CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 278/20

In the matter between:

ADAM DAMONS Applicant

and

CITY OF CAPE TOWN Respondent

Neutral citation:	*Damons v City of Cape Town* [2022] ZACC 13
Coram:	Madlanga J, Madondo AJ, Majiedt J, Mhlantla J, Pillay AJ, Rogers AJ, Theron J, Tlaletsi AJ and Tshiqi J.
Judgments:	Pillay AJ (minority): [1] to [108] Majiedt J (majority): [109] to [148]
Heard on:	12 August 2021
Decided on:	30 March 2022
Summary:	Unfair discrimination — reasonable accommodation — inherent requirements of a job — disability law — importance of pleadings in determining disputes — sections 5, 6(1), 6(2)(b) and 11(1) of the Employment Equity Act 55 of 1998

ORDER

On appeal from the Labour Appeal Court of South Africa, Cape Town hearing an appeal from the Labour Court, Cape Town:

1. Leave to appeal is granted.
2. The appeal is dismissed.

JUDGMENT

PILLAY AJ:

Introduction

> *"Highlighting* the fact that the majority of persons with disabilities live in conditions of poverty, and in this regard recognising the critical need to address the negative impact of poverty on persons with disabilities."[1]
>
> "South Africa can take pride in its effort to formulate policies to protect the rights of persons with disabilities."[2]

[1] Mr Adam Damons, the applicant, chose a career as a firefighter. His dream of advancing to the position of senior firefighter shattered when he was injured on duty. The injury occurred because the City of Cape Town, his employer and the respondent, disregarded safety measures during a fire drill. This accident permanently disabled the applicant from undertaking strenuous physical activity, to such an extent that he cannot carry anything heavier than 10 kilogrammes. Physical fitness is an inherent requirement

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[1] Item (t) of the Preamble to the Convention on the Rights of Persons with Disabilities, 13 December 2006 (CRPD).

[2] Foreword to the Code of Good Practice on Employment of Persons with Disabilities, GN 1085 *GG 39383*, 9 November 2015 (Code) as alluded to in section 3(c) of the Employment Equity Act 55 of 1998.

of the job of an operational firefighter. Consequently, he cannot successfully complete a physical assessment.

[2] The drill that resulted in the applicant's injuries, and eventual permanent disability, differed from ordinary drills. A disagreement between the officer in charge of the drill and one of the firefighters resulted in all participating firefighters being punished. Instead of carrying mannequins or test dummies on their backs while completing the ascent and descent in the drill tower – as is the normal drill process – they were required to carry their fellow firefighters. Ignoring the applicant's warning that the action was unsafe, his safety officer instructed him to get onto another trainee's back. That person could not carry him, and the applicant fell from the second to the first floor.[3]

[3] The applicant commenced his employment as a firefighter on 1 February 2001, and completed the firefighter courses in 2005. By 2008 he was eligible to apply for promotion or advancement to the position of senior firefighter. On 1 April 2009, the respondent introduced its Fire and Rescue Advancement Policy (Policy), which was applicable to its operational Fire and Rescue Service. In 2010, the applicant applied for a promotion. He might have been promoted in 2011 but for his disability.

[4] The respondent notified the applicant of a hearing concerning his incapacity on 3 May 2012. The purpose of the hearing was to assess whether he suffered from incapacity related to ill-health or injury, and if so, the nature and extent of his incapacity. If the incapacity was permanent, then the respondent would investigate the extent to which the applicant's work circumstances might be adapted to accommodate his disability. If the respondent found no solution to the problem, then it would consider alternative placement, if applicable, and as a last resort termination of his services. The incapacity hearing, held on 22 May 2012, concluded on the basis that the applicant

[3] *South African Municipal Workers Union obo Damons v City of Cape Town* [2018] ZALCCT 9; (2018) 39 ILJ 1812 (LC) (Labour Court judgment).

would provide an updated report from his physician and a meeting would be arranged with the respondent's occupational health practitioner to obtain a report.

[5] The outcome of a final incapacity assessment process concluded that the applicant could be accommodated within the Fire and Life Safety Section. After protracted negotiations with the applicant's trade union, the South African Municipal Workers' Union, the respondent transferred the applicant to alternative employment on 23 January 2013. In this position he was employed to do administrative and educational work. He retained his designation as a firefighter and salary level, although he was unable to perform the operational function of fighting fires. The applicant agreed to the transfer if "his current remuneration package as well as future promotions" remained applicable.

[6] The applicant applied for advancement to the position of senior firefighter. For the purposes of the advancement, he requested the respondent to relax the physical fitness requirement. The respondent refused the application for advancement and has not advanced or promoted him to any position since his transfer. The technical differences between advancement and promotion are irrelevant for the purposes of this judgment.

[7] Aggrieved, the applicant referred a dispute to the Commission for Conciliation, Mediation and Arbitration (CCMA) in terms of section 10(2) Employment Equity Act[4] of the (EEA) for conciliation. Conciliation was unsuccessful. Following arbitration before the South African Local Government Bargaining Council (SALGBC) in 2014, an action in the Labour Court and an appeal to the Labour Appeal Court, the applicant brings himself before this Court.

[8] As mentioned, physical fitness is an inherent requirement of the job of an operational firefighter. About this there is no dispute. Notwithstanding this, the

[4] No 55 of 1998.

applicant claims that the respondent is discriminating against him unfairly by refusing to waive the physical fitness requirement and to promote and advance him, preferably in his job as a firefighter. To this claim, the respondent raises the defence that physical fitness is an inherent requirement of the job of firefighters. This defence would be watertight against a charge of unfair and unjustifiable discrimination for refusing to waive an inherent requirement. In *Imatu*[5] the Labour Court Judgment confirmed that physical fitness is an inherent requirement for the job of a firefighter.[6] Facially, this seems to be an open and shut case. What then is the dispute about?

[9] Digging deeper, something is ajar.[7] The respondent raises the substantive defence that the transfer of the applicant to his current position in 2013 "did not amount to reasonable accommodation" because "reasonable accommodation" only applies if the person can perform the essential functions of the job, which, according to the respondent, the applicant cannot. It refutes any obligation to reasonably accommodate the applicant as a firefighter, a title, it says, he holds nominally because the defence of the inherent requirement of a job insulates it absolutely from a claim for unfair and unjustifiable discrimination. Furthermore, reasonable accommodation relates to accommodating the applicant to be a firefighter. The nature of his disability renders that job impossible. It also points out that neither party intends to either withdraw the requirement of physical ability and fitness in the Policy, or to create an exception to the Policy entitling the applicant to advancement as an operational firefighter. From the respondent's disclaimers the real issue in dispute distils down to this: does the respondent have an obligation to reasonably accommodate the applicant?

[10] Co-existing with the defence of the inherent requirement of a job are the rights of the applicant as a person with disabilities and a member of a designated group not to be unfairly or unjustifiably discriminated against and to be reasonably accommodated.

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[5] *Imatu v City of Cape Town* 2005 26 ILJ 1404 (LC) at para 28.

[6] *City of Cape Town v SA Municipal Workers Union obo Damons* [2020] ZALAC 9; (2020) 41 (ILJ) 1893 (LAC); (Labour Appeal Court judgment) at para 14 citing *Imatu*.

[7] Kennedy "Freedom and Constraint in Adjudication: A Critical Phenomenology" (1986) 36 *Journal of Legal Education* 518 at 522-3.

Corresponding obligations rest on the respondent to "take steps to promote equal opportunity in the workplace by eliminating unfair discrimination in any employment policy or practice".[8] Consequently, the applicant's claim for advancement or promotion to what the respondent refers to as a "a non-operational division", together with the respondent's defence, call for a probe into the co-existence of the principles pertaining to the inherent requirement of a job and the duty not to discriminate against, but rather reasonably accommodate people with disabilities. Are these principles mutually exclusive or must they work in tandem? Put differently, in a clash between the competing principles of the respondent's defence of the inherent requirement of a job and the applicant's protections against unfair and unjustifiable discrimination, must one principle prevail over another? Is reasonable accommodation relevant when adjudicating these competing interests?

[11] This line of enquiry into equality, discrimination and disability law is inspired specifically by the facts. The applicant is not a candidate applying for employment to whom the inherent requirement of a job defence would traditionally apply. He was an employee injured, not in the ordinary course of rendering firefighting services, but because the respondent failed to implement standard safety measures after the applicant warned the officer in charge of the risks. These facts establish pre-existing rights and obligations that call for a probe into the competing interests at stake.

Terminology

[12] At the outset, when discussing disability, the choice of terminology is an ideologically sensitive matter. "Disabled persons" implies that the people are incapable whereas "persons with disabilities" recognises that the people are capable but with some impairment. "Disability" incorporates both anatomical and mental impairments and the role and impact of social factors. Whether people are capable depends on both their own abilities as well as the availability of an enabling environment, tools and technology. Because the term "persons with disabilities" articulates disability not only

[8] Section 5 of the EEA.

as an inherent aspect of the person, but also accounts for social and environmental factors, it accords with the social, human rights response rather than the traditional, paternalistic, welfarist response. For welfarism, charity is both a means and an end.[9] In contrast, a developmental, human rights approach has a better fit with our transformative Constitution than welfarism. The EEA adopts the term "people with disabilities". Similarly, the World Health Organisation uses "persons with disabilities",[10] which is also reflected in the titles of both the CRPD[11] and the Code.

Litigation history

Arbitration

[13] The arbitrator diagnosed the nature and cause of the applicant's grievance from its inception to be as follows:

> "[T]he respondent is of the view that the mere fact that the applicant has been accommodated within the Unit that itself is sufficient. To me this is a misguided notion because there is no favour done to the applicant to accommodate him as that is a legal requirement expected from the respondent to do so. Clearly, it does not bother the respondent as to whether . . . the applicant is advanced. I note the attitude displayed here borders on arrogance of the respondent's management and there is no empathy displayed here towards the applicant. It is as if the applicant brought this condition to himself and therefore tough luck to him and must be grateful that he still works for the respondent."[12]

[9] South African Law Reform Commission (SALRC) "Domestication of the United Nations Convention on the Rights of Persons with Disabilities" Issue Paper 39, Project 148 (Domestication of the CRPD) at xiv, where the models are briefly discussed under the heading "How to Translate the CRPD into South African Law".

[10] World Health Organisation "World Report on Disability" (2011) at xxi.

[11] In Article 1, the CRPD identifies for its purpose "persons with disabilities" to include "those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others".

[12] *SAMWU obo A Damons v City of Cape Town*, SALGBC Arbitration Award, 17 October 2014, at para 23 (arbitration award).

[14] The arbitrator went on to remark that to confine the applicant "to one position for such a long time does affect one's dignity and status".[13] However, because the respondent raised the defence of the inherent requirements of a job, the arbitrator concluded that the bargaining council lacked the jurisdiction to determine this aspect of the dispute. Therefore, the applicant referred the dispute to the Labour Court in terms of section 10(6)(a) of the EEA.

Labour Court

Evidence before the Labour Court

[15] Before the Labour Court, the parties helpfully concluded a pre-trial minute. The second judgment relies on the applicant's statement of claim to distil his cause of action. However, the subsequent pre-trial minute clarifies the facts agreed, the facts in dispute and the legal issues for determination. In my view, the pre-trial minute supersedes prior pleadings and defines the causes of action for determination. In the minute the parties agreed on the following:

(a) During 2010 the applicant was injured whilst on duty.

(b) The injury is permanent and constitutes a disability for the purposes of the EEA in that it is a long-term physical impairment which limits his prospects of advancement as a firefighter.[14]

(c) On 23 January 2013, after the completion of an incapacity assessment process, the applicant "was accommodated with alternative employment because of his disability by transferring him to a position in the Finance and Billing Section in Goodwood and thereafter to his current position in the Fire and Life Safety Education Section in Bellville".

(d) The applicant's current position does not require intensive physical exercise. His work is administrative and educational.

[13] Id at para 24.

[14] Section 1 of the EEA defines "[p]ersons with disabilities" to mean people who have a long-term or recurring physical or mental impairment which substantially limits their prospects of entry into, or advancement in, employment.

