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CASE NOTE

Applying the intersection between defence of the inherent requirements of the job and the duty to provide reasonable accommodation for persons with disabilities in the workplace: *Damons v City of Cape Town*

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ABSTRACT

In *Damons v City of Cape Town* (2022), by a majority, the Constitutional Court held that the inherent requirements of the job defence in s 6(2)(b) of the Employment Equity Act is a complete defence to a charge of unfair discrimination in respect of an employee who has no capacity to perform the job in question due to a disability that cannot be rehabilitated or reasonably accommodated. By contrast, in a sole dissent, Pillay AJ held that s 6(2)(b) is not a complete defence where the employer ought to have created a new position to fit the capacities of the employee as a reasonable accommodation measure. This commentary explores the implications of the *Damons* case and appraises the divergent approaches of the Constitutional Court.

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1. Introduction

In its annual reports, the Commission for Employment Equity, which is charged with reporting to the Minister of Labour on the application of the Employment Equity Act 5 of 1998 (EEA),[1] has consistently highlighted that persons with disabilities continue to experience underrepresentation in the workplace across all occupational levels.[2] Persons with disabilities constitute about 7.5 per cent of the population,[3] yet they form just over 1 per cent of the workforce.[4] Globally, persons with disabilities have significantly lower rates of employment and higher rates of unemployment than persons without disabilities.[5] Four in ten persons without disabilities are neither in

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[1] Section 30.

[2] See for example, reports of the Commission for Employment Equity for 2021, 2022, and 2023 respectively: *21st Commission for Employment Equity Annual Report 20-21* (2021) 52; *22nd Commission for Employment Equity Annual Report 2021-22* (2022) 51; *23rd Commission for Employment Equity Annual Report 2022-23* (2023) 71.

[3] Statistics South Africa *Stats SA Profiles Persons with Disabilities* (2014).

[4] Commission for Employment Equity Reports for 2021, 2022 and 2023 (note 2 above).

[5] World Health Organization & World Bank *World Report on Disability* (2011) 235.

employment nor unemployed compared to seven in ten persons with disabilities.[6] The right to work of persons with disabilities is an unmet human right.[7]

Redressing the historical marginalisation and exclusion of persons with disabilities in the workplace requires a multisectoral approach to involve other sectors such as the education, vocational training and social welfare sectors. It calls for looking beyond the workplace to ensure that persons with disabilities have equal access to educational and vocational opportunities that are foundational to acquiring job-related skills as well as welfare supports such as social grants that reduce the economic consequences of disability.[8] At the same time, guaranteeing protection against unfair discrimination in the workplace, itself, is crucial.

Disability carries stigma.[9] Persons with disabilities may be denied employment merely because they have or are perceived to have an impairment regardless of whether they can perform the inherent requirements of the job in question. Alternatively, unfair discrimination may be the result failure by the employer to provide individualised support or adjustments to the workplace to accommodate a person with a disability and, thus, enable them to perform the inherent requirements of the job. Disputes that come before the Council for Conciliation, Mediation and Arbitration and the courts alleging unfair discrimination on the basis of disability underscore the importance of providing protections against attitudinal and structural barriers. The relatively recent decision of the Constitutional Court in *Damons v City of Cape Town* represents the first time that the apex court has decided a case directly implicating unfair discrimination on the basis of disability.[10] Earlier cases on this point have been decided by the Council for Conciliation, Mediation and Arbitration, the Labour Court and the Labour Court of Appeal.[11]

This commentary explores the significance of the Constitutional Court's decision in *Damons* for the protection of the right of persons with disabilities to non-discrimination in the workplace. In *Damons*, the majority held that denial of a promotion due to disability does not constitute unfair discrimination under s 6(1) of the EEA if provision of reasonable accommodation would not enable the employee to perform the inherent requirements of the particular job. In contrast, the minority held that denial of a promotion constitutes unfair discrimination if the employer fails

[6] International Labour Organization 'New ILO database highlights labour market challenges for persons with disabilities' (2022).

[7] World Health Organization & World Bank (note 5 above) chapter 8; South African Human Rights Commission *Promoting the Right to Work of Persons with Disabilities* (2016).

[8] L Graham 'Differences in employment and income poverty between people with and without disabilities in South Africa' (2020) 14 *ALTER* 299–317.

[9] JF Trani, J Moodley, P Anand, L Graham & MTT Maw 'Stigma of persons with disabilities in South Africa: Uncovering pathways from discrimination to depression and low self-esteem' (2020) 265 *Social Science & Medicine* 113449.

[10] *Damons v City of Cape Town* [2022] ZACC 13. In *SAA v Hoffmann v SAA* [2000] ZACC 17, unfair discrimination on the ground of disability was raised but the Constitutional Court declined to consider it, preferring to resolve the matter on other grounds: C Ngwena 'Developing juridical method for overcoming status subordination in disablism: The place of transformative epistemologies' (2014) 30 *South African Journal on Human Rights* 275, 278.

