperscript{18}

\textsuperscript{14} 1997 published by Department of Social Development.
\textsuperscript{16} Ibid.
\textsuperscript{17} Ibid.
\textsuperscript{18} Ibid.
The prevalence of sight disability was the highest (32 per cent) followed by physical disability (30 per cent), hearing (20 per cent), emotional disability (16 per cent), intellectual disability (12 per cent) and communication disability (7 per cent).\textsuperscript{19}

The new statistics of Census 2011 indicate a percentage of persons over the age of four years with disabilities increased from 5.7 per cent in 2009 to 6.3 per cent in 2010 and then declined to 5.2 per cent in 2011.\textsuperscript{20} Statistics South Africa has advised users in an earlier report to treat the findings with caution, as it showed considerable variation. Statistics South Africa undertook to further investigate disability findings using data from the forthcoming GHS 2011.\textsuperscript{21} Available statistical data on prevalence of disability in South Africa is not comprehensive or accurate. Estimates of the number of persons with disabilities in South Africa vary from 5.9 per cent to 12 per cent.\textsuperscript{22}

1.6 LIMITATION OF THE RESEARCH

The study focuses on the persons with disabilities that have the potential to compete in the labour market, since the nature and impact of some forms of disability cannot be integrated in the open labour market. There seem to be a new focus on this group in the Employment Services Bill.

It is also a fact that many are historically disadvantaged due to a lack of education. However this treatise will primarily focus on the legal framework of labour legislation and the impact of this on this marginalised group, with regard that the social impact of disability often plays a role in the unemployment of this group.

\textsuperscript{20} Statistics South Africa Statistical release P0318 Expected release date March 2013 2.
\textsuperscript{21} Statistics South Africa Statistical release PO318 Expected release date March 2012 19.
\textsuperscript{22} Disability knowledge and research: The role and effectiveness of disability legislation in South Africa 6.
1.7 HYPOTHESIS

South African labour legislation fails to promote and integrate persons with disabilities in the labour market, due to the lack of implementation, application and lack of sanctions.

1.8 SUMMARY

The employment rate of persons with disabilities is still a critical issue. It is evident that less than an estimated 1 per cent of this designated group is employed, against the 2 per cent target is employed in South Africa.

Despite development of applicable legislation and equality legislation that is described as some of the most progressive equality legislation in the world, the mobilization to employ persons with disabilities is still a very slow process.

Employers submit several reasons and provide justification for not employing people with disabilities amongst others costs, high turnover, inaccessibility of the workplace and absenteeism, however, some of the legislation imposed actually discourages participating in the labour market.

It is also significant that employment equity is often seen through racial and gender eyes. Many articles and speeches refer to equality and inclusion of blacks and women. Persons with disabilities are only mentioned in the background, although included in the list of designated groups.
CHAPTER 2
SOUTH AFRICAN LABOUR LEGISLATION TO GIVE EFFECT TO EMPLOYMENT EQUITY FOR PERSONS WITH DISABILITIES

“I was slightly brain damaged at birth, and I want people to like me, to see that they shouldn’t let a disability get in their way. I want to raise awareness – I want to turn my disability into ability.” Susan Boyle

The advent of democracy in 1994 was marked by conscious attempts to redress the socially inequalities of the apartheid era. One of the paramount objectives of the democratic government has been to compliment the fundamental rights in accordance with the Constitution. The government of the time proposed several social policies to address this.

In legal terms, the most compelling reason for reforming of the labour legislation was the requirements of the interim Constitution. Chapter 3 of the interim Constitution, the ‘Bill of Rights’ entrenched certain fundamental rights such as the right to equality and the freedom to engage in economic activity. The South African labour arena required apt labour legislation to address the disparities in the labour market, this needed to be in tune with International Human Rights Law and the International Labour Organisation as the new government committed itself to upholding international labour standards and undertook to submit to the ILO Conventions.

2.1 THE UNITED NATIONS (UN) AND THE INTERNATIONAL LABOUR ORGANISATION (ILO)

One of the most significant contributions of the UN is the Universal Declaration of Human Rights which was adopted in 1948.

The right of everyone to work, including persons with disabilities, was confirmed by the UN. The Universal Declaration of Human Rights confirms: “Everyone has the rights to work, to free choice of employment, to just and favourable conditions of work

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and to protection against unemployment. Everyone, without discrimination, has the right to equal pay for equal work. Everyone who works has the right to just and favourable remuneration ensuring for himself and his or her family an existence worthy of human dignity, and supplemented, if necessary, by other means of social protection.25

The early focus of the organisation on disability revolved around a paradigm of welfare and rehabilitation however the focus progressively changed to rights-based paradigm with equality as its driving force.26 Internationally the UN launched its World Programme of Action concerning Disabled Persons many years later and in 1982 the General Assembly adopted the World programme of Action Concerning Disabled Persons that was to guide the United Nations’ adopted Decade of Disabled Persons (1983-1992).27 At the time the South African government did not recognise the United Nations programme and this led to the up rise of a disability rights movement in South Africa.28 As the apartheid government did not recognise the UN 1981 International Year of Disabled Persons, Instead, 1986 was declared the national Year of the Disabled and the government established a committee on Disability (ICCD) to advise government on policy reform. In 1997, the government adopted the White Paper on an Integrated National Disability Strategy known as the INDS. The INDS represented a paradigm shift away from the medical or welfare model of disability. The INDS guided government and society as a whole with guidelines that will promote non-discriminatory development planning, programme implementation and service delivery.29

2.2 THE INTERNATIONAL CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES

The most recent and most significant contribution by the UN to address disability management was the response acknowledging the rights of persons with disabilities

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27 Dupper and Garbers Equality in the Workplace 186.
28 INDS 15.
29 The role and effectiveness of disability legislation in South Africa 17.
when The United Nations General Assembly adopted the Convention on the Rights of Persons with Disabilities (ICRPD)\textsuperscript{30} on 13 December 2006. South Africa ratified both the Convention and the Optional Protocol to the Convention on 30 November 2007\textsuperscript{31} showing its clear commitment to national and global implementation thereof. This Convention purposes to ‘promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms of persons with disabilities, and to promote respect for their inherent dignity.\textsuperscript{32} The Convention determines that state parties should recognise the right of persons with disabilities to work, on an equal basis with others. This includes the right to the opportunity to gain a living by work freely chosen or accepted in a labour market and a work environment that is open, inclusive and accessible to persons with disabilities. State parties are expected to safeguard and promote the realisation of the right to work, including those who acquire a disability during the course of employment, by taking appropriate steps including through legislation.\textsuperscript{33}

It is important to review the normative implications of the Convention for South Africa, with focus on substantive norms for the achievement of equality and elimination of unfair discrimination against disabled people with special reference to the workplace. Disability is a listed ground to have protection against unfair discrimination under the South African Constitution.\textsuperscript{34} What is the understanding of equality as a normative value and right in disability in the Convention?

Also how does the understanding of the convention impact on South Africa in terms of consonance or dissonance with equality norms and standards under the Constitution and the Employment Equity Act?\textsuperscript{35} To the extent that South Africa has ratified the Optional Protocol, and further that the South African constitution requires courts to consider international law, when interpreting the Bill of Rights.\textsuperscript{36}

\textsuperscript{30} UN Resolution A/RES/61/06.
\textsuperscript{32} Art 1 of the Convention.
\textsuperscript{33} Art 27 of the Convention.
\textsuperscript{34} S 9(3) and (4).
\textsuperscript{35} Dupper and Garbers Equality in the Workplace 183.
\textsuperscript{36} The Constitution s 39(1)(b).
It is argued that the Convention is an important contribution towards promoting the understanding of what is entailed in respecting, protecting and fulfilling the right to equality as it applies to persons with disabilities under South African jurisprudence\textsuperscript{37}. The Convention is merely viewed as a complimentary instrument and does not introduce substantive new jurisprudence into South African equality jurisprudence, but adds value in reinforcing substantive equality.\textsuperscript{38} South African disability jurisprudence is still in as an emerging stage, as courts have rarely had the opportunity to adjudicate on cases involving disability as a non-discrimination issue.\textsuperscript{39}

The Convention is of great value in its articulation of disability-specific equality concepts. It is apt to raise awareness and understanding about disability-specific equality concepts, not just for interpretation of the law or in disability advocacy, but also for general awareness and understanding aboutremedying the socio-economic exclusion of people with disabilities.\textsuperscript{40}

The Convention is seen to be a progressive instrument that addressed the failures of other instruments such as the International Covenant on Civil and Political rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) to address equality for Persons with Disabilities.\textsuperscript{41}

It is described as a conscious attempt at designing a human rights instrument that not only seeks to overcome the historical invisibility of disability in human rights treaties, but also seeks to recognise non-hierarchical equality in human difference and the imperative of normative inclusion of Persons with Disabilities in a plural society.\textsuperscript{42}

\begin{itemize}
\item \textsuperscript{37} Dupper and Garbers \textit{Equality in the Workplace} 182.
\item \textsuperscript{38} \textit{Ibid}.
\item \textsuperscript{39} \textit{Ibid}.
\item \textsuperscript{40} \textit{Ibid}.
\item \textsuperscript{41} \textit{Ibid}.
\item \textsuperscript{42} Dupper and Garbers \textit{Equality in the Workplace} 188.
\end{itemize}
The value added by this convention is perhaps best confirmed by Scales “Feminist Jurisprudence”\textsuperscript{43} it took consciousness-raising seriously and has allowed us to appreciate that the law is constitutive of social norms that flow from power relations. Structural inequality is not by accident, but the result of conscious and unconscious arrangement by society in which power is unequally distributed among social groups\textsuperscript{44}.

