

CHAPTER 5

SOUTH AFRICAN DISABILITY POLICY FRAMEWORK

“I discovered early that the hardest thing to overcome is not a physical disability but the mental condition which it induced. The world, I found, has a way of taking a man pretty much at his own rating. If he permits his loss to make him embarrassed and apologetic, he will draw embarrassment from others. But if he gains his own respect, the respect of those around him comes easily” Alexander de Seversky, an aviator and aeronautical engineer who lost his leg in World War I (People Dynamics, April 2005:16).

5.1 INTRODUCTION

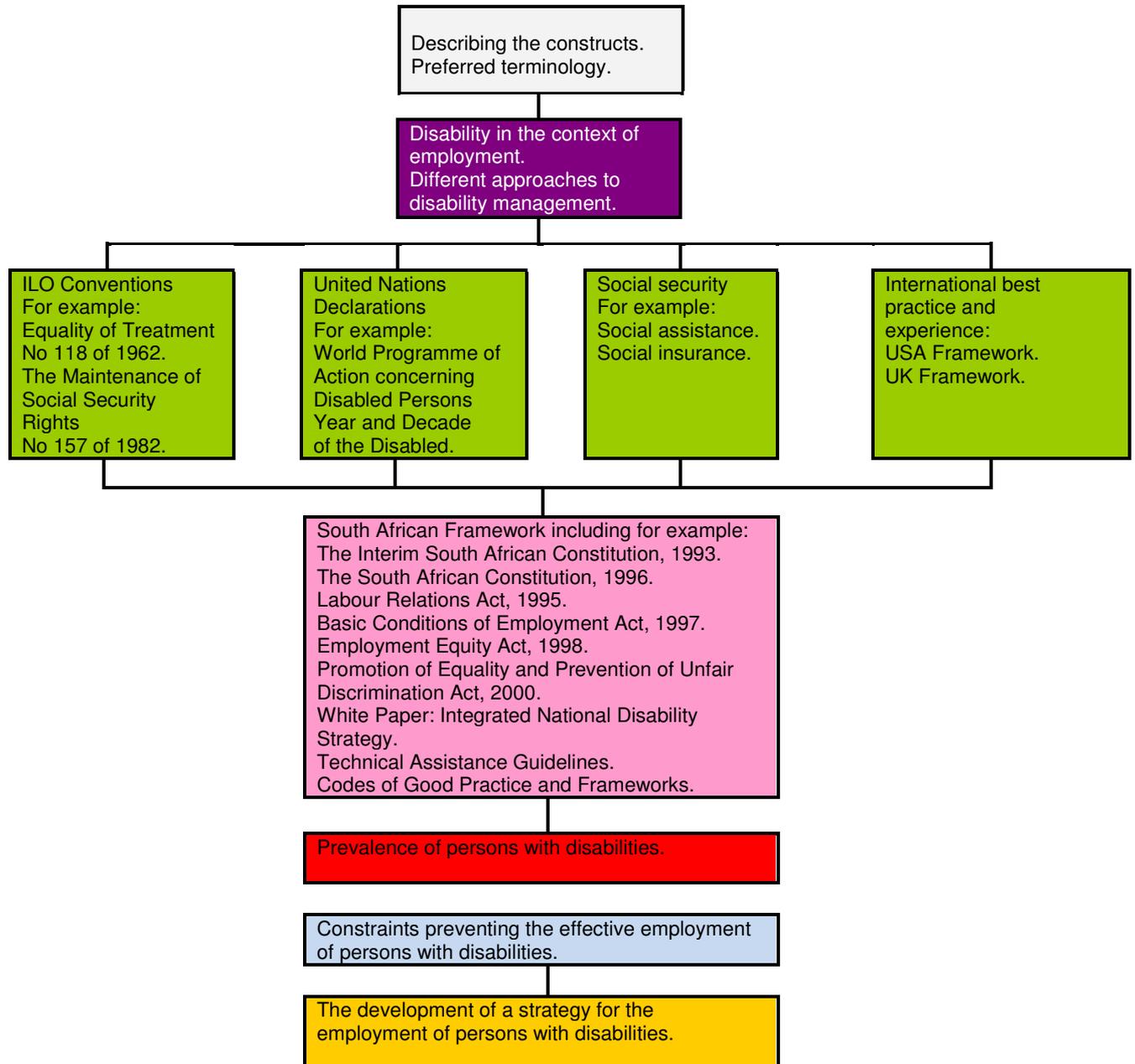
This chapter provides an analysis of the South African disability and employment policy framework. The development of a strategy which leads to the increased employment of persons with disabilities takes place within a legal and policy framework. This framework is either a positive force which increases the employment of persons with disabilities or a negative force in the employment of persons with disabilities which reduces or has an inhibiting effect on the employment of such persons. The low levels of employment of persons with disabilities must have a cause or causes and the analysis of the legal and policy framework could reveal some of the causes.

The relationship between the South African disability and employment policy framework and the international framework as discussed in Chapter 4 is interdependent. Chapter 5 should therefore be read in conjunction with the previous chapter. It should be borne in mind that the South African framework evolved over a number of years and certain components of this framework originated in the political dispensation before 1994. An alignment and integration of the different components of this framework are therefore not possible since the legislation referred to was drafted prior to the advent of the Constitution, 1996.

The discussion in this chapter would also indicate that certain provisions of legislation which originated from the Constitution, 1996 are not in line with the enabling provisions laid down in the said Constitution.

The relative position of the discussion of the South African Disability Management Framework in the overall literature review research framework is presented in light pink in Table 17 below.

Table 17: Disability management literature review research framework



5.2 EVOLVEMENT OF LABOUR LEGISLATION

In 1977, the government appointed the Wiehahn Commission to investigate South Africa's labour legislation. The Commission recommended the incorporation of specific anti-discrimination principles into South African legislation:

“The Commission cannot avoid the conclusion that in due course discrimination in the field of labour on the grounds of race, colour, sex, political opinion, religious belief, national extraction or social origin will have to be outlawed and criminalised in South Africa's labour dispensation” (The Complete Wiehahn Report (1982) part 5 paragraph 4.127.14, Dupper 2007:9).

The transition period between 1979 and 1994 cannot be unequivocally described as a harmonious and co-operative process but, the foundations for greater democracy in the workplace were firmly laid (Kemp 1992:6 as quoted by Ehlers 2002).

Until 11 November 1996, the day on which the Labour Relations Act, 108 of 1995 (LRA) came into effect, employers were at liberty to refuse to appoint someone on the basis of, for example, gender, race or trade union membership. Applicants for work enjoyed no protection under the previous Labour Relations Act, 28 of 1956. This meant that an applicant for work had no legal standing to declare a labour dispute with an employer, even though he or she may have been the victim of unfair discrimination (Dupper 2007:9).

The situation for employees (as opposed to applicants for work) was somewhat better. Some legislative provisions specifically permitted discrimination in employment, such as the Wage Act, 5 of 1957, which permitted differentiation between categories of employees on grounds, *inter alia*, of sex or race and the Industrial Conciliation Act, 28 of 1956, which introduced statutory job reservation, meaning that the Minister of Labour had the authority to reserve any job for Whites. There was no specific legislation or legislative provision which expressly and comprehensively outlawed racial or sexual discrimination in the workplace. The other vulnerable groups, like persons with disabilities, were also not protected by means of legislation (Dupper 2007:9).

In July 1994, after the 1994 elections and the new democratic dispensation came into place, a Ministerial Legal Task Team was appointed to draft a new Labour Relations Act. The Task Team was instructed, *inter alia*, to draft a Bill that would bring labour legislation in line with various International Labour Organisation Conventions (specific reference was made to the Discrimination (Employment and Occupation) Convention 111 of 1958) as well as the provisions of the interim Constitution (“Explanatory Memorandum to the Labour Relations Bill” (1995) *ILJ* 278 at 279 and 285 as quoted by Dupper 2007).

5.3 THE CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA

Since 27 April 1994, the date the interim Constitution of the Republic of South Africa, 1993 came into operation, equality has assumed a central position in South African law. Section 8, the equality provision of the interim Constitution, contained a guarantee that the law would protect and benefit people equally and it also contained a specific prohibition on unfair discrimination. In addition, it provided for measures designed to achieve the protection and advancement of people disadvantaged by unfair discrimination (Dupper 2007:11).

The Constitution, 1996 which replaced the interim Constitution, 1993 and which has been operational since 4 February 1997, retains equality as a fundamental constitutional value in very similar terms to that of the interim Constitution. The preamble of the interim Constitution referred to “...a need to create a new order in which all South Africans will be entitled to a common South African citizenship in a sovereign and democratic constitutional state *in which there is equality between men and women and people of all races ...*”. The preamble of the Constitution, 1996 further provides that the Constitution is adopted as the supreme law of the Republic and that it aims to “...establish a society based on democratic values, social justice and fundamental human rights... and every citizen is equally protected by law...”. In addition, section 1(a) of the Constitution, 1996 lists the “...achievement of equality...” as one of South Africa’s foundational values (Dupper 2007:16).

