

LLM DISSERTATION

ADRESSING OBESITY IN THE WORKPLACE: THE ROLE OF EMPLOYERS

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DECLARATION

I, Mariëtte Redelinghuys, declare that the work presented in this dissertation is original. It has not been presented to any other University or Institution. Where the work of other people has been used, references are provided. It is in this regard that I declare this work as originally mine, and it is hereby presented in partial fulfilment of the requirements for the award of the LLM Degree in Labour Law.

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SUMMARY

Obesity is a prevalent social matter in modern day society which open doors for discrimination in the workplace. South African employers should be aware of the possible risks and consequences they face when dealing with obesity in the workplace. Obesity is therefore a topic that will become a pressing issue in the South African workplaces soon and it is important to take note of international developments in this regard.

The Court of Justice of the European Union found on 19 December 2014 that morbid obesity may in certain instances be considered a disability under the European Union Equal treatment in Employment Directive if an employee is prevented from full participation in employment due to the employee's weight. With relatively new anti- discrimination laws in South Africa, the law has not developed to such an extent as to give clarity with regards to discrimination on the grounds of obesity as an arbitrary ground for unfair dismissal.

The legal position with regards to inherent requirements of a job and whether obesity may be deemed to be a disability in South Africa must be investigated to decide what role employers should play and employers should deal with the occurrence of obesity in the workplace.

In this dissertation, International standards, the current discrimination laws in South Africa and abroad will be investigated with the aim to establish guidelines for employers when obesity becomes a concern in the workplace.

Chapter 1

Introduction

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1.1 Introduction

Obesity is a prevalent social matter in modern day society which opens doors for discrimination in the workplace. South African employers should be aware of the possible risks and consequences they face when dealing with obesity in the workplace. According to a press release published during October 2015 by the Heart and Stroke Foundation,¹ South Africa has the highest overweight and obesity rate in sub-Saharan Africa. Obesity is, therefore, a topic that is becoming a pressing issue in the South African workplaces. It is, therefore, important to take note of international developments in this regard.

In an article relating to obesity and the proposed sugar tax in South Africa Myburg, senior researcher, at the Wits Health Consortium writes that obesity has become a global epidemic.² She further states that South Africa has the highest obesity rate; 26.8% of South Africans being classified as obese by the World Health Organisation (WHO). These alarming statistics raise the question as to how obesity and diseases relating to obesity affect employment in South Africa.

¹ www.heartfoundation.co.za/media-releases/national-obesity-week-south-africa accessed on 2 March 2016.

² Myburg "South Africa needs more than a sugar tax to get to the bottom of obesity" *Mail & Guardian*, 18 April 2017.

The Court of Justice of the European Union (CJEU) found on 19 December 2014 that morbid obesity may in certain instances be considered a disability under the European Union Equal Treatment in Employment Directive if an employee is prevented from full participation in employment due to the employee's weight.³

Smit and Viviers claim that body weight is a category of employment vulnerability in the workplace and they confirm that obesity opens the door for workplace discrimination and bullying.⁴ With obesity being labelled as a disability in certain instances, as determined by the CJEU, Smit and Viviers are correct in their categorization of body weight.

The legal position with regards to inherent requirements of a job and whether obesity may be deemed to be a disability in South Africa must be investigated to decide how it influences the role of employers. Furthermore, the effect of weight bias and workplace bullying due to obesity as well as procedures for incapacity albeit based on work performance or health must be investigated.

The equality clause⁵ in the Constitution for the Republic of South Africa, 1996 ("the Constitution") prohibits discrimination and promotes equality of all citizens. Obesity is not a listed ground in terms of the Constitution, however, disability is.⁶ The question arises whether South Africa will adopt the approach of the CJEU or whether South African Labour Law makes sufficient provision to cover the matter of weight discrimination.

The Employment Equity Act⁷ (EEA) gives effect to the equality clause of the Constitution⁸ and goes further by prohibiting discrimination on any arbitrary ground.⁹ Case law exists with regards to this specific topic and the interpretation of the clause although none specifically relate to obesity.

³ *Fag og Arbejde (FOA) v Kommunires Landsforening (KL) obo Karsten Kaltoft* ECLI:EU:2014:2463.

⁴ Smit and Viviers *Vulnerable Employees* (2017) 145.

⁵ S 9.

⁶ S 9(3).

⁷ Act 47 of 2013.

⁸ S 6 EEA.

⁹ S 6 (1) EEA.

It is my point of view that discrimination against obese employees could, in specific circumstances, be used as a justification for fair discrimination by an employer with regards to inherent job requirements.

There may very well be a difference in the way employers evaluate job applicants as opposed to existing employees suffering from obesity. The latter condition could also oblige employers to implement wellness programmes / supporting measures like the assistance given to alcoholics and drug addicts.

In a growing health and wellness conscious society more employers are investing in health and wellness programmes globally. In an article published in 2009, Heinen and Darling stated that employers have tried to manage health by addressing their employees' lifestyle risks.¹⁰

Wellness programmes have the potential to alleviate healthcare costs and curb absenteeism substantially. It may therefore be effective and result in a more satisfactory outcome rather than simply tolerating obesity in the workplace and the health issues obese employees may have.

1.2 Research questions

The purpose of this study is to evaluate the current position of obese employees in the South African workplace and to establish their rights and the role and obligations of employers. In this dissertation, the sufficiency of the South African labour legislation and procedures dealing with obese or overweight employees will be considered.

The following questions will be answered:

- What are the international standards that should be considered when evaluating workplace obesity in South Africa?
- Based on current South African law, what are the rights of employees and the role of employers when obesity in the workplace need to be addressed.
- Is current South African law sufficient to address obesity in the workplace?

¹⁰ Heinen and Darling "Addressing obesity in the workplace: The role of employers" *Milbank Quarterly* (2009) 101-22.

- Which recommendations and guidelines can be given to employers to ensure that they act within the boundaries of the law when they address obesity in the workplace?

When addressing these questions, the rights of obese employees and the obligations of employers to protect and adhere to these rights will be stressed. The existing South African position will be evaluated by considering both legislation and case law. International labour standards of the International Labour Organisation (ILO) and European Union (EU) and the position in other countries will also be evaluated to see if South African law will be adequate when obesity is addressed in the workplace.

1.3 Significance of the study

To provide clear guidelines with regards to how obesity should be treated in the workplace and what the role of employers are it is critically important that we consider the International Labour Standards with regards to discrimination.

Obesity is defined as a medical condition where excessive fat accumulation may impair health.¹¹ WHO bases a person's classification as obese on a body mass index (BMI) calculated as weight in kilograms divided by the square of height in metres. A person with a BMI of greater than 30 is considered obese.¹² Obesity and medical conditions related to obesity are, therefore, not only a local phenomenon but an increasing worldwide epidemic that the WHO is closely monitoring and reporting on.¹³

The Convention on the Rights of Persons with Disabilities (CRPD) determines the actions member states should implement to reach the goal of equality for all persons with disabilities. Central to the CPRD is the right to work and employment.¹⁴

¹¹ Some, Rashied, Ohonba "The Impact of obesity on employment in South Africa" ERZA working paper (2014) 475 4.

¹² World Health Organisation "Obesity: Preventing and managing the global epidemic" Report of WHO consultation presented at: The World Health Organization; June 3-5, 1997; Geneva, Switzerland. Publication WHO/NUT/NCD/81.1.

¹³ Some, Rashied, Ohonba "The Impact of obesity on employment in South Africa" ERZA working paper (2014) 475 2.

¹⁴ Article 27 CRPD.

As a member of the ILO, South Africa should adhere to ratified conventions. In this regard, I must make mention of the Convention Concerning Discrimination in Respect of Employment and Occupation, 111 of 1958.¹⁵ This Convention provides broad guidelines with regards to discrimination and it seems as if the content was indeed considered when the Constitution¹⁶ and the EEA¹⁷ were established in South Africa. As a member of the ILO and a country with an enormous obesity problem much has been written by American authors with regards to obesity and weight discrimination.

In a reaction to the CJEU decision *Sue Gilchrist*, a British employment law specialist, wrote that it would still be open to the national courts to decide whether obesity in certain instances falls under the ambit of a disability, however, other impairments associated with obesity, such as depression and diabetes may also play a roll.¹⁸ A study concerning the interpretation of *Fag og Arbejde (FOA) v Kommunires Landsforening (KL) obo Karsten Kaltoft (Kaltoft)*¹⁹ will be conducted and compared with what would ultimately be the South African position.

When studying discrimination law in the South African context it is important to understand what discrimination is and which test to apply to determine whether such discrimination is unfair. This is especially relevant in circumstances, such as obesity, which is not a listed ground in our Constitution²⁰ or the EEA.

The legal and practical problems experienced by obese employees in workplaces are worth evaluating as obese employees are targets for workplace bullying, discrimination and bias. The term “weightism” is used to refer to weight-based discrimination and prejudice.²¹

Perceptions with regards to overweight and obesity do have an influence on decisions employers make with regards to recruitment and promotion. Claims against employers in terms of the section 6(1) of the EEA as well as protection of obesity as a possible

¹⁵ Discrimination Convention ratified by South Africa on 5 March 1997.

¹⁶ 1996.

¹⁷ 47 of 2013.

¹⁸ Gilchrist “Obesity can be a disability if full and effective workplace participation is limited” www.outlaw.com, accessed on 30 March 2016.

¹⁹ ECLI:EU:2014:2463.

²⁰ The Constitution of the Republic of South Africa, 1996.

²¹ Smit and Viviers *Vulnerable Employees* (2017) 145.

disability is imminent, hence, the importance of employers to follow a pro-active approach when dealing with obesity in the workplace.

1.4 Research Methodology

This study follows an investigative and comparative approach on the labour rights of obese employees in South Africa. This study takes the form of a literature review and information was compiled from various sources including legislation, case law, conventions, journal articles, books, papers and web articles. The *De Jure* referencing style is used. When citing legislation, international instruments and case law, the full citation is given in the first footnote. The complete reference to each source is at the end of this dissertation. A shortened version of source is used in the footnotes.

1.5 Overview of chapters

Chapter 1 is a general introduction where research questions are identified and the significance of the study is discussed. The research methodology and referencing method are also explained.

Chapter 2 is an investigation into the ILO and EU standards to identify the international standards that should be considered when evaluating obesity in the workplace.

Chapter 3 is a comparative analysis which compares the position with regards to weight discrimination and obesity in the UK, USA and Canada. The Purpose of this chapter is to see how other countries have dealt with workplace obesity and to identify possible recommendations that can be used in South Africa.

In Chapter 4 the South African position is evaluated with specific reference to legislation and applicable case law.

Chapter 5, the conclusion, consist of answers to the research questions based on the study, recommendations and concluding remarks.

Chapter 2

ILO and EU standards – the underlying value system on discrimination in the workplace

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2.1 Introduction

South African labour law is greatly influenced by international labour standards and, therefore, the underlying value system of discrimination in the workplace of both the International Labour organisation (ILO) as well as the European Union (EU) need to be considered.²² The 1996 Constitution specifically provides that courts must consider international law,²³ and may consider foreign law²⁴ in the interpretation of the Bill of Rights.²⁵ I therefore submit that when addressing obesity in the workplace, and considering that some writers²⁶ call it a global epidemic, international law is extremely relevant in this instance.

European law and the European Charter of Fundamental Rights (ECFR) offer well-known forms of discrimination such as race, religion, gender and age tapered to the more comprehensive forms stipulated in South African legislation. However, none of the EU laws and treaties are clear on new and emerging forms of discrimination in the workplace such as sexual orientation, genetics and lifestyle.²⁷

The EU Directive on Equal Treatment in Employment²⁸ established a framework for equal treatment in employment and may be read as requiring member states to define disability not only through a medical model but also through a social model.

²² Van Niekerk et al *Law@work* (2015) 21.

²³ S 39(1)(b) of the Constitution of the Republic of South Africa, 1996.

²⁴ S 39 (1)(c) of the Constitution of the Republic of South Africa, 1996.

²⁵ Chapter 2 of the Constitution of the Republic of South Africa, 1996.

²⁶ See Chapter 1, paragraph 1.1.

²⁷ Discrimination at work in Europe, ILO, www.ILO.org/wcms_declfs_90_en. Accessed on 28 September 2016.