[11] For example: *IMATU v City of Cape Town* [2005] 10 BLLR 1084 (LC); *SAMWU obo Solomons and City of Cape Town* (2009) 18 SALGB 8.1.4; *Smith v Kit Kat Group (Pty) Ltd* (2017) 38 ILJ 483 (LC); *Standard Bank of South Africa v Commission for Conciliation, Mediation and Arbitration* 7 (2008) 29 ILJ 1239 (LC); *Jansen v Legal Aid South Africa* (2018) 39 *ILJ* 2024 (LC); *Independent Municipal and Allied Trade Union obo Strydom v Witzenburg Municipality* (2012) 33 *ILJ* 1081 (LAC); *Bidvest Data (Pty) Ltd v Statutory Council, Printing, Newspaper and Packaging Industry* [2015] ZALCCT 12; *Senekal v MEC for Education (Gauteng Province)* [2015] ZALCJHB 303 (19 August 2015); *Member of the Executive Council for the Department of Education Western Cape Government v Jethro* [2019] 10 BLLR 1110 (LAC).

to provide reasonable accommodation to enable the employee to perform the inherent requirements of a job the employer has a duty to create. The commentary appraises the divergent approaches of the bench.

It is argued that on the facts the majority reached the correct determination and that the minority opinion misapplied the relationship between the duty to provide reasonable accommodation and the inherent requirements of the job defence. Notwithstanding, it is submitted that the minority decision makes an important contribution to South African equality jurisprudence through illuminating reasonable accommodation as a non-discrimination principle. The commentary has six sections. The first section is this introduction. The second and third sections summarise, respectively, the facts of *Damons* and the issues that arose. The fourth section summarises the decision of the Court. The fifth section is an analysis of the decision while the sixth is the conclusion.

2. Facts

The case concerns Damons (the applicant) who was employed as a firefighter by the City of Cape Town (the respondent). While on duty, he sustained a serious physical injury during a fire drill. The injury was a result of disregard of safety measures by the respondent. The injury, which was permanent, left Damons incapacitated. His physical impairment could not be rehabilitated to allow him to serve operationally as a firefighter. However, he was retained and transferred to a new position that required him to perform administrative and educational duties only. He was allowed to keep his designation, salary and allowance as a firefighter. Later, he applied for promotion to the position of senior firefighter but was unsuccessful. According to the respondent's policy, to be promoted, Damons had to first pass a physical fitness test to determine capacity to perform the core duties of a firefighter. Damons contended that the promotion policy unfairly discriminated against him on the basis of disability contrary to s 6(1) of the EEA.

At first, Damons referred a dispute to the Council for Conciliation, Mediation and Arbitration.[12] When conciliation failed, the matter went to the Labour Court, which held that the respondent's promotion policy constituted unfair discrimination in terms of s 6(1) of the EEA.[13] The Labour Court was of the opinion that the respondent had failed to provide reasonable accommodation to Damons.[14] The respondent appealed to the Labour Court of Appeal.

Before the Labour Court of Appeal, the respondent successfully raised the defence of the inherent requirements of the job provided by s 6(2)(b) of the EEA, arguing that no adjustment or modification could be made to enable the applicant to perform the job of a firefighter.[15] According to the Court, differentiation between Damons and firefighters without a disability was justified by the inherent requirements for the position of a senior firefighter. Principally, the Labour Court relied on two cases. It

[12] *Damons* (note 10 above) para 7.
[13] *SA Municipal Workers Union obo Damons v City of Cape Town* (2018) 29 ILJ 1812 (LC).
[14] Ibid para 22.
[15] *City of Cape Town v SA Municipal Workers Union obo Damons* (2020) 41 (ILJ) 1893 (LAC).

applied the decision of the Labour Court in *IMATU v City of Cape Town*, which held that physical fitness was an inherent requirement of the job of a firefighter.[16] It followed its own decision in *TDF Network Africa v Faris*, which held that a requirement is inherent if it is 'rationally connected to the performance of the job and necessary for the fulfilment of a legitimate work-related purpose'.[17]

According to the Labour Court of Appeal, it was erroneous for the Labour Court to expect the respondent to waive the requirement of physical fitness. Drawing on the Code of Good Practice,[18] it explained that the aim of reasonable accommodation is not to displace the requirement to qualify for the job but to ameliorate the impact of the employee's impairment on the capacity to perform the essential functions of the job.[19] Damons appealed to the Constitutional Court.

3. Issues

The main issue before the Constitutional Court was whether the employer's refusal to promote the applicant constituted unfair and unjustifiable direct or alternatively indirect discrimination on the basis of disability contrary to s 6(1) of the EEA.[20] Attendant issues were whether the employer had unfairly discriminated against the applicant through failure to provide reasonable accommodation as an implied non-discrimination duty owed to an employee with a disability under s 6(1) and whether the defence of inherent nature of the job under s 6(2)(b) of the EEA is a complete defence.