\section*{2.3 THE ILO CONVENTIONS SPECIFICALLY ADDRESSING DISABILITY IN THE WORKPLACE}

\subsection*{2.3.1 VOCATIONAL REHABILITATION AND EMPLOYMENT OF DISABLED PERSONS (NO. 159) OF 1983}

In 1983 since the adoption of the Vocational Rehabilitation recommendation, of 1955, significant developments have occurred in the understanding of rehabilitation needs, the law and practice. Considering that 1981 was declared by the United Nations as the year of the Disabled Persons, with the theme “full participation and equality” and that a comprehensive World Programme of Action concerning Disabled Persons followed was to provide effective measures at the international and national levels for the realisation of goals of “full participation” of disabled persons in social life and development.\textsuperscript{45} The underlying labour standards contained in this convention, provided the principles contained in the Code of Good Practice on managing disability in the workplace.\textsuperscript{46}

\subsection*{2.3.2 ILO CODE OF PRACTICE ON MANAGING DISABILITY IN THE WORKPLACE (2002)}

The preface of the Code clearly indicate that the code has been drawn up to guide employers – they large, medium or small-sized enterprises, including private and public sector, in developing or highly industrialized countries – to adopt a positive strategy in managing disability- related issues in the workplace.\textsuperscript{47}

\footnotesize
\textsuperscript{43} Littleton “Equality and Feminist Legal Theory” Littleton “Restructuring Sexual Identity” as quoted by Dupper 204.
\textsuperscript{44} Dupper and Garbers \textit{Equality in the Workplace} 204.
\textsuperscript{45} www.ilo.org/ilolex/cgi-lex/convde.pl?C 159.
\textsuperscript{46} Code of Good Practice 1.
\textsuperscript{47} Preface of the Code.
2.3.3 ILO HUMAN RESOURCES DEVELOPMENT RECOMMENDATION (NO. 195) OF 2004

The recommendation mainly deals with the challenges posed by globalization, such as the so called “brain drain”, which is causing concern in many developing countries. It calls for international mechanisms that would mitigate the adverse impact on developing countries of the loss of skilled people. It also recognizes that education and training strategies and creating the right enabling conditions – economic growth, investment, creation of decent jobs and human development – that will assist countries in retaining skilled labour.48

The recommendation is built on a number of core principles that reflect the ILO’s values: that education, training and lifelong learning contribute significantly to promoting the interests of people, enterprises, the economy and society as a whole; that lifelong learning contributes to personal development, access to culture and active citizenship; it confirms that the social partners have roles to play and commitments to fulfil in support of lifelong learning. It acknowledges that many developing countries should be assisted to design, fund and implement education and training policies for economic and employment growth in the attempt to eradication poverty. It confirms that the realization of decent work for workers everywhere is a primary objective of the ILO.49

The instrument makes special mention and recognizes that education and training are a right for all people. It further advises on policies that ensure persons with special needs have access to education, training and lifelong learning that will be a powerful tool to liberate them economically and socially.

The international guidelines by the ILO provided direction and paved the way for South Africa to action apposite legislation to support the international conventions.

48 ILO Recommendation 195 of 2004 Preface Juan Somavia, Director General.
49 Ibid.
2.4 THE CONSTITUTION OF SOUTH AFRICA

The adoption of the Constitution\textsuperscript{50} in 1996 brought about a major change to the face of the South African legal system.\textsuperscript{51} It is the highest law and acts as the custodian of all legislation and subordinates all to its provisions. It further restrains the legislature from unreasonably encroaching on the individuals’ rights as contained in Chapter Two; The Bill of Rights.

The Constitution acknowledges in section 9(1) the right to equality: “Everyone is equal before the law and has the right to equal protection of the law” implicit in this right is the understanding that neither the State nor any other person may discriminate, directly or indirectly against anyone on various arbitrary grounds listed including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, religion, disability, religion, conscience, belief, culture, language and birth.\textsuperscript{52}

The heart of the South African Constitution is based on the notion of equality before the law. It is integral to the vision of society established in the preamble, and is entrenched as both a value and a legally enforceable right.\textsuperscript{53}

Section (9) sets out a detailed right offering substantive protection against unfair discrimination or differentiations made on the basis of prohibited grounds. Section 9(3) and (4), including disability, and prohibiting any other classification made on any other basis than section 9(1). Section 9(2) provides for positive and remedial equality enabling positive measures to advance equality.

From the right to equality as contained in the Constitution flow further rights, including the right to dignity,\textsuperscript{54} right to freedom and security,\textsuperscript{55} freedom of trade, occupation and profession\textsuperscript{56} amongst others.

\textsuperscript{52} S 9(3).
The promise in the Constitution “to improve the quality of life of all citizens and to free the potential of each person” applies to persons with disabilities as to all other social groups.

The Constitution specifically deals with labour and employment rights in section 23 confer to “everyone” the right to fair labour practises this required the South African legislature to redress labour legislation and to adopt an approach that would confirm the notion of equality with the aim to prevent discrimination.

It is contended that the Constitutional recognition of the right not to be discriminated against does, however, not afford sufficient protection. Due to the nature of a constitution it does not define the protected class or concepts relevant to the protection of people with disabilities. It thus requires to be supported by additional anti-discrimination legislation.

The Constitution thus paves the way and instructs as per section 9(4) the legislature to “enact national legislation to prevent or prohibit unfair discrimination”. In an attempt to review the unfolding of the legislation to follow it is necessary to review the history of the legislation under the previous dispensation.

2.5 LABOUR RELATIONS ACT 28 OF 1956 (1956 LRA)

This Act contained no explicit prohibition of discrimination in the definition of an unfair labour practice and provided no protection for applicants; employers were at liberty to refuse an applicant on the basis of gender, race inter alia disability. Applicants for employment enjoyed no protection or legal standing (locus standi) under the 1956 LRA to declare a dispute with an employer even though he/she was the victim of

55 S 12.
56 S 11.
57 Preamble of the Constitution.
unfair discrimination. In fact some legislative provisions specifically permitted discrimination in employment.

The interim Constitution section 8 paved the way for a guarantee that the law will contain a section that will protect and benefit people equally, and contained a specific prohibition on unfair discrimination. In addition, it provided for measures designed to achieve the protection and advancement of people previously marginalised and disadvantaged by unfair discrimination.

While it was possible after 1981 to bring a discrimination claim under the rubric of the unfair labour practice definition of 1956 LRA, the industrial Court seldom had the opportunity to adjudicate discrimination claims.

2.6 LABOUR RELATIONS ACT 66 OF 1995 (LRA)

The LRA was the first step in the Ministry of Labour's original five year plan to the reform of labour legislation. This Act aims to encourage collective bargaining and settlement of disputes; it also enhances the powers of the forums designed to facilitate these objectives. Previously discrimination was included in as a form of 'residual unfair labour practice' definition of the LRA, this prohibition was removed from the LRA and re-promulgated in the Employment Equity Act.

The Labour Relations Act 1998 provides for the regulation of unfair treatment in the workplace via a provision on unfair labour practices.