²⁸ Council Directive 2000/78 (EC).

To substantiate this statement the applicable directive will be discussed as well as the European Court of Justice (EUCJ) decision in the *Kaltoft – case*.²⁹

The study, will however, not be complete if one only considers European law and, therefore, the ILO conventions will also be considered.

The ILO Convention 111, also referred to as the Discrimination (Employment and Occupation) Convention ³⁰ defines discrimination as:

“any distinction, exclusion or preference made on the basis of race, colour sex, religion, political opinion, national extraction, or social origin, which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation.”

The definition as per ILO Convention 111 also lists grounds for discrimination but does not offer specific provision for arbitrary grounds such as obesity or lifestyle related discrimination.

In this Chapter, the ILO and EU standards with regards to discrimination will be evaluated to establish the scope of existing protection afforded to obese employees in terms of unfair discrimination in member states.

2.2 EU standards on discrimination

To determine the effect of EU law when dealing with obesity in the workplace, the EU framework on discrimination and enforcement of EU law must be considered. Treaties of the EU will have no force and effect if not adopted into legislation and court judgments of its member states.³¹ In order not to give up all sovereignty the Treaty on the Function of the European Union (TFEU) lists the matters on which legislation can be passed by the EU.³²

Although the EU has the powers to enact labour legislation the following matters are explicitly excluded: Pay, the right of freedom of association, the right to strike, and the right to impose lockouts.³³

²⁹ As mentioned in Chapter 1 above.

³⁰ 111 of 1958.

³¹ Bonnie, “The evolving role of the European Commission in the enforcement of community law: From negotiating compliance to prosecuting member states?” *JCER Volume 1 issue 2*, 39.

³² Bonnie “The evolving role of the European Commission in the enforcement of community law: From negotiating compliance to prosecuting member states?” *JCER Volume 1 issue 2*, 39.

³³ Article 153 of the TFEU.

It is submitted that the reasons for these exclusions are found in the diversity of the member states in so far as they relate to industrial relations and socio-economic circumstances.³⁴ Every state's economic and social model is different and it would simply not be possible to establish regulations pertaining to these specifically excluded matters to be implemented by all the members of the EU.

Although the EU does not have powers to enact legislation with regards to some of the core labour rights, it does have the power to make directives and regulations. The legislation passed by the EU, if appropriately framed, does have a direct effect on the EU Member States and its citizens. The term "direct effect" suggests a complicated impact which can be implemented under certain conditions only. It means that EU law does not have to be adopted into national legislation of member states for it to be enforced.³⁵

From the above submissions, it is safe to say that the relationship between European law and domestic law can be quite perplexing. The question must be answered whether the European law reigns supreme. The doctrine of supremacy was established and developed by the EUCJ and it means that whenever there is a conflict between domestic law and European law, European law prevails.³⁶ It seems that member states generally accept this doctrine. Most of them, however, disagree with the extreme interpretation and they reserve the right to review the constitutionality of European law under national constitutional law.³⁷

The EUCJ is the highest court in the European Union in matters of European Law and is one of the institutions of the European Union.³⁸ It is tasked *inter alia* with the interpretation of European Law and equal application across all member states.³⁹

³⁴ Bercusson *European Labour Law, The Strategy of Fundamental Rights* 2nd ed, Cambridge University Press (2009) 243.

³⁵ <http://one-europe.info/the-direct-effect-of-the-european-law-explained>, accessed on 1 March 2016.

³⁶ Arigho "The Supremacy of European Union Law: An inevitable Revolution of Federalism in Action" *Journal of Post graduate Research* (2014) 7.

³⁷ Weiss *Introduction to European Labour Law: European Legal Framework, EU Treaty Provisions and Charter of Fundamental Rights Volume 26* (2014) 3.

³⁸ Article 13, TFEU.

³⁹ Article 267, TFEU.

Decisions of courts of member states cannot be appealed to the EUCJ but the national courts can rather refer matters relating to European Law to the EUCJ.⁴⁰

The EUCJ has broad jurisdiction to hear various types of matters such as ruling applications for annulments, actions for failing to act brought by a member state or institution, actions against member states for failure to fulfil obligations, references for a preliminary ruling and appeals against decision of the general court.⁴¹

Based on the framework provided, one can conclude that European law is developed and amended to accommodate the diverse nature of the member states. The EU, however, retains the power to institute frameworks and minimum standards to ensure that member states at least adhere to the most fundamental human rights.⁴²

Treaties and Conventions set goals that need to be reached and rules that need to be implemented by member states. To give effect to treaties and convention regulations, declarations are used as instruments to ensure that set goals are reached.⁴³ Becker states that in this respect, the role of the CJEU is a binary one. On the one hand, the court ensures that member states comply with the necessary regulations and declarations and on the other hand it acts as an interpreter of European law.⁴⁴ It is my opinion that discrimination based on obesity should be dealt with according to national anti-discrimination laws in line with EU guidelines. Where a court of a member state seeks clarification or an interpretation the matter may be referred to the EU and once such clarification has been provided, the domestic court will implement the necessary EUCJ ruling.

European non-discrimination law was introduced to facilitate the functioning of the internal market and, therefore, it was traditionally limited to the sphere of employment.⁴⁵

⁴⁰ Article 19, TFEU.

⁴¹ *Segi and others v European Council* (Case C-355/04 P).

⁴² Becker "Managing diversity in the EU, inclusive European citizenship and third- country nationals" *Yale Human Rights and Development Law Journal* (2004) 156.

⁴³ Becker "Managing diversity in the EU, inclusive European citizenship and third- country nationals" *Yale Human Rights and Development Law Journal* (2004) 157.

⁴⁴ Becker "Managing diversity in the EU, inclusive European citizenship and third- country nationals" *Yale Human Rights and Development Law Journal* (2004) 156-158.

⁴⁵ *Handbook on European non-discrimination law* FRA European Union Agency of fundamental Rights and Council of Europe (2010) 12.

Non-discrimination law in Europe prohibits direct and indirect discrimination only in certain contexts. In the EU, non-discrimination law was introduced to facilitate the functioning of the internal market and was, therefore, traditionally confined to the sphere of employment.⁴⁶

The purpose of the Employment Equality Directive⁴⁷ is to protect employees against discrimination on the grounds of sexual orientation, disability, age and religion or belief. This Directive applies only in the context of employment.

Article 14 of the ECFR guarantees equality in relation to the enjoyment of the substantive rights guaranteed by the ECFR. In addition, Protocol 12 to the ECFR, which came into force in 2005, expands the scope of the prohibition on discrimination to cover any right which is guaranteed at the national level, even where this does not fall within the scope of an ECFR right. However, the Protocol has been ratified by only 17 of the 47 Council of Europe members, among which six are EU Member States. This means that among the EU Member States there exist different levels of obligations in European non-discrimination law.⁴⁸

With this background in mind the EUCJ in *Kaltoft* was approached for a preliminary ruling with regards to discrimination based on obesity and the interpretation of the general principles of EU law and the general framework for equality in employment and occupation as set out in the applicable EU Directive.⁴⁹ It is submitted that the reason for the referral was of paramount importance for EU law as none of the conventions, treaties and directives dealing with fundamental rights and freedoms explicitly make provision for discrimination on other arbitrary grounds. In effect, this means that when unfair discrimination disputes arise, the grounds must be directly or indirectly linked to a listed ground for discrimination. The facts in *Kaltoft*⁵⁰ were as follows:

⁴⁶ Weiss *Introduction to European Labour Law: European Legal Framework, EU Treaty Provisions and Charter of Fundamental Rights* (2014) The Hague: Schlachter (Hrsg.), EU Labour Law - A Commentary 3.

⁴⁷ Council Directive 2000/ 78/EC.

⁴⁸ Protocol 12 of 2005.

⁴⁹ Council Directive 2000/ 78/EC.

⁵⁰ ECLI:EU:2014:2463.

Mr. Kaltoft was employed as a child-minder by the Danish municipality. Mr. Kaltoft was obese but he made attempts to lose weight. After a one-year absence Mr. Kaltoft resumed his duties as a childminder. He was frequently visited by the head of childminders who always inquired about his weight. Due to a decrease in the number of children in the municipality, the employer had to dismiss one childminder and Mr. Kaltoft was nominated. At a meeting pertaining to his dismissal Mr. Kaltoft enquired why he was the only childminder affected. His obesity was mentioned as a factor that was considered.⁵¹

The legal arguments raised on behalf of Mr. Kaltoft were that his dismissal constituted discrimination based on obesity. Mr. Kaltoft was the only childminder affected by the alleged decline in workload. No other reasons were identified as a ground for dismissal apart from his obesity. Mr. Kaltoft claimed compensation for unfair discrimination.⁵²

The employer argued that Mr. Kaltoft was dismissed following a “specific assessment” based on a decline in the number of children”.⁵³ The matter was referred to the EUCJ who had to make a preliminary ruling on the following legal questions: Whether it was against EU law for a public-sector employer to discriminate on grounds of obesity? If discrimination based on obesity is prohibited in terms of EU law, does it have a direct application to a Danish citizen and his employer? If there is a prohibition against discrimination on grounds of obesity in terms of EU law in the labour market, who bears the burden of proof? And whether obesity can be deemed to be a disability?⁵⁴

The EUCJ identified the general principle of non-discrimination as an underlying value and an integral part of EU law. The principle of non-discrimination binds member states in so far as a national matter falls within the scope of EU law. It was noted that discrimination on grounds of obesity was not a specific provision in EU law.

⁵¹ *Kaltoft* at 3.

⁵² *Kaltoft* at 3.

⁵³ http://www.equalrightstrust.org/ertdocumentbank/Case%20Summary%20CJEU%20-%20Obesity_Final.pdf (accessed on 20 October 2016).

⁵⁴ *Kaltoft* at 3 and 4.

Specific mention was made of the Employment Equality Directive⁵⁵ that does not cite obesity as a ground for discrimination. The court also clearly advised against a too broad extension of listed grounds.⁵⁶

The court also considered the CFEU⁵⁷ which was also not applicable to the matter at hand if one considers the wording of the non- discrimination clause:

“1. Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited.

2. Within the scope of application of the Treaty establishing the European Community and of the Treaty on European Union, and without prejudice to the special provisions of those Treaties, any discrimination on grounds of nationality shall be prohibited.”⁵⁸

With regards to the first question whether it is contrary to EU law to discriminate against a person on grounds of obesity the court held that no such discriminatory ground exists and therefore the EUCJ did not consider the second and third questions.⁵⁹ As to whether obesity is a disability, the court defined “disability” as:

“Referring to a limitation which results in particular from long-term physical, mental or psychological impairments which in interaction with various barriers may hinder the full and effective participation of the person concerned in professional life on an equal basis with other workers.”⁶⁰

The court emphasised that this concept must be understood as referring “not only to the impossibility of exercising a professional activity, but also to a hindrance to the exercise of such an activity.”⁶¹

⁵⁵ Council Directive 2000/ 78/EC.

⁵⁶ *Kaltoft* 5.

⁵⁷ 2000/ C 364/01.

⁵⁸ Article 21 CFEU.

⁵⁹ *Kaltoft* at 4.

⁶⁰ *Kaltoft* at 4.

⁶¹ *Kaltoft* at 5.

According to the court the aim of the Directive⁶² is the implementation of equal treatment and access to work for persons with disabilities. The origin of the disability, should not be a deciding factor when considering that concept of “disability”.⁶³ I agree with the court in so far as the nature of the disability and the effect on the subject matter and his ability to work is concerned. What caused the disability, should not be taken into consideration. The distinguishing question remains whether there was direct or indirect discrimination on grounds of a disability. The court noted that before addressing disability and the role of employers in accommodating disabled employees, the definition of “disability” as quoted hereinabove must be considered.

The court stated, therefore, that:

“[I]f, under given circumstances, the obesity of the worker: entails a limitation which results in particular from physical, mental or psychological impairments which in interaction with various barriers may hinder the full and effective participation of the person concerned in professional life on an equal basis than other workers”.⁶⁴

The court also identified a set of conditions to be considered: Whether the obesity of the worker posed a limitation which resulted from physical, mental or psychological impairment? If these barriers might have hindered the full and effective participation in the work environment on an equal basis with other workers? And whether the limitation had a long-term effect?