4. Decision

In a judgment delivered by Majiedt J (Madlanga J, Madondo AJ, Mhlantla J, Rogers AJ, Theron J, Tlaletsi AJ and Tshiqi J concurring), the Court dismissed the appeal. It held that the applicant had not been unlawfully discriminated against on the basis of disability contrary to s 6(1) because the respondent had successfully raised the defence of the inherent requirements of a job in s 6(2)(b). It found that physical fitness is an inherent requirement of the job of senior firefighter as to be 'essential to its outcome and part of its core activities'.[21] The Court observed that the respondent's promotion policy spelt out the requirements for promotion.[22] The requirement to have continuous years of firefighting experience aside, a successful candidate was required to meet a fitness standard including the ability to 'perform heavy lifting and strenuous physical activities in confined areas and at elevated temperatures while wearing protective clothing and equipment weighing 25 kilograms'.[23]

[16] *IMATU* (note 11 above) para 28.
[17] *TDF Network Africa (Pty) Ltd v Faris* (2019) 40 ILJ 326 (LAC) para 37.
[18] Department of Labour 'Code of good practice and employment of persons with disabilities' (9 November 2015) *Government Gazette* item 6.5.1(b).
[19] *City of Cape Town* (note 15 above) paras 16–18.
[20] *Damons* (note 10 above) para 119.
[21] *Damons* (ibid) para 135.
[22] Ibid paras 126-127.
[23] Ibid para 126. The standard was adopted by the respondents from the United States. It emanates from *the* Standard on Comprehensive Occupational Medical Program for Fire Departments, 2003 edition of the USA National Fire Protection Association (NFPA 1582).

According to the majority, the job in question entailed engaging in active duties of a firefighter and was not a position in a non-operational capacity.[24] Endorsing the approach of the Labour Court of Appeal, Majiedt J reiterated the test for determining the inherent requirements of the job that was enunciated in *TDF Africa Network*[25] and upheld the finding that physical fitness was an inherent requirement of the position contemplated in the respondent's promotion policy. A level of physical fitness was an inescapable or indispensable requirement of the job in question according to the majority.[26] Physical fitness was both rationally connected to the performance of the job and necessary for the fulfilment of a legitimate work-related purpose.[27]

The majority's view was that the duty to provide reasonable accommodation was redundant. Majiedt said 'no amount of reasonable accommodation will enable the applicant to meet the inherent requirement of physical fitness for a senior firefighter'.[28] Damons could not be reasonably accommodated, through rehabilitation and/or adjustments or modifications to the job, to acquire requisite capacity. Accordingly, s 6(2)(b) was, therefore, a complete defence. The majority affirmed the decision of the Labour Court of Appeal.

Dissenting, Pillay AJ held that the conduct of the respondent constituted unfair and unjustifiable discrimination contrary to ss 5 and 6(1) of the EEA. Central to the dissent was the finding that the respondent had failed to discharge the duty to provide reasonable accommodation by refusing to consider appointing the applicant to a position with 'non-operational functions'. Consequently, the defence of the inherent requirements of 'a' job in s 6(2)(b) did not absolve the respondent, as the applicant was not seeking promotion to a position with 'operational functions'.

The essence of Pillay AJ's decision appears at the end of her judgment where she says:

> The inherent requirement of a job defence is justification for not employing the applicant as an operational firefighter. It is not justification for refusing to reasonably accommodate the applicant in non-operational functions with prospects for advancement. Consequently, the respondent is in breach of sections 5 and 6(1) of the EEA in that its refusal to reasonably accommodate the applicant in a job, with prospects for advancement, for which physical fitness is not required, amounts to unfair and unjustifiable discrimination of the applicant as a person with disabilities.[29]

Pillay AJ treated the case as one where the applicant was denied promotion to a position with non-operational administrative duties. In treating the position as non-operational for which physical fitness was not an inherent requirement, the dissenting judge gave a wide construction to the defence in s 6(2)(b). This section provides that it is not unfair discrimination to 'distinguish, exclude or prefer any person on the basis of an inherent requirement of *a* job'.[30] Pillay AJ placed emphasis on interpreting the section as meaning 'a job' that the applicant can be appointed

[24] *Damons* (note 10 above) para 122.
[25] *TDF Network Africa* (note 17 above) para 37; *Damons* (ibid) para 135.
[26] Ibid.
[27] Ibid.
[28] *Damons* (note 10 above) para 141.
[29] Ibid para 105.
[30] Emphasis added.

if created anew by the employer rather than 'the job' specifically contemplated by the employer. According to the judge, the legislature had deliberately used 'a job' rather than 'the job' in s 6(2)(b).[31] Pillay AJ reinforced her view by pointing out that the definition of reasonable accommodation in the EEA and the Code of Practice also refers to 'a job' rather than 'the job'.[32] Therefore, the employer had a duty to explore positions that Damons could hold and requisite accommodations such as counselling, reskilling, retraining and reassigning to enable the applicant to advance in employment.[33]