The Constitution, 1996 plays a vital role in providing a bridge between an unjust past and a just future. This is explicitly stated in the afterword of the interim Constitution,

where the Constitution is depicted as “... a historic bridge between the past of a deeply divided society characterised by strife, conflict, untold suffering and injustice and a democratic future” (Dupper 2007:17).

The Constitution, 1996 reaffirms the notions of dignity, equality and freedom as foundational to the vision of democracy embodied in the Constitution. One of the broad purposes upon which the Constitution, 1996 is founded is “...the achievement of equality...” (section 1(a)). The commitment to equality is a pervasive and overriding feature of the Constitution, 1996 (Dupper 2007:17).

If one assesses the approach to equality against the backdrop of the underlying principles and purposes of the Constitution, 1996 and the historical burden of inequality that it seeks to address, it is clear that a purely formal understanding of equality will risk disregarding the fundamental commitments of the Constitution, 1996. A substantive conception of equality, on the other hand, is supportive of these fundamental values. A purposive or purpose seeking approach to constitutional interpretation (to which the Constitutional Court has committed itself on several occasions) therefore means that the equality section of the Constitution, 1996 must be read as grounded on a substantive conception of equality. This reading had recently been confirmed in a number of Constitutional Court decisions (Dupper 2007:17,18).

Arguably the clearest indication that a substantive vision of equality is envisaged by the Constitution, 1996 is contained in section 9(2). The first part of the subsection contains the declaration that “Equality includes the full and equal enjoyment of all rights and freedoms”. Although affirmative action is not mentioned in this subsection it may be assumed from the second part of the subsection that affirmative action is not viewed as an exception to a formal notion of equality, but is considered to be a means of achieving equality in the substantive sense. The right to equality does more than simply prohibit discrimination or unequal treatment by the state or private individuals. It also places a positive duty on the government to act in order to ensure that everyone fully and equally enjoys all rights and freedoms. The Constitutional Court thus remarked that -

“Particularly in a country such as South Africa, persons belonging to certain categories have suffered considerable unfair discrimination in the past. It is insufficient for the Constitution merely to ensure, through its Bill of Rights, that statutory provisions which have caused such unfair discrimination in the past are eliminated. Past unfair discrimination frequently has ongoing negative consequences, the continuation of which is not halted immediately when the initial causes thereof are eliminated, and unless eliminated, may continue for a substantial time and even indefinitely. Like justice, equality delayed is equality denied.”
(National Coalition for Gay and Lesbian Equality v Minister of Justice 1999 (1) SA 6 (CC); [1998] 12 BCLR 1517 (CC) Para 60 (per Ackerman J) and City Council of Pretoria v Walker 1998 (2) SA 363 (CC) – Dupper 2007:19).

The need for such remedial or corrective measures has been recognised in both the interim Constitution, 1993 and the Constitution, 1996. The Constitutional Court has explicitly recognised that treating people identically (formal equality) can often result in inequality (Dupper 2007:19).

In this regard section 7 of the Constitution, 1996 provides as follows in respect of the Bill of Rights:

“7. (1) This Bill of Rights is a cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom.

(2) The state must respect, protect, promote and fulfil the rights in the Bill of Rights.

(3)

Section 9 of the Constitution, 1996 defines the concept of “equality” by determining that-

“9. (1) Everyone is equal before the law and has the right to equal protection and benefit of the law.

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

(3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, **disability**, religion, conscience, belief, culture, language and birth.

(4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.

(5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.” (Own emphasis).

According to Basson (2006:248) the Constitution, 1996 does not merely prohibit unfair discrimination (section 9(3)) but it actively promotes the achievement of equality for those individuals who have been disadvantaged as a result of past discriminatory practices.

The author further indicates that section 9 of the Constitution, 1996 provides for both substantive and formal equality. Formal equality requires equal or formal treatment of everyone, irrespective of their social or economic status while substantive equality requires equality in outcome or actual equality. In order to achieve substantive equality in, for example, the workplace, it is required that certain groups who have been subjected to past discriminatory practices be afforded preferential treatment in, for example, recruitment and promotion. This process of giving preferential treatment to those who in the past have been victims of discrimination is referred to as affirmative action (Basson 2006:251).

Section 23 of the Constitution, 1996 (titled Labour Relations) determines as follows:

“23. (1) Everyone has the right to fair labour practices...”.

The Constitution, 1996 does not define social security and social assistance. However, section 39 of the Constitution (Interpretation of the Bill of Rights), determines that -

“39.(4) When interpreting the Bill of Rights, a court, tribunal or forum -

- (1)(a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;

- (b) must consider international law; and
- (c) may consider foreign law.
- (2) When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.
- (3)...”

The international trends as set out in, for example, the ILO conventions should therefore also be read into the South African legal framework.

The categories of persons who have been past victims of discrimination are not defined in the Constitution, 1996. The Constitution, 1996 however, determines that legislative and other measures must be taken to “protect” or “advance” persons or categories of persons.

The Parliament of the Republic of South Africa has passed two Acts to comply with this determination namely:

- The Employment Equity Act, 55 of 1998; and
- the Promotion of Equality and Prevention of Unfair Discrimination Act, 4 of 2000.

The impact of the Constitution, 1996 on the employment of persons with disabilities is significant. This impact relates to:

- Unfair discrimination, specifically preventing direct or indirect discrimination related to the disability status of an employee;
- remedial or corrective action, specifically to correct the unfair discrimination of the past by treating employees with disabilities differently. This could include affirmative action programmes aimed at employees with disabilities; and
- ensuring compliance with international best practice as set out in, for example, the UN conventions, ILO conventions and international best practice.

This impact has not yet been relayed into action as can be seen from the declining employment numbers of persons with disabilities, which is discussed in detail later in Chapter 6. Although several cases related to payment of social grants to certain individuals have served before the Constitutional Court, it has not yet extensively dealt with disability as a Constitutional right. The pressure is building up in this regard with different groups threatening to approach the Constitutional Court with matters relating to alleged unfair discrimination on the basis of disability.

5.4 THE LABOUR RELATIONS ACT, 66 OF 1995.

The LRA, which for the most part became operational on 11 November 1996, contains a number of provisions that specifically prohibit discriminatory treatment of employees and applicants for work.

Section 187(1)(f) states that the dismissal of an employee is automatically unfair if the reason for the dismissal is that the employer unfairly discriminated against an employee, either directly or indirectly, on one or more of a number of non-exhaustive prohibited grounds. However, in terms of subsection (2) the dismissal may be fair if the reason for the dismissal is based on an inherent requirement of the job or if the employee had reached the normal or agreed retirement age for persons employed in that capacity.

Before it was repealed by the Labour Relations Amendment Act, 12 of 2002, Schedule 7 item 2(1)(a) of the LRA prohibited discrimination (other than a discriminatory dismissal) against employees. Under this provision applicants applying for work for the first time, also enjoyed protection against discrimination. As is the case in section 187(1)(f), unfair discrimination, whether directly or indirectly, on any one or more of a number of non-exhaustive grounds, is prohibited. Schedule 7 item 2(2), listed two justification grounds that an employer could raise against a claim of unfair discrimination, namely “affirmative action” and the “inherent requirements of the job” while item 2(2)(b) provided that an employer was not prevented from “adopting or implementing employment policies and practices that are designed to achieve the adequate protection and advancement of persons on grounds or categories of persons disadvantaged by unfair discrimination.” Schedule 7 item

2(2)(c), provided that any discrimination based on the inherent requirements of the job would not constitute unfair discrimination. If a person therefore experienced discrimination, the discrimination would be found not to be unfair if the affirmative action policy met the requirements of item 2(2)(b) or if the discrimination was based on the inherent requirements of the job.

Schedule 7 items 2(1)(a), 2(2) and 3(4)(a) of the LRA were replaced by Chapter II of the EEA which came into operation on 9 August 1999. Chapter II regulates discrimination against applicants for employment as well as employees, short of dismissal. Discriminatory dismissal remains regulated by section 187 of the LRA.

A link exists between the anti-discrimination provisions in section 187(1)(f), (the repealed) Schedule 7 item 2(1)(a), and the equality provisions of both the interim Constitution, 1993 and the Constitution, 1996. The support for a “substantive” notion of equality, and both indirect and direct discrimination, are prohibited. Affirmative action and the inherent requirements of the job were expressly introduced as justification grounds, but the overall notion of “fair” discrimination is retained in the event that the two listed justification grounds are not applicable.

The LRA does, however, provide for the dismissal of an employee on grounds of the employee’s incapacity, which becomes relevant when an employee becomes disabled during employment. The employer has the onus to show that there is a valid and fair reason for the dismissal and that a fair procedure has been followed.