Employees may institute action for automatic unfair dismissal under the LRA, dismissal for incapacity and disability. It should be clearly distinguished between an

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59 Such as the Wage Act 5 of 1957, Industrial Conciliation Act 28 of 1956.
61 200 van 1993.
63 Du Toit 33.
64 Grogan Employment Rights 6.
65 Grogan 7.
employee who is incapacitated\textsuperscript{66} compared to an employee with a disability.\textsuperscript{67} The employer's corresponding obligations to each situation differ materially. The Act however makes provisions for dismissal; \textit{inter alia}, on grounds of incapacity due to ill health or injury. Schedule \textsuperscript{8}\textsuperscript{68} contains in article 10 and 11, guidelines on dealing with incapacity and ill health. The duration and extent of the incapacity determines the employer's obligation. It is incumbent on the employer to explore options short of dismissal where the employee is expected to recover within a reasonable period of time.\textsuperscript{69} However, when the incapacity is permanent, the employer is to explore continued employment via alternative employment or adaption of duties or work circumstances.\textsuperscript{70} It may be necessary in some circumstances to distinguish between incapacity and disability to determine the need to accommodate or the fairness of a dismissal. In \textit{NEHAWU obo Lucas and the Department of Health (Western Cape)}\textsuperscript{71} the arbitrator examined the employment of persons with disabilities and the duty of the employer to accommodate. It was found that although the employee did not cooperate in the process, the employer did not have substantive reason to terminate the relationship and the dismissal was therefore found to be unfair.\textsuperscript{72} The degree of incapacity also plays a role and in accordance with the code 10(3) an employer cannot be expected to continue to employ an employee who is no longer productive.

The nature and the size of the business will also be a decisive consideration; the obligation on small business is less onerous to make accommodation as determined in the matter of \textit{Philander v Eco Car Hire CC}.\textsuperscript{73} A distinction was indicated that an injury on duty requires more tolerance from the employer, in \textit{Carr v Fisons Pharmaceuticals},\textsuperscript{74} an employee had been injured on duty and the employee was dismissed as she was no longer able to fulfil her duties, but without any consultation

\begin{thebibliography}{99}
\item\textsuperscript{66} S 188(1).
\item\textsuperscript{67} S 1 of the EEA.
\item\textsuperscript{68} The Code of Good Practice: Dismissal.
\item\textsuperscript{69} Beaumont, Beaumont Workshop (Spring 2008) 18.
\item\textsuperscript{70} \textit{Ibid}.
\item\textsuperscript{71} (2004) 25 ILJ 2091 (BCA).
\item\textsuperscript{73} [2001] 6 BALR 631 (CCMA).
\item\textsuperscript{74} (1995) 16 ILJ 179 (IC).
\end{thebibliography}
and the dismissal was held to be unfair. In *Tither v Trident Steel*\(^{75}\) the arbitrator found that employers may not dismiss employees without making a serious effort to adapt the employee's duties or position or to find alternative work. The dismissal was found to be substantively fair, but procedurally unfair. In *Standard Bank of South Africa v CCMA & Others*\(^{76}\) the court found that that the employer had the premise to end the relationship and pursued actions to do so. The employers’ obligation however was to demonstrate intent to continue the relationship. In the process the employer failed to explore reasonable accommodation of the employee and the dismissal of the employee for incapacity was automatically unfair. Dismissal must be the last option. In cases such as these the onus is on the employer to show that it has made every attempt for reasonable accommodation. Pillay J held as follows (at para 91) –

> “The search for accommodation is a multi-party inquiry. Although the principal responsibility for conducting the enquiry rests with the employer, at the very least, the employer must confer with the disabled employee her trade union or workplace representative…”\(^{77}\)

Disregarding medical advice to accommodate an employee is seen as discrimination.

### 2.7 EMPLOYMENT EQUITY ACT (EEA) 55 OF 1998

The EEA is a product of South Africa’s history and recent attempt of the legislature to give expression to the commitment to eradicate the inequality of the past.\(^{78}\) The EEA is meant to give expression to the broader constitutional right to equality as enshrined in section 9 of the Constitution adapted to fit the workplace context\(^{79}\) and further aims to give effect to the obligations of the Republic of South Africa as a member of the ILO.\(^{80}\) The Act purpose to achieve equality in the workplace by promoting equal opportunity and fair treatment in employment \(^{81}\) on the one hand,
and to eradicate all forms of unfair discrimination and on the other hand, in correcting the demographic imbalances in the nation’s workforce.\textsuperscript{82} It further purposes the implementation of affirmative action measures to redress the disadvantages in employment experienced by designated groups, in order to ensure their equitable representation in all occupational categories and levels in the workplace.\textsuperscript{83} The EEA consists of two sections.

Chapter II of the Act deals with the prohibition of unfair discrimination on several arbitrary grounds including disability. The Act interestingly contains no definition of the word “discriminate”. The addition of the adjective ‘unfair’ in section 6(1) implies that some forms of discrimination may be fair of, or at least be not necessarily unfair.\textsuperscript{84} The Constitutional Court has held that “discrimination” denotes \textit{the potential} to impair the fundamental dignity of persons as human beings or to affect them adversely in a comparable serious manner.\textsuperscript{85}

An investigation into a claim of unfair discrimination involves a two-stage inquiry.\textsuperscript{86} The first to establish if there was discrimination the second whether the discrimination was in fact unfair. Section 11 of the EEA states that “whenever unfair discrimination is alleged in terms of the Act, the employer against whom the allegation is made must establish that it is fair”.\textsuperscript{87} This suggests that the onus of proof is on the employer, however this does not vary the general rule that the person who alleges must prove.\textsuperscript{88} It merely confirms that the individual (employee) that will first have to proof, \textit{prima facie}, that discrimination indeed took place.

Chapter III of the Act goes further than just proscribing unfair discrimination, as it sets out the means by which “designated employers”\textsuperscript{89} must implement affirmative action in favour of designated groups. It further compels employers to remove barriers to

\begin{flushright}
\textsuperscript{82} S 2(a).
\textsuperscript{83} S 2(b).
\textsuperscript{84} Grogan 173.
\textsuperscript{85} Harksen v Lane NO and Others 1998 (1) SA 300 (CC) at [47].
\textsuperscript{86} Food & Allied Workers Union & others v Pets Products (Pty) Ltd (2000) 21 ILJ 1100 (LC) at [13].
\textsuperscript{88} Grogan 172.
\textsuperscript{89} Referring to those over a certain number of employee or whose turnover exceeds a stated amount.
\end{flushright}
the advancement of previously disadvantage groups,\textsuperscript{90} and actively advance them in all categories of employment by affirmative action. The EEA also requires that equity plans should state the time-frame within which equity will be achieved ‘where under-representation of people from designated groups has been identified. Affirmative action as a defence in terms of discrimination must be ‘consistent with the purposes of the EEA.’\textsuperscript{91}

This process in brief must take place by consulting with their employees, adopting equity plans and implementing them according to agreed targets. An equitable workplace according to the Act is one with a workforce that more or less approximates the demographics of the population as a whole.

In the context of the designated group of people with disabilities it is important to note that the EEA is the only statute that expressly includes applicants for employment.

It is however argued that affirmative action programmes should not be abused as protection will fall away when the effects of past discrimination have been removed and equality achieved as indicated in the matter of \textit{Reynhard v University of South Africa}.\textsuperscript{92} It is also suggested that an employer should engage in affirmative action as understood by the Act, instead of making token appointments from disadvantaged groups merely to promote its image or gain access to the markets.\textsuperscript{93} This practice of “token appointments” would affect the dignity of the designated group and would be in contradiction with the ethos of equality legislation. The use of the word ‘equal’ has been held to denote that the interests of the beneficiaries are not to be considered \textit{in vacuo}, but should have regard for the rights of others and the interest of the community, and to the possible disadvantage that the targeted persons or groups may suffer.\textsuperscript{94}

\textsuperscript{90} This includes (“blacks”, “coloureds”, “Indians”, woman and the disabled).
\textsuperscript{91} S (6)(2)(a).
\textsuperscript{92} (2008) 29 ILJ (LC).
\textsuperscript{93} Grogan 200.
\textsuperscript{94} \textit{Public Servants Association of SA \\ & others v Minister of Justice \\ & others} (1997) 18 ILJ 241.
The legitimate defence afforded to employers under the Act is the inherent requirements of the job. This provision recognises that it is not unfair to “distinguish, exclude or prefer any person on the basis of an inherent requirement of the job”, it recognise that there may be situations in which possession of one or other of the characteristics listed in 6(1), or lack thereof, may be relevant to certain posts or work. The word “inherent” suggests that possession of a personal characteristic (for example being male, female, speaking a particular language, being free of a disability) must be necessary to effectively perform the duties attached to a particular position. An example of such is customer preference. However in South Africa the Constitutional Court has held that the values of equality and human dignity far outweigh considerations such as customer preference.

Indications are that the courts set the requirements for this defence quite high. In IMATU v City of Cape Town, a case that refers to a blanket ban on employment of “type 1” diabetics as fire-fighters, the court accepted the following as examples of unacceptable criteria:

- evaluation of a person’s competence for task on the basis of stereotypes of the group to which the employee belongs;
- requirements based on preferences of employees and clients;
- requirements that a task should be performed in a particular way when the employee may be able to do it in other ways;
- qualifications based on the distinctions between the ability to perform “light” or “heavy” work.