(e) The applicant was allowed to retain his designation as a firefighter and salary level, including his 22.8% standby allowance.

(f) The applicant can no longer perform the core functions of a firefighter and is unable to perform the associated physical activities.

(g) The respondent employs learner firefighters, firefighters and senior firefighters at an operational level. Advancement is not automatic but is regulated by the respondent's Policy which was published on 1 April 2009. The respondent's alleged reason for the Policy was to eliminate the inconsistent and unfair application of the previous advancement criteria by applying (on the respondent's version) uniform criteria for advancement.

(h) The Policy applies to the advancement of all permanent staff members actively involved with operational firefighting and rescue activities, or any other functions delegated in terms of the Fire Brigade Services Act[15] which includes candidates from learner to senior firefighter. To be advanced from the rank of firefighter to that of senior firefighter, the Policy stipulates specific requirements.[16]

(i) Since the inception of the Policy, no firefighter has been advanced without having successfully completed the practical assessment. The practical assessment requires a firefighter to present theoretical knowledge in a lecture and be able to demonstrate the application of his or her theoretical knowledge physically. The applicant is unable to complete the practical assessment due to his disability. He is also unable to meet the respondent's alleged inherent requirements of a firefighter. The applicant can meet all the other requirements for the purposes of advancement.

[15] 99 of 1987.

[16] These requirements include (a) the recommendation of the Chief Fire Officer and approval from the Director: Emergency Services; (b) four years continuous firefighting experience; (c) accredited firefighter 2 or Southern African Emergency Services Institute (SAESI) Certificate; (d) accredited Hazmat Operations certificate; (e) Basic Ambulance Service Certificate; (f) valid code C1 drivers licence with Professional Driver's Permit (PrDP); (g) C1 Response Driver and pump operator; and (h) successfully undergo a practical (physical) assessment as per Service Order section 6, No 2.

(j) The applicant had previously applied for advancement. Despite his request, the respondent refused to relax the physical assessment requirement, asserting instead that physical fitness and ability are inherent requirements for the job of a firefighter and that the applicant is unable to meet this inherent physical requirement.

(k) The job description for the various firefighter ranks includes the requirement of being physically fit and able bodied for the performance of tasks associated with specific key performance areas of the posts, being able to perform strenuous physical tasks and heavy lifting in confined areas, and at elevated temperatures, while wearing heavy protective clothing and equipment, being able to perform rescue work in swift flowing water, and being able to enter structures on fire, whilst wearing protective gear and breathing apparatus and carrying a variety of service-related tools and equipment. The applicant is unable to meet these requirements due to his disability.

(l) Firefighters are required to successfully complete an annual physical fitness assessment and, where applicable, routine physical drills. Due to his disability the applicant is unable to undertake that assessment, perform the routine physical drills and fulfil the normal operational duties associated with being a firefighter. There is no prospect of him being rehabilitated from his disability to resume operational duty as the disability is of a permanent nature.

[16] Of the facts in dispute, four are relevant: the extent to which the respondent accommodated the applicant following his injury; the extent to which the applicant had access to advancement or promotion *in respect of other lines of employment* within Fire and Rescue Services or the respondent generally; the extent to which the respondent could have *accommodated* the applicant in the post of senior firefighter; and lastly, whether the Policy *discriminated* against the applicant based on his disability. These disputes of fact dovetail with the agreed legal issues below. Manifestly, his ambition to be a senior firefighter that he had articulated in his statement of claim changed during

the pre-trial proceedings. Accommodation and advancement or promotion to other lines of employment imply that the applicant was no longer seeking appointment as a senior firefighter only.

[17] The crux of the legal issues for the Labour Court to determine was first, whether the inherent requirement of physical fitness for a firefighter precluded the applicant's advancement or promotion to the position of senior firefighter. Second, regarding discrimination, the parties asked the Labour Court to determine whether the Policy constituted *justifiable and fair discrimination* in as much as it distinguished between persons on the basis of an inherent requirement of a job; and whether the application of the Policy to the applicant constituted *unfair direct, alternatively indirect, discrimination* as contemplated by section 6 of the EEA.[17]

[18] Together, the facts in dispute and the legal issues for determination informed the relief pleaded for. That relief included an order declaring the conduct of the respondent to be unfair discrimination as contemplated in section 6(1) of the EEA; an order directing the respondent to cease such discrimination by withdrawing the application of the physical assessment requirement in the Policy to persons with disabilities; an order directing the respondent to reconsider the applicant's application for advancement; and an order directing the respondent to pay the applicant compensation and costs.

[19] If the pre-trial minute was not clear about the relevance of reasonable accommodation in this dispute, then the respondent's Notice of Appeal is explicit about what this Court is required to determine. In the Labour Appeal Court, the respondent refuted the finding of the Labour Court that its transfer of the applicant amounted to reasonable accommodation. The respondent's attitude remained that transferring the

[17] The legal issues were: (a) whether the advancement of an employee from a firefighter to senior firefighter constitutes a promotion; (b) what purpose is served by the advancement/promotion of an employee to the post of senior firefighter; (c) whether the inherent requirement of physical fitness for a firefighter precludes the applicant's advancement to the position of senior firefighter; (d) whether the Policy constitutes justifiable and fair discrimination in as much as it distinguishes between persons on the basis of an inherent requirement of a job; and (e) whether the application of the policy to the applicant constitutes unfair direct, alternatively indirect, discrimination as contemplated by section 6 of the EEA.

applicant and "[a]llowing him to retain his title as a firefighter was a reasonable and *compassionate alternative* to the *termination* of his employment on the grounds of incapacity given that he could not perform the core functions of a firefighter". Termination for incapacity was foreshadowed from the outset in the notice to attend the incapacity hearing.

[20] And if the Notice of Appeal is not enough elucidation, then the common understanding of what the case was about is best articulated by the parties in their own words in the edited extracts below from the transcript of the applicant's cross-examination before the Labour Court:

> "Mr Conradie [attorney for the respondent]: And the argument put up by the City is that you cannot advance in terms of this policy in the operational side unless you can meet those requirements?
> Applicant: I would agree with you. This is why I said I am not asking to be placed on the operational side.
> . . .
> Mr Conradie: What I'm going to argue at the end of the case is that there cannot be an obligation on the City to create for you a career stream in what for simple terms I'll call now the admin section that you work in because you don't want to be operational but you regard yourself probably as having limited career prospects in the admin field and you now want to replicate almost what applies to the operational people in the area that you work?
> Applicant: I'm going to disagree if I may respond? . . . however everybody must progress through this document, if you however become injured like in my case you have no prospects and that is what we're challenging. I'm not saying they should take this document and create something similar to this, we're asking them, because I already meet all the qualifications that they have here, apart from the physical component.
> Mr Conradie: You see the difficulties and this is a very difficult area of law, so I'm not going to have a legal debate, but I just want to give you the understanding of the City's case. This is not a case in which you are saying to the City I would like to become a senior firefighter and get back on the fire truck and the City then says to you sorry you don't qualify because you can't pass the physical test, that is the normal type of case that would come to this Court and then the Court must look at whether or not putting

up this physical requirement discriminates against you. You're not asking to come back in the service, you're asking to stay where you are, but the City must give you a career progression, they must create a career for you in what I call the admin side, the non-operational side and I'm saying that that is a stretch too far. Do you want to comment on that?

Applicant: The City has got an admin side and you have therefore your level, clerk levels and your administrative levels, they are not called the firefighters within the education section so that is my view on it.

. . .

Mr Conradie: What I'm saying is that what you are asking for is similar to now saying. I want to move up in this specific field and I want you to create that career's dream for me. And that's not something that the City can be forced to do.

Applicant: I'm saying that I came into the employ of the City of Cape Town as a fit individual with prospects and hopes of an employer that is going to look after me and that is all that I'm saying, I'm expecting them, it's now seven years and today we're in court and still I have not moved. I don't know of any employer [employee?] that would be happy with that, so I feel that I'm prejudiced by an IOD and that is my view on that.

. . .

Mr Conradie: . . . about the bursary and going into the HR field . . . in other words, the employer almost prevented you from advancing?

Applicant: I would agree with that I will tell you why I agree with that, is because I have explained to them in writing the situation that I find myself and why I would then want to change from this direction to that direction and they still declined it and I will therefore agree with that.

Mr Conradie: Not much turns on it, but the word [thwarted] really means it's almost in bad faith, they prevented you from progressing.

Applicant: Well as I said now if you read the fact that you are in a hole and you need to ask the employer to assist the employee to get out of that and you still refuse that, decline it then I would say yes it is bad faith, that is my view on that."

[21] The respondent had a complete and correct understanding of the applicant's case. On the basis of its understanding, the respondent articulated the applicant's case as one for reasonable accommodation, which it said it was not obliged to implement. Setting up a career path is precisely what the applicant was seeking. This too the respondent understood very well as its attorney demonstrated when he cross-examined the

applicant. The pleadings had served their purpose. The respondent appreciated fully the complexities of the case when its attorney remarked during the cross-examination of the applicant: "this is a very difficult area of law". Why would it be difficult if the only issue was the defence of the inherent requirement of the job of a firefighter, which was settled law? It is difficult because this is not "*the normal type of case*" either on the law or the facts.

[22] The respondent disputes that it has a legal duty to accommodate the applicant and wants to apply its normal rules for advancement and promotion to him. On at least three occasions Mr Conradie put to the applicant that nothing stopped him from applying for other positions. The applicant responded each time that he did not have the relevant qualifications for those positions. While Mr Conradie acknowledged that the applicant may not have been successful, he persisted that he could still apply. The applicant responded that if he did apply for any promotion he would be hit by the inherent requirements for those positions. He was unqualified for a senior position in the administration and human resource stream. But in firefighting he met all the requirements except that of physical fitness. Therefore, if he could apply for promotion, he asked that it be in firefighting.[18]

[23] One of the issues in dispute was whether he could be advanced or promoted to "other lines of employment". In the light of the respondent's denial of any duty to reasonably accommodate the applicant, and that the applicant would have to apply for promotion if he wanted advancement, no evidence was led of exploring "other lines of employment". To be promoted, the applicant had to meet the inherent requirements for

[18] In relation to the promotion, the following extract from the transcript becomes relevant:

> "Mr Conradie [continued]: And what I'm saying to you is that you can apply for it, you may not meet all the requirements, but the fact that you have a permanent disability does not mean that they won't allow you to apply for the position and be considered for it, that's all I'm putting to you.
>
> Applicant: Okay, I would like to disagree and I would like to say this, if that is the case that due to the disability I can go that way then the question is what prevents me from going this way with a disability, why am I prevented here, from as per my going to apply admin, human resources with a disability, what is preventing me from going here in the same direction where I am now for five years with a disability, where I am educated in and I've got qualifications, those are the things that go to my mind and that is why I would disagree."

any job for which he applied. When counsel for the applicant objected to the respondent's attorney re-examining its witness about advancement opportunities and other lines of employment, the Court offered to rule on the objection. Unreasonable as the objection was, the respondent's attorney declined the offer, saying that nothing turned on it. This response is consistent with the respondent's attitude that its defence of the inherent requirement of a job trumped all claims for unfair discrimination.

Judgment of the Labour Court

[24] The Labour Court defined the question for its determination to be "whether applying the [P]olicy to [the applicant] in a way that prevents him from advancement due to his disability amounts to unfair discrimination".[19] As for the defence of the inherent requirement of a job, it found that the respondent—

> "is undermined by its own previous decision to keep [the applicant] in the Fire and Rescue Service albeit in a position that does not require active firefighting. It did so on an individualised basis after a painstaking series of incapacity investigations."[20]

[25] The Labour Court declared that applying the Policy to the applicant in a way that prevented him from advancing due to his disability amounted to unfair discrimination in terms of section 6(1) of the EEA. Weighing heavily on its decision was the undisputed evidence that the respondent caused the applicant's disability. While acknowledging that the respondent's defence of the inherent requirements of a job was a "complete" defence to an allegation of unfair discrimination,[21] the Court diagnosed that the applicant's discrimination grievance went wider than an attack on the inherent requirements of a job. Applying item 7.5.1 of the Code relating to the prohibition of employing people with disabilities on less favourable terms, it declared the application of the Policy to the applicant to amount to unfair discrimination.[22]

[19] Labour Court judgment above n 3 at para 20.