Unfair labour practice came into effect as a result of the Wiehahn Commission referred to above. The original definition in 1979 referred to an unfair labour practice as “any practice which in the opinion of the industrial court constitutes an unfair labour practice” (Industrial Conciliation Amendment Act 94 of 1979). This very broad definition relied almost entirely on the discretion of the newly formed Industrial Court (Le Roux and Van Niekerk 1994:19). These authors argued that the “mandate given to the industrial court to restructure South African industrial relations was extraordinary, both as to its potential scope and its vagueness”. Le Roux and Van Niekerk quote Brassey et al in *The New Labour Law* (1987:122) as submitting that “so extensive an abrogation of legislative prerogative must surely be unique in our

parliamentary history”. The definition was, however, amended and expanded upon in 1982 (Labour Relations Amendment Act 51 of 1982) and it was this amended definition that allowed the industrial court to develop its jurisprudence of unfair labour practice and to place fairness high on the agenda in any termination of employment.

The requirement for fair dismissals for misconduct, incapacity and operational requirements was that the employer required a valid and fair reason to dismiss and that a fair procedure had to be followed. This rule was based on international labour standards of the time.

ILO Convention 158 of 1982 deals with “Termination of Employment at the Initiative of the Employer” and it sets out the three broad reasons for a so-called “fair” dismissal:

“The employment of a worker shall not be terminated unless there is a valid reason for such termination connected with the capacity or conduct of the worker or based on the operational requirements of the undertaking, establishment or service” (article 4 of ILO Convention 158 of 1982).

The capacity of the worker relates to the ability of the worker to do the work. This ability may relate to the performance, or to the health of the worker.

Substantive fairness is generally viewed concomitantly with procedural fairness.

Article 7 of ILO Convention 158 of 1982 sets out the broad procedural requirements for dismissals for conduct and capacity as follows:

“The employment of a worker shall not be terminated for reasons related to the worker’s conduct or performance before he or she is provided with an opportunity to defend”.

The performance standard is central to any dismissal for incapacity. Dismissal for poor work performance assumes that the employee is incapable of doing the work

and allows an employer the prerogative to set the performance standards required for a particular job or position.

Grogan (2009:160) argues, however, that “If either party becomes permanently unable to perform his or her obligations under the contract, or is unable to perform those obligations for a period that is unreasonable ad far as the other is concerned, the other party is entitled to terminate the contract on the ground of such non-performance. A dismissal on the basis of incapacity is therefore deemed to be a “no-fault” dismissal because the employer can no longer afford to continue employing an employee who is incapable of doing the work.

Section 188 of the LRA acknowledges that incapacity may be a fair ground for dismissing an employee. It is, however, only in the Code of Good Practice: Dismissal that the LRA sets out what constitutes a fair reason for dismissal and what would in general terms be a fair procedure. It is also in the Code that the LRA distinguishes three forms of incapacity: poor work performance, ill health or injury. Item 9 of the Code sets out the guidelines that an employer should follow in order for a dismissal for poor work performance to be fair. In item 10 of the Code incapacity for ill health or injury is analysed and distinctions are made between temporary and permanent incapacity and work related injuries. Item 11 then sets out another set of guidelines for employers for those cases where the incapacity arises from ill health or injury. The LRA has therefore incorporated into the Code a fairly comprehensive set of guidelines on how to adjudicate whether a dismissal for poor work performance, ill health or injury is fair or unfair.

It is apparent that there is no legal obligation on an employer in terms of the LRA to reasonably accommodate an employee who became disabled in the course of his or her employment.

5.5 THE EMPLOYMENT EQUITY ACT, 55 OF 1998

The purpose of the EEA is set out in section 2 of Chapter 1 of the Act, namely:

“2. The purpose of this Act is to achieve equity in the workplace by –

(a) promoting equal opportunity and fair treatment in employment through the

- elimination of unfair discrimination; and
- (b) implementing affirmative action measures to redress the disadvantages in employment experienced by designated groups, in order to ensure their equitable representation in all occupational categories and levels in the workforce.”

The EEA defines the designated groups as follows in section 1:

“designated groups’ means black people, women and people with disabilities;”

The Minister of Labour (People Dynamics, 2003:6) defines “employment equity’ as the promotion of non-discrimination and the creation of equal opportunities in the workplace by using mechanisms such as affirmative action and reasonable accommodation”.

The EEA states that a person may be suitably qualified for a job if any one or a combination of factors exists. The EEA states in section 20(3) that “For the purpose of this Act, a person may be suitably qualified for a job as a result of any one of, or combination of that person’s-

- a) formal qualification;
- b) prior learning;
- c) relevant experience ; or
- d) capacity to acquire, within a reasonable time, the ability to do the job.”

This provision applies to all designated groups, including persons with disabilities. The need to extend the concept of “suitably qualified” arose because it was necessitated by a lack of qualified individuals within the designated groups, in certain categories of employment. An employer is therefore in terms of the EEA, obliged to review all the factors listed in section 20(3) in determining whether an employee or an applicant for employment has the ability to do the job in question (section 20(4)).

The question of unfair discrimination against applicants for work and employees (other than a discriminatory dismissal), is comprehensively regulated by chapter II of the EEA, and no longer by Schedule 7, item 2(1)(a) of the LRA. Chapter II of the EEA applies to all employers and employees, except those employees excluded

from the ambit of the LRA (namely members of the National Defence Force, the National Intelligence Agency or the South African Secret Service). Section 5 of the EEA provides that every employer must eliminate unfair discrimination in its employment policy or practice. “Employment policy or practice”, in turn, is defined in section 1.

Section 6(1) of the EEA prohibits unfair discrimination in the following terms:

“No person may unfairly discriminate, directly or indirectly, against an employee, in any employment policy or practice, on one or more grounds, including race, gender, sex, pregnancy, marital status, family responsibility, ethnic or social origin, colour, sexual orientation, age, disability, religion, HIV status, conscience, belief, political opinion, culture, language and birth.”

The prohibition against unfair discrimination mirrors the wording of the equality provision of the Constitution, 1996. In addition to the sixteen grounds listed in section 9(3) of the Constitution, 1996 the EEA also includes family responsibility, political opinion and HIV status. However, similar to the Constitution, 1996 and the LRA, the list is not exhaustive in that the word “including” appears before the grounds mentioned. The two justification grounds contained in Schedule 7 of the repealed item 2(2) of the LRA, namely affirmative action and an inherent requirement of a job, have been retained.

Tinarelli (2000:16) explains that discrimination appears most obviously when an employer focuses on irrelevant personal characteristics instead of work performance or merit. Cascio (1998:41 as quoted by Tinarelli 2000) defines discrimination as: “.... the giving of an unfair advantage or disadvantage to members of a particular group in comparison with the members of other groups. The disadvantage usually results in a denial or restriction of employment opportunities, or in an inequality in terms of the benefits of employment”.

Chapter III of the EEA requires from designated employers to do the following:

- Implement affirmative action measures for persons from designated groups (section 13 read with section 15);

- ensure equitable representation of black persons, women and persons with disabilities (the “designated group” defined in section 1);
- consult with employees on a range of matters pertaining to employment equity (section 16 read with section 17);
- conduct an analysis of employment policies, practices, procedures and the working environment in order to identify employment constraints adversely affecting designated persons (section 19);
- prepare an employment equity plan (section 20) and report either annually or bi-annually to the Director-General of the Department of Labour on the progress made in implementing the employment equity plan (section 21).

Section 15 of the EEA provides a broad definition of what it regards as an “affirmative action measure”. In general it means any measure aimed at ensuring the equal employment opportunities and equitable representation of suitably qualified persons from designated groups in all occupational categories and levels in the workforce. Furthermore, it is clear that the term “affirmative action measure” applies much more widely than only to the preferential employment of members of the designated groups to vacant positions. It also includes:

- Preferential promotion as well as the development and training of employees in order to promote their prospects for advancement;
- a duty on employers to inspect their employment policies and practices to remove any constraints inherent in such policies and practices (or remove discriminatory policies and practices);
- measures to further diversity in the workplace; and
- a duty on employers to make “reasonable accommodation”. This means the modification or adjustment to a job or the working environment that will enable a person from a designated group to have access or participate or advance in employment.

The EEA provides that the goal of affirmative action is to ensure equitable representation of all race groups in organisations, in all occupational categories and levels in the workforce. The EEA does not define the term “equitable representation.

5.6 THE PROMOTION OF EQUALITY AND PREVENTION OF UNFAIR DISCRIMINATION ACT, 4 OF 2000

In order to comply with section 9(4) of the Constitution, 1996 (which places a duty on the state to pass national legislation to prevent or prohibit unfair discrimination and to promote the achievement of equality), the PEPUDA was enacted. Although the Act does not apply to “any person” to the extent to which the EEA applies, section 5(3) does have an impact on the employment sphere. Except for the exclusion of those bound by the EEA, PEPUDA binds the state and all persons, and has precedence over any other applicable law except for the Constitution, 1996 (section 5(1) and (2)). PEPUDA covers a wide range of practices, including labour and employment, education, health care services and benefits, housing, insurance services, pensions, provision of goods, services and facilities, clubs, sports and associations (section 29 and Schedule 1).