According to Pillay AJ, adopting a 'narrow' meaning to the s 6(2)(b) defence would have the effect of substantially leaving persons with disabilities outside the framework of Chapter 2 of the EEA, which requires all employers to take positive steps to eliminate unfair discrimination (s 5) and prohibits unfair discrimination (s 6(1)).[34] Instead, persons with disabilities would only benefit from the duty of reasonable accommodation when considered as representative of members of designated groups who are beneficiaries of affirmative action measures imposed on designated employers by Chapter 3 of the EEA.[35] Pillay AJ outlined the differences between non-discrimination measures and affirmative action measures, highlighting the advantage of non-discrimination measures in terms of their equality of opportunities reach.[36]

5. Analysis

Damons is primarily about the interpretation of s 6(1) of the EEA and its relationship with the duty to provide reasonable accommodation and the defence of the inherent requirements of the job in s 6(2)(b) of the EEA in the determination of unfair discrimination on the basis of disability. Sections 6(1) and (2)(b) state:

1. No person may unfairly discriminate, directly or indirectly, against an employee, in any employment policy or practice, on one or more grounds, including race, gender, sex, pregnancy, marital status, family responsibility, ethnic or social origin, colour, sexual orientation, age, *disability*, religion, HIV status, conscience, belief, political opinion, culture, language and birth.
2. It is not unfair discrimination to –

    a. take affirmative action measures consistent with the purpose of this Act; or …
    b. *distinguish, exclude or prefer any person on the basis of an inherent requirement of a job*.[37]

Section 6(1) prohibits unfair discrimination while s 6(2) provides the employer with two possible defences one of which – s 6(2)(b) – is the inherent requirements

[31] *Damons* (note 10 above) para 77.
[32] Department of Labour (note 18 above) item 6.1.
[33] *Damons* (note 10 above) para 97.
[34] Ibid para 36.
[35] Ibid para 36.
[36] Ibid paras 36, 37 and 75.
[37] Emphasis added.

of the job defence. *Damons* presents us with two competing legal propositions about how s 6(1) and s 6(2)(b) relate to each other. The propositions of the majority and the minority of the Court converge in accepting that an employee with a disability has a right to be provided with reasonable accommodation by the employer as an implication of the right to non-discrimination in s 6(1) and the realisation of substantive equality under the Constitution of the Republic of South Africa, 1996. However, the propositions diverge in their application of the intersection between reasonable accommodation and the defence of the inherent requirements of the job defence. Determining which is the better proposition requires clarifying first the meaning and implications of reasonable accommodation.

5.1 Reasonable accommodation

Reasonable accommodation is a juridical modality for achieving substantive equality.[38] It ensures that equality should not mean integration or assimilation into a pre-existing norm but a recognition and acceptance of human diversity.[39] It applies to every protected group and not just persons with disabilities. The essence of the duty of reasonable accommodation is to require positive measures to be adopted to meet the different needs of an individual on account of a protected characteristic such as sex, gender, disability or pregnancy, which cannot be adequately served by arrangements that are suitable for people who do not share such a characteristic.[40] Reasonable accommodation protects equality and human dignity by ensuring that each person is assessed according to their own individual abilities, instead of being judged against presumed group characteristics that may not be reasonably necessary but are the result of bias or historical prejudice.[41] It is a recognition that to achieve substantive equality, it may be necessary to treat some social groups differently.[42]

For persons with disabilities, the duty to provide reasonable accommodation challenges the injustice of structural barriers that are erected on ableist assumptions. It is transformative by requiring the employer to adjust and modify the job and/or the workplace environment to dismantle structural barriers that contribute to the exclusion of persons with disabilities but are not necessary for performing the inherent requirements of the job. In this way, reasonable accommodation levels the playing field.[43] It constitutes a paradigm shift from the blandness of a 'one size fits all' approach under formal equality. The Convention on the Rights of Persons with Disabilities (CRPD) is the clearest expression of this shift.[44]

The duty to provide reasonable accommodation is one of the tools used by the CRPD to achieve substantive equality for persons with disabilities in society, including the

[38] *MEC for Education v Pillay* 2008 (2) BCLR 99 (CC) paras 72–76; *Witzenburg Municipality* (note 11 above) para 8; JL Pretorius, ME Klinck & C Ngwena (eds) *Employment Equity Law* (2001, 2023 update) para 7.1.
[39] *Pillay* (ibid) para 75.
[40] Ibid para 73.
[41] *British Columbia (Superintendent of Motor Vehicles) v British Columbia (Council of Human Rights)* (1999) 3 SCR 868 para 19.
[42] *Damons* (note 10 above) para 80.
[43] Ibid para 140.
[44] United Nations General Assembly 3 December 2006, A/RES/61/106, entry into force: 3 May 2008.

workplace. To enforce its provisions directly, the CRPD should first be domesticated.[45] However, in the absence of domestication, it is a persuasive source when interpreting the EEA. Courts are constitutionally enjoined to consider international law when interpreting law that implicates the Bill of Rights.[46] The EEA implements constitutional equality. Its provisions must be interpreted in compliance with the Constitution.[47] When interpreting legislation, the Constitution requires courts to prefer an interpretation that is consistent with international law.[48] In any event, the EEA expressly reinforces the status of international law. [49] It expressly states that its provisions must be interpreted in consonance with South Africa's international obligations.[50]

Instructive for a jurisdiction such as South Africa, whose equality jurisprudence is committed to the achievement of substantive equality and human dignity, the CRPD is animated by substantive equality and human dignity.[51] It adopts a human rights model of disability underpinned by a social model that departs from a medicalised understanding of disability. Significantly, the CRPD does not treat disability as an intrinsic limitation. Instead, disability is an outcome from the interaction between persons with impairments and barriers of an attitudinal and environmental nature that hinders their full and effective participation in society on an equal basis with others.[52] Persons with disabilities have a human right to participate in society, including the workplace, on an equal basis with others. The focus, therefore, is on accommodating persons with disabilities by removing structural barriers.