[20] Id at para 19.

[21] Id at para 45.

[22] Id at paras 20-1.

Weighing the interests of the respondent it noted that the respondent did not raise issues of financial prejudice as a reason for its stance but rather relied on the need for consistency in the application of its policy.

[26] Significantly, the Court extracted from the respondent's final incapacity report that: the applicant's "injury was permanent"; that his work could be adapted "to accommodate his incapacity", and that he "can be transferred to a section … that does not require him to perform the physical functions that he may not perform and still add value to the work of the Fire and Rescue Service".[23] Considering that it was known that his disability was permanent when he was accommodated, the Labour Court seemed to suggest that if advancement could be effected by voluntarily waiving the physical fitness requirement once, then it should be possible to do so again, specifically for the applicant. The Labour Court concluded that the respondent had not met its onus of establishing fairness on a balance of probabilities. Having recognised the applicant's right to dignity[24] and that "he is a firefighter, who is denied progression in remuneration or status through the ranks",[25] the Court created a wide berth for the respondent's exercise of its managerial discretion, by directing it to reconsider the applicant's advancement application within 15 days of the order being handed down.[26]

Labour Appeal Court

[27] The Labour Appeal Court focused on the respondent's defence of the inherent requirements of a job to resist the applicant's claim for advancement to the position of senior firefighter.[27] It noted that the Policy requiring a practical physical assessment was implemented prior to the applicant sustaining his injury.[28] Referring to the

[23] Id at para 22.

[24] Id at para 21.

[25] Id at para 17.

[26] Id at para 23.

[27] Labour Appeal Court judgment above n 6 at para 13.

[28] Id at para 13.

judgment of the Labour Court in *Imatu,*[29] the Labour Appeal Court accepted that physical fitness is an inherent requirement for the job of a firefighter.[30] It endorsed *TDF Network Africa*[31] 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.[32]

[28] In overturning the Labour Court's judgment, the Labour Appeal Court reasoned as follows:

> "The court *a quo* correctly noted that [the] appellant, following Mr Damons' disability, engaged in a 'painstaking series of incapacity investigations' and ultimately placed him in a position that did not require active firefighting. It is difficult to see how this conclusion can justify the further one reached by the court *a quo*, namely that Damons' disability which prevented him from being advanced amounted to unfair discrimination. To the extent that there is a differentiation between Damons and active firefighters, who are considered for promotion, this is justified both by the rational requirements contained in the Policy and by the inherent requirements for the position of a senior firefighter. In this connection, although again in a different context, the. . . *dictum* of this Court in [*SAA*][33] is relevant. [34]

[29] The Labour Appeal Court considered the Code which provides at item 6.5.1 that—

> "employers should 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."[35]

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[29] *Imatu* above n 5 at para 14.

[30] Labour Appeal Court judgment above n 6 at para 14.

[31] *TDF Network Africa (Pty) Ltd v Faris* [2018] ZALAC 30; (2019) 40 ILJ 326 (LAC) *(TDF Network Africa).*

[32] Id at para 37 and Labour Appeal Court judgment above n 6 at para 14.

[33] *South African Airways (Pty) Ltd v V* [2014] ZALAC 27; (2014) 35 ILJ 2774 (LAC) (*SAA*).

[34] Id at para 54.

[35] Labour Appeal Court judgment above n 6 at para 16.

[30] It then considered item 7.5.1(b) of the Code, which states that "an employer may not retain employees who become disabled, on less favourable terms and conditions than employees doing the same work, for reasons connected with the disability",[36] and remarked:

> "These provisions indicate that [an employee with a disability] cannot be discriminated against other employees who do the same work and, to that specific extent that the doctrine of reasonable accommodation applies. *A policy must be designed to reduce the impact of the impairment of the person's capacity to fill the essential functions of the job.*"[37]

[31] The Labour Appeal Court confirmed that it was not possible for the applicant to perform the essential tasks of an active firefighter, nor could it possibly be in the public interest to have firefighters who were not capable of dealing with the outbreak of fires, which, in the respondent's area of operation, were extremely frequent.[38] Upholding the appeal, the Labour Appeal Court set aside the decision of the Labour Court, with no order as to costs.[39]

In this Court

The submissions

[32] For the applicant, the crucial issue is his advancement. Summing up, he asks whether there is any justification for refusing him opportunities for advancement based on his disability, when (a) the injury was occasioned by the respondent, (b) the Policy does not cater for the applicant's situation, and (c) the applicant attached the condition regarding his advancement and prospects to his transfer. The applicant asserts that the application of the Policy to him constitutes unfair discrimination.

[36] Id at para 17.

[37] Id at para 18.

[38] Id at para 18.

[39] Id at paras 20-1.

[33] To these claims, the respondent holds up the defence of the inherent requirements of the job. This defence, it asserts, absolves it of any duty to accommodate the applicant. On the facts, no adjustment or modification can be made to render the applicant physically fit for the job of a firefighter. The central question to be decided is whether it is unfair discrimination, for the purposes of section 6 of the EEA, for the respondent to make the ability to perform intense physical activity an inherent requirement of the job for employees engaged to fight fires. In response to the applicant's reliance on item 6.5.1 of the Code that he must be accommodated because of his disability, the respondent says that claim cannot be sustained. Item 6.5.1(b) of the Code requires an employer to reasonably accommodate the needs of persons with disabilities with the aim of reducing the impact of the impairment on the person's capacity to fulfil the essential functions of *the* job. The respondent denies that its obligation under this item applies to the applicant because it is common cause that he is not capable of fulfilling the essential functions of *the* job of a firefighter.

Issues

[34] The points of departure in the courts below require this Court's intervention to address the primary issue: does the respondent discriminate unfairly against the applicant on the grounds of his disability? The secondary issue is whether the respondent has a duty to reasonably accommodate the applicant, which the respondent denies it has when it raises the defence of an inherent requirement of a job. A finding against the respondent on the secondary question would automatically dispose of the primary question. The respondent has sharpened the secondary issue by contending that reasonable accommodation applies specifically to "*the* job" of firefighting.

[35] What this case is not about is the application of Chapter III of the EEA. Not once does either party refer to Chapter III. Chapter III regulates the implementation of affirmative action by adopting employment equity measures "to ensure . . . equitable representation . . . in the workforce".[40] Both parties hinge their respective cases on the

[40] Section 2(b) of the EEA.

interpretation and application of section 6 of the EEA in Chapter II, which regulates the prohibition of unfair discrimination. Therefore, this case is about the primary purpose of "promoting equal opportunity and fair treatment in employment through the elimination of unfair discrimination".[41] In this instance, the question is whether reasonably accommodating the applicant would achieve this purpose. The applicant is asserting his individual rights.

[36] If the narrow view prevails, namely that reasonable accommodation must be implemented only as affirmative action in terms of Chapter III, then only designated employers will be obligated to accommodate members of designated groups.[42] Although the respondent is a designated employer and the applicant is a member of a designated group, that is irrelevant in this instance when the issue is one of principle concerning individual rights and protections against discrimination. Such an approach would leave employees like the applicant, who assert discrimination claims that have nothing to do with employment equity plans, without a remedy under the EEA. That would defeat the very purpose of the EEA to be a "one stop shop", providing comprehensively for all discrimination in employment claims. Employees would be driven elsewhere to find recourse. Comparatively, the Constitution and the Promotion of Equality and Prevention of Unfair Discrimination Act[43] (Equality Act), would be infinitely more generous than the EEA if a narrow interpretation of the EEA prevails. Furthermore, it would be a mistake to equate reasonable accommodation with affirmative action. Reasonable accommodation may include but is not limited to affirmative action. In *Pillay*,[44] reasonable accommodation involved recognising religious and cultural differences in the interests of promoting equality and diversity and countering the dominance of mainstream Christian practices. Exceptional individuals like Stephen Hawking and Beethoven would make the case for reasonable

[41] Section 2(a) of the EEA.

[42] Defined below.

[43] 4 of 2000.

[44] *MEC for Education, KwaZulu-Natal v Pillay* [2007] ZACC 21; 2008 (1) SA 474 (CC); 2008 (2) BCLR 99 (CC) (*Pillay*).

accommodation rather than affirmative action. This case is firmly grounded in the interpretation and application of the provisions of Chapters I and II of the EEA and disability law expatiated in the CRPD and the Code.

[37] This case is also not about a breach of an agreement to promote the applicant. When agreeing to his transfer, the applicant "indicated that alternative placement would be acceptable to him as long as certain requirements of his would remain applicable specifically [with regard to] his current remuneration package as well as future promotions". This stipulation did not amount to a condition, which if not complied with, would result in the respondent breaching the agreement to transfer.

[38] Unjustifiable hardship is also not an issue. The Labour Court noted that in raising the inherent requirement of a job defence, the respondent was concerned about consistency in the application of its Policy. The respondent did not raise financial prejudice or any other hardships in resisting the applicant's claims for equality through advancement.

Condonation

[39] Although the delay of 105 days is long, the applicant's explanation that COVID-19 conditions, lack of funds and a fallout with his trade union caused the delay, is acceptable. His reasonable prospects of success, in my view, tip the balance in favour of this Court granting condonation.

Jurisdiction and leave to appeal

[40] Because this matter concerns discrimination and employment, this Court has jurisdiction. The respondent correctly concedes that the interpretation of the EEA raises a constitutional issue.

[41] Regarding leave to appeal, once the parties agreed during the pre-trial proceedings that physical fitness was an inherent requirement for the job of a firefighter

and that the applicant did not meet that requirement, the inherent requirement defence had to succeed. This it did in both courts below. If this were the only issue, then the applicant's case was dead in the water as early as when the pre-trial minute was concluded. That issue raised no arguable point of law. Determining whether physical fitness is an inherent requirement of the job of firefighters was settled when the Labour Appeal Court confirmed the decision in *Imatu*.[45] The Policy stipulating physical fitness as an inherent requirement for the job of a firefighter was not unfair discrimination. Therefore, if that was the only issue, I would have refused leave to appeal without a hearing. This case is about much more than discrimination under the Policy.

[42] The applicant commenced and continues this case on a cause of action based on unfair discrimination. The respondent resisted the claim with the defence of the inherent requirement of the job. To this, the applicant mounts a discrimination and reasonable accommodation challenge. Distinguishing this case from others in which the defence of the inherent requirement of the job prevailed is the status of the applicant as a serving employee who suffered a life-changing injury on duty because the respondent failed to observe safety measures. These facts inspire a novel enquiry into whether the defence of the inherent requirements of a job and unfair discrimination in section 6of the EEA co-exist or are mutually exclusive when reasonable accommodation is in issue. Differences arise between the applicant and respondent and between the Labour Court and the Labour Appeal Court about the interpretation and application of section 6(1) and 6(2)(b) to the circumstances of this case. If the Labour Appeal Court prevails, then the defence of the inherent requirement of the job in section 6(2)(b) would trump claims against unfair discrimination and any obligation to reasonably accommodate the applicant. If the Labour Court prevails, then the defence of the inherent requirement of the job would co-exist in tandem with protection against discrimination through reasonable accommodation. These differences in the approach to the legal issues applied to the facts spawn novel questions in the world of work.

[45] Labour Appeal Court judgment n 6 at para 14.

Because, in my view there are reasonable prospects that the approach of the Labour Court may prevail, the application for leave to appeal must be granted.

Statutory framework

[43] Both parties rest their rights and responsibilities on the EEA and its Code. As post-apartheid or new age legislation, the twofold purpose of the EEA set out in section 2 is—

> "to achieve equity in the workplace by—
>
> (a) promoting equal opportunity and fair treatment in employment through the elimination of unfair discrimination; and
> (b) implementing affirmative action measures to redress the disadvantages in employment experienced by designated groups, in order to ensure their equitable representation in all occupational levels in the workforce."