PEPUDA contains a simple prohibition of discrimination in section 6, and leaves the further explanation thereof to section 1 of the Act, which contains the definitions. Both direct and indirect discrimination is prohibited. “Discrimination” is defined as any act or omission which *directly or indirectly* imposes a burden, obligation or disadvantage on or withholds benefits, opportunities or advantages from any person on one or more of the prohibited grounds (section 1 (viii)). Prohibited grounds, in turn, are defined as referring to “race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, **disability**, religion, conscience, belief, culture, language and birth”. These are the same grounds listed in section 9 of the Constitution, 1996. The open-ended nature of the list is confirmed by the provision that prohibited grounds include any other (unlisted) ground where discrimination on that ground causes or perpetuates systematic disadvantage, undermines human dignity, or adversely affects the equal enjoyment of a person’s rights and freedoms in a serious manner that is comparable to discrimination of a listed ground (own emphasis).

The PEPUDA is more explicit than the EEA on at least two important questions, namely the burden of proof (section 13) and the determination of fairness or

unfairness (section 14). These sections are a codification of the broad principles developed thus far by the Constitutional Court.

5.7 CODE OF GOOD PRACTICE: KEY ASPECTS ON THE EMPLOYMENT OF PERSONS WITH DISABILITIES IN THE WORKPLACE

The Department of Labour, in terms of the EEA issued the Code of Good Practice: Key Aspects on the Employment of Persons with Disabilities in the Workplace (referred to as the Disability Code) during 2002. The Disability Code was published on the advice of the Commission for Employment Equity.

The contents of the Disability Code are as follows:

- The definition of persons with disabilities;
- reasonable accommodation for persons with disabilities;
- recruitment and selection;
- medical and psychological testing and other similar assessments;
- placements;
- training and career advancement;
- retaining persons with disabilities;
- termination of employment;
- avoiding unfair discrimination and achieving employment equity during the employment cycle;
- workers' compensation;
- confidentiality and disclosure of disability;
- employee benefits;
- employment equity planning in respect of persons with disabilities; and
- education and awareness.

The Disability Code is merely a guideline and does not have the authority of law. It does also not create additional rights and obligations. The nature of the Disability Code is very general and it is intended to be read in conjunction with other codes of good practice issued by the Minister of Labour. The Disability Code mentions that employers and employees should use it to develop, implement and refine disability equity policies and programmes.

A provision in the Disability Code to make provisional job offers to persons with disabilities is of significance. This clause provides for an employer to make a job offer “conditional” on medical or functional testing. This is done in order to determine an applicant’s actual or potential ability to perform the essential functions of a specific job. The testing must comply with the statutory requirements. The employer may test the disabled candidate only and not require the other applicants to undergo testing. If the testing shows that accommodation requirements create unjustifiable hardship or that there is an objective justification that relates to the inherent requirements of the job or to health and safety, the employer may withdraw the job offer.

The Disability Code provides that disabled employees may not be employed on less favourable terms and conditions for reasons connected with disability.

5.8 THE SOUTH AFRICAN INTEGRATED NATIONAL DISABILITY STRATEGY

The Reconstruction and Development (RDP) White Paper indicated that “The Government will design, in consultation with disabled persons, a comprehensive programme for disabled persons which will enhance their engagement in society and remove discriminatory practices against them, especially in the workplace.” The INDS (1997:17 to 20) therefore has its origin in the RDP.

Subsequently a Disability Programme was established in the Office of the President to facilitate the full integration of disability into the RDP. The establishment of the programme was a further important landmark in disability management in South Africa. The establishment of the programme provided a point of reference as well as strategic leadership and political support. It also provided the highest status to disability management which is an important achievement.

The INDS (1997) was published as a White Paper during November 1997. The then Deputy President mentions in the foreword that “...the White Paper represents government’s thinking about what it can contribute to the development of disabled

people and to the promotion and protection of their rights. I believe in a partnership with disabled people. Therefore the furtherance of our joint objectives can only be met by the involvement of persons with disabilities themselves.”

The INDS (1997) consists of six chapters, namely:

- Chapter 1: Situational Analysis.
- Chapter 2: National International Context.
- Chapter 3: Policy Guidelines.
- Chapter 4: Legislation Monitoring.
- Chapter 5: Progress to date.
- Chapter 6: Recommendations.

The INDS (1997:1) indicates that there is a serious lack of reliable information on the nature and prevalence of disability in South Africa. As highlighted in the statistical analysis of population statistics relating to the disabled (Chapter 6 of this research) there is no single source offering detailed information. The analysis further reflects on the exclusion of persons with disabilities from the mainstream of society and specifically the hardships women and children with disabilities suffer (INDS 1997:2 and 4).

The vision expressed is “a society for all”. It indicates that the concept of a society for all, encompassing human diversity and the development of all human potential, captures the spirit of the human rights instruments of the UN (INDS 1997:18). Defining and translating the human rights of disabled persons into specific measures and programmes however, remains a major challenge. The Standard Rules for the Equalisation of Opportunities for Persons with Disabilities is the main instrument guiding public policy in the direction of ensuring the human rights of disabled persons. They will also assist government in creating an enabling environment that will lead to the full participation and equalisation of opportunities for persons with disabilities at all levels of society during and after the period of reconstruction and development (INDS 1997:18 and 19).

The principles, upon which the strategy is based, include:

- A people driven process - the right to self-representation is emphasised as a fundamental principle;
- integration and sustainability – due to the piecemeal manner in which disability management was dealt with in the past, it has led to the very poor circumstances disabled persons find themselves in. Disability management must be fully integrated into the principles, strategies and framework; and
- strategic guidelines – the Standard Rules on the Equalisation of Opportunities for Persons with Disabilities, the World Programme of Action Concerning Disabled Persons and the Disability Rights Charters, will be the guiding documents in developing, implementing and monitoring INDS (1997:19 and 20).

The INDS (1997) identifies the following policy guidelines:

- Prevention;
- public education and awareness raising;
- health care;
- rehabilitation;
- barrier free access;
- transport;
- communications;
- data, information and research;
- education;
- employment;
- human resource development;
- social welfare and community development;
- social security;
- housing; and
- sport and recreation.

Each policy guideline consists of four sub-areas namely:

- Introduction;
- policy objective or components;
- strategy; and
- mechanism.

The INDS (1997:2 and 3) emphasises that the majority of persons with disabilities in South Africa have been excluded from the mainstream of society and have been prevented from accessing fundamental social, political and economic rights.

The exclusion experienced by persons with disabilities and their families is as a result of a range of factors, for example (INDS 1997:2):

- The political and economic inequalities of the apartheid system;
- social attitudes which have perpetuated the development of disabled persons as dependent and in need of care; and
- a discriminatory and weak legislative framework which has sanctioned and reinforced exclusionary constraints.

The key forms of exclusion responsible for the cumulative disadvantage of persons with disabilities are poverty, unemployment and exclusion through legislation (INDS, 1997:2 and 3). Poor people face a greater risk of impairment or disability, as far as women with disabilities, particularly black disabled women, are concerned.

Of particular relevance for this research, are the guidelines impacting on employment policy which is briefly analysed. The unemployment gaps between non-disabled and disabled job seekers are factual as discussed in detail below and the INDS (1997) indicates that it must be narrowed. Conditions must be created to broaden the range of employment options for disabled persons so as to provide them with real possibilities of occupational choice. The emphasis on the term “real” must be noted as the ILO, as part of its research, states that work must be meaningful before a person will actually receive benefit from it.

Conditions must be created to broaden the range of employment options for disabled persons so as to provide them with real possibilities of occupational choice. The vocational integration of persons with disabilities into the mainstream labour market must therefore be facilitated to ensure real employment for persons with disabilities (INDS 1997:42).