Reasonable accommodation is defined by the CRPD as 'necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms'.[53] States are required to provide reasonable accommodation to comply with the right to equality and non-discrimination guaranteed by article 5.[54] Article 27(1), which addresses work and employment, requires the state to ensure that reasonable accommodation is provided to persons with disabilities in the workplace.[55] Failure to provide reasonable accommodation constitutes unfair discrimination under the CRPD.[56]

In South African law, the notion of a duty to provide reasonable accommodation preceded the CRPD. Reasonable accommodation is a product of evolving post-apartheid

[45] Section 231(2) of the Constitution. A process is under way to consider domesticating the CRPD: South African Law Reform Commission 'Domestication of the United Nations Convention on the Rights of Persons with Disabilities' issue paper 39, Project 148 (Domestication of the CRPD) (2021).
[46] Section 39(b) of the Constitution.
[47] Section 3(a) and (b) of the Constitution.
[48] Section 233 of the Constitution.
[49] Pretorius et al (note 38 above) para 1.2.2.
[50] Section 3(1) of EEA.
[51] Article 1 of the CRPD.
[52] CRPD, para (e) of preamble and art 1.
[53] Article 2 of the CRPD.
[54] Article 5(3) of the CRPD.
[55] Article 27(1)(i) of the CRPD.
[56] Articles 2 and 5(3) of the CRPD.

constitutional jurisprudence for giving effect to substantive equality.[57] It arises from the imperative towards substantive equality and the rejection of formal equality when determining constitutional equality that is inscribed in ss 9(1), (3) and (4) of the Constitution.[58] Reasonable accommodation is implicitly linked to both the determination of the fairness of the discrimination under s 9 and whether unfair discrimination is justifiable under the limitation clause of the Constitution – s 36 – which incorporates the principle of proportionality.[59] In the workplace, proportionality means that an employment policy or practice that limits the employee's right to equality is discriminatory if a less discriminatory alternative is available to achieve a legitimate goal of the policy or practice.[60]

In post-apartheid jurisprudence, reasonable accommodation promotes substantive equality in two ways: as a non-discrimination principle when determining unfair discrimination and as an affirmative action duty. As an affirmative duty, its scope is limited to Chapter III of the EEA, as Pillay AJ explained.[61] Chapter III affirmative action duties apply only to ensuring equitable representation of designated groups – Black people, persons with disabilities and women – in workplaces run by designated employers. However, *Damons* was not about reasonable accommodation as an affirmative action duty in Chapter III but a non-discrimination duty in Chapters I and II of the EEA. [62]

The test for determining unfair discrimination under 6(1) of the EEA follows the judicially settled framework laid down in *Harksen v Lane* by the Constitutional Court under s 9 of the Constitution to protect the right to equality and its connection with human dignity and the achievement of substantive equality.[63] For listed protected grounds, such as disability, the onus is on the employer to prove that the discrimination is not unfair or, if it is, that it is justifiable. The EEA consolidates this approach regarding the determination of burden of proof.[64] What is less well established is that reasonable accommodation is a principle implied in the determination of unfair discrimination under the *Harksen v Lane* test as this is not expressly mentioned in the test. The EEA does not expressly link reasonable accommodation to the determination of unfair discrimination under s 6(1).

The EEA expressly refers to reasonable accommodation but only in the context of Chapter III duties owed to 'designated groups'. It defines reasonable accommodation as 'any modification or adjustment to a job or to the working environment that will enable a person from a designated group to have access to or participate or advance in employment'.[65] The reference to a 'designated group' clearly links reasonable accommodation with affirmative action duties in Chapter III. The EEA is textually different from the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of

[57] Pretorius et al (note 38 above) para 7.2.
[58] Ibid.
[59] Ibid.
[60] *SA Clothing and Textile Workers Union v Berg River Textiles – A Division of Seardel Group Trading (Pty) Ltd* [2018] JOL para 37.
[61] *Damons* (note 10 above) para 83.
[62] Ibid para 36.
[63] *Harksen v Lane* 1997 (11) BCLR 1489 (CC) para 53.
[64] Section 11(1) of the EEA.
[65] Section 1 of the EEA.