Where these factors are present obesity can be regarded as a disability. It was left to the national court to consider these factors and make the determination whether Mr. Kaltoft was disabled.⁶⁵

The preliminary ruling provides us with an interpretation that has a major influence on the interpretation and implementation of non-discrimination law in the EU and elsewhere. It can be argued that this preliminary ruling gives a very broad interpretation of the applicable directive and confirms that the underlying value of non-discrimination law in the EU is equality itself.

⁶² Council Directive 2000/ 78/EC.

⁶³ *Kaltoft* at 5.

⁶⁴ *Kaltoft* at 5.

⁶⁵ *Kaltoft* at 5.

The EUCJ had to be creative and it considered the concept of “disability” very widely. It would not be surprising if the EU, based on this judgement, considers amendments of applicable laws to incorporate discrimination on an arbitrary ground, as was done in the South African Employment Equity Act (EEA).⁶⁶

2.3 ILO Standards on discrimination

Since the establishment of the ILO in 1919 international labour standards have played an integral role in South Africa. Established as a system of international law, standards aimed at promoting opportunities for all people to be part of the labour market under condition of freedom, equity, security and dignity. These standards have grown in importance since 1919 due to globalisation of world economies.

The three main objectives of the ILO can be summarised as follows:⁶⁷

“a) To prevent social dumping and to prohibit the exploitation of workers by a country or company; b) to fight poverty and to prevent unrest; and c) to promote peace through social justice.”

As early as the 1900’s the need for minimum labour standards was identified.⁶⁸ After World War II the Philadelphia Declaration was adopted to incorporate Human Rights as a basis for social policy. The Philadelphia Declaration is now an annexure to the ILO constitution.⁶⁹

The three main organs of the ILO consist of the General Conference, the Governing Body and the International Labour Office. The General Conference can be described as the highest organ in the hierarchy with representatives from all the member states. These representatives must consist of two delegates from government, one employer’s delegate and one worker’s delegate. Voting with regards to international labour matters is done on this level.⁷⁰

⁶⁶ S 6(2) EEA 55 of 1998.

⁶⁷Preamble of the Constitution of the ILO.

⁶⁸ Wisskirchen “The standard- setting and monitoring activity of the ILO: Legal questions and practical experience” *International Labour Reveiw* (2005) Vol 144 (3) 254.

⁶⁹ Wisskirchen “The standard- setting and monitoring activity of the ILO: Legal questions and practical experience” *International Labour Reveiw* (2005) Vol 144 (3) 254.

⁷⁰ Wisskirchen “The standard- setting and monitoring activity of the ILO: Legal questions and practical experience” *International Labour Reveiw* (2005) Vol 144 (3) 255.

The executive organ of the ILO is the governing body consisting of 28 member states whose delegates also have to be comprised from the government, employers and workers.⁷¹ The International Labour Office evaluates and enforces compliance with ILO standards. The South African Legal fraternity must be aware of ILO standards since, the Constitution regulates the application of South African law.⁷² Van Niekerk *et al* emphasises that the CC has ruled that international instruments, whether binding or not, must be considered and used for interpretation.⁷³

2.3.2 The relationship between the ILO standards and domestic law in member states

International labour standards are adopted in the form of conventions and recommendations. Conventions, if ratified by member states, are legally binding once they are ratified whereas recommendations serve as non-binding guidelines to member states.⁷⁴

The governing body of the ILO has identified 8 fundamental Conventions and aim to achieve universal ratification thereof.⁷⁵ The 8 Conventions are: Freedom of

Association and the Right to Organise Convention,⁷⁶ Right to Organise and Collective Bargaining Convention,⁷⁷ Forced Labour Convention,⁷⁸ Abolition of forced Labour Convention,⁷⁹ Minimum Age Convention,⁸⁰ Worst Forms of Child Labour Convention,⁸¹ Equal remuneration Convention,⁸² and the Discrimination (Employment and Occupation) Convention.⁸³

⁷¹ Wisskirchen "The standard- setting and monitoring activity of the ILO: Legal questions and practical experience" *International Labour Review* (2005) Vol 144 (3) 255.

⁷² Van Niekerk *et al Law at work* (2015) 29.

⁷³ Van Niekerk *et al Law at work* (2015) 29.

⁷⁴ ILO "Rules of the game: A brief introduction to international labour standards" (2013) *Revised edition* 9.

⁷⁵ Van Niekerk *et al Law at work* (2015) 24-25.

⁷⁶ 87 of 1948.

⁷⁷ 89 of 1949.

⁷⁸ 29 of 1930.

⁷⁹ 105 of 1957.

⁸⁰ 138 of 1973.

⁸¹ 184 of 1999.

⁸² 100 of 1951.

⁸³ 111 of 1958.

Member states of the ILO are required to submit any convention adopted by their national authority for the enactment of legislation to give effect to the ratified convention and the member state is also subject to the ILO's supervisory system.⁸⁴

Ratification of conventions remain low, especially in developing countries due to competitive disadvantages once a convention is ratified. Some countries simply do not possess the capacity to enforce all the detailed rules and requirements ratification prescribes.⁸⁵

Because of poor ratification, the ILO established 4 core labour rights that all member states must honour without the requirement of ratification. These four labour rights are: Freedom of association and collective bargaining; Prohibition of forced labour; Prohibition of child labour and Prohibition of discrimination.

For purposes of this dissertation it is important to note that prohibition of discrimination is a core labour right and the standards about discrimination in the work place, of which discrimination on grounds of obesity may be an example, pose a duty on employers to investigate sound labour practices in this regard with the ILO standards and national labour legislation in mind.

2.3.3 Enforcement measures of the ILO

The mechanisms to supervise the applications of conventions by member states are found in the Constitution of the ILO. These mechanisms provide for reporting⁸⁶ and complaints procedures.⁸⁷

Article 22 of the ILO Constitution requires member states to report on the conventions that are ratified, while article 19 makes provision for the ILO to request reports from government with regards to the reasons for not ratifying a certain convention and what actions have been taken to comply with certain conventions.

⁸⁴ ILO "Rules of the game: A brief introduction to international labour standards" *Revised edition* 15.

⁸⁵ Weiss "International Labour Standards: A complex Public-Private-Policy Mix" *International Journal of Comparative Labour Law and Industrial relations* (2013) 6.

⁸⁶ Article 22, ILO Constitution.

⁸⁷ Article 23, ILO Constitution.

These reports are reviewed by the Committee of Experts on the application of conventions and recommendations annually who, in turn, compiles its own report. The committee may request further information from a member state.⁸⁸

Another form of supervision can be found in the “name and shame” approach at the International Labour Conference where reports of the Committee of Experts on the application of conventions and recommendations are tabled and discussed.⁸⁹

In 1998 when the ILO identified the core labour rights mentioned hereinabove, a follow-up procedure was also established. This procedure requires member states who have not ratified the eight conventions concerning core labour rights to report annually on their progress in implementing the necessary measures to promote these labour standards. Employer and worker groups can then comment on the reports. A global report is then compiled by the Director General of the International Labour Office.⁹⁰ There are complex procedures on complaints and reporting within specific timelines prior to forcing a member state to comply with a ratified convention. It is my opinion that reporting and enforcement measures should be simplified and that the ILO may benefit from a permanent arbitration organ or court to invoke the necessary enforcement measures.⁹¹

Weiss confirms this view as he states that there are no proper enforcement measures in place. He notes that sanctions may be imposed by other member states to force countries to comply and that International Framework Agreements may be an effective tool to insure compliance.⁹²

⁸⁸ Elliott “The ILO and Enforcement of Core Labour Standards” *International Economics Policy Briefs* (2000) 00-6 2.

⁸⁹ Elliott “The ILO and Enforcement of Core Labour Standards” *International Economics Policy Briefs* (2000) 00-6 2.

⁹⁰ Elliott “The ILO and Enforcement of Core Labour Standards” *International Economics Policy Briefs* (2000) 00-6 3-4.

⁹¹ Weiss “International Labour Standards: A complex Public-Private-Policy Mix” *International Journal of Comparative Labour Law and Industrial relations* (2013) 11.

⁹² Weiss “International Labour Standards: A complex Public- Private-Policy Mix” *International Journal of Comparative Labour Law and Industrial relations* (2013) 11.

2.3.4 Underlying value system of the ILO and discrimination in the workplace

With the prohibition of discrimination identified as a core labour right by the ILO one can conclude that member states should make matters relating to discrimination a priority. Workplace discrimination, however, remains a persistent problem due to prejudice, stereotyping and biased institutions. An obese person can for instance be perceived as lazy or someone that will take too much sick leave.

In terms of Convention 111 of the ILO⁹³, discrimination is defined as:

“(a) any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin (among other characteristics), "which has the effect of nullifying or impairing equality of opportunity and treatment in employment or occupation.”⁹⁴

Furthermore Convention 111 goes further and includes any other distinction, exclusion or preference as grounds for discrimination.⁹⁵ In my opinion the Convention was formulated in such a manner that some examples of discrimination were excluded in the listed grounds. Grounds that are listed are clearly not a closed list.⁹⁶

The South African Constitution acknowledges the importance of international standards and provides for the consideration of international law when its own Bill of Rights is interpreted.⁹⁷ In *State v Makwanyane and another*,⁹⁸ the CC provided clarity and confirmed that binding, as well as non-binding international law should be considered when interpreting the Bill of Rights. The Constitution is, however, not the only statute to promote the harmonization of South African law and international human rights law. Objectives of the Labour Relations Act of 1995⁹⁹ are “to give effect to the obligations incurred by the Republic as a member state of the International Labour Organisation.”¹⁰⁰

⁹³ Convention no. 111, Convention Concerning Discrimination in Respect of Employment and Occupation, 1958.

⁹⁴ Article 1(a) of Convention 111.

⁹⁵ Article 1 (b) of Convention 111.

⁹⁶ Article 1(b) of Convention no. 111, 1958, makes provision for any other distinction, exclusion or preference not listed in Article 1(b).

⁹⁷ S 39 (1), The Constitution of the Republic of South Africa 108 of 1996.

⁹⁸ 1995 (3) SA 391 CC.

⁹⁹ Act 66 of 1995.

¹⁰⁰ S 1 & 3 of Act 66 of 1995.

2.4 Conclusion

International labour law and labour standards have an impact on states and governments across the globe. Due to globalisation and the growth of international trade, international standards need to be established to protect vulnerable employees against discrimination and exploitation. Despite the need for uniform standards the diversity of states makes the establishment thereof challenging. In my view, the international standards on discrimination should be minimum requirements.¹⁰¹

Case law and different interpretations by member states and even by international courts and tribunals cannot be disregarded as it may have a direct impact on the interpretation and enforcement of our own laws. Therefore, one should not only look at South African law but seek to find solutions and guidelines in International law when considering the role of employers where obesity in the workplace is to be addressed.

The labour standards relevant to obesity in terms of both the EU and the ILO are based on equality and non-discrimination. Neither the EU nor the ILO, list obesity as a ground for discrimination. However, the grounds for discrimination in both the EU and the ILO are not limited. It can be concluded that equality and non-discrimination in workplaces in Europe and elsewhere are the main considerations when addressing obesity in the workplace. ILO and EU standards do however not assist with the practical implications of obesity in workplaces due the diversity of member states that must comply to these standards. To only consider the EU and ILO standards do not give us sufficient guidelines when dealing with obesity specifically.

In Chapter 3 the application for these labour standards by member states of both the EU and the ILO will be evaluated to see how they are incorporated into domestic law. This will assist when consideration is given to whether South African law is sufficient to deal with obesity. Thus far one can state that employees have the right to be treated with dignity and not to be discriminated against. The challenge for the employer will be to determine whether an obese person would qualify as disabled or whether such a person can be treated like any other employee for purposes of incapacity.

¹⁰¹ http://www.ilo.org/wcmsp5/groups/public/---ed_emp/---emp_ent/---multi/documents/publication/wcms_116342.pdf accessed on 29 August 2017. In this Circular, it is stressed that National Labour Standards should be consulted.