This case so far the leading (and thus far only) case on discrimination on the grounds of disability sets the tone for the defence of people with disabilities. The lesson that emerges from this case is that if employers wish to exclude categories of employees

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95 S (6)(2)(b).
96 Grogan 200.
97 Hoffmann v SA Airways (2000) 21 ILJ 2357 (CC) at [33]-[37].
98 (2005) 26 ILJ 1404 (LC) at 1141A.
on the basis of health, they must prove that they are incapable of meeting the requirements of the job, or that they are susceptible to a much higher risk than other employees failing to meet these requirements in circumstances they are likely to encounter while pursuing their career. This applies whether or not the condition concerned is strictly classified as a disability.\(^99\)

The EEA also places an obligation on an employer to make reasonable accommodation in respect of people from designated groups in order to ensure that they enjoy equal opportunities and are equitable represented in the workplace.\(^{100}\) Failure to do so could constitute unfair discrimination, where it would not lead to undue hardship for the employer; this may include amending rules and policies.

### 2.8 CODE OF GOOD PRACTICE - ON THE EMPLOYMENT OF PEOPLE WITH DISABILITIES

The Code of Good Practice officially launched on 19 August 2002; was established in line with the Employment Equity Act. No 55 of 1998.\(^{101}\)

The Code is clear about the fact that it is not an authoritative summary of the law, nor does it create additional rights and obligations.\(^{102}\) However it goes further to state that the courts and tribunals that interpret and apply the Employment Equity Act must consider the code.\(^{103}\) Perhaps one of the most valuable uses of the Code is that it is intended for employers and employees and their organisations to develop, implement and refine disability equity policies and programmes to suit the needs of their own workplaces.\(^{104}\)

Failure to observe the code does not in itself render a person liable in any proceedings, rather the code is there to answer to the employer on how disability in the workplace should be defined and managed. The Code is informed by the

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\(^{99}\) Grogan 211.

\(^{100}\) S 15(2) (c).

\(^{101}\) S 54(1).

\(^{102}\) Employment Equity: Code of Good Practice s 3.1.

\(^{103}\) S 3.1.

\(^{104}\) S 3.4.
underlying principles of the International labour Organization standards as contained in the Vocational Rehabilitation and Employment Convention of 1983.

This was an attempt by Department of Labour to assist employers to comply with the EEA and transcribe the obligations in terms of persons with disabilities to the workplace and potential employers.

2.9 TECHNICAL ASSISTANCE GUIDELINES ON THE EMPLOYMENT OF PEOPLE WITH DISABILITIES

The Technical Assistance guidelines on the Employment of People with Disabilities (TAG) are intended to complement the Code of Good Practice on the Employment of People with Disabilities. Its intention is to build on the Code to set out practical guidelines and examples for employers, employees and trade unions on how to promote equality, diversity and fair treatment in employment through elimination of unfair discrimination.105

The TAG should be seen as part of the broader equality agenda for people with disabilities to have their rights recognised in the labour market.106 The Code and the TAG forms the basis for the implementation of the provisions of the Act. These are the documents that will be used to guide employers in the implementation of the Act and will be used to guide the Courts where disputes may arise.107

With the launch of the TAG on 3 November 2003, Minister Mdladlana, Minister of Labour at the time, referred in the keynote address to the fact that the Portfolio Committee on Labour, reported on the failure of business to making significant advances towards the employment and promotion of people with disabilities.108

The Minister further promised that the Department “is at the moment making advances to close all loopholes in order to make it difficult for employers to have

105 Foreword M M S Mdladlana Minister of Labour in the TAG.
106 Foreword.
107 TAG 5.
excuses in the implementation of affirmative action, with special focus on people with disabilities”.

Considering the time frames and that the fact that the little progress has since been made this promise seems to be still unfulfilled.

## 2.10 BASIC CONDITIONS OF EMPLOYMENT ACT 75 OF 1997 (BCEA)

The purpose of the BCEA is to advance economic development and social justice as it sets out to give effect to the right to fair labour practices as referred to in section 23(1) of the Constitution by establishing and making provision for the regulation of basic conditions of employment.

This Act can give assistance to an employer to provide reasonable accommodation to the employee with disabilities for example to adjust working conditions for People with Disabilities such as weekly rest periods and sick leave provisions. However the Act makes no allowances or specific provisions for disabled employees.

## 2.11 THE PROMOTION OF EQUALITY AND PREVENTION OF UNFAIR DISCRIMINATION ACT 4 OF 2000 (PEPUDA)

The Act drafted to give effect to section 9(4) of the Constitution read with item 23(1) of Schedule 6 to the Constitution of the Republic of South Africa, 1996, so as to prevent and prohibit unfair discrimination and harassment; to promote equality and eliminate unfair discrimination; to prevent and prohibit hate speech; and to provide for matters connected therewith.

This Act is a wide-ranging act although it is a further attempt to prohibit unfair discrimination, it is not intended to overlap or displace the EEA that governs equity in the workplace. PEPUDA impacts the workplace as it broadens the base as it

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109 Ibid.
110 Purpose of the Act.
111 Introduction to the Act.
112 DuPer and Garbers *Essential Employment Discrimination Law* 287.
covers matters that are not covered by the EEA and it covers employees and their employers that are excluded from the EEA.

The Act also attempts to ensure that Persons with Disabilities are treated with respect and should enjoy similar rights as non-disabled people. The Act identifies unfair practices such as creating artificial barriers to employment opportunities or applying human resource practices which unfairly discriminated against persons from identified groups on prohibited grounds. As one of the listed grounds of prohibition is disability and is specifically dealt with in section 9 of the Act.\textsuperscript{113}

The objectives of the Act make it clear that the intention of the legislation is, amongst other things, to “give effect to the letter and spirit of the Constitution”, to promote equality and to promote the “equal enjoyment of all rights and freedoms by every person”.\textsuperscript{114}

In theory and in accordance with the Act, the designated group may have recourse under this act to take on an employer that does not make his workplace accessible for people with disabilities to access employment. Considering the position of this already marginalised group this approach are unlikely to be accessible to people with low literacy levels and/or formal education, who are most likely unable to access legal services to vindicate their rights claims. Perhaps only a selected group that have access to lawyers and or cases that are taken up by public interest groups will ever be heard. Given the level of poverty in South Africa it is likely that a vast majority of rights claimants will remain unassisted.

\textsuperscript{113} Prohibition of unfair discrimination on ground of disability

9. Subject to section 6, no person may unfairly discriminate against any person on the ground of disability, including—

(a) denying or removing from any person who has a disability, any supporting or enabling facility necessary for their functioning in society;

(b) contravening the code of practice or regulations of the South African Bureau of Standards that govern environmental accessibility;

(c) failing to eliminate obstacles that unfairly limit or restrict persons with disabilities from enjoying equal opportunities or failing to take steps to accommodate the needs of such persons.

\textsuperscript{114} S 2(b)(i)-(iii).
2.12 THE PROTECTED DISCLOSURES ACT (26 OF 2000)

To conceal or disclose a disability is an important aspect regarding the employment of persons with disabilities, yet an ethical dilemma. The South African Constitution makes provision for the right to privacy\textsuperscript{115} however disclosure makes provision for the employer to make reasonable accommodation and allowance for conducive working conditions. The Bill of Rights affords the individual the right to informational privacy. The right is related to reasons for protecting human dignity and control over private information.

There is thus no obligation on the individual to disclose their disability status or whether they require adjustment to be made to the workplace environment. However employees can only require adjustment to be made provided they disclose their disability status or if the status is self-evident to the employer. The intention of this Act was to make provision for procedures in terms of which employees in both the private and public sector may disclose information regarding unlawful or irregular conduct by employers or other employees. Equally to provide for the protection of employees who make such a disclosures.

Section 1 (i) is applicable to cover Persons with Disabilities. Section (3) also states that “no” employee may be subjected to any occupational detriment by his or her employee on account of having made protected disclosure.\textsuperscript{116} The Act further confirms that such employee may not be denied appointment to any employment, profession or office.

The guidelines provided by the Code of Good Practice\textsuperscript{117} and the TAG serves as important tools to assist the employer in developing ways on how to deal with the disclosed information of the person with a disability. This should assist the employer in making informed decisions about providing reasonable accommodation for persons with disabilities in the workplace.

\textsuperscript{115} S14.
\textsuperscript{116} S 6.
\textsuperscript{117} TAG 51.
The Protected Disclosure Act can serve as a guideline to provide further protection to refrain employers from discrimination against persons with disabilities after making disclosure about their disability. The manner in which the employer treats confidentiality and records regarding such information should solicit trust with a person with a disability to disclose information about their disability. The employer should also exercise caution on who may have access to this information.