2000 (Equality Act), which makes an explicit link between reasonable accommodation and unfair discrimination.[66] The Equality Act lists 'reasonable accommodation' as one of the factors to take into account when determining unfair discrimination.[67] Furthermore, the Equality Act provides that when determining unfair discrimination on the grounds of race, gender, and disability, failure to provide reasonable accommodation is presumptively unfair.[68] The EEA does not expressly make such linkages even if the Code of Good Practice pursuant to the EEA does.[69]

5.1.1 Application of reasonable accommodation

Both sides of the Court in *Damons* were correct in proceeding on the footing that reasonable accommodation is a non-discrimination principle relevant to the determination of unfair discrimination. The majority accepted this proposition largely as a point of departure but without any substantive engagement with the rationale and source of reasonable accommodation. The minority judgment, on the other hand, substantively engaged with rationale and source of reasonable accommodation in South African jurisprudence. Pillay AJ's dissent illuminates reasonable accommodation by articulating its relevance to the determination of unfair discrimination under the EEA and highlighting its connections with the achievement of substantive equality for persons with disabilities and compliance with international human rights obligations under the CRPD.

Pillay AJ is correct in linking reasonable accommodation with equality, human dignity and freedom as well as highlighting that reasonable accommodation does not depend on express statutory recognition as it is fundamentally a constitutional non-discrimination principle. Her citation of *MEC for Education v Pillay* in support is germane.[70] *Pillay* is the first case in which the Constitutional Court gave explicit recognition to reasonable accommodation as a non-discrimination duty under the Constitution.[71] *Pillay* concerned the determination of unfair discrimination under the Equality Act. The Court had to determine whether refusal by a school to permit a pupil to wear a nose stud constituted unfair discrimination on grounds of culture and religion under the Act for failure to provide reasonable accommodation. In its determination, the Constitutional Court went beyond the provisions of the Equality Act to explain the rationale of reasonable accommodation. The Equality Act prohibits unfair discrimination. However, unlike the EEA it also codifies much of the equality jurisprudence that was developed by the Constitutional Court in its early years. Reasonable accommodation is among the principles it codifies.[72] In its determination, the Court in *Pillay* posited reasonable accommodation as a broader non-discrimination principle that emanates from the equality clause of the Constitution and is not limited to the Equality Act.[73] Underscoring substantive equality as the goal of the equality

[66] Act 4 of 2000.
[67] Sections 14(i) and (ii) of the Equality Act.
[68] Ibid ss 7(e), 8(h) and 9(c).
[69] Department of Labour (note 18 above) item 6.1.
[70] *Damons* (note 10 above) paras 79–81.
[71] *Pillay* (note 38 above).
[72] Section 14(3)(i) of the Equality Act.
[73] Pillay (note 38 above) para 72.

clause of the Constitution, Langa CJ said that the kernel of reasonable accommodation is that 'sometimes the community, whether it is the State, an employer or a school, must take positive measures and possibly incur additional hardship or expense in order to allow all people to participate and enjoy all their rights equally'.[74]

Damons is not the first case to imply reasonable accommodation into the determination of unfair discrimination under the EEA. Both the Labour Court and the Labour Court of Appeal have done so in previous cases.[75] *Standard Bank of South Africa v The Commission for Conciliation, Mediation and Arbitration* is an example.[76] An employee had developed severe back pain following a road traffic accident and could no longer discharge her usual duties as a home-loan consultant. A medical report had recommended modifying the employee's workstation and occupational therapy to enable the employee to perform her duties. The employee had also requested a headset as an assistive device and a flexible working schedule. The employer refused to act on the recommendation and request, citing costs. The employee was dismissed for incapacity. The Labour Court found that the costs of meeting the needs of the employee would have been very small. It held that the employer's conduct constituted a failure to provide reasonable accommodation and unfair discrimination in breach of s 6(1) of the EEA. *Independent Municipal and Allied Trade Union obo Strydom v Witzenburg Municipality* is another example.[77] In this case, the Labour Appeal Court observed that reasonable accommodation was, foremost, a constitutional principle that is implied in the determination of unfair discrimination and is applicable not only to the EEA but also the determination of unfair dismissal under the Labour Relations Act.[78]

The facts of *Damons* did not give rise to determining the limits of the duty to provide reasonable accommodation. However, the Court correctly proceeded on the footing that, while reasonable accommodation requires more than a *de minimis* effort, it is not an unlimited duty. International human rights law and comparative equality jurisprudence uses proportionality to determine the extent of the effort required. For example, the CRPD, states that reasonable accommodation should not impose 'a disproportionate or undue burden'.[79] This is similar to the approach of the Supreme Court of Canada under the Charter of Rights and Freedoms that uses 'undue hardship' as the limit.[80] In *Pillay*, Langa CJ explicitly aligned with the Canadian approach on this point.[81] *Damons*, endorses the principle of proportionality to determine the limits. Pillay AJ said:

> When assessing reasonable accommodation, a countervailing consideration would be the relative hardships for the employer. Proportionality must prevail between reasonable accommodation on the one hand, and the extent of the hardship on the other hand. Reasonableness imports the notion of proportionality into applying disability law.[82]

[74] Ibid para 73.
[75] Pretorius et al (note 38 above) para 7.2.
[76] *Standard Bank of South Africa* (note 11 above).
[77] *Witzenburg Municipality* (note 11 above).
[78] Ibid para 8.
[79] Article 2 of the CRPD.
[80] *Central Okanagan School District No 23 v Renaud* [1992] 2 SCR 970 para 983g–985a.
[81] *Pillay* (note 38 above) para 76.
[82] *Damons* (note 10 above) para 87.