The critical strategies suggested (pages 42 to 45) are:

- Occupational choice, namely that persons with disabilities should be provided with a range of employment opportunities aimed at meeting different needs and offering real possibilities for occupational choice;
- inter-sectorial collaboration, namely that employment opportunities will only come about if a number of government departments and key stakeholders in the NGO and private sector, work together;
- training of the recruitment staff and other human resource management staff of organisations, needs to be encouraged to ensure that they understand the options available in the placement and promotion of disabled job seekers and employees;
- employment and training opportunities for disabled persons should be provided on an equitable basis, and in accordance with equitable employment practices;
- the INDS (1997) suggests that employment targets for persons with disabilities at entry and higher levels, must be determined for both the private and the public sector;
- the promotion and implementation of policies and programmes for disabled persons which ensure equity in terms of employment benefits, status and conditions, is an area of priority including-
 - equitable provision of employment benefits;
 - equitable application of the BCEA;
 - the application of these standard working conditions to sheltered employment;
 - the promotion of measures to protect disabled workers against discriminatory practices during retrenchment;
 - the promotion of reasonable and equitable work environments for disabled workers which could include incentives to encourage the accommodation of workstations to facilitate the employment of persons with disabilities, through the provision of assistive devices, personal assistance, specialised and alternative technology and equipment and adjustments to the work environment;
 - the use of vocational assessment techniques to facilitate the matching of disabled job-seekers with job-related requirements;

- the listing of essential job requirements as a basis for determining the suitability of disabled job-seekers;
- the use of incentives to encourage the provision of work instruments, machine adaptations, documentation and tools in a format that is usable by and equitably accommodate the needs of disabled workers;
- the promotion of alternative work arrangements and hours;
- the evaluation of the performance and productivity of disabled employees on an equitably comparative basis with non-disabled employees; and
- creation of work opportunities for persons with disabilities through the development and maintenance of small, medium and micro-enterprises.

The following principles and role-players continually feature in the INDS (1997):

- Self-representation, namely persons with disabilities are best equipped to change, for example, perceptions and attitudes towards disability and should therefore play a central role in the development of strategies and projects through organisations for persons with disabilities.
- South African Human Rights Commission (SAHRC) with one of its responsibilities, as defined by the Constitution, 1996 to take the lead in the promotion of human rights pertaining to persons with disabilities.
- Training of personnel dealing with the public should contain disability awareness components so that they may understand the Social Model of disability and its implications.
- Decreasing discrimination against persons with disabilities based on archaic beliefs and customs.
- Putting a value on diversity by creating a positive and accommodating environment in which diversity is respected and valued.
- Assistive devices and rehabilitation technology which enable individuals with disabilities to participate on equal terms. If persons with disabilities are to access their rights and responsibilities and participate in society as equal citizens they must have access to appropriate and affordable assistive devices.

The extremely high level of unemployment amongst persons with disabilities can be attributed to a number of factors:

- Low skill levels due to inadequate education;
- discriminatory attitudes and practices by employers;
- past discriminatory and ineffective labour legislation;
- lack of enabling mechanisms to promote employment opportunities;
- inaccessible public transport;
- inaccessible and unsupportive work environments;
- inadequate and inaccessible provision for vocational rehabilitation and training;
- generally high levels of unemployment;
- the fact that menial labour is often the only option for poorly skilled job-seekers;
- inadequate access to information; and
- ignorance in society.

The high level of functional illiteracy amongst disabled adults is a direct result of the lack of educational opportunities for children with disabilities, especially in rural areas. The result is low skill levels and a correspondingly limited access to employment opportunities.

As a result those persons with disabilities who do have jobs, often find themselves working in sheltered/protective workshops run either by the Department of Labour, by private welfare organisations, or by disabled persons themselves. Although the nature and scope of these workshops and self-help projects are considerable, they do not provide persons with disabilities and their families with sustainable incomes or opportunities for competitive economic activity.

5.9 THE TECHNICAL ASSISTANCE GUIDELINES ON THE EMPLOYMENT OF PERSONS WITH DISABILITIES

The Department of Labour issued the Technical Assistance Guidelines (TAG) on the Employment of Persons with Disabilities, towards the end of 2003. The purpose of the TAG is to assist employers, employees, trade unions and persons with disabilities to understand the EEA and its Code of Good Practice: Key aspects on the Employment of Persons with Disabilities in the Workplace (referred to earlier as

the Disability Code). This includes non-discrimination and affirmative action measures and provides guidelines on how to implement it.

The TAG explains the definitions of “disability” and “impairment” and the practical implementation/meaning thereof. It also explains the practicalities of reasonable accommodation and provides practical examples. It provides guidelines on dealing with the following human resource management practices:

- Recruitment and selection;
- medical and psychological testing and other similar assessments;
- placement;
- training and career enhancement;
- retaining persons with disabilities;
- termination of employment;
- workers compensation;
- confidentiality and disclosure of disability;
- employee benefits;
- employment equity planning in respect of persons with disabilities; and
- education and awareness.

The TAG does not add any new dimension to the management of disability and employment but it merely sets out the practical explanation of the EEA and the Disability Code.

5.10 CODE OF GOOD PRACTICE: INTEGRATION OF EMPLOYMENT EQUITY INTO HUMAN RESOURCE POLICIES AND PRACTICES

The Minister of Labour issued the Code of Good Practice on the Integration of Employment Equity into Human Resource Policies and Practices (Integration Code) on 4 August 2005. The objective of the Integration Code is to provide guidelines on the elimination of unfair discrimination and the implementation of affirmative action measures in the context of key human resource areas, as provided for in the EEA. The Integration Code is not intended to be a comprehensive human resource management code, but rather an identification of human resource management

areas that are key to employment equity and can be used to advance equity objectives.

The guidelines set out in the Integration Code enable employers to ensure that their human resource management policies and practices are based on non-discrimination and reflect employment equity principles at the commencement of employment, during employment and when terminating employment.

The structure of the Integration Code mirrors the life cycle of an employee in employment. It deals with possible constraints and unfair discrimination that could occur at each phase, including commencing employment, during employment and on termination of employment. It also describes affirmative action measures that could be used at each phase to advance the objectives of the EEA. It focuses on the following areas:

- Scope, which provides a brief definition of the topic in the context of the employment life cycle;
- impact of employment equity which details the non-discrimination principles and affirmative action measures that are relevant to the topic;
- policy and practice matters which provides information about the policy and practice matters that could arise, and makes suggestions regarding their implementation;
- linkages with other areas which identifies cross-references to other key topics as well as other relevant codes and legislation dealt with in the codes.

Some of the key contributions of the Integration Code are:

- Removing constraints as the first step towards ensuring fairness and equity in the workplace. In the context of historical disparities in South Africa, the EEA requires employers, employees and representative trade unions to jointly develop strategies to advance designated groups by adopting appropriate affirmative action measures and incorporating them into formal employment equity plans. Affirmative action measures are essentially remedial measures designed to redress the imbalances of the past. This is a mandatory strategy to achieve equity in employment as an outcome;

- it provides guidance in relation to the audit, analysis and consultation aspects of the employer's obligations through:
 - Consulting with its employees and representative trade unions;
 - auditing and analysis of all employment policies and practices in the workplace and developing a demographic profile of its workforce;
 - preparing and implementing an employment equity plan; and
 - reporting to the Department of Labour on progress made on the implementation of its employment equity plan.

The Integration Code also links to other human resource management practices namely:

- Performance management suggesting that senior management performance should be, amongst others, measured against the extent to which they have achieved their numerical targets; and
- promotions, namely that succession planning and decisions on promotion must take account of an employer's numerical targets and ensure that under-represented groups in identified categories are developed and promoted.

Similar to the TAG the Integration Code does not add any new dimensions. It sets out to explain the EEA with specific emphasis on aspects of integrating employment equity into human resource management practices. This is a positive contribution to the process of employing persons with disabilities, although the impact of the Integration Code is not significant.

5.11 THE SMALL, MEDIUM AND MICRO ENTERPRISE WHITE PAPER

The Small, Medium and Micro Enterprise White Paper (SMME) identify disabled entrepreneurs as a target group. The Ntsika Enterprise Promotion Agency (NEPA) which was established through this White Paper has in response, appointed a disabled person to assist with the development of targeted assistance measures and the removal of constraints within the SMME sector for disabled entrepreneurs.

It also sets out to create more opportunities of protective/sheltered employment, for example, sheltered/protective workshops and protected work environments within ordinary places of work.

Existing mainstream vocational training centres should be made accessible to accommodate the specific physical, communication and learning needs of persons with disabilities. In this way persons with disabilities can be prepared for and find work opportunities in the open labour market. Support (financial and training) should be given to existing self-help groups, which presently provide training of this nature.

In terms of human resource development, the objective is to develop the capacity of disabled persons through their participation in the economic development of their communities and the country, governance and maintaining of the opportunities for persons with disabilities within their local communities and at local and national level.

The strategies for achieving these policy objectives are:

- Skill development;
- inclusive training;
- setting specific standards for training modules;
- participation by disabled persons in developing and upgrading of training modules; and
- development and integration of Adult Basic Education and Training in other training modules presented at vocational training centres.

The White Paper further recommends comprehensive anti-discrimination legislation which must seek to address past inequalities by means of equalising opportunities while controlling any tendency towards further discrimination. The establishment of a monitoring system at all levels which must cover the full environment, but also targeting:

- Women and girls, particularly with intellectual disabilities due to their vulnerability to sexual and physical abuse;
- disabled elderly persons;
- disabled woman and rural disabled persons in the workplace;
- abused children in institutes for disabled children;

- parents with disabled children; and
- disability groups with specific needs.