[44] Echoing the preamble to the EEA, section 3 prescribes that the EEA—

> "must be interpreted—
>
> (a) in compliance with the Constitution;
> (b) so as to give effect to its purpose;
> (a) Taking into account any relevant code of good practice issued in terms of this Act or any other employment law; and
> (b) in compliance with the international law obligations of the Republic, in particular those contained in the International Labour Organisation Convention (No. 111) concerning Discrimination in Respect of Employment and Occupation."

[45] The constitutional rights implicated include the rights to equality, dignity, freedom of trade, occupation and profession, fair labour practices and access to courts.

All these rights are regulated under the EEA,[46] read with the Labour Relations Act[47] (LRA).

International law

[46] Section 3 of the EEA imports the promise in the Explanatory Memorandum preceding the Employment Equity Bill[48] to "fulfil South Africa's obligations in terms of Convention 111[49] . . . and the United Nations Declaration on the Rights of Disabled Persons (1975)".[50] South Africa ratified both international standards implicating disability: Convention 111 on 5 March 1997 and the CRPD on 30 November 2007. In 2020, the SALRC published an Issue Paper on domesticating the CRPD.[51] Seemingly, domestication is required in addition to ratification for the CRPD to be enforceable. Neither party made submissions about the application of these standards to this matter; nor did the applicant seek to enforce any international law obligations or claim any relief on that ground against the respondent, as an organ of state.

[47] Section 233 of the Constitution permits recourse to South Africa's international law obligations for the purpose of interpreting legislation.[52] Optimistically, Dugard explains that the Constitution "seeks to ensure that South African law will evolve in

[46] See in this regard *Standard Bank of South Africa v Commission for Conciliation, Mediation and Arbitration* [2007] ZALC 98; (2008) 29 ILJ 1239 (LC); [2008] at paras 66-7.

[47] 66 of 1995.

[48] Explanatory Memorandum to the Employment Equity Bill GN 1840 *GG* 18481, 1 December 1997 (Explanatory Memorandum).

[49] Convention 111 refers to the Discrimination (Employment and Occupation) Convention, 25 June 1958 (Convention 111).

[50] Explanatory Memorandum above n 47 at 9 states that "the [Employment Equity] Bill will fulfil South Africa's obligations in terms of Convention 111, and is consistent with other international instruments such as the International Convention on the Elimination of All Forms of Racial Discrimination (1965); the Convention on the Elimination of All Forms of Discrimination Against Women (1979) and the United Nations Declaration on the Rights of Disabled Persons (1975)".

[51] Domestication of the CRPD above n 9. This Paper draws from a wide variety of sources, including western countries and the Pan African Parliament.

[52] Section 233 of the Constitution: "When interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law."

accordance with international law".[53] Reinforcing his optimism is section 3(d) of the EEA which requires that the Act be interpreted in compliance with the Republic's international law obligations and specifically Convention 111. Considering that the CRPD may require domestication, I refer to it merely as a guide to the interpretation of the EEA. To ignore these standards, as the second judgment suggests, would undermine *all* the exhortations in section 3 of the EEA above.

Convention 111

[48] Back in 1958, the International Labour Organisation (ILO) was modest in its aims. Consequently, in defining discrimination, Convention 111 does not recognise disability as a ground. Instead, disability fell under the general rubric of "such other distinction, exclusion or preference which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation".[54] Member states are left to recognise additional grounds of discrimination.

[49] However, Convention 111 recognised "disablement" as a circumstance for encouraging "special measures designed to meet the particular requirements of persons". [55] Taking special measures does not equate to discrimination. What is also deemed not to be discrimination is any "distinction, exclusion or preference in respect of a particular job based on the inherent requirements thereof".[56] The overarching aim of Convention 111 is to call on member states to promote "equality of opportunity and treatment in respect of employment and occupation, with a view to eliminating any discrimination".[57]

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[53] Dugard "International Law and the South African Constitution" (1997) 8 *European Journal of International Law* 77 at 92.

[54] Convention 111 above n 47 at Article 1.

[55] Id at Article 5(2) provides that "other special measures designed to meet the particular requirements of persons who, for reasons such as sex, age, *disablement*, family responsibilities or social or cultural status, are generally recognised to require special protection or assistance".

[56] Id at Article 1(2).

[57] Id at Article 2.

CRPD

[50] By the end of the twentieth century, international law on disability was striking out in a new direction. "Non-discrimination, and the equal effective enjoyment of all human rights by people with disabilities, are therefore the dominant theme of the long-overdue reform in the way disability and the disabled are viewed throughout the world."[58] Dramatically, charitable motives towards people with disabilities shifted towards human rights. Persons with disabilities are no longer to be treated as objects of welfare, medical treatment and social protection but subjects with rights, not merely specific rights, but all human rights, without discrimination. Not only national states and institutions, but also persons with disabilities themselves, are now framing their grievances and injustice in the lexicon of rights.

[51] Quinn and Degener summarise the shift as follows:

> "Seeing people with disabilities as subjects rather than objects entails giving them access to the full benefits of basic freedoms that most people take for granted and doing so in a way that is respectful and accommodating of their difference. It means abandoning the tendency to perceive people with disabilities as problems and viewing them instead in terms of their rights."[59]

[52] In its preamble, the CRPD unambiguously affirms a human rights model for disability when it promotes "the full enjoyment by persons with disabilities of their human rights and fundamental freedoms".[60] Elevating disability discrimination to "a violation of the inherent dignity and worth of the human person",[61] pegs this ground of discrimination firmly within the human rights paradigm.

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[58] Quinn et al *Human Rights and Disability - The Current Use and Future Potential of United Nations Human Rights Instruments* (United Nations, Geneva 2002) at 1.

[59] Quinn and Degener "The Moral Authority for Change: Human Rights Values and the Worldwide Process of Disability Reform" in Quinn et al above n 59. Quinn and Degener led the review of the gamut of United Nations standards on disability, which were foundational for the CRPD.

[60] Items (m) of the preamble to the CRPD.

[61] Item (h) id.

[53] As "an evolving concept",[62] disability is neither static nor intrinsic to the person. Fredman's example, that mobility may depend on whether a person has a wheelchair,[63] when expanded, means that even if a wheelchair is available, the built environment must be conducive for its use. The ability to speak may well depend on a speech-generating device, without which, in the case of Stephen Hawking, *A Brief History of Time* might never have come to be. Beethoven produced his best music in a state of deafness. Identifying people in terms of their disability, discounts their ability.

[54] Accommodations are about enabling capabilities to flourish.[64] Using rights as functional to the most important capabilities, Nussbaum has generated a list of "separate and indispensable components" of "the most central capabilities that should be the goal of public policy".[65] Capabilities include the ability to live a worthy life, in good bodily health and integrity, to be able to use senses, imagination and thought, to feel, to reason, to affiliate, to play, and to control one's political and material environment.[66] This is what it means to be developmental. As an assessment tool used for the Human Development Reports of the United Nations Development Programme, capabilities are a respected, rational standard for assessing evidence in the enforcement of socio-economic rights, of which labour rights form a part.[67] As such, it commends itself for application in determining the scope of reasonable accommodation.

[55] The coincidence of poverty with disability cannot be overlooked or underestimated. By projecting poverty as coinciding with disability, the CRPD highlights "that the majority of persons with disabilities live in conditions of poverty".[68] By recognising the critical need to address the negative impact of poverty on persons

[62] Item (e) id.

[63] Fredman *Discrimination Law* (Oxford University Press, Oxford 2011) at 98.

[64] Woolman *The Selfless Constitution*: *Experimentalism and Flourishing as Foundations of South Africa's Basic Law* (Juta & Co Ltd, Cape Town 2013) at 56.

[65] Nussbaum "Capabilities and Human Rights" (1997) 66 *Fordham Law Review* 273 at 277.

[66] Id at 277.

[67] Id.

[68] Item (t) of the preamble to the CRPD.

with disabilities, the CRPD recognises that the "full participation by persons with disabilities will result in their enhanced sense of belonging and in significant advances in the human, social and economic development of society and the eradication of poverty".[69] Mainstreaming disability issues is integral to strategies for sustainable development.[70] Sen's "foundational view of development as freedom" pitches substantive freedoms as both the means and the ends of development.[71]

[56] The definition of "discrimination on the basis of disability" includes all forms of discrimination and disability. Paradoxically, denying reasonable accommodation is also discrimination.[72] As a counterweight, in its definition of "reasonable accommodation", the CRPD recognises an exemption on the ground of "undue hardship".[73]

[57] Article 27[74] urges that "States Parties *shall* safeguard and promote the realisation of the right to work, *including for those who acquire a disability during the course of*

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[69] Item (m) of the preamble to the CRPD.

[70] Item (g) of the preamble to the CRPD.

[71] Sen *Development as Freedom* (Knopf, New York 1999) at 5.

[72] Article 2 of the CRPD defines "[d]iscrimination on the basis of disability" to mean any distinction, exclusion or restriction on the basis of disability which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise, on an equal basis with others, of all human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field. It includes all forms of discrimination, *including denial of reasonable accommodation*.

[73] Article 2 of the CRPD defines "reasonable accommodation" to mean "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."

[74] Article 27 of the CRPD considers disability in the context of work and employment and provides as follows:

> "1. States Parties recognise the right of persons with disabilities to work, on an equal basis with others; this includes the right to the opportunity to gain a living by work freely chosen or accepted in a labour market and work environment that is open, inclusive and accessible to persons with disabilities. States Parties shall safeguard and promote the realisation of the right to work, including for those who acquire a disability during the course of employment, by taking appropriate steps, including through legislation, to, inter alia:
>
> (a) Prohibit discrimination on the basis of disability with regard to all matters concerning all forms of employment, including conditions of recruitment, hiring and employment, continuance of employment, career advancement and safe and healthy working conditions;
>
> (b) Protect the rights of persons with disabilities, on an equal basis with others, to just and favourable conditions of work, including equal opportunities and

employment".[75] Equality is strongly undergirded by promoting access in various forms – accessible work environment, "access to general technical and *vocational guidance programmes, placement services and vocational and continuing training*"[76] and to "*employment opportunities and career advancement*".[77] The public sector is preferred for employing people with disabilities.[78] Particularly important for current purposes is the obligation on State Parties to:

> "*Ensure* that reasonable accommodation is provided to persons with disabilities in the workplace."[79]

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equal remuneration for work of equal value, safe and healthy working conditions, including protection from harassment, and the redress of grievances;

(c) Ensure that persons with disabilities are able to exercise their labour and trade union rights on an equal basis with others;

(d) Enable persons with disabilities to have effective access to general technical and vocational guidance programmes, placement services and vocational and continuing training;

(e) Promote employment opportunities and career advancement for persons with disabilities in the labour market, as well as assistance in finding, obtaining, maintaining and returning to employment;

(f) Promote opportunities for self-employment, entrepreneurship, the development of cooperatives and starting one's own business;

(g) Employ persons with disabilities in the public sector;

(h) Promote the employment of persons with disabilities in the private sector through appropriate policies and measures, which may include affirmative action programmes, incentives and other measures;

(i) Ensure that reasonable accommodation is provided to persons with disabilities in the workplace;

(j) Promote the acquisition by persons with disabilities of work experience in the open labour market;

(k) Promote vocational and professional rehabilitation, job retention and return-to-work programmes for persons with disabilities.

2. States Parties shall ensure that persons with disabilities are not held in slavery or in servitude, and are protected, on an equal basis with others, from forced or compulsory labour."

[75] Article 27(1) of the CRPD.

[76] Article 27(1)(d) of the CRPD.

[77] Id at article 27(1)(e).

[78] Article 27(1)(g) of the CRPD.

[79] Article 27(1)(i) of the CRPD.