2.13 SKILLS DEVELOPMENT ACT 97 OF 1998

This Act addresses and provides for the legal framework wherein the state assumes responsibility for the training of workers and is tied to the capacity building strategy encapsulated in the EEA. One of the purposes of the Act is to improve the employment prospects of people previously disadvantaged by unfair discrimination and to redress disadvantages through training and education.

Persons with disabilities amongst other disadvantaged and the targets set in the National Skills Development Strategy set should be 85 per cent black, 54 per cent female and 4 per cent persons with disabilities. In evaluating this target figures indicate that (0.04 per cent) achieving Level One of the National Qualifications Framework (NQF) this number is still significantly under the target. The Code of Good Practice state that one of the ways that unfair discrimination is perpetuated is inappropriate and inadequate training of persons with disabilities or failing to ensure that the company’s training courses are fair and accessible to employees with disabilities.

Another purpose of the Act is to provide opportunities for new entrants to the labour market to gain work experience, and to provide opportunities to employee people who find it difficult to be employed, such as persons with disabilities. Since many of the employable persons with disabilities have very little skill and exposure to the labour market the TAG state that employers must consider offering learner ships or additional training to “high potential candidates”.

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118 TAG 42.
119 The role and effectiveness of disability strategy legislation in South Africa 8.
120 TAG 42.
The Skills Development responsibility falls under the auspices of the Department of Higher Education and training is facilitated through some twenty odd SETA’s, that operate through a levy and grant system as determined by the Skills Development Levies Act (SDLA).\textsuperscript{121, 122}

In response to the view that there is considerable scope to increase the employment of Persons with Disabilities within the Fasset\textsuperscript{123} sector. This Seta proactively provides for substantial deductions\textsuperscript{124} that can be claimed from the South African Revenue Services for a learner with a disability. The Seta further affords for a Learner ship Cash Grant, Strategic- Cash grant, SMME Grant and special project funding for each learner with a disability.

Although the sector only employs a very small number of people with disabilities the type of work performed in the sector lends itself to the training of larger numbers of persons with physical disabilities. By recruiting persons with disabilities employers will not only meet the skills needs within the sector, but they may also be able to support national policy legislation such as employment equity targets, Corporate Social Responsibility Initiatives (CSRI) and Broad Based Black Economic Empowerment (B-BBEE) targets. In addition, employers are able to benefit from higher SARS learner ship deductions for each year of the learner ship that has been registered and completed and possible LCG amounts for these learners.\textsuperscript{125}

Employers are able to improve a company’s rating in terms of the Department of Trade and Industry’s (DTI) codes. Skills development forms 20 per cent of the weighting in (DTI) B-BBEE Codes. Skills development can contribute a substantial

\textsuperscript{121} Act 9 of 1999.
\textsuperscript{122} According to this Act, every employer in South Africa with a payroll exceeding R500 000,00 per annum is liable to register for Compulsory Skills Development Levy (SDL) that amounts to 1 per cent of the total payroll as calculated for the Pay- As- You- Earn ( PAYE) tax, this includes staff who fall below the PAYE threshold, but excludes registered learner ship.
\textsuperscript{123} Finance, Accounting, Management Consulting and Other Financial Services sector.
\textsuperscript{124} Learner with a disability commencement allowance R50 000 per annum, completion allowance R50 000 per annum multiplied by no of completed 12 months periods.
\textsuperscript{125} FASSET Disability Toolkit 10.
number of points to the DTI’s codes and the training and development of Persons with Disabilities.\textsuperscript{126}

This financial benefits obviously not the most important, but relevant to the economic rational of a company is not well publicised and very little information is available on this. This could be a persuasive tool in assisting companies to give preference to applicants with a Disability.

2.14 OCCUPATIONAL HEALTH AND SAFETY ACT 85 OF 1993

This Act confers the common-law duty of employers to provide and maintain a safe and healthy environment for all employees. The Act does not make any special provision for Persons with Disabilities in the Workplace. The only guidance in terms of Health and Safety issues relating to disability is found in the TAG.\textsuperscript{127} It advises that as part of an ongoing health and safety audit within a workplace, the needs of employees with disabilities must be included. Evacuation procedures should take into account any specific or additional measures to ensure that an employee with a disability is safely evacuated from a building or work site during emergencies.

Special needs and reasonable accommodation are often related to health and safety issues. The lack of guardrails, for example may present a severe threat to the blind. However these do not have to be onerous as a review of standard safety procedures such as fire evacuations, lift operating procedures, door sensors and warning of glass doors will confirm that these measures are in place.

This Act seems to lack information relating to the health and safety of Persons with Disabilities and makes no provision for the special needs of this group and no proviso for enforcement for special needs safety.

\textsuperscript{126} Disability Toolkit 8-10.
\textsuperscript{127} TAG 17.
2.15 SOCIAL SECURITY LEGISLATION

The South African Constitution\textsuperscript{128} confirms the right for everyone to have access to social security, and including, if they are unable to support themselves and their dependants, appropriate social assistance.\textsuperscript{129} The South African social security system comprises of the different social security schemes\textsuperscript{130} that mainly focus on paying compensation and paying other benefits and expenses flowing from an incident, for instance medical expenses.\textsuperscript{131} This legislation is aimed at compensation and the important object of prevention and integration are not considered. According to Jordaan et al Social Security is not merely curative (in the sense providing compensation) but also preventative and remedial in nature. The focus should be on the cause of social insecurity (in the form of amongst others, social exclusion or marginalisation) rather than on (merely dealing with) the effects.\textsuperscript{132}

Employees have rights not only against their employers but also against the state, which in the capacity of guarantor of the well-being of all citizens has assumed responsibility for the care of employees who lose their employment or who are injured while on duty.\textsuperscript{133}

The main instruments for the discharge of this responsibility in terms of social insurance are the Unemployment Insurance Act\textsuperscript{134} (UIA) and the Unemployment Contributions Act\textsuperscript{135} (UICA) and special legislation covers specific aspects of Occupational Diseases in Mines and Works Act.\textsuperscript{136} The Occupational Health and Safety Act (OHSA),\textsuperscript{137} and the Mines Health and Safety Act (MHSA)\textsuperscript{138} deal with

\begin{itemize}
  \item S 27(1)(c).
  \item Jordaan, Kalula and Strydom (eds) \textit{Juta's Pocket Companions Understanding Social Security} (2009) 1.
  \item Such as the schemes for social assistance, unemployment insurance and compensation for occupational injuries and diseases.
  \item Jordaan \textit{et al Understanding Social Security} 5.
  \item Jordaan \textit{et al} 7.
  \item Grogan 8.
  \item 63 of 2001.
  \item 4 of 2002.
  \item 78 of 1973.
  \item 85 of 1993.
  \item 29 of 1993.
\end{itemize}
preventative and standard-setting framework in respective the non-mining and mining sectors. The Road Accident Fund,\(^{139}\) which is primarily funded from a compulsory fuel levy, pays out compensation for loss or damage suffered as a result of any bodily injuries or death, caused by negligent driving of motor vehicles. The state makes further provision in terms of social assistance benefits that are provided in terms of the Social Assistance Act\(^{140}\) this assistance includes amongst others a disability grant. However the legal system restricts large parts of social insurance to the formal employment context, it excludes many from participation, it adopts a categorical and means-tested approach to social assistance.\(^{141}\)

The manner in which the South African system is organised is a challenge for persons with disabilities as the focus lies on those who are involved in formal employment.\(^{142}\)

In terms of the Compensation for Occupational Injuries and Diseases Act\(^{143}\) (COIDA) an employee who is injured on duty and suffers a permanent injury resulting in a disability, will be compensated according to the assessment on the percentage of disability sustained.

The South African administration of social security benefits are affected by several state departments. Due to the lack of communication between the departments it results in a system that does nothing to encourage a person with a disability or a newly disabled employee to enter the labour market or to remain in employment. For instance a disability grant also offers free health benefits to a person with a disability that is essential in disability management. Once employed the person with a disability, not only loose the income but also the medical care provided by Department of Health. The situation often discourages persons with a disability to engage in the Labour Market as the cost associated with disability costs is

\(^{139}\) Regulated by the Road Accident Fund Act 56 of 1996.
\(^{140}\) 13 of 2004.
\(^{141}\) Jordaan et al Understanding Social Security 24.
\(^{142}\) Jordaan et al Understanding Social Security 19.
\(^{143}\) Act 130 of 1993.
exceptionally high. It also discourages small employers to employ a person with a disability as they cannot afford to provide medical benefits.

2.16 SUMMARY

The TAG confirms this principle so clearly: The process of integrating persons with disabilities into the workplace should be motivated from a strategic business or management perspective, rather than an ad hoc activity in reaction to the requirements of any Act or legislation.\textsuperscript{144}

Undisputedly South Africa’s Constitution and discrimination legislation reflects all the right principles of human dignity inclusion and equality. The supporting employment legislation amongst others; The Basic Conditions of Employment Act, The Labour Relations Act, Skills Development and Health and Safety Act seem to be still in the dark on how to deal with the issues relating to disability.