Chapter 3

International perspectives

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3.1 Introduction

The World Health Organisation (WHO) states that obesity and overweight is a global problem. They estimate that obesity has tripled since 1975 and define obesity and overweight as “abnormal or excessive” fat accumulation that may impair health.¹⁰² In a report of the International Labour Organisation (ILO) on equality at work, it is stated that discrimination based on lifestyle is prevalent across the globe. Smoking and being overweight is specifically mentioned as an “occupational disadvantage” in many countries.¹⁰³

The above-mentioned report further states that a person’s capacity to perform a specific job is an important factor to consider when discrimination and equality is addressed.¹⁰⁴ This means that one can argue that it may be fair not to employ a person if his/her obesity or overweight prevents him/her from performing his/her duties.¹⁰⁵ This approach is like the South African “inherent requirements of the job”- defence employers may raise.

Member states of the ILO must adhere to the relevant ILO regulations and specification and incorporate this into domestic laws.

¹⁰² <http://www.who.int/mediacentre/factsheets/fs311/en/> accessed on 17 November 2017.

¹⁰³ Report of the Director General “Equality at work: Tackling the challenges, Global Report under the follow up to the ILO Declaration on Fundamental Principles at work” 96th session 2007 49.

¹⁰⁴ Report of the Director General “Equality at work: Tackling the challenges, Global Report under the follow up to the ILO Declaration on Fundamental Principles at work” 96th session 2007 50 at 187.

¹⁰⁵ Report of the Director General “Equality at work: Tackling the challenges, Global Report under the follow up to the ILO Declaration on Fundamental Principles at work” 96th session 2007 50 at 187.

As the ILO has, as early as 2007, already identified obesity as a ground for discrimination based on lifestyle, it is a factor that many states will consider. Policies relating to obesity is likely to increase.¹⁰⁶

As member of the ILO, the South African legal fraternity must take note and consider the status quo and interpretation of other countries with regards to obesity and weight discrimination in workplaces. This will certainly enable them to identify certain similarities and differences that can be used to develop a set of rules or recommendations that can be implemented in workplaces nationally.

In this Chapter, the legal stance in the United Kingdom (UK), United States of America (USA) and Canada will be studied to further evaluate the application of ILO and EU standards in member states. The study will assist in determining whether South African Law would sufficiently cover disputes relating to obesity in employment. The aim is also to assist in identifying recommendations and guidelines for the South African employer.

3.2 The United Kingdom

Like South Africa, the UK does not have laws that specifically protect obese persons, however, when the *Kaltoft*-decision was made, the UK was still a member of the European Union (EU) and EU law still had an impact on UK law.¹⁰⁷ The Equality Act (EA)¹⁰⁸ identifies protected characteristics namely: age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex; sexual and sexual orientation as protected grounds of discrimination.¹⁰⁹ Obesity is not on this list, however, disability is.

The EA defines a disability as follows: “A person has a disability if the person has a physical or mental impairment, and the impairment has a substantial and long-term adverse effect on person’s ability to carry out normal day-to-day activities.”¹¹⁰

¹⁰⁶ Smit and Viviers *Vulnerable Employees* (2017) 149.

¹⁰⁷ Viviers en Smit “The Phenomenon of Weight based discrimination in South African Employment” *Journal for Juridical Science* (2014) 105.

¹⁰⁸ Equality Act 2010.

¹⁰⁹ S 4 EA.

¹¹⁰ S 6(1) EA.

From the definition of the term “disability” as it appears in the EA, an obese employee will have to prove that the obesity has a “substantial and long-term adverse effect on the employee’s ability to carry out normal day-to-day activities”. The question arises whether obesity will fall within the definition of a disability in terms of the EA.

In the matter of *Walker v Sita Information Networking Ltd*¹¹¹ (*Walker*), it was held that an obese employee with many related and unrelated illnesses, both mental and physical, would be covered by the EA under UK-law. In this matter, an obese employee claimed that his obesity was a disability and therefore, he should be covered under the Disability Discrimination Act.¹¹² This employee suffered from many conditions that were linked to his obesity. The Employment Appeal Tribunal, investigated the extent of the employee’s impairments and stressed that obesity will not constitute a disability, but that the person may be classified as disabled in the case of discrimination if the conditions disable the employee to participate in everyday activities.¹¹³

It can be argued that obesity is not a disability but the health problems associated with obesity may render an employee disabled. Flint and Snook support this argument when they state that, “The ruling may be related to its particular facts, but it now seems that obesity may make it more likely that people are regarded as having a disabling characteristic within meanings ascribed in the EA and domestic laws.”¹¹⁴

The *Walker*-judgement is supported by the *Kaltoft*-decision that is discussed in Chapter 2. The fact that the tribunal acknowledge obesity as a possible form of disability does leave UK employees with a recourse against weight discrimination.¹¹⁵

Flint and Snook also state that the instances in which obese individuals can claim protection under the EA should be examined further, especially in the light of reasonable accommodation of such employees. They also sketch scenarios that may become relevant in the workplaces in the UK.

¹¹¹ UK EAT/0097/12 KN (2013).

¹¹² Disability Discrimination Act, 1995 (Replaced by the EA).

¹¹³ Flint and Snook “Disability discrimination and obesity: The big questions?” (2015) at <http://shura.shu.ac.uk/10873> 6 accessed on 18 November 2017.

¹¹⁴ Flint and Snook “Disability discrimination and obesity: The big questions?” (2015) at <http://shura.shu.ac.uk/10873> 6 accessed on 18 November 2017.

¹¹⁵ Smit and Viviers *Vulnerable Employees* (2017) 157.

The UK police service, for instance, require regular fitness tests and the question is raised whether fitness tests would be incorporated in employment contracts in other establishments.¹¹⁶

3.3 The United States of America

The statistics relating to obesity in the USA are staggering. It is recorded that almost 34.9 % of adults in the USA are obese.¹¹⁷ Puhl states that obesity and overweight people are vulnerable in the American society and that weight bias, discrimination and prejudice is at the order of the day.¹¹⁸ Staman confirms that obesity is an epidemic in the United States and that obesity discrimination is prevalent.¹¹⁹

Federal laws in the USA do not make provision for weight discrimination. It has, however, been argued that weight is a disability when the Americans with Disabilities Act (ADA)¹²⁰ or the Rehabilitation Act¹²¹ are considered.¹²² The ADA was Amended in 2008 to make provision for more medical conditions.¹²³

The ADA (as amended) defines a person with a disability as a person who has a physical or mental impairment that substantially limits one or more major life activity. This includes people who have a record of such an impairment, even if they do not currently have a disability. It also includes individuals who do not have a disability but are regarded as having a disability. The ADA also makes it unlawful to discriminate against a person based on that person's association with a person with a disability.¹²⁴ Obesity is not expressly included in this definition.

¹¹⁶ Flint and Snook "Disability discrimination and obesity: The big questions?" (2015) at <http://shura.shu.ac.uk/10873> 6 accessed on 18 November 2017.

¹¹⁷ Smit and Viviers *Vulnerable Employees* (2017) 149.

¹¹⁸ Puhl "Weight Discrimination: A Socially Acceptable injustice" <http://www.obesityaction.org/wp-content/uploads/Obesity-Discrimination.pdf> accessed on 17 November 2017.

¹¹⁹ Staman "Obesity Discrimination and the Americans with Disabilities Act" (2007) *CRS* 2.

¹²⁰ ADA of 1990.

¹²¹ 1973.

¹²² Staman "Obesity Discrimination and the Americans with Disabilities Act" (2007) *CRS* 2.

¹²³ Hodges "A new wave of litigation: Obesity related disability discrimination" *Georgia Employment Law Letter* (2013) 1.

¹²⁴ Viviers en Smit "The Phenomenon of Weight based discrimination in South African Employment" *Journal for Juridical Science* (2014) footnote 67 at 99.

The Equal Employment Opportunity Commission (EEOC) sought to provide guidelines and clarity to employers and employees with the interpretation and application of the ADA.¹²⁵ It did not expressly exclude obesity or being overweight from the definition, but stated that only severe obesity would be regarded as an impairment in terms of the ADA definition.

It further found that if an employee could prove that the obesity was caused by a condition such as a thyroid- or heart problem the obesity could be regarded as a disability.¹²⁶ It can be argued that if the obesity does not have an underlying cause the ADA would not protect such an employee and other avenues should be sought to assist the employee to lose the weight to be able to function properly in society and in the workplace. Should the employee not be willing to accept such assistance dismissal may be fair.

This argument is contrary to the position in the UK and the EU where it was found that obesity may in severe cases be a disability regardless of the underlying cause.¹²⁷ It seems that employees' onus to prove discrimination in terms of the ADA would be more difficult than in Europe. The USA identifies the difference between incapacity and a disability in this regard.

There are certain American jurisdictions that do protect its citizens from appearance-based discrimination that specifically includes weight namely: Michigan, Santa Cruz (California), Urbana (Illinois), Howard County (Maryland), San Francisco (California) and Madison (Wisconsin).¹²⁸ Employees that do not fall under these jurisdictions must look at indirect ways to enforce their rights.

Case law with regards to weight discrimination and obesity lawsuits give insight into the American point of view. In *Cook v Rhode Island Department of Mental Health, Retardation and Hospitals* (Cook)¹²⁹ the Applicant applied for a position as institution attendant at the Respondent.

¹²⁵ A new wave of litigation: Obesity related disability discrimination" *Georgia Employment Law Letter* (2013) 1.

¹²⁶ Viviers en Smit "The Phenomenon of Weight based discrimination in South African Employment" *Journal for Juridical Science* (2014) 100.

¹²⁷ See Chapter 4 paragraph 4.2 hereinabove.

¹²⁸ Viviers and Smit "The Phenomenon of Weight based discrimination in South African Employment" *Journal for Juridical Science* (2014) 100.

¹²⁹ 10F.3d 17 (1993).

The Applicant's job application was unsuccessful and the reason given was that she was too fat for the job despite her good employment history in a similar role. The applicant brought the matter to court, basing the ground for discrimination on her weight under the Rehabilitation Act.

The applicant was successful. The Respondent's main argument was that the applicant, due to the morbid obesity, would not be able to fulfil the physical demands of the position. It was found that despite the morbid obesity the applicant was still able to fulfil the inherent requirements of the job and that the test for disability was satisfied.¹³⁰

In *Cook* both the questions with regards to obesity as a disability as well as inherent requirements of the job was considered by the court.

In *Francis v City of Meridan (Francis)*¹³¹ a firefighter was disciplined for not meeting weight guidelines prescribed by the employer. Francis's claim that he was discriminated against because of a disability under the ADA failed. He did not prove that he suffered for an impairment and merely claimed that he did not meet weight requirements.¹³²

The matter of *Gerdom v Continental Airlines Inc.(Gerdom)*¹³³ an air-hostess was dismissed due to not meeting the employer's weight requirements. If the weight limit is exceeded the hostess would have to lose at least 2 pounds per week to prevent suspension and dismissal. These weight limits only applied to females and their male colleagues were not affected. The employer conceded that it wanted to ensure that customers were served by "thin, attractive women". The employer did not defend its case successfully.¹³⁴

¹³⁰ Smit and Viviers *Vulnerable Employees* (2017) 152.

¹³¹ 129 F.3D 281 (1997).

¹³² Staman "Obesity Discrimination and the Americans with Disabilities Act" (2007) *CRS* 5.

¹³³ 692F. 2d 602 9th CIR.1981.

¹³⁴ Viviers and Smit "The Phenomenon of Weight based discrimination in South African Employment" *Journal for Juridical Science* (2014) 102.

In both *Francis* and *Gerdorn* it seems that the use of weight to dismiss an employee was arbitrary and a mere observation of person's physique and that the nature of the work does not warrant such drastic measures. The test would in most cases still be whether the employee has the ability, despite the weight, to do the work required.

American courts in jurisdictions where weight discrimination is not regulated through statute will still look at the available disability and discrimination laws to assess matters regarding obesity.

3.4 Canada

As in the UK and the USA, Canada also has an obesity crisis. It is regarded as one of the main causes of preventable deaths (apart from smoking).¹³⁵ The Canadian Medical Association predicts that obesity will soon become the main cause of preventable deaths in Canada.¹³⁶ It is, therefore, logical that obesity would also be a contentious point in the Canadian workplace.