[58] Lawson accepts that the CRPD looks "beyond traditional legal scholarship" and draws "upon ideas and approaches (including the social model of disability) developed in [the] movements [of people with disabilities] and literature in the multidisciplinary field of Disability Studies."[80]

[59] Ngwena and Albertyn commend the CRPD as—

> "animated by substantive and transformative equality. It seeks to overcome the legacy of systemic disability-related inequality and discrimination through recognising the diversity of humankind. It creates a new vision of disability that finds concrete expression in the duty to accommodate difference under conditions of equality and human dignity. For these reasons, the CRPD now serves as a complementary reference point for any juridical discourse at the intersection between disability and equality.[81]

[60] Significantly, the United Nations Declaration on the Rights of Disabled Persons, the 1975 predecessor of the CRPD,[82] informed the drafting of the EEA.[83] The CRPD evolved more than half a century after Convention 111, and almost a decade after the EEA. Unlike its predecessor, the CRPD unambiguously espouses the international shift towards the human rights model for people with disabilities. Both the CRPD and Convention 111 connect the complexity of reasonable accommodation, the inherent requirement of a job and undue hardship. The shift internationally towards a human rights impulse must infuse the interpretation of the EEA.

The Code

[61] Another aid to interpretation referred to in section 3(c) of the EEA, is the Code. The Code urges "persons with disabilities to have their rights recognised in the labour market where they experience high levels of unemployment . . . often remaining in low

[80] Lawson "Disability Law as an Academic Discipline: Towards Cohesion and Mainstreaming?" (2020) 47 *Journal of Law and Society* 558 at 559.

[81] Ngwena and Albertyn "Special Issue on Disability: Introduction" (2014) 30 *SAJHR* 214.

[82] United Nations Declaration on the Rights of Disabled Persons, 9 December 1975.

[83] Explanatory Memorandum above n 46 at 9.

status jobs or earn a lower-than-average remuneration".[84] The aim of the Code includes "protect[ing] persons with disabilities against unfair discrimination in the workplace". It "*directs employers to implement affirmative action measures to redress discrimination*".[85] Further, it is "intended to help create awareness of the contributions persons with disabilities can make and to encourage employers to fully use the skills of such persons".[86]

[62] The Code is not "an authoritative summary of the law, nor does it create additional rights and obligations".[87] Instead, it is "a guide for employers and employees on promoting equal opportunities and fair treatment for persons with disabilities".[88] The courts and employers "must" consider it to interpret and apply the EEA.[89] Particularly relevant is item 6 of the Code which imposes positive duties on employers to reasonably accommodate employees and offer various ways of promoting equality and eliminating discrimination.[90] Item 6.1 and 6.2 state imperatively—

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[84] The Code above n 2 at item 1.

[85] Id at item 2.1

[86] Id at item 2.4.

[87] Id at item 3.1.

[88] Id at item 2.2.

[89] Id at item 3.1. and 3.4.

[90] Key aspects of the Code include the following:

> "6.1 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*.
>
> 6.2 Employers *must assess* and adopt effective measures, both in terms of cost and quality that is consistent with removing the barriers to perform the job and to enjoy *equal access to the benefits and opportunities* of employment.
>
> 6.3 Reasonable accommodation requirement applies to applicants and employees with disabilities who are *suitably qualified for the job*, which may be required—
>
> . . .
>
> (b) *in the working environment*;
>
> (c) *in the way work is usually done, evaluated and rewarded;* and
>
> (d) in the benefits and privileges of employment.
>
> . . .
>
> 6.7 The particular accommodation will depend *on the individual*, the degree and nature of impairment and its effect on the person, as well as on the job and the working environment.

> "Employers *must* reasonably accommodate the needs of persons with disabilities . . . to fulfil the essential functions of *a job*. Employers *must assess* and adopt effective measures."

Interfacing equality, non-discrimination, inherent requirement of a job and reasonable accommodation

Equality and non-discrimination

[63] Section 5 of the EEA compels the elimination of unfair discrimination:

> "Every employer must take steps to promote equal opportunity in the workplace by eliminating unfair discrimination in any employment policy or practice."

[64] Section 6(1) of the EEA prohibits unfair discrimination, including on the ground of disability.[91] Consistent with the international standards above, section 6(2) creates two exceptions to the duty not to discriminate:

> 6.8 Reasonable accommodation may be temporary or permanent, depending on the nature and extent of the disability.
>
> 6.9 Reasonable accommodation includes but is not limited to—
>
> . . .
>
> (d) *changing training and assessment* materials and systems;
>
> (e) *restructuring jobs* so that *non-essential functions are re-assigned* [and]
>
> (f) *adjusting working conditions*, including working time and leave.
>
> 6.11 An employer may evaluate work performance against the same standards as other employees; however, the nature of the disability . . . may require an employer to *adapt* the way in which *performance is measured*.
>
> 6.13 The employer need not accommodate . . . an employee with a disability if this would impose an *unjustifiable hardship* on the business of the employer.
>
> 6.12 'Unjustifiable hardship' is action that requires *significant or considerable difficulty or expense*. This involves considering, amongst other things, the *effectiveness* of the accommodation and the extent to which it would *seriously disrupt the operation of the business.*
>
> 6.13 An accommodation that imposes an unjustifiable hardship for one employer at a *specific time* may not be so for another or for the same employer at a *different time*."

[91] Section 6(1) states as follows:

> "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, birth or on any other arbitrary ground."

"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."

Burden of proof

[65] Section 5 above places the duty squarely on the employer to eliminate discrimination. Reinforcing that duty, section 11(1) of the EEA imposes a positive burden of proof:

"If unfair discrimination is alleged on a ground listed in section 6(1), the employer against whom the allegation is made must prove, on a balance of probabilities, that such discrimination—

(a) did not take place as alleged; or

(b) is rational and not unfair, or is otherwise justifiable."

[66] This burden applies to unfair discrimination alleged on the ground of disability in section 6(1). The onus also rests on an employer to prove that the discrimination is not unfair, and if it is unfair, that it is justifiable.[92] If implementing reasonable accommodation is impossible or an undue or unjustifiable hardship, the discrimination would not be unfair. The burden of proof informs how reasonableness and proportionality would apply in mediating the respective rights of the parties.

The inherent requirement of a job

[67] The genesis of section 6(2)(b) is Article 1(2) of Convention 111, which lays the basis for the defence of an inherent requirement not amounting to discrimination.[93] The

[92] *Harksen v Lane N.O.* [1997] ZACC 12; 1998 (1) SA 300 (CC); 1997 (11) BCLR 1489 (CC) para 50.

[93] Article 1(2) of the Convention 111 id states that "[a]ny distinction, exclusion or preference in respect of a particular job based on the inherent requirements thereof shall not be deemed to be discrimination".

CRPD does not mention the concept of the inherent requirement of a job. An inherent requirement of the job is usually impervious – a complete defence – to a claim for unfair discrimination. Of course, the requirement must be genuine. Once a requirement is determined to be inherent, then as a matter of law, it is not unfair discrimination for an employer to insist on employees meeting the requirement. An employer who proves that a requirement is inherent is protected against a claim of discrimination and therefore cannot be compelled to waive or excuse an inherent requirement to accommodate a person with disability.

[68] Whether physical fitness is an inherent requirement of the job of a firefighter is uncontroversial.[94] The applicant accepts that this requirement is a genuine inherent requirement of the job of operational firefighters.[95] The respondent invites this Court to take judicial notice of this fact. The invitation is well received.[96] The Policy applies to all firefighters who must be physically fit to be operational.[97] Commendably, the Policy

[94] Contrast with *Imatu* above n 5 in which being free of diabetes was held not to be an inherent physical fitness requirement for a firefighter; see also *Pharmaco Distribution (Pty) Ltd v EWN* (2017) 38 ILJ 2496 (LAC) in which submitting to undergo a specialist medical examination, including psychological evaluations at the expense of the company by a medical practitioner nominated and appointed by the company was held not to be an inherent requirement of a stressful job.

[95] *TDF Network Africa* above n 31 at para 37 held:

> "[T]he requirement must be rationally connected to the performance of the job. This means that the requirement should have been adopted in a genuine and good faith belief that it was necessary to the fulfilment of a legitimate work-related purpose and must be reasonably necessary to the accomplishment of that purpose."

See also *Department of Correctional Services v Police and Prisons Civil Rights Union* [2013] ZASCA 40; 2013 (4) SA 176 (SCA) at para 21. At para 23, the Court held that an inherent requirement means "a permanent attribute or quality forming . . . essential element . . . and an indispensable attribute which must relate in an inescapable way to the performing of a job". In *Macdonald v London Health Sciences Centre and St Lawrence College* 2019 HRTO 1134, the Human Rights Tribunal of Ontario held that reasonable accommodation is a "co-operative and collaborative process".

[96] *Imatu* above n 5 para 14.

[97] Item 2 of the Policy. See also Regulation 3(d) of the Regulations: Fire Brigade Reserve Force, GN 78 *GG* 15431 requires that a potential reservist must—

> "in the opinion of the chief fire officer, be mentally and physically capable of performing fire service duties in general or any or all of the functions of a service as defined in section 1 of the [Fire Brigade Services] Act".

Although the Fire Brigade Services Act does not prescribe employment conditions for members of the service, the regulations do require physical ability to be appointed as a reservist.

aims "to enhance the levels of efficiency of the firefighting staff . . . to provide for the long-term sustainability of a proficient and professional Fire and Rescue Service".[98]

[69] The applicant accepts that he cannot be operational. However, he argues that in applying the Policy, the respondent differentiates between him, and others similarly situated. The applicant contends that the requirement of a physical assessment is not applied to all employees seeking to be advanced to the rank of firefighter or senior firefighter. Some employees hold the position of senior firefighter without performing any physical tasks. Applying the Policy differently by holding the physical fitness requirement against him, while waiving it for others, is unfair. It shuts the door on him to advance in his chosen career, he persists.

[70] Although the applicant claimed that he had evidence of this allegedly disparate treatment, he led none. In contrast, the respondent led evidence of the need to overcome historical anomalies by standardising its employment policies following the merger of several municipalities. Additionally, in the pre-trial minute the applicant acknowledged that since the inception of the Policy, no firefighter has been advanced without successfully completing the practical assessment. That concession puts to bed this dispute of fact.

[71] Excusing physical fitness as an inherent requirement for operational firefighters would perforate the principle enforced by statute, namely, that it is not unfair discrimination to exclude or prefer a person based on an inherent requirement of the job. Applying section 6(2)(b) of the EEA to require a firefighter to be physically fit to be operational firefighter is not unfair discrimination. Quite sensibly, the applicant does not seek to be an operational firefighter.

[98] Item 4 of the Policy.

[72] The Labour Court correctly characterised the inherent requirements of the job as a complete defence to the claim of unfair discrimination. Similarly, the Labour Appeal Court found that—

> "in this case, it is not possible for [the applicant] to perform the essential requirements of an *active* firefighter nor could it possibly be in the public interest to have firefighters who are not capable of dealing with the outbreak of fires which, in the area of jurisdiction of the appellant, are notoriously frequent."[99]

[73] Accordingly, I agree with both the Labour Court and the Labour Appeal Court insofar as they found that physical fitness is an inherent requirement of the job of operational firefighters. I also uphold the decision of the Labour Appeal Court in which it set aside the decision of the Labour Court which had held that the application of the Policy to the applicant amounted to unfair discrimination in terms of section 6(1) of the EEA. Left over for determination then is the Labour Appeal Court's decision to set aside the Labour Court's order directing the respondent to re-consider the applicant's advancement application. And should the Labour Appeal Court have done more than remark obiter, commending a policy about reasonable accommodation?

Reasonable accommodation

[74] "Reasonable accommodation" is defined to mean:

> "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."[100]

[75] The EEA does no more than define reasonable accommodation and mention it once more as an affirmative action measure in section 15(2)(c). As mentioned above, reasonable accommodation is not synonymous with affirmative action. And legislation in the form of the EEA is not the only route to promoting the achievement of equality

[99] Labour Appeal Court judgment above n 6 at para 18.

[100] Section 1 of the EEA.

when the Constitution encourages "other measures designed to protect or advance persons." A policy on reasonable accommodation as suggested by the Labour Appeal Court would fit the bill.