Prahalad (2006:2) presents the vision of the co-creation of a solution to the problem of poverty if large and small firms, governments, civil society organisations, development agencies and the poor themselves work together with a shared agenda. In this case the focus area is persons with disabilities. The strategy in the White Paper is very limited as it does not create a framework to co-create a solution to the problem of poverty amongst persons with disabilities. It's much more "protectionist" than it is "developmental" and "entrepreneurial". This is an area requiring more development in South Africa.

5.12 NATIONAL BUILDING REGULATIONS

Accessibility of buildings is a significant constraint or even a barrier to persons with disabilities and in their employment. The increase in the number of employees with disabilities would be disrupted by a constraint as significant as this. The standard with which each building must comply is determined by the South African Bureau of Standards (SABS). The SABS drafts and publishes the National Building Regulations (NBR) (SABS 0400-1990) and the Code of Practice (SABS 02 Ed) in terms of section 17 of the National Building Regulations and Building Standards Act, 103 of 1977. Part S of the NBR regulates the accessibility to buildings.

Part S of the NBR sets the national standard to which buildings should comply to be accessible to persons with disabilities. The term "accessible" is defined as "the effective use of a site, building or facility by a disabled person". The sign used to indicate that a building is disability friendly, consists of a figure in a wheelchair and a plain background as shown in Figure 1.

Figure 1: International symbol indicating that a building is disability friendly



(Source: NBR)

This is an international symbol. Facilities that are not in accordance with the requirements of this standard may not bear this symbol. The symbol is the property of the International Standards Office and its use can only be sanctioned where the minimum requirements of the NBR have been met.

Many South African buildings are smaller buildings and therefore would not require compliance with Part S of the NBR. This raises the constitutionality of the NBR. Accessibility is a barrier which directly discriminates against persons with disabilities. This is an issue requiring serious attention of owners of buildings and employers. To determine whether a building is accessible, it is necessary to do an audit against a standard or a checklist.

The accessibility of buildings does have an economic aspect. However, if proper planning is done from the outset additional costs can be significantly reduced.

5.13 IMPLEMENTATION STRUCTURES

The relative newness of disability management in South Africa has resulted in a fragmented approach to implementation. The following organisations are the most important role players in disability management:

- Office on the Status of Persons with Disabilities;
- Ministry of Women, Children and Persons with Disabilities;
- Department of Labour;
- Department of Social Development;
- South African Social Security Agency;
- Commission for Conciliation, Mediation and Arbitration;
- Labour Court;
- Employment Equity Commission; and
- South African Human Rights Commission.

The Office on the Status of Persons with Disabilities (OSDP) was the first structure created specifically for the management of disability. It was created after the 1994 general election in South Africa. It was a very small component (three to five employees) but strategically situated in the Office of the President of South Africa. The OSDP created a nodal point for disability management and they produced the INDS (1997) discussed extensively earlier in this chapter. The OSDP had no implementation responsibilities but successfully provided strategic direction and gathered political support for the establishment of the socio-political disability model.

Following the 2009 general election the new administration restructured the government configuration extensively. Disability management became part of the newly created Ministry of Women, Children and Persons with Disabilities. This newly created Ministry is established within the Presidency. This was a significant elevation in status for the OSDP and it also emphasises the relevant importance that the new administration, under the leadership of President Jacob Zuma, attaches to this vulnerable group. Although the Department which will support this Ministry is still in the process of being established at the time this research is finalised, early indications are that more senior officials will be assigned the responsibility of providing strategy and direction in disability management.

The implementation of the various elements of disability management is assigned to the Department of Labour, Department of Social Development and the South African Social Security Agency. The Department of Labour provides policy and implements various employment related initiatives. The Minister of Labour has appointed the

Employment Equity Commission to advise on all employment equity related matters, including disability management. The monitoring of progress with the implementation of the EEA, through employment equity reports, provides valuable information. This information is published annually in various reports including the Annual Report of the Employment Equity Commission. The Department of Social Development provides policy on social security matters and various social grants, including the disability grant. The actual payment of these grants takes place through the South African Social Security Agency.

Labour disputes related to unfair labour practices and unfair dismissal are dealt with through the Commission for Conciliation, Mediation and Arbitration (CCMA) and the Labour Court. Disputes related to discrimination are initially mediated by the said Commission and thereafter referred to the Labour Court.

The South African Human Rights Commission (SAHRC) is also a very important role-player in disability management. The Constitution, 1996 is a cornerstone of this new democracy. The equality clause (section 9) includes disability as a prohibited ground for discrimination. The SAHRC has been mandated to promote respect for human rights and a culture of human rights (section 184(1) of the Constitution, 1996, Newsletter of the SAHRC, 2000).

The South African Human Rights Commission have functions and powers that are far reaching, including the power of search and seizure, the power to subpoena, and the ability to litigate on a person's behalf or on behalf of a group of people. The Constitution, 1996 requires the Commission to monitor the progressive realisation of the economic and social rights contained in the Constitution. The Commission has developed the protocols and the government "fears" the protocols as it seeks information from government departments on various critical issues (McClain-Nhlapo, Commissioner of the SAHRC - <http://www.sahrc.org.za> and [www.eeoc.gov/abouteeoc/40th pane/firstprinciples.html](http://www.eeoc.gov/abouteeoc/40th%20pane/firstprinciples.html)).

Another very important function of the Commission is to advise the government on policy and legislation. The Commission was responsible for facilitating the development of the South African Promotion of Equality and Prevention of Unfair

Discrimination Act, 4 of 2000 (PEPUDA – as discussed earlier in the chapter). The drafting of PEPUDA was facilitated by the South African Human Rights Commission and included a great amount of consultation with disabled persons’ organisations (McClain-Nhlapo, Commissioner of the SAHRC - <http://www.sahrc.org.za>).

The first case brought before a court of law in South Africa was discrimination based on disability. The Commission acted on behalf of the complainant, who was an attorney using a wheelchair and was unable to access one of the South African courts. The legal argument was that because the courthouse was inaccessible to wheelchair users, such users were discriminated against in view of their disabilities. The equality courts (which were separate, basic courts established to support this piece of legislation), found against the Department of Justice and the Department of Public Works. They then required all courts in South Africa to become accessible within five years. This was seen as a major victory for persons with disabilities in South Africa (McClain-Nhlapo, Commissioner of the SAHRC - <http://www.sahrc.org.za> and [www.eeoc.gov/abouteeoc/40th pane/firstprinciples.html](http://www.eeoc.gov/abouteeoc/40th%20year/firstprinciples.html)).

The Commission on Employment Equity raised its concern in its 2007/2008 Annual Report that the lack of cases involving unfair discrimination reaching the Labour Court are due to the high costs and the accessibility of the Labour Court system. They made recommendations that the powers of the CCMA be expanded in this area. This recommendation has not been implemented to date.

5.14 DISCUSSION OF THE SOUTH AFRICAN DISABILITY MANAGEMENT FRAMEWORK

Similar to the assessments of the disability management strategies in the USA and the UK, the South African framework should be assessed. The same criteria or areas of assessment will be used. The assessment of the South African disability management framework is presented in Table 18 below.

Table 18: Assessment of the disability management framework of South Africa

No	RELEVANT AREA	CONCISE DESCRIPTION OF AREA
1.	Constitutional determination and protection against discrimination	Section 9 of the Constitution, 1996 provides protection for persons with disabilities against discriminatory practices. The

No	RELEVANT AREA	CONCISE DESCRIPTION OF AREA
	for persons with disability.	Constitution, 1996 also provides for fair labour practices. The EEA and the other relevant policy frameworks are either directly or indirectly linked to the Constitution, 1996 as reference is made to the right of a person with disability not to be discriminated against. This reference is made in for example par 1.5, 2.3.2 and par 4.1 of the TAG.
2.	General legislative determination against discrimination and the protection of persons with disabilities.	The EEA and PEPUDA legislate in this regard. These provisions are to protect persons with disabilities against discrimination and to affirm them in terms of employment. A single Act dealing comprehensively with disability management, like in the case of the USA and the UK does not exist in South Africa. The lack of such single Act is a significant weakness in the South African disability management framework.
3.	Institutions responsible for the implementation and enforcement of the constitutional and legislative provisions.	The relative newness of disability management in South Africa has resulted in a fragmented approach to implementation. The Office on the Status of Persons with Disabilities (OSDP) is the first structure created specifically for the management of disability. During 2009 the OSDP was absorbed into a newly created Ministry of Women, Children and Persons with Disabilities. The implementation of the various elements of disability management is assigned to the Department of Labour, Department of Social Development and the South African Social Security Agency. The Department of Labour provides policy and implements various employment related initiatives. The Minister of Labour has appointed the Employment Equity Commission to advise on all employment equity related matters, including disability management. The monitoring of progress with the implementation of the EEA, through employment equity reports, provides valuable information. The Department of Social Development provides policy on social security matters and various social grants, including the disability grant. The actual payment of these grants takes place through the South African Social Security Agency. Labour disputes related to unfair labour practices and unfair dismissals are dealt with through the CCMA and the Labour Court. Disputes related to discrimination are initially mediated by the said Commission and thereafter referred to the Labour Court. The South African Human Rights Commission (SAHRC) is also a very important role-player in disability management. The Constitution, 1996 is a cornerstone of this new democracy. The equality clause (section 9) includes disability as a prohibited ground for discrimination. The SAHRC has been mandated to promote respect for human rights and a culture of human rights (section 184(1) of the Constitution, 1996, Newsletter of the SAHRC, 2000).