An important contribution *Damons* makes, especially through the deliberations of Pillay AJ, is in explicating reasonable accommodation as a non-discrimination principle with constitutional origins. *Damons* reinforces that, though reasonable accommodation is not expressly stated in the non-discrimination provisions EEA, it is a constitutionally mandated non-discrimination principle when determinating of unfair discrimination under s 6(1). By implication it is a component of the *Harksen v Lane* test. *Damons* lends the weight of the apex court to a proposition that is a crucial element of the transformative architecture of substantive equality.

5.2 Applying the intersection between reasonable accommodation and the inherent requirements of the job defence

The defence in s 6(2)(b), which provides that it is not unfair discrimination to 'distinguish, exclude prefer any person on the basis of an inherent requirement of a job', originates from Convention 111 of the International Labour Organisation.[83] It is also found in the Labour Relations Act 66 of 1995, which regulates unfair dismissal. Section 187(2)(a) of this Act provides that a dismissal may be fair if the reason for dismissal is based on an 'inherent requirement of the particular job'. Comparable jurisdictions have legislation with a similar defence though not necessarily the same formulation. For example, Title VII of the American Civil Rights Act 1964[84] and the Canadian Human Rights Act of 1985[85] use 'bona fide occupational qualification'. The Australian Sex Discrimination Act and Race Relations Act use 'genuine occupational qualification'.[86]

South African courts, as courts elsewhere, narrowly construe the inherent requirements of the job defence. In *IMATU v City of Cape Town*, the Labour Court said that the defence should be applied restrictively against the employer.[87] In that case, the Court held that an employment policy that imposed a blanket ban on employing firefighters who were diabetic and dependent on insulin constituted unfair discrimination. This is because the policy unfairly excluded a firefighter whose diabetes and insulin dependence were adequately managed and did not pose a risk to health and safety in the operations of a firefighter. The court said:

> [a]ny legislatively formulated justification of discrimination constitutes, in effect, a limitation on the constitutionally entrenched right to equality and this militates against an expansive reading of the phrase 'an inherent requirement of the job.[88]

A narrow construction serves to protect the employee from unfair discrimination and unfair labour practices that can easily undermine fundamental rights while concomitantly protecting the employer's interests. It prevents the employer from using consideration extraneous or peripheral to the job or relying on stereotypes or

[83] International Labour Organization (ILO) *Discrimination (Employment and Occupation) Convention* C111, 25 June 1958.
[84] 42 USC § 2000e-2(e).
[85] Section 15(1)(a) of the Canadian Human Rights Act of 1985.
[86] Section 7(2) of the Sex Discrimination Act 1975 and s 5 of the Race Relations Act 1976.
[87] *IMATU* (note 11 above) para 103.
[88] Ibid.

generalisations to deny an employee who has the capacity to perform the job with or without reasonable accommodation. The term 'inherent' implies that the requirement is necessary for the performance of the job as to be indispensable. Thus, as the Labour Court of Appeal enunciated in *TDF Africa*, an inherent requirement must be 'rationally connected to the performance of the job and necessary for the fulfilment of a legitimate work-related purpose'.[89] It is a requirement without which the essential functions of the job cannot be performed at all. Conversely, a requirement is not essential if a less discriminatory requirement would enable the performance of the inherent requirements of the job and does not impose undue hardship.[90]

In *Damons*, the job in question required the applicant to perform core physical activities of a firefighter. Due to permanent physical disability, no amount of reasonable accommodation could enable the applicant to do so. The majority observed that the Code of Good Practice pursuant to the EEA links the employer's duty to provide reasonable accommodation to employees with disabilities with performance of the inherent requirements of the job.[91] Majiedt J stressed that while the purpose of reasonable accommodation is to create a level playing field between persons with disabilities and persons without disabilities to enable the former to perform the job, it does not extend to dispensing with the inherent requirements of the particular job. The judge said:

> In other words, they [reasonable accommodation measures] are aimed at placing the employee with disabilities on an equal footing with employees without disabilities as far as the operational requirements and performance of the job are concerned. The obligation to reasonably accommodate thus applies if such reasonable accommodation will make it possible for the employee to fulfil the inherent requirements of the job.[92]

While agreeing with the proposition that reasonable accommodation is for the purpose of enabling the employee to discharge the inherent requirements of the job and that physical fitness is a core requirement, as explained earlier, the dissenting judgment reached its conclusion by treating the job in question as a non-operational position. The essential functions of a non-operational position could be discharged if reasonable accommodation in the form of measures such as counselling, reskilling, retraining and reassignment were considered.[93] Notably, the two sides of the court were not speaking to the same job.