[76] Unlike the Equality Act,[101] which is more explicit about the function of reasonable accommodation in eliminating discrimination, the EEA adds no further clarity to the concept.[102] To aid interpretation, recourse must be had to section 39(1) and (2) of the Constitution,[103] section 3 of the EEA, items 2.1 and 6 of the Code, and the CRPD. Giving meaning to "reasonable accommodation" means ensuring, at a minimum, an interpretation that upholds the rights and values of equality, dignity and freedom. Equality means substantive equality.[104] For if there is substantive equality in the workplace, dignity is sure to follow. So will, importantly, economic freedom. Therefore, equity in the title of the EEA embraces more than equality in employment.

[77] 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

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[101] 4 of 2000. I refer to the Equality Act purely for the purposes of comparison. The Equality Act does not apply to persons to whom and to the extent to which the EEA applies.

[102] Section 9(c) of the Equality Act states that—

> "[s]ubject to section 6, no person may unfairly discriminate against any person on the ground of disability including:
>
> . . .
>
> (c) failing to eliminate obstacles that unfairly limit or restrict persons with disabilities from enjoying equal opportunities or failing to take steps to reasonably accommodate the needs of such persons."

Consequently, references to *Pillay* above n 44 must be viewed with the caution that it applies the Equality Act.

[103] Section 39 of the Constitution provides that:

> "(1) When interpreting the Bill of Rights, a court, tribunal or forum—
>
> (a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;
>
> (b) must consider international law; and
>
> (c) may consider foreign law.
>
> (2) When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights."

[104] See generally this Court's approach to equality in *Harksen* above n 92 and *Prinsloo v Van der Linde* [1997] ZACC 5; 1997 (3) SA 1012 (CC); 1997 (6) BCLR 759 (CC).

accommodation". 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.

[78] The EEA defines "people with disabilities" to mean "people who have a long-term or recurring physical or mental impairment which substantially limits their prospects of entry into, *or advancement in*, employment".[105] *Advancement* is recognised in the definitions of both "reasonable accommodation" and "people with disabilities". Again, no limitation is placed on advancement in a particular job. Also implicit in this definition is the acknowledgment that "disability is an evolving concept",[106] requiring ongoing engagement and assessment for advancement in employment. Access to employment cannot be limited to familiar physical, mechanical means of participating, – for example, wheelchairs and ramps – but must include psychological counselling, career counselling and training to maximise participation to enable a better fit between a person with disabilities and a job.[107] "Reasonable accommodation" contemplates not merely participation, but also advancement in employment.[108] To realise these aspirations, "the working environment" requires re-

[105] Section 1 of the EEA.

[106] Item (e) of the preamble

e to the CRPD states:

> "Recognising that disability is an evolving concept and that disability results from the interaction between persons with impairments and attitudinal and environmental barriers that hinders their full and effective participation in society on an equal basis with others."

[107] Article 27(1)(d) of the CRPD.

[108] Article 27(1)(e) of the CRPD.

imagination and innovation to facilitate enabling conditions for employment. Shifting a welfarist culture and consciousness towards a human rights mindset would be a starting point.

[79] Reasonable accommodation is not new to constitutional jurisprudence. Ironically, in *Pillay*, which was not a labour matter, this Court looked to the EEA for a definition:

> "It is therefore necessary to consider both the content of the idea of reasonable accommodation and its place in the Equality Act.
>
> The concept of reasonable accommodation is not new to our law – this Court has repeatedly expressed the need for reasonable accommodation when considering matters of religion. The Employment Equity Act 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' and recognises making reasonable accommodation for designated groups as an affirmative action measure. There is also specific mention of the concept in the Equality Act."[109]

[80] Taking reasonable accommodation measures consistent with the purpose of the EEA is asymmetric: to achieve equality, differential and preferential treatment of people with disabilities is necessary.[110] This asymmetry foreshadowed in *Pillay* is consistent with both sections 5 and 6(2)(a) of the EEA[111] and Article 5(3) of the CRPD, which states:

> "In order to promote equality and eliminate discrimination, States Parties shall take all appropriate steps to ensure that reasonable accommodation is provided."

[81] In *Pillay* this Court said that the Equality Act recognised that—

[109] *Pillay* above n 44 at para 71.

[110] Nussbaum above n 65 at 298.

[111] Section 6(2)(a) states that "[e]very employer *must* take steps to promote equal opportunity in the workplace by eliminating unfair discrimination in any employment policy or practice."

> "'failing to take steps to reasonably accommodate the needs' of people on the basis of race, gender or disability will amount to unfair discrimination. The Equality Act places a duty on the state to 'develop codes of practice . . . in order to promote equality, and develop guidelines, including codes in respect of reasonable accommodation' and permits courts to order that a group or class of persons be reasonably accommodated."[112]

[82] This Court went on to refer to section 14(3) of the Equality Act which offers guidelines for crafting policy to reasonably accommodate differences to prevent discrimination and promote equality.[113] Nothing less is expected of the EEA. Reasonable accommodation is a means to promote substantive equality and to eliminate and prohibit discrimination, as prescribed in sections 2, 5 and 6(1) of the EEA. Conversely, failing or refusing to reasonably accommodate a person with a disability would not achieve these objectives. An employer, as the bearer of a positive duty[114] to

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[112] *Pillay* above n 44 at paras 71-2.

[113] Section 14(3) of the Equality Act:

> "(a) Whether the discrimination impairs or is likely to impair human dignity;
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> (b) the impact or likely impact of the discrimination on the complainant;
>
> (c) the position of the complainant in society and whether he or she suffers from patterns of disadvantage or belongs to a group that suffers from such patterns of disadvantage;
>
> (d) the nature and extent of the discrimination;
>
> (e) whether the discrimination is systemic in nature;
>
> (f) whether the discrimination has a legitimate purpose;
>
> (g) whether and to what extent the discrimination achieves its purpose;
>
> (h) whether there are less restrictive and less disadvantageous means to achieve the purpose;
>
> (i) whether and to what extent the respondent has taken such steps as being reasonable in the circumstances to—
>
> (i) address the disadvantage which arises from or is related to one or more of the prohibited grounds; or
>
> (ii) accommodate diversity."

[114] On the issue of positive duties but in a different context in *Daniels v Scribante* [2017] ZACC 13; 2017 (4) SA 341 (CC); 2017 (8) BCLR 949 (CC), Madlanga J wrote for the majority at paras 38-9:

> "This positive / negative obligation argument needs to be confronted head-on. . . . What is paramount includes: what is the nature of the right; what is the history behind the right; what does the right seek to achieve; how best can that be achieved; what is the 'potential of invasion of that right . . . and, would letting private persons off the net not negate the essential content of

promote equality by eliminating unfair discrimination, is consequently also the bearer of another positive duty namely, to reasonably accommodate people with disabilities. Thus, a failure to reasonably accommodate a person with disabilities would be unfair discrimination.[115] This duty is reinforced by the definition of "discrimination on the bases of disability" under the CRPD.[116] Employers who reasonably accommodate persons with disabilities to realise substantive equality simultaneously enjoy protection against discrimination claims.[117]

[83] Of course, under the EEA "reasonable accommodation" is not available to everyone. Only members of "designated groups" – namely, South Africans who are "black people, women and people with disabilities" – qualify.[118] As a person with a disability, the applicant qualifies for reasonable accommodation. Whether a white male employee who seeks reasonable accommodation on the grounds of his religion, conscience, belief, political opinion, culture or language will succeed, is a question for another day.

[84] To this raft of employment equity and disability laws, the concept of ubuntu must be added. The applicant invited this Court to apply public policy and morality in its search for a just and equitable remedy. Ubuntu or "humanness" which suffuses our

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> the right? If, on weighing up all the relevant factors, we are led to the conclusion that private persons are not only bound but must in fact bear a positive obligation, we should not shy away from imposing it; section 8(2) does envisage that."

[115] Article 2 of the CRPD.

[116] Article 2 of CRPD defines "[d]iscrimination on the basis of disability" to mean:

> "any distinction, exclusion or restriction on the basis of disability which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise, on an equal basis with others, of all human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field. It includes all forms of discrimination, *including denial of reasonable accommodation*."

[117] See generally this Court's approach to equality in *Harksen* above n 92; *Prinsloo* above n 106; *Van Heerden* at para 30 and *SAPS v Solidarity obo Barnard* [2014] ZACC 23; 2014 (6) SA 123 (CC); 2014 (10) BCLR 1195 (CC) at para 35. Section 6(2)(a) insofar as reasonable accommodation amounts to affirmative action; and section 9(2) of the Constitution: "Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken".

[118] Section 1 of the EEA.

constitutional order as a compass to guide our humanity and morality[119] would fortify reasonable accommodation as a moral response to claims by people with disabilities. This Court adopted the principle of ubuntu as our humanitarian and moral loadstar.[120] First recognised in *Makwanyane*, this Court anticipated that ubuntu would infuse a cultural shift to eliminate unfair discrimination and historical injustices.[121] In *Port Elizabeth Municipality*, this Court applied ubuntu to navigate the competing claims of "grace and compassion" and the "formal structures of the law". *Port Elizabeth Municipality* reminded us when it applied ubuntu that:

> "The inherited injustices at the macro level will inevitably make it difficult for the courts to ensure immediate present-day equity at the micro level. The judiciary cannot of itself correct all the systemic unfairness to be found in our society. Yet it can at least *soften and minimise the degree of injustice and inequity which . . . the weaker parties in conditions of inequality of necessity entails*."[122]

[85] Ubuntu finds application in employment contracts, which are grounded in extreme good faith.[123] Our constitutional values require that there be negotiations and that "they must be done reasonably, with a view to reaching an agreement and in good faith."[124] Building on this evolution, ubuntu must apply with equal vigour to stop unfair discrimination and welfarist responses to people with disabilities.[125] In *Kirland*, this Court placed "a higher duty on the state to respect the law . . . and to tread

[119] *Port Elizabeth Municipality v Various Occupiers* [2004] ZACC 7; 2005 (1) SA 217 (CC); 2004 (12) BCLR 1268 (CC) at para 37 citing *S v Makwanyane* [1995] ZACC 3; 1995 (3) SA 391 (CC); 1995 (6) BCLR (CC) *(Makwanyane) at para 308.*

[120] *Port Elizabeth Municipality* Id.

[121] *Makwanyane* above n 119 at paras 223-7, 242, 250, 263 and 306.

[122] *Port Elizabeth Municipality* above n 119 at para 38.

[123] *Makate v Vodacom (Pty) Ltd* [2016] ZACC 13; 2016 (4) SA 121 (CC); 2016 (6) BCLR 709 (CC) at paras 14 and 100.

[124] Id at para 100 citing *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd* [2011] ZACC 30; 2012 (1) SA 256 (CC); 2012 (3) BCLR 219 (CC) *(Everfresh).*

[125] *Port Elizabeth Municipality* above n 119 at para 37.

respectfully when dealing with rights".[126] Ubuntu and the CRPD inform such a higher duty upon the state as the preeminent employer of persons with disabilities.[127]

[86] Accommodating persons with disabilities is not about granting gratuitous advantage or preference, or – as some smugly say – throwing largesse at a problem. In *Van Heerden* this Court did not throw largesse at the 10% of the Members of Parliament who, due to our apartheid history, would not have shared on par the financial attributes of the 90% of the long serving predominantly white members.[128] Treating people with disabilities as problems is abhorrent to a human rights culture and conscience. Rather, reasonable accommodation must be a genuine effort to remedy disadvantage so as to enable equality of opportunity and remuneration, and parity of participation.[129] Employers as duty bearers must, in the ordinary course, assess the ability of their workforce and make appropriate adjustments. In the case of persons with disabilities, they should, in all earnestness, consult with that person in utmost good faith to clarify whether reasonable accommodation would be necessary and, if so, what form that might take.[130] Reasonable accommodation in the workplace must be tailored to an individual's particular impairment as "an evolving concept".[131]

[87] 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

[126] *MEC for Health, Eastern Cape v Kirland Investments (Pty) Ltd* [2014] ZACC 6; 2014 (3) SA 481 (CC); 2014 (5) BCLR 547 (CC) (*Kirland*) at para 82.

[127] Article 27(1)(g) of the CRPD.

[128] *Minister of Finance v Van Heerden* [2004] ZACC 3; 2004 (6) SA 121 (CC); 2004 (11) BCLR 1125 (CC) at para 56 *(Van Heerden).*

[129] Ngwena "Interpreting Aspects of the Intersection Between Disability, Discrimination and Equality" (2005) 16 *Stell LR* 3 at 5.