No	RELEVANT AREA	CONCISE DESCRIPTION OF AREA
4.	Definition of disability.	<p>Chapter 5 of the TAG emphasises the three criteria covered in section 1 of the EEA relating to the definition of persons with disability, namely par 5.1.1:</p> <p>A person must have an impairment which may either be physical, mental or a combination of both. A physical impairment is described as a partial or total loss of a bodily function or part of the body including sensory impairments. A mental impairment is described as a clinically recognised condition of illness that affects a person's thinking process, judgement or emotions including intellectual, emotional and learning disabilities.</p> <p>The impairment must also be long term or recurring. Long term is referred to as at least 12 months while recurring means the impairment is likely to happen again.</p> <p>The impairment must be substantially limiting. It indicates that if the effects of the impairment are not substantially limiting, even if they are physical and/or mental, is long-term or recurring, the person is not covered under the EEA.</p> <p>It is emphasised (p11) that it is necessary to do a careful, case by case analysis to determine whether an impairment substantially limits a person's prospects of entry into, or advancement in employment.</p>
5.	Human resource management practices covered.	<p>Employment related areas covered are:</p> <p>Reasonable accommodation (Chapter 6).</p> <p>Recruitment and selection (Chapter 7).</p> <p>Medical and psychological testing and other similar assessments (Chapter 8).</p> <p>Placement (Chapter 9).</p> <p>Training and career advancement (Chapter 10).</p> <p>Retaining persons with disabilities (Chapter 11).</p> <p>Termination of employment (Chapter 12).</p> <p>Worker compensation (Chapter 13).</p> <p>Confidentiality and disclosure of disability (Chapter 14).</p> <p>Employment benefits (Chapter 15).</p> <p>Employment equity planning in respect of persons with disabilities (Chapter 16).</p> <p>Education and awareness (Chapter 17).</p>
5.1.	Recruitment and selection (including medical and psychological testing, placement, compensation, confidentiality and	<p>Employers are to draw up the job profiles and specifications that identify the inherent requirement and essential functions of the job and the skills and capabilities required to perform the job.</p> <p>Application forms should focus on identifying an applicant's ability</p>



No	RELEVANT AREA	CONCISE DESCRIPTION OF AREA
	disclosure).	<p>to perform the inherent requirement of the job. Employers should provide opportunity in the application for the applicant to voluntarily disclose his or her disability status.</p> <p>The advert should be clear and concise but contain enough detail so that the applicant can make an informed decision. Adverts should not contain any unnecessary criteria that do not pertain to the essential functions of the job as this may unfairly exclude persons with disabilities.</p> <p>Selection criteria that are fair and non-discriminatory should be used. The same criteria must be used by the employer for disabled as for non-disabled job applicants.</p> <p>Employers should carefully document the selection process to ensure that they are in a position to show that they did not discriminate in selecting a specific candidate. Discrimination in selection criteria relating to a functional impairment is reasonable when impairment makes it impossible to perform the inherent requirements of the job.</p> <p>The interview should focus on the applicant's ability to perform the essential functions of the job irrespective of the degree or severity of the disability. No further detailed discussions should be entered into. Conditional job offers may be made to one person at a time to allow the employer to assess the ability of the applicant with a disability to perform the essential functions of a job, with or without reasonable accommodation. This is not intended to assess the medical condition nor the nature of the disability. The conditional job offer may be withdrawn if the testing shows that:</p> <ul style="list-style-type: none">➤ Accommodation requirements would create unjustifiable hardship; or➤ there is an objective justification that relates to the inherent requirement of the job; or➤ this is an objective justification that relates to health and safety. <p>An employer may require a medical examination or make a disability-related inquiry as the inquiry or exam is relevant and appropriate to the kind of work for which the applicant or employee is being tested. Any medical information obtained must be treated as a confidential medical record.</p> <p>A disability related inquiry is a question (or series of questions)</p>



No	RELEVANT AREA	CONCISE DESCRIPTION OF AREA
		<p>that is likely to elicit information about a disability. The same principles noted above apply to a situation where an existing employee is injured, either on-the-job or off-the-job, and the testing is needed to assist in the decision as to whether and how the individual should be accommodated, if necessary.</p> <p>The EEA provides that psychological testing and other similar assessments of an employee are prohibited unless the test or assessment being used:</p> <ul style="list-style-type: none">➤ Has shown to be scientifically valid and reliable;➤ can be applied fairly to all employees; and➤ is not biased against any employee or group. <p>An individual with a disability should not, because of a disability, be assigned to a job with less favourable conditions than that of a not disabled employee. An employer may also not limit, segregate, or classify an individual with a disability in any way that negatively affects the individual in terms of job opportunity and advancement.</p> <p>Rates of pay or any other forms of compensation must be the same as that of the not disabled colleague(s).</p> <p>The placement of persons with disabilities into the workplace must be followed by comprehensive orientation and induction training that must include disability sensitisation training. The induction training is therefore an opportunity to guarantee that all the stakeholders are given the skills to succeed in this new relationship, which must be based on mutual respect, understanding and trust.</p> <p>The employer needs to consult with the employee on what type of reasonable accommodation might be needed during the induction training.</p> <p>Employers, including health and medical services personnel, may only gather private information about an applicant or employee if it is necessary to achieve a “legitimate purpose” and with the written consent of the person.</p> <p>A legitimate purpose would be to ensure that the purposes of the EEA are furthered e.g. the non-discrimination and affirmative action if appropriate through the use of the information.</p> <p>The applicant or employee with a disability may choose to</p>



No	RELEVANT AREA	CONCISE DESCRIPTION OF AREA
		<p>disclose his or her disability, impairment and related accommodation requirements at any time in the employment process. However, if the person with a disability chooses not to disclose, the employer may not be aware of the needs of the employee, especially if the impairment is not self-evident. In this case, the employer is not obliged to provide the accommodation. If the disability, however, is self-evident, the employer can reasonably be expected to be aware and to be proactively involved in identifying with the applicant or employee what accommodation may be required.</p> <p>An employee with a disability can disclose the disability at any time, even if there is no immediate need for reasonable accommodation.</p> <p>If the disability is not self-evident and the employee discloses that they have a disability and may need accommodation, the employer may require the employee to disclose sufficient information to confirm the disability status and the accommodation requirements.</p> <p>An employer is entitled to request testing under certain conditions. If further information is needed, the employer may request a functional assessment of a specific job-related disability, and must bear the costs of the test.</p> <p>Competent vocational and occupation personnel with expertise, from within or outside the company, should be used to gather the required information. These personnel would be carefully evaluated to make sure they understand the EEA, codes and related best practices both in South Africa and Internationally.</p> <p>The employer must ensure that benefit schemes do not unfairly discriminate, either directly or indirectly, against any applicant or employee with a disability. This applies whether the employer provides access to the scheme directly or indirectly. No benefit scheme can refuse membership to an applicant or employee simply because they have a disability.</p> <p>In order to ensure retention of qualified employees with disabilities and to reduce the costs of benefit schemes, designated employers should investigate and where reasonable, offer benefit schemes that reasonably accommodate employees with disabilities. These include vocational rehabilitation, training and temporary income replacement benefits to employees who,</p>

No	RELEVANT AREA	CONCISE DESCRIPTION OF AREA
		because of illness or injury, cannot work for an extended period.
5.2.	Training and career advancement.	<p>The EEA, Disability Code and TAG should be the baseline documents for any training conducted within a company on the employment of persons with disabilities. The Disability Code and the TAG should form the basis for the content of any company's Disability Employment Equity Policy.</p> <p>The members of the Employment Equity Forum(s) should be trained on the content of the Disability Code and the TAG.</p> <p>All human resource managers should be trained on how to incorporate the content of the Disability Code and the TAG in their current recruitment policies and practices so as to enable them to comply with Chapter 2 (Prohibition of Unfair Discrimination) of the EEA.</p> <p>Whatever disability an employee may have, the employee should be actively engaged in planning his/her own career development. All training plans and courses must be fair and without discrimination. Training courses must be accessible to employees with disabilities.</p> <p>The only way to overcome fears, myths and negative attitudes about the abilities of employees and applicants with disabilities is through vigorous education and training within the private and public sectors.</p>
5.3.	Performance management.	<p>Performance management and reward systems and practices to evaluate work performance should clearly identify, fairly measure and reward performance of the essential functions of the job. Key performance or measurable output indicators should be identified between the employer and employees with a disability prior to the job taking place. Any performance processes involving interventions or reward or recognition must not unfairly discriminate on the basis of disability. In many instances employees are rewarded on criteria such as efficiency which is often limited to perceptions of getting the job done as quickly as possible. Efficiency and other criteria, used to evaluate performance should be developed from a holistic perspective (where attention is given to objective performance standards, effectiveness and quality of output).</p> <p>Reasonable accommodation must be provided when an applicant or employee voluntarily discloses a disability related accommodation need or when such a need is reasonably self-</p>