Although obesity is also not specifically included in human rights and equity laws in Canada, the Canadian Charter of Human Rights and Fundamental Freedoms¹³⁷ do make provision for discrimination based on disability. Apart from the abovementioned Charter, Canada has a federal human rights act as well as 14 human rights acts in 14 provinces.¹³⁸

Section 15 of the Canadian *Charter of Human Rights and Fundamental Freedoms* read as follows:

“15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

(2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.”¹³⁹

¹³⁵ Eisenburg *et al* “Legislative approaches for tackling the Obesity epidemic” *CMAJ* 183 (2012).

¹³⁶ Eisenburg *et al* “Legislative approaches for tackling the Obesity epidemic” *CMAJ* 183 (2012).

¹³⁷ 1982.

¹³⁸ Fredman “Comparative study of anti-discrimination and equality laws of the US, Canada, South Africa and India” European Commission (2012) 18.

¹³⁹ Charter of Human Rights and Fundamental Freedoms, 1982.

For clarification with regards to what may be construed as a disability or a handicap *Quebec (Commission des droits de la personne et des droits de la jeunesse) v Boisbriand (City of)*,¹⁴⁰ is a leading Canadian civil rights decision of the Supreme Court of Canada.

The court considered the nature of a disability in law and found that a disability is not merely a biomedical condition but rather can exist as a perceived limitation or social construct.¹⁴¹

The decision arises from two separate claims by individuals for discrimination under the Quebec Charter of Human Rights and Freedoms. The first individual was refused employment with the city of Montreal as a gardener-horticulturalist because her medical condition involving chronic back pains would be too costly and would interfere with her long-term employment. The second individual was a police officer for the city of Boisbriand. He was dismissed after missing work due to having Crohn's disease.¹⁴²

The matter focused on the interpretation of the word "handicap" in the Charter. The court stated that given the Charter's quasi-constitutional status it must be given a wider interpretation, for instance, a handicap that can exist outside of functional limitations. There is also a subjective component on which there can be discrimination. Although the court advised that there may be a defence against discrimination based on the requirements for the job.¹⁴³

It can be argued that obesity itself will not be regarded as a disability but that it may cause conditions that limit a person to such an extent that a person with such a debilitating condition may be protected in terms of Canadian Human Rights Law. The Ontario Human Rights Code¹⁴⁴ defines "disability" as:

"any degree of physical disability, infirmity, malformation or disfigurement that is caused by bodily injury, birth defect or illness and

¹⁴⁰2000 SCC 27, [2000] 1 S.C.R. 665.

¹⁴¹ https://www.cdn-hr-reporter.ca/hr_topics/interpretation-statutes/perceived-disability-protected, accessed on 22 November 2017.

¹⁴² https://www.cdn-hr-reporter.ca/hr_topics/interpretation-statutes/perceived-disability-protected, accessed on 22 November 2017.

¹⁴³ https://www.cdn-hr-reporter.ca/hr_topics/interpretation-statutes/perceived-disability-protected, accessed on 22 November 2017.

¹⁴⁴ *Human Rights Code* of 1962.

without limiting the generality of the foregoing includes, diabetes mellites, epilepsy, a brain injury, any degree of paralysis, amputation, lack of physical co-ordination, blindness, visual impediment or physical reliance on a guide dog or other animal or on a wheelchair or other remedial appliance or device.”¹⁴⁵

The question arises whether obesity can in terms of the above definition be a disability. In *Lombardi v Walton Enterprises*¹⁴⁶ this question was answered in the affirmative. The Canadians go further to also state that a social perception that a person may have a disability, even though such a perception is wrong, can have the effect that discrimination based on such an incorrect perception will be protected under human rights legislation.¹⁴⁷

In this instance obesity discrimination will, if the right circumstances exist, be a disability for purposes of protection under the various Human Rights laws in Canada, which will in effect cause employers to consider reasonable accommodation for such employees.

3.5 Conclusion

Although the three countries discussed do not have specific legislation for the protection of obese individuals, it seems that in all three instances obesity can be regarded as a disability when the condition is so debilitating that it will affect work performance or when it causes medical conditions that will impair an individual's ability to perform everyday tasks. From the USA study, one can argue that employer's will have to be careful to not use obesity as an arbitrary reason to deny a person employment and that certain weight restrictions in employment policies should be carefully considered and when such restrictions are imposed. Employers must bear the onus to prove that such restrictions are necessary. All three countries follow a similar approach with regards to obesity, and especially obesity discrimination in the workplace.

¹⁴⁵ S10 *Human Rights Code* of 1962.

¹⁴⁶ (2012) HRTO 1675 (CANLII).

¹⁴⁷ 2000 SCC 27, [2000] 1 S.C.R. 665.

The core value these countries share with South Africa is the right to human dignity and the protection thereof.

The USA is the only country where it seems that the underlying cause of obesity is considered before a call is made on whether an individual will be protected under the ADA. In my opinion, this approach is correct as a condition that can be overturned by correct lifestyle choices should not get special attention.

One can conclude that the current position internationally is that obesity and related conditions must be considered by interpreting current law and legal definitions as opposed to developing and amending the law to make provision for obesity or weight based discrimination to be protected.¹⁴⁸

The overlap between incapacity and obesity as a disability must be considered carefully, and all the factors relating to a specific case should be evaluated first to ensure that employers deal with the situation on the correct manner. In this instance, the Canadian approach may provide a guideline with regards to distinguishing between incapacity and disability. Employees have the right not to be discriminated against unfairly. It is role of employers to ensure that their policies and decisions that affect obese employees do not infringe on that rights. Furthermore, appearance is an arbitrary ground for discrimination, according to the USA decisions. South Africa will in my opinion take a similar approach as discussed in Chapter 4.

¹⁴⁸ This statement is based on the fact that all three countries follow this approach.

Chapter 4

Obesity in the workplace: The South African position

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4.1 Introduction

Obesity and illnesses related to obesity in South Africa are regarded by many medical practitioners as a pandemic. Coupled with the growing rate of unemployment in South Africa it is essential to investigate the current legal position and role that employers must play when addressing obesity in the South African Workplace.¹⁴⁹

The European Court of Justice (EUCJ) decision in *Fag og Arbejde (FOA) v Kommunires Landsforening (KL) obo Karsten Kaltoft*, as discussed in Chapter 2, is a point of departure to be considered in South Africa by employers. In South Africa, there have not been any judgments concerning obesity as a disability. The question as to how employers should address the matter should therefore be regarded as a key initiative in the field of labour law reform. Schedule 8 of the Labour Relations Act (LRA),¹⁵⁰ also known as the Code of Good Practice: Dismissal, provides guidelines with regards to substantive and procedural fairness in dismissals. Obesity will have a direct influence on work performance and may cause ill health that renders an employee unable to work. In terms of Schedule 8, guidelines do exist for dealing with poor work performance and incapacity.¹⁵¹

¹⁴⁹ Some, Rashied, Ohonba “The Impact of obesity on employment in South Africa” ERZA working paper (2014) 475 2.

¹⁵⁰ 66 of 1995.

¹⁵¹ S 9, 10, and 11 of Schedule 8.

The mere fact that an employee's obesity contributes to that individual's incapacity to reach a required standard of performance as required by the employer may be more complicated than just following a dismissal procedure as contemplated by the LRA.¹⁵² Employers must, in my opinion, tread carefully when applying the available procedures, especially when obesity discrimination is a factor. In the absence of a benchmark judgment on obesity it could be beneficial to this research to investigate judgments on substantive equality. Obesity is not a listed ground for discrimination as it appears from section 6 of the Employment Equity Act (EEA),¹⁵³ therefore, the fundamental rights as specified in the Constitution¹⁵⁴ must be considered. Case law with regards to discrimination on "other arbitrary grounds" will also be investigated.

In this chapter incapacity, obesity as a disability, as well as discrimination on arbitrary grounds be investigated as well as the defence of inherent requirements of a job will be discussed to see how obesity should be treated in South African workplaces.

4.2 Incapacity

The treatment of obese persons in the workplace and the extent to which discrimination and dismissal laws should be applied by employers in this instance necessitate an investigation into the existing duties of employers. Especially when obesity becomes a factor in work performance or incapacity due to ill health.

The LRA regulates, amongst others, dismissal law and the law pertaining to termination of employment. It expressly recognizes the following grounds for termination of the employment contract: Misconduct on the part of the employee;¹⁵⁵ the employee's poor performance and/or incapacity¹⁵⁶ and the operational requirements of the employer.¹⁵⁷

¹⁵² 66 of 1995.

¹⁵³ 55 of 1998.

¹⁵⁴ Chapter 2, The Bill of Rights.

¹⁵⁵ S 2(2) of Schedule 8.

¹⁵⁶ S 188.

¹⁵⁷ S 189.

Schedule VIII of the LRA as well as the accompanying Code of Good Practise regulates the substantive and procedural requirements needed to ensure fair labour practise and fair dismissal. The Code of Good Practise¹⁵⁸ regulates the substantive and procedural requirements needed to ensure fair labour practise and fair dismissal.

When obesity in the workplace is considered, the regulations with regards to incapacity due to poor work performance or ill health should be considered. The LRA recognises the fairness of dismissal for incapacity.¹⁵⁹ The LRA also differentiates between poor performance and ill health or injuries.¹⁶⁰ However, dismissal based on disability is deemed to be an automatically unfair dismissal.

I believe that an obese employee, if the obesity render an employee unable to perform his/her duties, may be dealt with in the same manner as prescribed in Schedule VIII relating to incapacity.¹⁶¹ These procedures for incapacity for poor performance or ill health or injuries differ. Considering the international approaches discussed in Chapter 3 obesity as disability must also be considered. An employer can not merely decide to proceed with medical incapacity procedures if such and employee may qualify as a disabled person.

For dismissal relating to incapacity due to poor work performance it should first be established whether a certain performance standard existed and whether this performance standard was indeed breached.¹⁶² Once it is established that an employee did breach a performance standard it is a requirement that the employee should be aware of the performance standard, that the employee was given a fair opportunity to meet the said standard and that dismissal was appropriate in the circumstances.¹⁶³

Severe obesity and illnesses may have an influence on work performance where employees are required to do certain physical tasks that requires a certain fitness level.

¹⁵⁸ Schedule VIII of the LRA.

¹⁵⁹ S188.

¹⁶⁰ See Items 9 and 10 of Schedule VII.

¹⁶¹ For the procedures prescribed, see Items 9 and 10 Schedule 8.

¹⁶² Item 9(a) of Schedule 8 of the LRA.

¹⁶³ Item 9 (b) of Schedule 8 of the LRA.

The question now arises whether an ordinary poor work performance procedure would be appropriate or whether it is the employer's duty to give the employee a fair chance to reach the required standard, for example, assistance with health and wellness programs. In my opinion, an effort should be made to assist the employee. Should the employer then apply measures to get an employee in shape to reach the required standard and if the employee still has difficulty with work performance or if the employee does not also try to improve, the employee may then be dismissed.

Dismissals relating to medical incapacity due to ill health or injury requires a different approach than what is prescribed for poor work performance. The employer must investigate the extent of the incapacity to see whether the work environment can be adapted to accommodate the employee, whether the situation would be temporary or permanent and whether there are any other alternatives.¹⁶⁴ Furthermore, the employee has the right to state his/her case and be represented by a trade union representative or fellow employee.¹⁶⁵

The degree and cause the of incapacity are identified in Schedule 8 as a relevant factor to be considered. It is specifically stated that in certain kinds of incapacity such as alcoholism or drug abuse, it may be appropriate for employers to consider counselling or rehabilitation as an alternative.¹⁶⁶ This should be considered in cases of obesity as well. It is my view that a similar approach can be followed when dealing with obesity in the workplace. Should an employee's obesity or an illness linked to the obesity cause incapacity in the workplace the employee should look for alternatives and he /she should be given a reasonable time to lose weight and to hopefully resolve any health problems.

The reason for dismissal in poor performance cases depend on the question whether an employer can be expected to continue with the employment relationship considering the interest of the business as well as that of the employee and circumstances of the specific case.¹⁶⁷

¹⁶⁴ Item 10(1) of Schedule 8 of the LRA.

¹⁶⁵ Item 10(2) of Schedule 8 of the LRA.

¹⁶⁶ Item 10(3) of Schedule 8 of the LRA.