[130] Item 6.2 of the Code. Also see White Paper on the Rights of Persons with Disabilities, GN 230 *GG* 39792, 9 March 2016 (White Paper).

[131] Item 6.2 of the Code and Domestication of the CRPD above n 1 at para 2.12.

law.[132] Article 5 of the Council Directive of the European Union[133] introduced the concept of proportionality.[134] The CRPD qualifies the meaning of reasonable accommodation by not imposing a disproportionate or undue burden on the employer. Similarly, the Canadian Charter of Rights and Freedoms introduced the concept of undue hardship in 1998.[135] This Court categorically refused to adopt "a *de minimis* cost" standard followed in the United States,[136] and preferred a proportionality test "that will depend intimately on the facts".[137]

[88] This case is distinguishable from other cases in which an inherent requirement of a job prevailed. In *Imatu*, in which diabetes was found not to impede the employee's physical fitness, reasonable accommodation did not arise.[138] In a case in which age is an inherent requirement of the job of, say, a pilot, a similar raft of reasonable accommodation protections supporting people with disabilities is not available for

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[132] *Association for Mineworkers and Construction Union v Anglo Gold Ashanti Limited* [2021] ZACC 42; (2022) 43 ILJ 291 (CC); 2022 2 BLLR 115 (CC); at para 88.

[133] Council Directive of the European Union 2000/78/EC.

[134] The European Court of Justice in *DW v Nobel Plastiques Ibérica SA* C-397/18, EU:C:2019:703 at paras 65 and 74 takes the view that—

> "the employer must take appropriate measures, i.e. effective and practical measures to adapt the workplace to the disability, for example by adapting premises and equipment, patterns of working time, the distribution of tasks or the provision of training or integration resources, without imposing a disproportionate burden on the employer, taking account, in particular, of the financial and other costs entailed, the scale and financial resources of the undertaking and the possibility of obtaining public funding or any other assistance".

[135] Under Canadian law, "reasonable accommodation" was interpreted in *County of Brant v OPSEU* (2013) ONSC 1955, where it was held, with reference to *Bowater Canadian Forest Products Inc. v. Industrial Wood and Allied Workers Canada*, Local 2693 (Giardino Grievance), that the—

> "employer 'is not entitled to require or expect a disabled employee to perform all the normal functions of the regular job' and 'if necessary, and if it is possible to do so without undue hardship, a disabled employee must even be excused from an essential function of the job'".

In accordance with section 17(2) of the Canadian Human Rights Code, R.S.O. 1990, c. H.19, undue hardship would involve "considering the cost, outside sources of funding, if any, and health and safety requirements, if any". Ngwena above n 129 at 559 states that undue hardship also includes the disturbance of a collective agreement, whether reasonable accommodation adversely affects the moral of the employees, the size of the employer's operation and the interchangeability of the facilities.

[136] *Pillay* above n 44 at para 76, referring to the United States Supreme Court in *Trans World Airlines Inc v Hardison* 432 US 63 (1977) at 84, and the Canadian Supreme Court in *Central Okanagan School District No 23 v Renaud* 1992 CanLII 81 (SC); [1992] 2 SCR 970 (*Central Okanagan*) at 983g-985a.

[137] *Pillay* id at para 76.

[138] *Imatu* above n 5 at para 106.

discrimination based on age.[139] Insightfully, in this case the Labour Court anticipated reasonable accommodation to be an exercise in proportionality.[140] The balance to be struck is between what needs to be done to promote equality, and to prevent, eliminate and prohibit unfair discrimination, and what is doable. Given our historical and constitutional intolerance for unfair and unjustified discrimination, what needs to be done requires "more than mere negligible effort . . . to satisfy the duty to accommodate".[141]

Implementing reasonable accommodation to avoid discrimination

[89] As stated above, the costs of reasonable accommodation, along with the duty not to discriminate, rest on the duty-bearer and not on the persons with disabilities.[142] The burden of proving that conduct does not amount to unfair discrimination rests on the respondent.[143] So does the burden of proving unjustifiable hardship.[144] The duty to reasonably accommodate also falls upon the respondent.[145] If reasonable accommodation is not considered, or is considered to be unduly hard to implement, the respondent bears the onus of proving that any ensuing discrimination is fair. These heavy burdens on the respondent weigh on mediating the competing rights of the parties. They answer the question posed above thus: The defence of the inherent requirement of a job, and an employer's obligation to promote equality by taking

[139] See Labour Appeal Court judgment above n 6 at para 15 and *South African Airways (Pty) Ltd v GJJVV* [2014] 8 BLLR 748 (LAC) at para 54.

[140] Labour Court judgment above n 3 at para 46.

[141] *Pillay* above n 44 at para 76 citing *Central Okanagan* above n 136 at 984.

[142] Section 11 of the EEA. Item 6.2 of the Code provides that "*employers* must assess and adopt effective measures, both in terms of *cost* and quality that is consistent with removing the barriers to perform the job and to enjoy equal access to the benefits and opportunities of employment".

[143] Section 11 of the EEA.

[144] For a definition of "unjustifiable hardship", we must look to item 6.12 and 6.13 of the Code:

> "Unjustifiable hardship is action that requires significant or considerable difficulty or expense and that would substantially harm the viability of the enterprise. This involves considering the effectiveness of the accommodation and the extent to which it would seriously disrupt the operation of the business.
>
> An accommodation that imposes an unjustifiable hardship for one employer at a specific time may not be so for another or for the same employer at a different time."

[145] Item 6.1 of the Code.

reasonable accommodation measures to eliminate discrimination are not mutually exclusive.

[90] Additionally, the duty to reasonably accommodate disability is a statutorily imposed legal duty and not an optional act of charity, compassion and welfare.[146] It cannot be that once an employer successfully raises the defence of the inherent requirement of a job, its obligation to eliminate discrimination automatically ends. Consistent with section 3 of the EEA and section 39(2) of the Constitution, section 6(2)(b) does not jettison the employer's obligations in sections 5 and 6(1).

[91] The second judgment interprets the Code to mean that reasonable accommodation applies only if it would enable an employee to fulfil the inherent requirements of *the* job. Otherwise, accommodation would be unreasonable, because it would be asking the employer to employ a person who cannot possibly perform the inherent requirements of *that* job.[147] Such a narrow interpretation is inconsistent with the Code's exhortation that "[e]mployers *must* reasonably accommodate". In my view, "the aim of the accommodation" is not about fulfilling "the essential functions of *the* job" but "a" job. In the search for reasonable accommodation an employer is not limited to a particular job. However, once a job is identified, then assessment, access and suitability for "*the* job" applies.[148] Grounding this interpretation are sections 2, 3, 5 and 6(1) of the EEA supported by Convention 111, the Code, Article 27 of the CRPD and Ubuntu.

[92] The respondent made two significant concessions. First, the respondent's attorney correctly conceded from the bar that, when reasonable accommodation applies,

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[146] Definition of "reasonable accommodation" in section 1 of the EEA, Article 2 of the CRPD and Item 6.1 of the Code.

[147] Second judgment at [68]:

> "The obligation to reasonably accommodate thus applies if that reasonable accommodation will make it possible for the employee to fulfil the inherent requirements of the job. Accommodation beyond this would cease to be reasonable, because it would effectively require an employer to employ someone who cannot possibly perform the inherent requirements of the job."

[148] Code item 6.2 and 6.3. See above n 93 for the key aspects of the Code.

it is not a once-off event but an on-going engagement with the employee. The second concession was that sustaining an injury on duty is relevant to determining the duration of the employer's duty to accommodate an employee. These concessions, together with the respondent's recognition that this is not the usual inherent requirement of a job case, go some way to acknowledging that employees injured on duty must be accommodated more than other employees with disabilities who are injured elsewhere; and that the respondent's duty to accommodate a candidate for employment differs from its duty to the applicant.[149]

[93] Reasonable accommodation is much more than a matter of duration and enabling physical access to work. Rather, reasonableness is a proportionate response to accommodate incapacities, enable capabilities and restore identity and dignity. To maximise the potential of suitably qualified people with disabilities, item 6.9 of the Code requires reasonable accommodation to include changing training and assessment materials and systems, restructuring jobs so that non-essential functions are re-assigned, and adjusting working conditions. It is common cause that the nature of the applicant's disability is such that no known technology or other forms of accommodation enable him to be an operational firefighter. What is unknown is whether he could be accommodated in some other position, with prospects for advancement, or promotion, for which physical fitness is not an inherent requirement. His own efforts at advancing himself were stillborn once his application for a bursary failed.

[94] In *Pillay*, the difficult question was not whether positive steps must be taken, but how far the state must go to accommodate that applicant. Unlike in *Pillay*, in this case the respondent, another state organ, denies that it has a duty to accommodate the applicant. In this instance, disability law reinforces the higher duty that rests on the respondent to reasonably accommodate the applicant. Additionally, the respondent is responsible for the injuries that resulted in his permanent disability.[150] Managing risks

[149] *JL v Rand Mutual Assurance*, unreported judgment of the High Court of South Africa, Gauteng Local Division, Johannesburg, Case number A3062/19 (25 October 2019.

[150] *Kirland* above n 126 at para 82.

to the physical safety of its personnel ought to be a key component of operating a firefighting service. Not least, because the failure of personnel to meet the fitness requirement would relegate injured employees to performing non-operational functions, or worse still, eventual dismissal for incapacity. Either way, the livelihood implications for an injured employee are infinitely more devastating than for the respondent which would have little difficulty in replacing him. Relegating the applicant, on account of his disability, to a position in which he has had no prospect of advancement since 2013, must be deprecated as "mere negligible effort . . . to satisfy the duty to accommodate".[151]

[95] The evidence proves that the applicant relentlessly asserted, and the respondent understood his case to be for advancement or promotion as a firefighter. From his limited lens through a peephole perspective as an employee, firefighting is the job he knows and for which he is most qualified. As management, the respondent has an expansive bird's eye view of the jobs in the entire City. No options for advancement or promotion were canvassed in evidence even though this was an issue in dispute. To discharge its duty to accommodate the applicant, the respondent cannot depend on the applicant applying for positions. Likewise, the applicant's counsel obstructing evidence about other lines of employment did not absolve the respondent from proving compliance with its statutory obligations. Having adopted the stance that the inherent requirement of *the* job is an absolute defence against all claims of discrimination, the respondent led no evidence to discharge its obligation to explore ways of accommodating the applicant in other lines of employment. Persisting, as the respondent's attorney did, with the contention that the applicant could apply for any position other than firefighting would be realistic only if he meets the inherent requirements for those positions. With no qualifications beyond firefighting, and no training and reskilling, his prospects for senior positions in the administration and human resources are non-existent.

[151] *Pillay* above n 44 at para 76, referring to the United States Supreme Court in *Trans World Airlines Inc v Hardison* 432 US 63 (1977) at 84, and the Canadian Supreme Court in *Central Okanagan* above n 136 *at* 983g-985a.

[96] While there were negotiations that resulted in the transfer of the applicant to his current position, there is no evidence of further negotiations to advance or promote the applicant. The applicant is stagnating in his current position, which at the time of the trial in 2018, was for seven years. Work for the applicant, as for any person with disabilities, restores dignity, and is a safety net against poverty. The applicant's disability is no ordinary injury on duty prevalent in a high-risk service such as firefighting. It is a disability arising from the respondent's disregard for its own safety procedures. And the disability is permanent. The injuries strip the applicant of some of his dignity as he is no longer the self-sufficient man he once was. From being a physically strong, capable, firefighter and family man, he now has to depend on others to lift weights as light as 10 kilograms. The respondent as the state, as the employer and as the ultimate cause of the applicant's disability, is triply obliged to accommodate the applicant. Notwithstanding this litigation, and irrespective of how the applicant pleaded his case, the principle of reasonable accommodation imposes a positive duty on the respondent to apply the Code to the applicant to explore ways of accommodating him beyond his current position. Deflecting its obligations to advance the applicant by raising a section 6(2)(b) defence is impermissible in the circumstances.