Perhaps this goes a long way in explaining that South Africa make all the right noises but fail to facilitate employment for this group and also fail to sustain persons with disabilities in employment.

In case law the term incapacity and disability are used in an interchangeable manner. An injury on duty, or an accident, may result in permanent physical or intellectual disability. A slow onset illness, like cancer or HIV/AIDS may start as a mild incapacity but may progress to a serious incapacity that would affect the individual’s ability to perform work duties. The disease may even be work-related. Severe stress, depression, alcoholism or drug abuse may also affect an employee in the workplace to the extent that the problem is alleged to be incapacity or disability. The Constitution, LRA and the EEA protect persons with disabilities from unfair discrimination. The distinction between the two dismissals on the basis of disability and those on the basis of incapacity will, however, need to be clarified. A dismissal based on disability could fall within the ambit of automatically unfair dismissal\textsuperscript{145} whilst a dismissal based on incapacity would fall into the category of “other unfair

\textsuperscript{144} TAG 2.

\textsuperscript{145} S 187(1)(f).
dismissals". The question of whether an employee is being dismissed on the basis of incapacity or disability may be a question of fact, but the process and the consequences of the dismissal will be different.

Employment equity encourages the redistribution of opportunities and ultimately of opportunities and wealth to all skilled and willing members of society. This reduces resentment on the part of the less fortunate, and promotes their participation in society, thus fostering inclusion, social solidarity and cohesion.

Employers still provide many reasons and justifications of not employing persons with disabilities such as costs, high turnover, absenteeism, etc. The legislations have also not provided enough strict measures on how to deal with these employers who still do not comply. It seems like legislation must be reviewed and revised to accommodate critical issues that affect Persons with disabilities in relation to employment.

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146 S 188.

CHAPTER 3
COMPARATIVE STUDY OF OTHER JURISDICTIONS

“It is ability that mattered, not, disability which is a word that I’m not crazy about using”
Best Actress Award 1982- Marlee Matlin (hearing impaired)

Since South-Africa is a young democracy it is imperative to review its developing legislation against international labour law. The South African Constitution compels a court, tribunal or forum, when interpreting the Bill of rights, to consider international law.148

3.1 EMPLOYMENT EQUITY IN CANADA

The South African equality legislation is modelled after the Canadian Employment Equity Act, under the auspices of the presidency of Mr Nelson Mandela, who is Canada’s second honorary citizen.149

Internationally, Canada is recognised as a world leader in welcoming diversity and including all ethnic and racial groups in the nation’s social and economic life.150 One of the earliest reports on equity was tabled in 1984 by Judge Rosalie Abella who used the term “employment equity” to distinguish the Canadian initiative from the American affirmative action programs which has been associated with quotas. The stated purpose of the Act was and still is:

“If to achieve equality in the workplace so that no person shall be denied employment opportunities or benefits from reasons unrelated to ability and, in the fulfilment of that goal, to correct the conditions of disadvantage in employment experienced by woman, Aboriginal peoples, persons with disabilities and members of visible minorities by giving effect to the principles that employment equity means more than treating persons the same way but also requires special measures and the accommodation of differences.”151

148 S 39(1)(b).
For this reason the four designated groups addressed in equity legislation aimed at women, Aboriginal people, persons with disabilities and visible minorities.

The new Employment Equity Act that came into force in October 1996, extended coverage to the federal public service, mandated the Canadian Human Rights Commission to conduct on-site compliance reviews, and provides for final enforcement of the Act, including by an Employment Equity Review Tribunal, empowered to hear disputes and issue orders.\textsuperscript{152} The Minister of Labour is responsible for advising employers, analysing employers' reports, reporting to Parliament on progress achieved and implementing the Federal Contractors Program. The Federal Contractors Program for employment equity require enterprises with 100 or more employees with the federal government to certify their commitment to implement employment equity initiatives in order to bid on contracts over $200,000. The Act requires a committee of the House of Commons to review the legislation to be undertaken every five years.\textsuperscript{153}

Canada is one of the view countries, similar to South African, that have one “umbrella” piece of legislation for its four designated groups, while most other industrialised countries address the designated groups under fragmented legislation.\textsuperscript{154}

The two other countries that commands attention for review is the United States of America (USA) and the United Kingdom (UK) due to the implementation of comprehensive legislation and the successes reflected in employment statistics.

The overall employment rate in the USA for persons with disabilities in the age group 21 to 64 years was 75.1 per cent. This is only slightly below the overall employment rate of 80.5 per cent in the USA.

\textsuperscript{152} Employment Equity Act Review 4.
\textsuperscript{153} Ibid.
\textsuperscript{154} Ibid.
In the UK the figure is lower with 50 per cent of persons with disabilities of a working age being employed compared to 80 per cent of non disabled persons being employed.\textsuperscript{155}

3.2 THE UNITED STATES OF AMERICA

In the United States of America, a number of laws and programs protect the vulnerable groups namely women, individuals who are over 40 years of age, persons with disabilities, war veterans and racial minorities.

Dr Martin Luther King Junior made his “I have a dream” speech on 28 August 1963 which also had an impact on the proposed legislation. His speech was followed by the bombing of a black church in Alabama and the killing of several children. This led to the strengthening of the key provisions of Title VII. The key features of this process included the establishment of the US Equal Employment Opportunity Commission and made Title VII applicable to all employers with more than 25 employees. The bill was sent to the Rules Committee the day before President Kennedy was assassinated and it was signed into law on 2 July 1964. The legislation that followed this was the first major American civil rights legislation, specifically Title VII of the legislation dealt with prohibition of discrimination in employment.\textsuperscript{156}

3.2.1 THE AMERICANS WITH DISABILITIES ACT OF 1990

The Americans with Disability Act (ADA) was the nations commitment that its sorrowful legacy of oppression, segregation and inequality in dealing with disability would be overturned by the ADA’s clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities’ in which sweeping protections were provided in employment, public service, public accommodation and services operated by private entities, transportation and telecommunications. “The

\textsuperscript{155} Van Staden \textit{A Strategy for the employment of persons with disabilities} Submitted in fulfilment of the requirements for the degree University of Pretoria PhD in Labour Relations Management in the Faculty of Economic and Management Sciences (2011) 91.

\textsuperscript{156} Ibid.
ADA has been the impetus for revolution in the inclusion, integration and empowerment of Americans with disabilities”.\textsuperscript{157}

There are similarities in between the EEA and the ADA. Both Acts provides detailed information regarding the concept of disability. The Act serves the same purpose of addressing discrimination within the employment setting against People with disabilities. Both highlight the need for reasonable accommodation to address special needs in the workplace. There is however a dissimilarity the ADA does not require affirmative action plans as the EEA does. However the ADA has played an important role in creating employment opportunities for people with disabilities in the United States.

The ADA and its various supporting assistance guidelines are easily accessible. These documents have been laid out clearly and it was written in a style which is easily understood. The level of detail especially in the guidelines is extensive and easy to understand examples are provided to clarify issues. The technical assistance guidelines especially are voluminous as a result of its comprehensiveness. It is however easy to read and to find the information required.

The ADA is further supported by the Disability Discrimination Act of 1995 or the DDA, what is significant in this Act is that the section that refers to employment applies to any organisation employing staff, irrespective of how many people are employed.\textsuperscript{158}

The employment provisions in the DDA is similar require an employee to consider the needs of a prospective or current employees, so what is put in place is focused on individual requirements, rather than on developing inclusive and general policies and general good practice.\textsuperscript{159} The DDA is, similar to the ADA, very comprehensive and it is further enhanced with the Code.

\textsuperscript{158} \url{http://www.dacymru.com/dwl/InfoDDA.html} 3 (last visited 7 January 2013).
\textsuperscript{159} \textit{Ibid}. 
3.3 DISABILITY LEGISLATION IN THE UNITED KINGDOM (UK)

The Constitution of the UK makes no specific determination for protection against discrimination for persons with disability. However the Disability Discrimination Act, 1995 (DDA) and the supporting Code of Practice Employment and Occupation issued by the Disability Rights Commission, 2004 ensues extensive protection for Persons with a Disabilities in the workplace. The Code does not impose any legal obligations. The Disability Rights Commission (DRC) has statutory powers to work towards the elimination of discrimination and to promote the equalisation of opportunities for disabled persons. The DDA includes extensive recruitment regulations specifically aimed at favouring disabled applicants. The Act makes extensive obligations on accommodation and accessibility and protection against discrimination.¹⁶⁰

Despite the evolved international legislation it is acknowledged that South Africa is one of the countries in the world with the most progressive discrimination legislation as contained in amongst other the EEA and PEPUDA.