¹⁶⁷ *Hendricks v Mercantile and General Reinsurance CO of SA Ltd* (1994) 3 LCD 83 (LAC).

Obesity in the workplace may pose challenges to employers concerning work, performance, inherent requirements of the job, discrimination and incapacity and workplace bullying or victimisation. Employers have a duty to protect employees against prejudice and harm. Obese employees are particularly vulnerable due to society's perceptions of obese people.¹⁶⁸ To establish duties and the role of employers in this regard, applicable legislation should provide the necessary tools for employers to act within the sphere of fair labour practices.

In her doctoral thesis Smit investigates *inter alia* the impact of workplace bullying on South African employees and the legal approach followed in South African labour law. In her study, she identifies the following legislation as being applicable when workplace bullying is discussed:¹⁶⁹ the Constitution,¹⁷⁰ the LRA,¹⁷¹ the EEA¹⁷², the Occupational Health and Safety Act,¹⁷³ the Protection from Harassment Act,¹⁷⁴ the Promotion of Equality and the Prevention of Unfair Discrimination Act.¹⁷⁵

As obese employees may be more exposed or vulnerable compared to others, these Acts that Smit identified are relevant for purposes of this dissertation and the Constitution,¹⁷⁶ the LRA,¹⁷⁷ the EEA.¹⁷⁸

When dismissing an employee for incapacity and employer should consider whether the employee can do the work. If the employee is not capable, further investigation should be lodged to establish the extent of the incapability, whether the working environment or duties can be adapted or whether any other suitable positions are available.¹⁷⁹ In this instance illnesses relating to obesity, rather than the obesity itself is applicable. When considering dismissal for incapacity / ill health, an employer must

¹⁶⁸ Viviers and Smit "The Phenomenon of Weight based discrimination in South African Employment" (2014) *Journal of Juridical Science* 93.

¹⁶⁹ Smit *Bullying in the Workplace: A Uniform Approach in South African Labour Law* (2014).

¹⁷⁰ 1996.

¹⁷¹ 66 of 1995.

¹⁷² 55 of 1998.

¹⁷³ 181 of 1993.

¹⁷⁴ 17 of 2011.

¹⁷⁵ 4 of 2000.

¹⁷⁶ The Constitution of the Republic of South Africa, 1996.

¹⁷⁷ 66 of 1995.

¹⁷⁸ 55 of 1998.

¹⁷⁹ Item 11 of Schedule 8 of the LRA.

exhaust all other possibilities. To demonstrate the role of employer and what is expected case law need to be considered.

In *Wylie and Standard Executors & Trustees (Wylie)*¹⁸⁰ the employee suffered from multiple sclerosis. After an insurance claim for disability was submitted it was found that the employee was not entirely disabled. It was suggested that the employee should be accommodated in his current position, that he find another job outside the bank or that he should be accommodated in a different capacity in the bank. The employer opted to look at alternatives outside the bank or in a different capacity as opposed to accommodating the employee in his current role. Employment was terminated after three months. The CCMA found the dismissal to be unfair because the employer failed to comply with the provisions of Schedule VII. The CCMA further stated that it was crucial that an occupational therapist was involved to establish the functional ability of the employee.

In *Steyn v South African Airways (Steyn)*¹⁸¹ the employee could not perform flight duties, for approximately two years, due to a knee operation. The employer's aviation medicine specialist recommended that the employee be sent to an occupational therapist. This advice was ignored by the employer. It was found that there was no evidence to determine whether the employee would be able to resume his duties at some point. The dismissal was found to be unfair. It was suggested that alternatives such as extended unpaid leave should have been considered in this instance.

In *Standard Bank SA v CCMA and Others*¹⁸² (*Standard Bank*) the employee was involved in a motor vehicle accident. She suffered from severe back pains. She found it difficult to continue doing her normal duties. The employer sympathised with her and offered light administrative work. She found it to be uninspiring and requested a telephone sales job. She then found it difficult to sit and requested a headset to enable her to work properly and the employer refused and relegated her to a paper shredding job. A year later after the accident, she was frequently absent from work.

¹⁸⁰ (2006) 27 ILJ 2210 (CCMA).

¹⁸¹ WE 2717/2007.

¹⁸²(2008) 29 ILJ 1289 LC.

The Bank acknowledged that the employee is unlikely to be able to resume her normal functions but an application to medically board her was refused. The employee's services were terminated due to incapacity two years later. She referred the matter to the CCMA. The commissioner held that the dismissal was unfair. On review, the court disagreed with the commissioner's view that that the Bank had been patient, tolerant and even charitable to the employee. That observation, said the court, was inconsistent with the finding that the Bank failed to obtain a report by the occupational therapist and to consult with the employee about possible adaptations to her workstation, as it had been recommended by her medical doctor.

The court noted that the claim for unfair dismissal goes further than what the LRA may seem to suggest. Such dismissals involve many constitutional rights, for instance, the right to equality, human dignity, to choose occupation and to fair labour practices. Further, that the finding that the employer discriminated against her did not assist her because she had not mounted her case in the CCMA on that basis. The court further noted that if she initially approached the court with a claim based on unfair discrimination, she would have been successful.

In *NEHAWU on behalf of Lucas and the Department of Health Western Cape (Lucas)*¹⁸³ the Applicant was employed as a general worker in the nursing department of a hospital. After being injured on duty she was longer able to bend or lift heavy objects and was transferred to the clerical department. At the clerical department, she did not perform well and was accused by co-workers that she received preferential treatment.

After an unsuccessful application for a more senior administrative post, her superintendent applied for her discharge for incapacity. The Department of Health however required an assessment by a specialist as well as an occupational therapist. The Applicant refused such an assessment and her employment was subsequently terminated.

¹⁸³ (2004) 25 ILJ 2091 (BCA).

In determining the fairness of the dismissal, the arbitrator noted that the Code of Good Practice in the EEA was far broader than the LRA in respect of impairments that amounted to a disability. In that, where impairment amounted to a disability under the EEA the employee was entitled to reasonable accommodation. The arbitrator was of the view that the general concept of fairness required an employer to consider whether the employee was a person with disabilities under the EEA in determining whether there was a sufficient, valid and fair reason to terminate employment. The arbitrator's view was that even in circumstances where the employee had not specifically sought special treatment with reference to the EEA and claimed the status of the person with a disability. The above ought to be taken into consideration. The Arbitrator made a point that disability status is not to be considered only as a weapon to claim special treatment under the affirmative action provisions in chapter 2 of the EEA but that it should also be considered as a shield to protect the person who has a disability from being dismissed from employment.

It was also evident that the employer had attempted to consider alternative accommodation in terms of the LRA rather than in terms of the EEA. Having considered the extent of the employer's duty to make reasonable accommodation for the employee, the arbitrator found insufficient evidence that the employer had considered any reasonable accommodation in relation to this rule or the nursing department but all in relation to a clerical job for which she was in any event not qualified. The LRA requires employers to look for suitable alternatives to adapt the employee's current role where possible to accommodate the employee's circumstances.¹⁸⁴ With the general notion being that if the employer complied, the termination is viewed as being fair both substantively and procedurally.

It is clear from the above that an employer may dismiss an employee on grounds of incapacity. Possible discrimination has to however be considered carefully to avoid disputes relating to unfair dismissal based on disability.

¹⁸⁴ Item 10 of Schedule 8, LRA.

The employer should not just dismiss employees if they are no longer able to do the work they are employed to do. There is a duty placed upon employers to investigate, seek professional advice and to determine the availability of alternative work. Dismissal should be the last resort. Illnesses relating to obesity should be treated in the same manner.

4.3 Obesity as a disability

As established in the previous paragraph, dismissal based on a listed ground for discrimination such as disability, is deemed to be an automatically unfair dismissal. Would obesity however be regarded as a disability? There have not been any case law testing the grounds on this aspect to date.

People with disabilities are defined as: “People who have a long term or recurring physical or mental impairment, which substantially limits their prospects of entry into, or advancement in employment.”¹⁸⁵

The Code of Good Practice: Key Aspects of Employment of People with Disabilities¹⁸⁶ relies on this definition in providing guidelines for employers on the protection and advancement of people with disabilities. It is required in terms of the abovementioned Code of Good Practise that employers must provide reasonable accommodation for people with disabilities. Such accommodation should however not cause “unjustifiable hardship” to the employer.¹⁸⁷

In *Standard Bank of South Africa v CCMA (Standard Bank)*¹⁸⁸ the Labour Court held that unjustifiable hardship means “more than mere negligible effort”. The court further suggested a proportionality test in the case of what reasonable accommodation should entail. The court went further to state that the expected modification should be passed on a “pragmatic common-sense approach.”¹⁸⁹

¹⁸⁵ Du Toit et al *Labour Relations- A Comprehensive Guide* 6th ed (2015) 745.

¹⁸⁶ GN 1345 GG 23702. 19 August 2002.

¹⁸⁷ Du Toit et al *Labour Relations- A Comprehensive Guide* 6th ed (2015) 746.

¹⁸⁸ (2008) 4 BLLR 456 (LC).

¹⁸⁹ (2008) 4 BLLR 456 (LC) 76.

In *NUM obo Nongala v Libanon Mine*¹⁹⁰ (*Nongala*) the employee was diagnosed with diabetes and he became obese. He was a first-aid team leader on the mine. Due to his condition, he was certified as unfit to work underground. The defence raised the point that it was an inherent requirement for the employee's job to work underground. The court determined that the employee was fairly dismissed because of medical incapacity but it also stated that the employer should have done more to try to accommodate the employee elsewhere.

Although disability was not alleged in this matter, the court made an interesting observation that the when it mentioned reasonable accommodation which is a requirement in terms of The Code of Good Practice: Key Aspects of Employment of People with Disabilities.¹⁹¹ This opens the door to the argument that even if not regarded as a disability, an employer still has a duty to take reasonable steps to accommodate employees. In this case, assisting the employee to join a gym or perhaps to consider temporary incapacity until the employee's condition and weight improves, should have been considered before permanent termination of employment. *Nongala* also illustrates the overlap between incapacity and disability and emphasise the role of employers to investigate the specific situation and to make an effort to look at alternatives for the employee.

In *PSA obo October v Department of Community Safety, Western Cape (October)*,¹⁹² obesity was also not treated as a disability. In this matter the employer stated that the employee's medical conditions were self-inflicted as they all related to obesity. The employer offered assistance in the form of a gym membership, which offer was declined by the employee. The employee was dismissed for incapacity. The court held that the dismissal was fair. The above matter illustrates the distinction made between self-inflicted obesity and work-related obesity. The duty of the employer to assist the employee is also emphasised.

¹⁹⁰ (1999) 1 ICJ 8.1.38.

¹⁹¹ GN 1345 GG 23702 19 August 2002.

¹⁹² (2010) 19 PSCBC 3.5.1.

It seems that weight discrimination based on infringement of someone's dignity or based on disability are two grounds for possible discrimination disputes obese employees can consider.

It can be argued that whether obesity is a disability, would be determined based on the definition of a disability as mentioned above. If the obesity is a long term or recurring condition the employee cannot reasonably overcome and that would limit their prospects of entry into or advancement in employment, I believe that South African courts may treat obesity as a disability in lieu of the *Nongala*- case that made mention of reasonable accommodation in a matter that related to medical incapacity.

4.4 Discrimination

According to Smit and Viviers¹⁹³ weight discrimination or "weightism" can be viewed from two angles: Body weight as a ground for discrimination and obesity as a disability. The EEA makes provision for discrimination based on a disability but it does not mention weight or obesity as a ground for discrimination.¹⁹⁴ Obesity discrimination is a violation of a person's human dignity and should be challenged as such.¹⁹⁵ I agree with this statement in so far as it relates to bullying and prejudice.

The purpose of the EEA is to achieve equality 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 by designated groups to ensure that equitable representation in all occupational categories and levels in the workplace are covered.”¹⁹⁶

The EEA lists certain grounds for discrimination but also includes any other arbitrary ground.¹⁹⁷ I believe that in South Africa, obesity will be categorised as an arbitrary ground for discrimination as well as a disability in certain instances.

¹⁹³ Smit and Viviers *Vulnerable Employees* (2017) 160.

¹⁹⁴ Pretorius *et al Employment Equity Law* (2007) 7-26(1).