No	RELEVANT AREA	CONCISE DESCRIPTION OF AREA
		evident to the employer.
5.4	Retention.	<p>To prevent a disability from occurring, and when necessary, to intervene early following the onset of a disability by using coordinated, cost-conscious, quality case management and rehabilitation services that reflect an organisation's commitment to continued employment of those experiencing functional work limitations.</p> <p>Integrated disability management coordinates occupational and non- occupation disability benefits, for example absence and paid leave programmes, with a focus on early return to work.</p> <p>Increasingly, integrated disability management programmes also coordinate health and behavioural health care, health promotion, disease management, medical case management services and employee assistance programme (EAP).</p> <p>Coordinate access for employees to disability / income replacement benefits. Reasonable and flexible benefit and sick leave management.</p> <p>The essential job functions are the foundation upon which the qualifications and competencies of employees with disabilities are evaluated to determine whether a reasonable accommodation option exists.</p> <p>Linking physicians, employees with disabilities and the company in developing return-to-work plans.</p> <p>Development of job modification and return-to-work options as medically appropriate.</p> <p>Engaging employees with disabilities in meaningful discussion of their work options is a basic tenet.</p> <p>Return-to-work or reasonable accommodation options, amongst others, include transitional work (temporary changes in job duties or techniques during periods of recuperation); modified work (changes in work tasks, schedules, methods or equipment); or alternate work (reassignment to a different job if accommodation cannot be made in the original position).</p> <p>The reasonable accommodation process should be followed even if restrictions are expected to be temporary, in order to make</p>

No	RELEVANT AREA	CONCISE DESCRIPTION OF AREA
		appropriate return-to-work decisions.
5.5.	Labour relations.	If an employer is unable to retain the employee who becomes disabled or who is no longer able to do the job, the employer may consider terminating the employment relationship in accordance with Schedule 8 of the Labour Relations Act, 66 of 1995. Employers should assist with work related compensation.
6.	Reasonable accommodation.	<p>It describes reasonable accommodation as that all designated employees should reasonably accommodate the needs of persons with disabilities. It also indicates that this is a non-discriminative and affirmative action requirement. It states that reasonable accommodation is an effective affirmative action measure which is aimed at reducing the impact of the impairment of the person's capacity to perform essential functions of the job (par 6.1).</p> <p>The criteria for reasonable accommodation is stated as including three interrelated factors, namely:</p> <ul style="list-style-type: none"> ➤ The barriers must be removed by the reasonable accommodation; ➤ persons with disabilities must be allowed to enjoy equal access to the benefits and opportunities of employment; and ➤ employers can adopt the most cost effective means committed with the above two criteria. <p>The reasonable accommodation applies to applicants and employees throughout the period of employment, namely:</p> <ul style="list-style-type: none"> ➤ Employer to analyse the job functions (6.3.1) to determine the inherent basic qualification and competencies required to perform essential functions; ➤ job advertisements and applications must be made available in an appropriate format; ➤ interview process must be held at a location which is fully accessible; ➤ assessment or skills testing should be free of bias and discrimination; ➤ staff must be sensitised and made aware of diversity in the workplace; ➤ employees with disabilities should be consulted to ensure input specific to their career advancement. Determination should be made on where the person with a disability is presently, where the person wants to be and the career path to be followed to get there;



No	RELEVANT AREA	CONCISE DESCRIPTION OF AREA
		<ul style="list-style-type: none"> ➤ the employer is required to ensure through rehabilitation, training or any other appropriate measure the retention of existing staff with disabilities. Where existing employees become disabled the employer must ensure that the employee remains in his or her job before considering alternatives; ➤ the Occupation Health and Safety Act, 85 of 1993 provides that the employer is obligated to provide and maintain a working environment that is safe to all employees. The needs of employees with disabilities must be included in a health and safety audit; and ➤ The employer must take all reasonable steps to ensure that the working environment does not prevent persons with disabilities from accessing or retaining positions for which they are suitably qualified. <p>It is indicated that reasonable accommodation must be discussed after the decision has been made that the person with disability complies with the job criteria and after a conditional job offer has been made.</p> <p>The employer is also obligated to reasonably accommodate the employee when changes to the work or the work environment occur.</p> <p>The employer should consult the employee and where reasonable and practical, technical experts to establish appropriate mechanisms to accommodate the employee.</p> <p>Reasonable accommodation may be temporary or permanent depending on the nature and extent of the disability.</p> <p>Employers are not obligated to provide reasonable accommodation if it creates unjustifiable hardship. Unjustifiable hardship is defined as action which requires considerable difficulty or expense.</p>
7.	Comprehensiveness and user friendliness of the legislative and policy framework to support the human resource management profession, persons with disabilities and managers in employing persons with disabilities.	<p>The TAG is difficult to get hold of. The document has been laid out clearly and it was written in a style which is easily understood.</p> <p>The level of detail in the TAG is quite extensive. However the information is fragmented between the EEA, PEPUDA, Disability Code, Integration Code and the TAG. This fragmentation and the low profile disability management generally enjoyed in South Africa causes the contribution of these documents to the</p>

No	RELEVANT AREA	CONCISE DESCRIPTION OF AREA
		employment of persons with disabilities to be negligible.
8.	General impact of the Constitutional determination, legislative framework and employment policy framework on the improvement of the employment figures of persons with disabilities.	The South African disability management framework is supposed to have a significant impact on the employment of persons with disabilities, but it fails to fulfil this expectation.
9.	Employers and employer's organisations.	The disability management framework places an important responsibility on the shoulders of employers since employers are obligated to comply with wide ranging determinations. This obligation is not clearly defined and this results in limited progress being made in the employment of persons with disabilities.
10.	Trade unions.	<p>Trade unions should include the Disability Code and the TAG in their education and training programmes.</p> <p>All trade unions should design a disability employment equity training programme as part of their broader diversity training.</p> <p>The programme should encourage employees with disabilities to share their own experiences. Unions can utilise the services of persons with disabilities to assist with the designing and facilitation of some of the sessions covered in the programmes. Existing disability management training providers should integrate the content of the Disability Code and the TAG into their current training material for trade unions.</p>
11.	Persons with disabilities.	<p>Persons with disabilities should play a leading role in creating awareness in the workplace and they must guide the development of all awareness programmes in the workplace. They must also consider becoming members of trade unions and any representative structures within the workplace in order to create hands on disability awareness training.</p> <p>Persons with disabilities are well represented through organisations to which persons with disabilities belong. These organisations are actively ensuring that the rights of persons with disabilities are recognised.</p>

Sources: Adapted from the Constitution, 1996, Employment Equity Act, Disability Code, Integration Code, TAG, and the INDS (1997).

5.15 SUMMARY

The contribution of this chapter to the research process and the development of a strategy to employ persons with disabilities can be summarised as follows:

- Section 9 of the Constitution, 1996 provides protection for persons with disabilities against discriminatory practices and for fair labour practices.
- The EEA and the other relevant policy frameworks are either directly or indirectly linked to the Constitution, 1996 as reference is made to the right of a person with disability not to be discriminated against.
- The South African disability management framework is largely compliant with the ICRPD as discussed in Chapter 4.
- A single Act dealing comprehensively with disability management, like in the case of the USA and the UK does not exist in South Africa. The lack of such single Act is a significant weakness in the South African disability management framework.
- The relative newness of disability management in South Africa has resulted in a fragmented approach to implementation. The newly created Ministry of Women, Children and Persons with Disabilities is strategically positioned in the Presidency to provide political and strategic force to disability management in South Africa.
- The level of detail in the TAG is quite extensive but the information is fragmented between the EEA, PEPUDA, Disability Code, Integration Code and the TAG.
- This fragmentation and the low profile disability management generally enjoy in South Africa cause the contribution of these documents to the employment of persons with disabilities to be negligible.
- The disability management framework places an important responsibility on the shoulders of employers since employers are obligated to comply with wide ranging determinations. This obligation is not clearly defined resulting in limited progress being made in the employment of persons with disabilities.

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