3.4 SUMMARY

The South African legislature made no provision for separate legislation such applicable by the ADD, merely the Code of conduct and the TAG that is specifically aimed at disability. It is also evident in the employment figures of the UK and the USA that this seems to be effective as it perhaps provide more detail in terms of the requirements.

CHAPTER 4
EMPLOYMENT EQUITY LEGISLATION IN ACTION

“...the failure of any nation to adopt humane conditions of labour is an obstacle in the way if other nations which desire to improve the conditions in their own countries.”
 Constitution of the ILO

In a public address in November 2006 the previous minister of Labour Mr Mdladlana made serious noise about tightening the noose on employment equity violators.161

It is clear that the country has some of the most comprehensive legislation and policy protection and promoting the rights of persons with disabilities in the word.

The key questions remain:

- How effective has this legislation and policy environment been in making real changes to the lives of persons with disabilities?
- Are policies being implemented and acted on, or do they ‘evaporate’ the closer one gets to grass roots?

4.1 EVOLUTION OF DISABILITY AS A HUMAN RIGHTS AND EQUALITY ISSUE

Mayor limitation of early United Nations’ approaches was an orientation towards treating disability as an individual impairment that was disconnected from the physical and social environment.162 The focus was rehabilitation driven, to enabled the disabled individual to present himself as “whole” as possible so that they so that they could fit into an existing normal environment. No insight that the physical and social environment may be a major disabling factor that may require repair. Thus the ultimate goal was integrating disabled people into a supposedly ‘normal life’163. Thus the focus has been on the disability rather than the ability.

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162 Dupper and Garbers Equity in the Workplace 185.
163 Ibid.
4.2 EFFICACY, APPLICATION AND IMPLEMENTATION

While support for the formulation and adoption of policy and legislation has been excellent, policy implementation and enforcement of legislation lagged behind. Two factors that have contributed to the poor implementation of legislation and policies are that the definition and nature of persons with disabilities have not been adequately reviewed and articulated. The policy requirements for disability mainstreaming are not adequately linked to performance management, thereby undermining commitment to implementation. It is also evident that the fact that no separate disability legislation in South Africa exists as in the USA and the UK results in lack of specific sanctions and implementation.

Another factor may be that legislation is not implemented due to a lack of fiscal resources and commitment. Where successful implementation has occurred, it has largely been due to political support and advocacy by the disability sector.

Concerning the implementation of the Employment Equity Act (EEA), and based on information submitted by national departments and provincial administrations for the 797,750 employees employed in the public service, it was found that there are 2,007 disabled employees in the public service. This represents an average of 0.25 per cent – a figure that falls far short of the 2 per cent target that was envisaged for 2005.164

In its report for 2002/03, the Commission for Employment Equity (CEE) reported some improvements in the employment of disabled people by all employers – both government and the private sector. According to CEE, altogether employers reported a total of 26,539 employees with disabilities in 2002. This represents 1 per cent of all employees included in the 2002 employment equity reports.165

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164 Dube The role and effectiveness of disability strategy legislation in South Africa 8.

165 Dube Disability Knowledge and Research: The role of effectiveness of disability legislation in South Africa (March 2005) 8.
Out of a total of 26,539 (100 per cent) of employees with disabilities in various occupational categories, 14,045 (52.9 per cent) were African, 3,578 (13.5 per cent) were coloured, 1,138 (4.3 per cent) were Indian and 7,778 (29.3 per cent) were white.  

4.3 LEGISLATION A BARRIER TO INTEGRATION?

4.3.1 DISCRIMINATION LEGISLATION

The question bodes if South African equality jurisprudence has been a forerunner in terms of progressive thrust, why is this not evident in the result?

Charles Ngwena\textsuperscript{167} is of the opinion that South African disability jurisprudence is at a nascent stage, courts have rarely been given the opportunity to adjudicate on disability as a non-discrimination issue. The courts still seem to grapple with the definitional issues as clearly displayed in \textit{IMATU v City of Cape Town}.\textsuperscript{168}

The Constitution and the LRA provides for the regulation of unfair treatment in the workplace via a provision for unfair labour practices. Perhaps the most surprising aspect of our law on equality is that, given the deeply divided nature of our society, that there is so little of it. Where are the discrimination cases, the equal pay suits and harassment litigation?

Similarly in other countries with a less entrenched pattern of discriminatory behaviour are beset with anti-discrimination litigation.

An interesting new matter \textit{Gebhardt and Education Labour Relations Council}\textsuperscript{169} where a review application focus on the difficulties that employers face when confronted with the application of employment equity targets where applicants for promotion are members of different designated groups.

\textsuperscript{166} Ibid.
\textsuperscript{167} Dubber and Garbers \textit{Equality in the Workplace} 183.
\textsuperscript{168} [52].
\textsuperscript{169} Case no 820/08 2012 (LC).
The applicant suffered from hearing loss and heavy bouts of vertigo, she applied for a promotional post at the Boland College (she acted in this position for three years) and mentioned her hearing disability on her application form. Although she scored the highest score on the criteria, nevertheless the candidate with the second highest score was appointed; the appointee was a coloured lady.

Mrs Gebhart referred the matter as an unfair labour practice as she did not agree that the appointee, from a designated group, should have been appointed in line with the employment equity targets and that there was a “under-representation” of coloured females in the workplace.

Steenkamp J, held In this matter the arbitrator never applied his mind and confirmed that it is the duty of the employed to effectively implement affirmative action measures for people from designated groups such as people with disabilities. This case confirms the position of the applicant with a disability as part of a designated group, deemed to be less important than that of race. Even in this case the employer did not take note of the disability of the employee and did not consider the weight this may carry in the equity plan.

The matter has been resubmitted to an arbitrator to consider the unfair labour practise claim.

It needs consideration to how far the promise of South Africa’s equality laws match the reality and we need to develop a compass to orient legislative, judicial and policy efforts to match the way forward.

### 4.3.2 EMPLOYMENT LEGISLATION

The employment legislation aim to set minimum conditions of employment and to regulate health and safety for the protection of employees make no special provision or distinction for persons with disabilities.

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[25]
4.3.3 SOCIAL SECURITY LEGISLATION

The form of assistance provided, combined with the past medical approach to disability issues, place persons with a disability in a disadvantaged position. Being the recipient of social assistance is often seen as a sympathetic hand out and not as part of a more comprehensive strategy which is aimed at restoring the dignity of a person with a disability and to rep-introduce them into the mainstream of society and economic life. It also creates the mental state that a person is only good enough to receive a hand out and not good enough to earn a living. It also results in that the person receiving the hand out, give up the challenge to better them as they become dependent on the social assistance, without them making a meaningful contribution for it. The low representation of persons with disabilities in employment in the labour market may likely be due to the payment of a disability grant. The majority of persons with disabilities have limited education and when employed is often employed in an entry level position a minimum wage. The effort of employment and the associated costs related to employment amongst others, transport, clothing and high disability maintenance costs such as medication and assistive devices could easily make it a better financial proposition to rather receive a disability grant than to fight for employment. Social security could thus directly have a negative impact on employment of persons with disabilities.

One of the key issues is that disability issues have been addressed in a piecemeal, fragmented fashion, coupled with a serious lack of reliable information on the nature and prevalence of disability in South Africa, with the lack of interdepartmental liaison and policy formulation.

4.4 DISPUTE RESOLUTION

Rights without remedies are an abomination in law. The right not to be discriminated against is devalued if there is no means of enforcing this right.
Disputes relating to unfair discrimination issues must be referred to the CCMA for conciliation within, six months of the act or omission that allegedly constituted the unfair discrimination. Failure to resolve the dispute a party may refer the matter to the Labour Court for adjudication. The parties may, however consent to the arbitration of the dispute by the CCMA.

A dispute about an alleged unfair dismissal on discriminatory grounds is typified as an automatic unfair dismissal. The same dispute resolution path is afforded, however if a bargaining council exists for a specific industry that has jurisdiction the matter needs to be referred to the Council for conciliation.

Again the reason for dismissal is important if an employee is dismissed on the basis of incapacity the dismissal will be fair; if a fair reason exists and a fair procedure was followed. A dismissal based on disability may be automatically unfair, giving the employer no defence and the judge no direction – except that the dismissal may be fair if the reason is based on an inherent requirement of the job and the dismissal is both substantively and procedurally fair.

According to the statistical information available from the CCMA very few disputes have been referred in terms of the EEA, perhaps these have generally being dealt with as unfair labour practises and not as discriminatory referrals.

It is a further a contention that the dispute process further marginalise the already marginalised group as the process of conciliation often result in a unresolved outcome. The individual affected by this outcome seldom have the resources to take the matter to Labour Court.