¹⁹⁵ Smit and Viviers *Vulnerable Employees* (2017) 161.

¹⁹⁶ S 2 of the EEA.

¹⁹⁷ S 6(1) of the EEA.

Even though the EEA prohibits unfair discrimination it goes further in providing what does not constitute unfair discrimination.¹⁹⁸ For purposes of obesity in the workplace, discrimination based on inherent requirements of the job may be a ground on which discrimination may be fair.¹⁹⁹

Section 186 (1) LRA makes provision for constructive dismissal. Bullying, victimisation and discrimination against employees because of their weight can lead to a constructive dismissal dispute. Smit and Viviers state that constructive dismissal is a good remedy for the victims of bullying in the workplace.²⁰⁰

In *Marsland v New Way Motor & Diesel Engineering (Marsland)*,²⁰¹ the employee suffered a nervous breakdown after his wife deserted him during a family holiday. After a month in hospital, he returned to work and noted marked change in the way he was treated by management. A few months later, the employee took a week off due to depression. Upon his return, he was told to “pull himself together,” whereafter he was called for a disciplinary inquiry and given a final written warning for poor work performance. The respondent appealed. After that, he was told to leave and was denied access to his filing cabinet. His projects were cancelled and he was prohibited from making any telephone calls.

He was also threatened and verbally abused by his seniors. When his appeal against the final warning was to be heard, the employee was called to a meeting where he was told that his work had been outsourced and that his position as marketing manager was redundant. The employee left after being threatened with assault. He claimed that he had been constructively dismissed for a reason which was automatically unfair.

¹⁹⁸ S 6 (2) of the EEA states that it would not be unfair discrimination if affirmative action measures are taken in line with the purpose of the act or if any person is distinguished, excluded or preferred due to an inherent requirement of the job.

¹⁹⁹ S 6(2) EEA.

²⁰⁰ Smit and Viviers *Vulnerable Employees* (2017) 31.

²⁰¹ (2009) 30 ILJ 169 (LC).

The court held that “there could be no legitimate purpose for the verbal abuse of the employee and “it was conduct that the employee could not be expected to put up with.”²⁰²

A prerequisite to claim constructive dismissal is for the employee to resign. Due to the nature of such a claim, re-instatement or re-employment as a remedy cannot be considered, which means that the employee will be unemployed.²⁰³ Le Roux *et al* rightly state that compensation is a remedy that does not prevent conduct that causes constructive dismissal.²⁰⁴ Conduct of bullies can be managed by way of disciplinary sanctions and a grievance procedure will establish a platform for an employee to complain. Other than these internal disciplinary policies and procedures no other preventive measures exist. The Constitution is the supreme law of South Africa.²⁰⁵ It is based on values which include human dignity, the achievement of equality and the advancement of human rights and freedoms as well as non-racism and non-sexism.²⁰⁶ In the interpretation of any other legislation and in the development of common or customary law it is required that the rights as established in the Bill of Rights must be promoted.²⁰⁷ When dealing with obesity and possible discrimination based on obesity these fundamental rights will and must be considered. Equality and anti-discrimination are paramount to the study of obesity in the workplace and it is important to identify specific sections in the Constitution that would be relevant to these issues. In this instance depression was listed as an unlisted ground and not as disability.

It should be noted that none of these rights in the Bill of Rights are regarded as obsolete and that they may be limited if such a limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality, and freedom.²⁰⁸ It can, therefore, be argued that infringement on these fundamental rights may be allowed if it is justified and fair. An example of such a justified infringement would be where employment equity goals are set to achieve the greater goal of equality in the workplace.

²⁰² (2009) 30 ILJ 169 (LC) 189.

²⁰³ Smit and Viviers *Vulnerable Employees* (2017) 31.

²⁰⁴ Le Roux *et al Harassment in the Workplace: Law, Policies and Processes* (2010) 65.

²⁰⁵ S 2.

²⁰⁶ S 1.

²⁰⁷ S 39(2).

²⁰⁸ S 36.

Specific labour legislation gives effect to the Constitution. When labour legislation is interpreted the constitutional rights and values must be acknowledged and considered.²⁰⁹ Section 9 of the Constitution deals with equality and there you will find certain specified grounds for discrimination. If discrimination on these grounds exist an automatic presumption of unfairness can be made.²¹⁰ This list is not a closed list of grounds for discrimination, as section 9(3) of the Constitution²¹¹ is worded as follows: “The state may not discriminate directly or indirectly against anyone on one or more grounds, including race, gender.”²¹² This is similar to Convention 111²¹³ of the ILO that was discussed in Chapter 2. This point of view is supported by the Constitutional Court (CC) in *Harksen v Lane NO and Others (Harksen)*.²¹⁴ It will be discussed later in this chapter.

Obesity is not a listed ground for discrimination in the Constitution but it does not mean that it is excluded as a discriminatory ground. It just means that there is not an automatically negative presumption of unfairness that can be made. Therefore, the principles that the courts use to determine whether unfair discrimination took place and the labour legislation that gave effect to the fundamental rights in employment need to be applied when discrimination based on obesity is considered. Whether obesity is a disability would be governed by the definitions for incapacity and disability.

In terms of section 6(2) (b) of the EEA the exclusion or preference of a person based on an inherent requirement of a job does not constitute unfair discrimination. The inherent requirement of a job can therefore be a statutory defence available to employers in unfair discrimination disputes. The EEA does not define the phrase “inherent requirement of the job” which leaves the interpretation of the term open to the courts.

²⁰⁹ S 1(a) of the LRA and s 2 and 3 of the EEA.

²¹⁰ Du Plessis and Fouche *A Practical guide to Labour Law* (2012) 89.

²¹¹ 1996.

²¹² Smit *Bullying in the Workplace: A Uniform Approach in South African Labour law* (2014)

²¹³ 111 of 1958.

²¹⁴ 1998 (11) BCLR 1498 (CC) at 42, 43.

In *Woolworths (Pty) Ltd v Whitehead (Woolworths)*²¹⁵ the court held that an inherent requirement means or implies an “indispensable attribute of the job which must relate to an inescapable way to the performing of the job required.”²¹⁶ It can therefore be accepted that an inherent requirement is an attribute without which the job would be compromised to such an extent that it would be detrimental to the employer. In this matter, the company argued that continuous work for a 12-month period was inherent to the position as HR generalist who was expected to oversee an integration process which was taking place at the time.²¹⁷ Although the court found that the inability of Ms. Whitehead to work continuously due to her pregnancy and subsequent maternity leave was rational, the inability to work for a continuous 12 months was not objectively justifiable.²¹⁸ I conclude that under normal circumstances employers are obliged to follow the necessary rules relating to time off for maternity leave or temporary incapacity. Because these rules exist for all employees, to discriminate due to these instances would be unfair. If an employer, therefore, discriminates against an obese person due to the fear of absenteeism or due to diseases associated with obesity, it will constitute unfair discrimination.

While *Woolworths* dealt with the requirement of continuous service *Hoffmann v South African Airways (Hoffmann)*²¹⁹ dealt with the HIV status of a prospective employee. Hoffmann, an HIV positive person applied for employment as a cabin attendant. He successfully completed a four stage selection process. He was found to be a suitable candidate and clinically fit but was declined a position due to testing HIV positive. South African Airways (SAA) justified their policy of refusing employment to HIV positive cabin attendants on safety, medical and operational grounds. They argued that 1) cabin attendants were required to get yellow fever vaccinations and that HIV positive crew members would not be able to do so, hence, creating a risk for customers, 2) that they were prone to contracting opportunistic contagious diseases and 3) that they would not be able to perform the emergency and safety procedures required of the position.

²¹⁵ (2000) 6 BLLR 640 (LAC).

²¹⁶ *Woolworths* 36.

²¹⁷ *Woolworths* 16.

²¹⁸ *Woolworths* 46.

²¹⁹ (2000) 12 BLLR 1365 (CC).

SAA further argued that they treat disabilities such as epilepsy, impaired vision and deafness similarly and submitted that the shorter life expectancy of HIV positive employees does not warrant training costs. The employer, therefore, attempted to justify discrimination based on HIV status by attempting to motivate why being HIV negative is an inherent requirement of the job.

The CC in its majority opinion mentioned *Harksen*²²⁰ and stated that the determining factor regarding unfairness was its impact on the persons discriminated against and relevant considerations included the position of the victim in society, the purpose sought to be achieved by the discrimination and the extent to which the rights or interests of the affected persons were influenced and how their human dignity was impaired. The court concluded that the refusal to employ Hoffmann was a violation of his right to equality and ordered SAA to instate Hoffmann.

It can be argued that the *Hoffmann*-decision²²¹ illustrates the crafty way employers may attempt to validate discrimination based on inherent requirements of the job. An owner of a gym may argue that the employment of an obese person would have a negative effect on his business. In such a scenario when looking at the court's decision such an employer would probably not succeed with a defence based on inherent requirements of the job if the person has the necessary skills. It is, therefore, my opinion that the defence relating to inherent requirements of a job should be applied restrictively.²²²

The principles identified in *Hoffmann* are still applied by our courts. In the reportable judgement *IMATU and another v City of Cape Town*²²³ (*IMATU*) the Labour Court found that an applicant for a job of firefighter who had been refused an appointment to this post because he was an insulin dependent diabetic had been unfairly discriminated against. The City of Cape Town argued that a blanket ban on the employment of diabetics to the position of firefighter was fair and justified based on the inherent requirement of the job of firefighter.

²²⁰ 1998 (1) SA 300 (CC).

²²¹ (2000) 12 BLLR 1365 (CC).

²²² Thompson and Benjamin *South African Labour Law*, 2004.

²²³ (2005) 11 BLLR 1084 (LC).

In this instance diabetes, as with depression in *Marsland* or HIV in *Hoffman*, were not interpreted as a disability, but rather treated as discrimination on an arbitrary ground. This may be because of the inclusion of arbitrary grounds in the EEA. When these insights are applied to obesity the same tests will apply unless a good case is made to declare the obesity a disability.

As established hereinabove, obesity or weight discrimination could be an arbitrary ground for discrimination as it is not a listed ground for discrimination in Section (6)(1) of the EEA²²⁴. The said section was amended in 2015 to include the phrase “or any other arbitrary ground.” As expected, clarification was sought through the courts to determine the meaning of “any other arbitrary ground”, especially whether the phrase creates a new category of discrimination grounds over and above the listed grounds for discrimination and grounds analogous to listed grounds.

Prior to the amendment to the EEA, discrimination on unspecified grounds was determined through the courts. In *Marsland v New Way Motor & Diesel Engineering (Marsland)*²²⁵ The court in *Marsland* relied on *Harksen v Lane*²²⁶ where the court held that the constitutional grounds for discrimination were not a closed list and could include any “discrimination on an unspecified ground if it is based on attributes or characteristics which have the potential to impair the fundamental dignity of persons as human beings, or affect them in a comparably serious manner.”²²⁷

The court found that discrimination on the grounds of mental illness impairs the human dignity of a person and, therefore, mental illness is a prohibited ground for discrimination. The court also considered the factors identified in *Hoffman* to determine whether the discrimination was unfair.

As already stated, after the amendment of section 6(1) of the EEA to include “any other arbitrary ground”. In my opinion as the courts have dealt with unspecified grounds of discrimination previously the same approach would be followed should a party to a dispute claim discrimination on an arbitrary ground unless good cause is shown to treat consider the obesity as a disability.

²²⁴ 55 of 1998.

²²⁵ (2009) 30 ILJ 169 (LC),

²²⁶ *Harksen v Lane* NO 1998 (1) SA 300 (CC).

²²⁷ at 322.

In *S Ndudula & 17 Others v Metrorail PRASA (Western Cape)*²²⁸ the Labour Court considered whether “arbitrary” means unlisted and whether an arbitrary ground for discrimination must have a relation to a listed ground. In this case the employer appointed two employees as section managers on a higher salary than other section managers. The Applicants claimed that they were discriminated against on an arbitrary ground. The Applicants did not rely on any listed ground. Instead the applicants argued that there was differentiation which was arbitrary and, therefore, unfair discrimination.