Pillay AJ described her approach to deciphering the meaning of the inherent requirements of 'a job' in s 6(2)b) as a 'purposive, generous interpretation' aimed at protecting constitutional equality in the workplace.[94] The following passage captures Pillay AJ's approach in this regard:

> To comply with the Constitution and to give effect to the purpose of the EEA, section 3 above compels a purposive, generous interpretation of 'reasonable accommodation'.

[89] *TDF Network Africa* (note 17 above) para 37; *Damons* (note 10 above) para 135.
[90] *SA Clothing and Textile Workers Union* (note 60 above) para 37.
[91] *Damons* (note 10 above) para 140.
[92] Ibid para 140.
[93] Ibid para 97.
[94] Ibid para 77.

> Thus, 'any modification or adjustment' is not limited to the particular job, but refers broadly to 'a job'. The careful use of the article 'a' and not 'the' recurs in both the 'the inherent requirement of a job' in section 6(2)(b) and in item 6.1 of the Code: 'Employers must reasonably accommodate the needs of persons with disabilities. The aim of the accommodation is to reduce the impact of the impairment of the person's capacity to fulfil the essential functions of a job.' Although there are other explanations for using 'a' instead of 'the', the text also lends itself to the interpretation I seek to place on it.[95]

It can be argued Pillay AJ's approach is preferable on the ground that it has more synergy with the values of promoting equality and human dignity under the Constitution for a social group that has been historically marginalised in the workplace.[96] However, it is submitted that the approach of Pillay AJ would be persuasive or even compelling if Damons had been seeking promotion to 'any position' or 'any job'.[97] This is because employers have a duty under ss 5 and 6 of the EEA to ensure that employment policies and practices, including promotion policies, are not unfairly discriminatory. Excluding employees with disabilities from the prospect of promotion would be prima facie discriminatory. However, this is not how the case was pleaded. Damons was seeking promotion to a specific position of a senior firefighter. Interpreting the s 6(2)(b) defence to apply to a wider ambit of positions than that stipulated in the job in question dislodges reasonable accommodation and the inherent requirements of the job defence from their moorings in a specific job.

It is submitted that, in essence, Pillay AJ approach had the effect of judicialising the legitimacy of imposing undue hardship or a disproportionate burden on employers as part of reasonable accommodation in order to protect the right of job applicants and employees with disabilities to non-discrimination in the workplace. While the approach adopted by the minority has a place in reasonable accommodation as an affirmative action measure that operates as a shield rather than a sword, it is inappropriate for determining unfair discrimination as it amounts to a unilateral rewriting of the employment contract to disregard legitimate business needs. The fact that the employer's negligence was responsible for causing the applicant's incapacity appears to have influenced AJ Pillay's to apply reasonable accommodation in a way that requires an employer to create a new position for an employee who lacks requisite capacity for the specific job in question.

The majority were correct in pointing out that aligning with the dissenting judgment would have the effect of fundamentally undermining the reciprocal obligations in an employment relationship under the EEA. It would amount to 'subverting the careful balance which the EEA strikes between, on the one hand, respecting the legitimate operational prerogatives and needs of employers, and, on the other hand, ensuring that employers take steps to ensure equitable access to the workplace.'[98]

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[95] Ibid.

[96] In support of this view see: M van Staden 'An update of recent labour law developments from the South African courts' (2022) 4 *Journal of South African Law* 717, 742; R Laubscher 'Aantekeninge: Overview of Constitutional Court judgments on the bill of rights – 2022' (2023) 2 *Journal of South African Law* 316, 318.

[97] C Wingfield & N Coetzer 'The fired firefighter: The Concourt weighs in' (2022) 2 *Without Prejudice* 20.

[98] *Damons* (note 10 above) para 143.

Majiedt J elaborated on the adverse implications for employers if the Court were to agree with Pillay AJ. He said:

> If the first judgment's [Pillay AJ's judgment] understanding of section 6(2) were to prevail, employers would effectively be required to reasonably accommodate employees who cannot meet the inherent requirements of the job to which they seek appointment. Or worse, it would place an obligation on employers to create new positions in order to accommodate employees who did not meet the inherent requirements of a different job altogether. This is plainly incompatible with the very nature and purpose of reasonable accommodation, which is to enable an employee with disabilities to perform in accordance with the inherent requirements of the job.[99]

6. Conclusion

Damons does not break new ground. Its main significance lies in illuminating reasonable accommodation and its relationship with the inherent requirements of the job defence. *Damons* reinforces that reasonable accommodation is a non-discrimination principle that originates from the constitutional commitment to substantive equality and is implied in s 6(1) of the EEA. This is useful judicial guidance from the apex court and a contribution towards the development of substantive equality. *Damons* is also significant for reinforcing that s 6(2)(b) of the EEA is a complete defence if the job applicant or employee does not have the capacity to perform the essential functions of the job with or without reasonable accommodation. It reiterates the principle that reasonable accommodation cannot be applied to displace the inherent requirements of a job defence and effectively require the employer to create a new position to fit the capacity of an employee or job applicant.

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No conflict of interest has been declared by the author.

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[99] Ibid para 142.