The Employment Amendment Bill of 2012, section 10 makes provision for the amendment and these disputes may now under specific provisions be referred for arbitration to the CCMA.

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171 EEA s 10(6)(a).
172 S 10(6)(b).
4.5 SUMMARY

If we accept that in a liberal society each human being is of equal worth and is deserving of equal respect our response ought to desire a model of disability that is alive to systematic equality and seeks to create an inclusive society as an ethical duty in a plural society.

The current legislation in the form of the EEA and others has created a new sense of awareness of the needs of persons with disability. Conversely the implementation of this legislation has had marginal impact on the employment life persons with disabilities in South Africa.

Problems associated with this is budgetary constraints, ignorance of civil servants charged with the responsibility of implementing these policies, and procedural bottlenecks, amongst other things have been identified as some of the main causes of ‘policy evaporation’ within South African context.

Generally the development of disability policies within government and private sector is in its infancy whit the majority of departments having only draft policies. These policies are generally not backed up by funding strategies hence no meaningful implementation of these policies has taken place.

It is clear that South Africa did not reach the end of the struggle for equality when democracy was achieved; it simply joined the mainstream. We now have the unique opportunity to show the way forward to the rest of the world by developing new methods for substantive equality.
CHAPTER 5
RESEARCH FINDINGS AND DISCUSSION

The outcome of the research and the findings measured to the initial hypothesis leaves much food for thought. The purpose is to discuss the inadequacy of the labour legislation in the promotion and integration of persons with disability into the labour market and to offer an attempt to mitigate these shortcomings.

5.1 THE DEFINITION OF PERSONS WITH DISABILITIES

One of the first challenges posed is the definition of Persons with Disability as set out in the EEA; the broad definition leaves confusion when incapacity and disability is discussed in the interchangeable manner even as referred to in the Code on Dismissal as contained in Chapter 8.173

Reviewing the definition in international legislation and ILO documentation it seems to be even more inclusive as serious illnesses such as HIV is also included in this definition and then proportions a larger group in society.

The definition of accessibility and reasonable accommodation is vague and is seen by employers as a further onerous barrier to employee persons with disabilities. It is also common cause that laws governing physical accessibility to buildings and venues are not enforced.

Strict enforcement of the National Building Regulations must be adhered to; failure to comply should be regulated by substantial fines and/or of non-approval of plans.

173 As contained in the LRA.
Recommendations:

It is further viewed that the terms “impairment”, “substantially”, “long term” and “recurring” were indicated as being unclear and perhaps the word “substantially” should be omitted.\(^{174}\)

It was advised in research by \(^{175}\) that all disabilities should not be lumped together. The definition should provide for levels of disability within the various categories. A rating system similar to the BBBEE scorecard was suggested to identify the disability types.\(^{176}\)

In the research thesis 38 respondents with disabilities recommended that the definition be amended to: “Persons who have a long-term or recurring physical or mental impairment that substantially limits their prospects of entry into performance and/or advancement in employment.”\(^{177}\)

5.2 THE EFFECT OF LABOUR LEGISLATION IN INTEGRATION AND PROMOTION

Although as previously conferred the comprehensive discrimination legislation still seems to fail to draw the attention of employers.

Recommendations:

A complete separate bill similarly to the proposed services bill will have the same effect as for instance the ADA.

A separate Act and guideline to demystify the issues addressing the employment, including reasonable accommodation and environmental accessibility, of persons with disabilities is required.

The focus seems to be more on legislation and policy making to align with the Constitution and International standards to look good, than to have concern for the


\(^{175}\) Ibid.

\(^{176}\) Ibid.

\(^{177}\) Ibid.
implementation and the removal barriers in the employment of persons with disabilities.

There seem to be a lack of defined targets set for the employment of persons with disability and the compliance is not measured. Black people are seen to be historically disadvantaged and the matter seems to be politicised to a great extent. Persons with disabilities have an on-going struggle with stereotyping and discrimination and should be regarded as “continuously” disadvantaged. The broad target set at two percent is not enforced and no sanctions are associated with failure to achieve the target.

**Recommendation:**
Specific targets should be set for specific industries such as in the FASSET sector, which is very proactive in their approach. The focus should be shifted to the person with a disability instead of the other designated groups, specific industries will have specific skills needs that could be presented as a career path to persons with disabilities, with the financial support provided in the form of a bursary to suitable candidates.

The targets should be enforced with penalties where applicable, currently the new amendments to the EEA, Act propose substantial penalties that are mainly focused on designated employers that fail to comply with EEA legislation. This compliancy mainly focuses on people of colour and women. The lack of compliance needs to be addressed by properly trained civil servants to ensure implementation and compliancy.

**5.3 HUMAN RESOURCE MANAGEMENT TO INCLUDE DISABILITY MANAGEMENT**

Senior management in public sector as well as private sector needs to be trained and desensitized to effectively manage disability issues.
Recommendations:
In addition to training managers on the management of disability it should be part of the managers’ key performance areas in performance agreements. This will ensure compliance and commitment in implementing disability legislation. Knowledge on disability and reasonable accommodation is a highly specialised field and this should be included in the rehabilitation of the person who has recently being disabled, to encourage a person with a disability to remain in the labour market.

5.4 SKILLS DEVELOPMENT

The advantages as offered in the Skills Development Act to companies should be utilised and promoted. A general lack of knowledge exists with business of any benefits that may be applicable when an employer offers employment or a learnership to a person with a disability.

Recommendation:
The Department of Higher Education and SARS and even the Department of Labour who is the custodian of Employment Equity reporting should make a combined effort to make this information more accessible and available.

The financial benefits available from the Skills Development Act and SARS should be more widely promoted and made more accessible for small business.

5.5 FINAL SUMMATION

The fact that the South African legislative framework prohibits discrimination against persons with disabilities, but the key role players who should implement it, is not aware of it and therefore fail to implement it, nullifies the effects of the said legislation. The call is for a separate set of legislation that is strictly enforced and that the employment legislation is adapted to address the specific needs of employment of persons with disabilities.
The Constitution, EEA, the Code and the TAG are all very useful but are not sufficient to enforce and to effectively integrate persons with disabilities into the labour market.

These legislative and policy instruments are hardly ever used to assist with disability management in the workplace. An awareness programme aimed at business should be created by the custodians of this legislation.

The institutional efficiency of government is not adequate to ensure the full implementation of legislation, policies and strategies between the different departments responsible for different areas. Government failed in its responsibility, and promises to people with disabilities as set out in policy documents, legislation and international instruments such as the ICRPD.

This failed responsibility manifests within government, for government as an employer and by government who through employment equity reporting should monitor employer’s progress made.

The leadership of South Africa must visibly demonstrate their commitment to persons with disabilities. Political, government and business leaders should set the direction and the pace in transforming the present situation of persons with disabilities in South Africa.

This again confirms that labour as a social phenomenon is not only concerned with workplace related issues but also with aspects encompassing the whole of the socio-political and economic scenario.
“Every man is born with the ability to do something well. This is what the Lord intended him to do, using that ability – what life is all about.” – Gracie Allen

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Appendix A
Definition of Key Aspect

- **People (Persons) with disabilities**: means people who have a long-term or recurring physical or mental impairment which substantially limits their prospects of entry into, or advancement in, employment.

- **Decent work**: According to the ILO Definition involves opportunities for work that is productive and delivers a fair income, security in the workplace and social protection for families, better prospects for personal development and social integration, freedom for people to express their concerns, organize and participate in the decisions that affect their lives and equality of opportunity and treatment for all women and men.

- **Designated group**: means black people, woman and people with disabilities.

- **Designation employer**: means-
  (a) An employer who employs 50 or more employees;
  (b) An employer who employs fewer than 50 employees, but has a total annual turnover that is equal to or above the applicable annual turnover of a small business in terms of Schedule 4 of this Act;
  (c) A municipality, as referred to in Chapter 7 of the Constitution;
  (d) An organ of state as defined in section 239 of the Constitution, but excluding local spheres of government, the National Defence Force, the National Intelligence Agency and the South African Secret Service and
  (e) An employer bound by a collective agreement in terms of section 23 or 31 of the LRA, which appoints it as a designated employer in terms of this Act, to the extent provided for in the agreement.

Reasonable accommodation:

- “Modification or adjustment to a job or working environment that will enable a person from a designated group to have reasonable access or participate, or advance in employment.”
• The ILO definition: accommodation is adaptation of the job, including adjustment or modification of machinery and equipment, or job content, work organization and work environment to provide access to place of work and working time to facilitate the employment of people with Disabilities.

• *Reasonable accommodation* “any modification or adjustment to a job or to the working environment that will enable a person from a designated group to have access to or participate in or advance employment”