The court came to the following conclusion:

“The crux of the test for unfair discrimination is the impairment of human dignity or an adverse effect in a comparably similar manner, not the classification of the ground as listed or unlisted as is evident from the quotation from *Harksen*. ... Differentiation on both a listed and analogous ground amounts to unfair discrimination only if the differentiation has indeed affected human dignity or has had an adverse effect in a similar serious consequence.... the purpose of adding ‘*or any other arbitrary ground*’ to section 6 was not to create a third category of unfair discrimination as contended for by the applicants in this matter.... The purpose of the legislator by inserting ‘*or any other arbitrary ground*’ serves no other purpose than being synonymous with ‘*one or more ground*’ or being synonymous with ‘*unlisted grounds*’”.²²⁹

It is important to discuss the test in *Harksen v Lane (Harksen)*²³⁰ in more detail as the *Ndudula*-judgement, as with most discrimination cases, rely on the *Harksen* judgment.

The CC laid down the test to determine whether a certain act or legislative provision is unconstitutional. The matter was decided in terms of the Interim Constitution. The CC has adopted a three-stage approach for determining the fairness of a legislative provision or act that is challenged based on it conflicting with the constitutional right to equality. The approach adopted by the CC will seek to establish –

- 1) whether the sections of the Insolvency Act differentiate between people or categories of people. If this is answered in the affirmative then there must be a rational connection between the differentiation in question and the legitimate governmental purpose it is designed to further or achieve.”;

²²⁸ (C 1012 / 2016) ZALAC.

²²⁹ Paras 73, 101,102 (footnotes omitted).

²³⁰ 1998 (1) SA 300 (CC).

- 2) whether the discrimination was unfair
- 3) The discrimination, even if unfair, could be justified.

If this test is applied to discrimination based on obesity the following needs to be answered. Whether the action of the employer has the effect that there is a differentiation between the obese employee and other employees, whether this differentiation is fair and whether discrimination can be justified by the employer. In *Ndudula* it was held that the phrase “any other arbitrary ground” does not introduce a new set of unlisted grounds for discrimination. The test in *Harksen* will however apply where differentiation must first be established. The same test will apply to obesity discrimination.

4.5 Conclusion

When considering weight-based discrimination the fundamental rights to human dignity of all people must be kept in mind. It is submitted that an employee who would like to bring an unfair discrimination claim based on obesity would not be able to do so, unless the obesity can be linked to a current listed ground in terms of Section 6(1) EEA such as disability. The alternative is to refer the matter based on an arbitrary ground. Furthermore, even though an employee’s work performance or incapacity due to obesity is affected, the employer has the duty to assist or take measures to reasonably accommodate the employee.

It is my submission that obese employees also have a responsibility to manage their weight to ensure that they will meet all the requirements of their jobs unless their obesity cannot be remedied by lifestyle changes. The principle of fairness should apply and these employees must be given a reasonable chance to make a real effort, not only for their own benefit but also for the benefit of the employer.

Discrimination based on obesity will be tested as per the test in *Harksen*. With regards to disability, the definition is quite broad which opens the door for obesity to be considered as a disability. This interpretation must however still be tested by South African courts.

Chapter 5

Conclusion

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5.1 Introduction

From the onset, the aim of this dissertation was to answer the questions identified in Chapter 1. Obesity is becoming a contentious issue in the South African workplace and clear guidelines with regards to the role of employers are needed. Neither national or international law addresses obesity directly. However, in both these instances the principle of equality and human dignity is identified.

In this chapter, the research questions will be addressed and certain recommendations will be made to address obesity and weight discrimination.

5.2 What are the international standards that should be considered when evaluating workplace obesity in South Africa?

Currently protection of obese employees is not regulated specifically, however, European Union (EU) and International Labour Organisation (ILO) standards dictate fair labour practices, human dignity and non-discrimination as core values to be considered when dealing with employees. Similarly, South Africa also follows this approach.

In *Kaltoft* the European Court of Justice (EUCJ) analysed EU law to find its application in a matter dealing with obesity discrimination, the condition had to be linked to one of the listed grounds in the Charter of Fundamental Rights of the European Union (CFEU).²³¹

It was found that obesity in severe cases may constitute a disability. The United Kingdom (UK) Employment Appeal tribunal followed a similar approach in *Walker* but stated that obesity is not a disability unless, for purposes of discrimination, the employee is unable to perform everyday activities.

ILO Convention 111 has similar listed grounds for discrimination but goes further by including “any other distinction, exclusion or preference as grounds for discrimination”.²³² This has the effect that discrimination based on obesity or weight can be considered under the core values of the ILO. This is confirmed by the approaches taken in the American and Canadian courts in the matters discussed in Chapter 3.

As a member of the ILO South Africa is bound to comply with Convention 111 and it does. Not only does the Constitution protect human rights but it also protects everyone against unfair labour practices.²³³ Both the Employment Equity Act (EEA), Labour Relations Act (LRA) and Basic Conditions of Employment Act (BCEA) aim to give effect to the core rights in the Constitution. In my view South Africa has gone beyond expectations where the protection of human rights and protection against discrimination are concerned, especially due to the severe human rights violations experienced during the previous regime. Due to this fact the EEA does not only list certain grounds for discrimination in employment but also includes “any other arbitrary ground.”²³⁴ This has the effect that obesity or weight discrimination can be regarded as discrimination on an arbitrary ground. As seen in the application of *Marsland*, the core value that needs protection is human dignity: If workplace bullying or arbitrary dismissals infringe on an obese person’s human dignity, that person would probably succeed with an action against the employer.

²³¹ See Article 21(1) and Chapter 2 of this dissertation page 13.

²³² Article 1(b)

²³³ S 36.

²³⁴ S 6(1).

It seems that the extent of the protection of obese employees in the workplace finds a general application both nationally and internationally. Obesity discrimination is dealt with in accordance with core labour standards. As the occurrence of disputes relating to obesity and weightism increase, the law will be developed through the courts and may in future see further development in lifestyle based workplace policies and procedures.

The labour standards relevant to obesity in terms of both the EU and the ILO are based on equality and non-discrimination. Neither the EU nor the ILO list obesity as a ground for discrimination, however, the grounds for discrimination in both the EU and the ILO are not limited. It can be concluded that equality and non-discrimination in workplaces in Europe and elsewhere are the main considerations when addressing obesity in the workplace. ILO and EU Standards do however not assist with the practical implications of obesity in workplaces due the diversity of member states that must comply to these standards. To only consider the EU and ILO standards do not give us sufficient guidelines when dealing with obesity specifically. The study of the UK, USA and Canada, do however suggest that the current position internationally is that obesity and related conditions must be considered by interpreting current law and legal definitions as opposed to developing and amending the law to make special provision for obesity or weight based discrimination to be protected. The main aim concentrates on non-discrimination, human dignity and fair labour practise. Compared to the international study conducted in this dissertation South Africa do comply with internal standards.

5.3 The rights of employees and the role of employers when obesity is addressed in the workplace

It has been established that employers need to be aware of the impact of obesity on the work environment and the consequences that may follow discrimination and dismissals based on obesity. In a country with a very high unemployment rate the CCMA and Labour Court are bound to take a holistic approach to saving jobs and keeping people in employment.

This argument can be substantiated by the set procedures as seen in the Code of Good Practice: Dismissal.²³⁵ The extent to which employers must ensure procedural and substantively fair practices cannot be over-emphasised.

There are 3 scenarios relating to obesity that is applicable in the employment relationship namely incapacity, discrimination based on arbitrary grounds, and obesity as a disability. In these scenarios, as can be seen from applicable case law and discussions on applicable legislation and case law discussed in Chapter 4 the following obligations of employers can be identified.

If the obesity causes medical problems to the extent that the employee's capacity is effected severely and he cannot perform his duties at all, the medical incapacity procedures should be considered by employers. Here the role of the employer would be to consider medical reports and look at alternatives to accommodate the employee. If no such possibilities exist, the employee may be dismissed based on medical incapacity. In this instance, the medical condition is considered and not specifically the obesity. Consideration should be given to obesity as disability in this regard as well and employers must therefore consider all the facts to their disposal when decisions are made as to which route to follow. From the relevant case law it is clear that employers are required to do more to establish the extent to which the employee is unable to do the work. In *Standard Bank, Wylie and Steyn*, an evaluation by an occupational therapist was suggested. In *Lucas*, the adaptation of the employee's work station was suggested and in *Nongalo*, although the matter dealt with incapacity, the court stated that the employer had to look at alternatives such as reasonable accommodation.²³⁶

The employer's role and duty is therefore to ensure that an employee remains in employment and to take the necessary measures to accommodate an employee as far as reasonably possible. The onus would be on the employer to prove that this was done should a dispute arise.

Inherent requirements of the job are often used as a defence against discrimination. When considering *Whitehead* and several of the other cases it can be concluded that

²³⁵ Schedule VIII, LRA.

²³⁶ See paragraph 4.2.

the onus of proof that rests with the employer is a heavy burden and that this defence does not always succeed as seen in *Hofmann*. An employer's argument may make sense but must be substantiated by medical evidence if it is claimed that an employee will not be able to fulfil the requirements of the job. The role of employers to protect employees against discrimination on any ground and what employers can do to ensure that they are compliant and protected within the legal framework will be discussed in the recommendations in this Chapter. Obesity as an arbitrary ground for discrimination would still find its basis in the listed grounds and principles of human dignity.

Obesity as disability expects of an employer to adhere to the legislation with regards to people with disabilities and will require an employer to consider reasonable accommodation. For this purpose, one should also consider the definition of disability subjectively as it relates to the employee's obesity. Employees have the right to work, and the right to fair labour practise and non-discrimination. These fundamental rights are non-negotiable and employers must take all reasonable measures to ensure that they do not infringe on these rights.

5.4 Is South African law sufficient to address obesity in the workplace

As can be seen from the previous Chapters South African Labour law seem to be more regulated than international law.

In my view, which is supported by Viviers and Smit,²³⁷ employees will be able to take action based on a contravention of the rights to dignity and equality or alleging that obesity is a disability. Clarification is however needed with regards to how the courts will apply the current legislation.

The provision of discrimination arbitrary grounds has been well covered in several cases. The test applied in these cases as prescribed by *Harksen* can be applied to cases of weight discrimination.

The LRA makes provision for remedies relating to automatically unfair dismissal, unfair dismissal due to incapacity, unfair discrimination as well as constructive dismissal. These are all actions obese employees may take against employers based on the

²³⁷ Viviers and Smit "The Phenomenon of Weight based discrimination in South African Employment" *Journal for Juridical Science* (2014) 110.

specific situation. In these instances, the existing law is sufficient to also deal with matters involving obesity.

In Chapter 4 the overlap between incapacity and disability was mentioned *Lucas* and *Nongalo* were discussed. I submit that the definition of disability should be developed further to bring clarity with regards to when a person will be seen as a person with a disability and when it is a matter of incapacity. A clear distinction could not be found in existing case law.

5.5 Recommendations

Firstly, based on the above findings it is recommended that employers develop internal policies and procedures that will make provision specifically with regards to incapacity, discrimination and disability.

The incapacity policy and procedure should be based on the Code of Good Practise and should make provision for proper investigation into the matter, consent by the employee to undergo the necessary medical assessments required, as well as an investigation with regards to accommodating the employee. A procedure relating to consultations and interaction with the employee should be formalised and be applicable to all employees.

Pro-active action can be taken internally to ensure fair practices and to limit the employers' risk. Alcohol and drug addiction policies may be amended to include food addiction where the health and wellness of employees are promoted.

Secondly, it may be advisable to consider an amendment on the Code of Good Practise to include morbid obesity as a disability in specific circumstances. This will serve as a guideline to employers when considering their own workplace policies and will provide certainty. Consideration should also be given in the Code to what reasonable accommodation entails.

Employers should create awareness in the workplace relating to discrimination and victimisation. A code of conduct dealing specifically dealing with discrimination should be introduced. This should include discrimination on listed as well as arbitrary grounds and discrimination on arbitrary grounds should be explained.

A training programme for management and employees on discrimination and victimisation is recommended.

Awareness programmes with regards to workplace bullying, victimisation and prejudice due to weight or appearance or lifestyle related problems can be included in skills development programmes like HIV awareness courses offered by SETA's. It is further recommended that evaluate their grievance procedures to ensure that vulnerable employees effected by discrimination and victimisation have a safe forum in which their grievances in this regard may be heard and addressed.

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