[97] Performing non-operational administrative and educational work is a necessary function of the firefighting services for which physical fitness is dispensable. The respondent submits that those performing non-operational functions bear the title of firefighter only notionally. They are not firefighters. For the applicant, holding the title of firefighter restores the identity he lost through his disability. Irrespective of what title the respondent chooses to assign to the applicant, it is common cause that the respondent has non-operational functions that the applicant currently performs. The remedy then must be for the respondent to explore what positions the applicant can hold and what accommodations can be made for him to enhance his responsibilities so that he has prospects for advancement. If necessary, the respondent must facilitate counselling, reskilling, retraining and reassigning to the applicant functions that he can perform. The respondent's helicopter view of what is doable should, with creativity and imagination, craft a career path that the applicant seeks.

[98] Between May 2012 and January 2013, the hearings that preceded his transfer were aimed at assessing the nature and extent of his incapacity and the options for either accommodating him or terminating his services as a last resort. Dismissal for incapacity was on the respondent's agenda from the outset. Contrary the view expressed in the second judgment I am unconvinced that the transfer was intended to reasonably accommodate the applicant. Fortifying my conviction is the respondent's disavowal – in its grounds of appeal in the Labour Appeal Court and in this Court – of any duty to reasonably accommodate the applicant once it raises the defence of the inherent requirement of a job defence. Additionally, the respondent knew that the applicant had a permanent disability. Transferring him as a firefighter to his current position could not have been temporary because his disability was permanent, unless the respondent planned to dismiss him for incapacity to meet the operational functions of firefighter. The respondent's attitude remains that neither compassion nor the EEA and its Code require it to accommodate the applicant. This is the wrong attitude. Tellingly, the arbitrator observed, as I do, that the respondent was not doing the applicant any favours by accommodating him without advancement. To deliver the goods, it is not compassion that the applicant seeks but compliance with the EEA and its Code.

[99] Although the applicant claimed compensation, he did not pursue that in the courts below. Nor did either party provide any clarity to questions from this Court about compensation for the applicant's injury on duty from any compensation fund or insurer. In this claim for discrimination, the Court is required to assess the applicant's conditions of employment against the law; whether he received compensation for his injuries while on duty is irrelevant. Additionally, if the parties considered it relevant they would have pleaded it. Certainly, if the respondent had successfully facilitated the applicant's occupational injury claim, it would have pleaded it, especially if it considered such compensation an adequate remedy for his disability. We do not know what the status of any compensation claim is. However, we do know that the applicant did not have funds to pay for legal services, at least initially. Any evidence about other forms of workers' compensation are irrelevant; work as dignity is priceless.

Conclusion

[100] The second judgment treats as irrelevant the fact that the applicant sustained the injury that led to his permanent disability while at work. The singular question it isolates for determination is whether the Policy discriminates unfairly against the applicant. In the view expressed in the second judgment, the pleadings make out no other case. I disagree.

[101] However, assuming without agreeing that applicant's statement of case makes out no other case, not even one for unfair discrimination, the pre-trial minute served the purpose of adequately informing the parties and the courts about what the issues were. Helpfully, it was the respondent that crystallised the issues in its Notice of Appeal when it disavowed any obligation to reasonably accommodate the applicant because it raised the inherent requirement of a job defence. In posing this substantive question, commendably, the respondent did not raise procedural, technical or formalistic objections to the applicant's pleadings. That the respondent and the courts below had a complete appreciation for the applicant's case is also manifest from both the pre-trial conference minute and the exchanges during cross-examination. Consequently, the points of departure in the courts below revealed nuances rather than gaping disparities about the application of reasonable accommodation. The Labour Appeal Court settled for the *obiter* remark that a reasonable accommodation policy must be designed whereas the Labour Court recognised proportionality as the means to prevent unfair discrimination, for which it robustly prescribed the reconsideration remedy.

[102] In *Holomisa*,[152] a case concerning discrimination on the grounds of marital status, five judges in the Supreme Court of Appeal unanimously made short shrift of Mrs Holomisa's claim, saying that the constitutional argument had to fail; it was raised for the first time in the appeal and "*it was not traversed at all in the pleadings*".[153]

[152] *Holomisa v Holomisa* [2018] ZACC 40; 2018 JDR 1808 (CC); 2019 (2) BCLR 247 (CC).

[153] Id at para 8.

Furthermore, Mrs Holomisa did not elect to convert her marital regime and there was "no evidence" to suggest that she had wished to do so but was unable to. The Supreme Court of Appeal decided that it could "not make a new contract for the parties and [was] thus obliged to enforce the terms of their marriage contract". Mrs Holomisa lost her appeal in the Supreme Court of Appeal.[154] However, notwithstanding deficiencies in the pleadings and evidence, this Court unanimously granted a '"no-brainer"' remedy to convert her marital regime to be in community of property. This Court reasoned against sending Mrs Holomisa off "with a stone instead of bread".[155] Far from resorting to pity reasoning, this Court recognised the reality of inequality, the urgency for social transformation and the consequences of not granting a remedy to eliminate unfair discrimination. *Holomisa* set the precedent for eliminating discrimination on the grounds of marital status.

[103] Assuming again without agreeing that the applicant makes out no other case but whether the Policy discriminates unfairly against the applicant, this case would be similar to *Holomisa*. Like *Holomisa*, if deficiencies in the pleadings and the evidence are put aside, this case would whittle to interpreting and applying legislation. In this instance interpreting and applying sections 5, 6(1) and 6(2)(b) of the EEA would be carved out as the crisp points of law for hearing this dispute.

[104] For a person with disabilities and limited resources, to reach this Court in prosecuting his claim, is an extraordinary achievement. However, notwithstanding the applicant's efforts, he fails to produce pleadings of the kind required by the majority of members of this Court to find that he was unfairly discriminated against. And if it was not clear before now how poverty – and in the applicant's case, adequate and timeous access to resources – coincides with disability to heap harm upon harm, then depriving the applicant of a substantive remedy because his pleadings may not make out a case for unfair discrimination is a clear demonstration.

[154] Id.

[155] Id at para 32.

[105] In my view, the respondent's refusal to reasonably accommodate the applicant is discrimination. The discrimination is direct, unfair and automatic because it is on the ground of disability. The onus to prove that the discrimination on a specified ground is not unfair rests on the respondent. 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.

[106] Taking my cue from the points of departure in the courts below, I find that the Labour Appeal Court should not have limited itself to an *obiter* remark that a policy must be designed to reasonably accommodate people with disabilities. I would uphold the Labour Court's reconsideration remedy. A higher intolerance for discrimination in all its forms is preferable to a reflexive retreat into welfarism.

Costs

[107] Ordinarily costs would not be awarded in a labour matter. However, in this case, getting to this Court was a financial struggle after the applicant's trade union withdrew its assistance. Additionally, the applicant has endured his current position, without reasonable accommodation and advancement for almost 10 years, while this litigation ran its course. He funds this appeal personally with no help from his trade union. Considering that the applicant is a person with disabilities, he should be accommodated with a favourable costs order.

[108] Had I commanded the majority, I would have granted leave, upheld the appeal, and granted a reconsideration remedy with costs.

MAJIEDT J (Madlanga J, Madondo AJ, Mhlantla J, Rogers AJ, Theron J, Tlaletsi AJ and Tshiqi J concurring):

[109] I have read the judgment penned by my Sister, Pillay AJ (first judgment). It is elegantly crafted and rightly infused with great empathy and solicitude for the plight of persons with disabilities, particularly in the workplace. Regrettably, I find myself unable to agree with the outcome and the underlying reasoning in the first judgment. I agree that leave to appeal must be granted but take the view that the appeal ought to be dismissed. At the outset, it is necessary to caution against *ad misericordiam* (appeal to pity) reasoning that attempts to persuade solely by evoking legally irrelevant feelings of sympathy. In this case, that type of reasoning would have us fixate on the fact that the applicant sustained the injury that led to his permanent disability while at work. Yet, that fact is entirely irrelevant to the legal question that is dispositive of this appeal, namely: does the Policy discriminate unfairly against the applicant?

[110] Although it is tempting to have regard to the circumstances surrounding the applicant's injury, which are emotionally compelling, they are not logically connected to the central issue in the case, namely the alleged unfair discrimination brought about by the Policy's inherent requirement for the job of senior firefighter. One understandably empathises with the applicant's unfortunate plight and its cause, and of course, the law must be responsive to social realities. It does not exist in a vacuum. However, the law must also balance various interests, which may at times compete, and it must be applied dispassionately and in a sustainable fashion

[111] The facts have been extensively narrated and I will add to or amplify them only where necessary. It bears repetition that the respondent (City) was responsible for Mr Damons' unfortunate injury during the ill-conceived fire drill. The subsequent events and the ensuing litigation, which ultimately resulted in the decision of the Labour Appeal Court, have been elucidated in the first judgment.

The Policy

[112] As will become apparent, the Policy self-evidently plays a central role in the adjudication of this dispute. In its unequivocal terms, the Policy applies to operational firefighters involved in active duties. That was common cause between the parties, as captured in the pre-trial minute. A similar agreement regarding the requirements for advancement from the rank of firefighter to senior firefighter was also recorded in the pre-trial minute, including the requirement to "[s]uccessfully undergo a practical (physical) assessment".

[113] Therefore, there was consensus on the requirements for advancement to the position of senior firefighter in terms of the Policy. And, significantly, it was recorded in the pre-trial minute that "[s]ince the inception of the Policy, no Firefighter has been advanced without having successfully completed the practical assessment referred to . . above". It was recorded further that "Damons is unable to complete the practical assessment due to his disability. He is also unable to meet the alleged inherent requirements of a Firefighter". Lastly, it was recorded that:

> "Damons is unable to fulfil the normal operational duties associated with being a firefighter due to his disability. There is furthermore no prospect of him being rehabilitated from his disability as it is permanent in nature. He is thus unable to resume operational duty in the future."

[114] On the common cause facts, no post of non-operational senior firefighter exists. The Policy applies only to operational firefighters and their advancement to the post of senior firefighter. The respondent adduced the evidence of Mr Ian Schnetler, the respondent's Chief Fire Officer. It was clear from his uncontested evidence that the phenomenon of senior firefighters in the non-operational sphere was a historical anomaly, and that the Policy was designed precisely to address this anomaly. He explained that as a result of the merger of different municipalities into the City of Cape Town, the respondent had inherited firefighters appointed under different policies and practices.

[115] To ensure a single practice for the appointment and advancement of firefighters, the respondent introduced the Policy in 2009. That purpose is recorded in the Preamble to the Policy itself. That evidence was not disputed. Mr Schnetler emphatically stated that since the inception of the Policy, no firefighter has been advanced that does not meet all the requirements – evidence in respect of which he was not cross-examined. And, crucially, this last fact was part of the common cause facts in the pre-trial minute.

The pleaded case

[116] Pleadings fulfil an essential role in determining disputes in a court of law. That much is axiomatic. This is so, even in matters relating to the exercise and protection of constitutional rights. As the Supreme Court of Appeal explained in *Fischer*:

> "Turning then to the nature of civil litigation in our adversarial system, it is for the parties, either in the pleadings or affidavits (which serve the function of both pleadings and evidence), to set out and define the nature of their dispute, and it is for the court to adjudicate upon those issues. That is so even where the dispute involves an issue pertaining to the basic human rights guaranteed by our Constitution, for '(i)t is impermissible for a party to rely on a constitutional complaint that was not pleaded.' There are cases where the parties may expand those issues by the way in which they conduct the proceedings. There may also be instances where the court may *mero motu* raise a question of law that emerges fully from the evidence and is necessary for the decision of the case. That is subject to the proviso that no prejudice will be caused to any party by its being decided".[156]

[117] The general rule is that this Court may not "decide a case on the basis of its own issues that have not been raised by the parties in the papers" and that it "should not tell a litigant what it should complain about".[157] In *Garvas*, this Court expounded the role of pleadings:

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[156] *Fischer v Ramahlele* [2014] ZASCA 88; 2014 (4) SA 614 (SCA) at para 13.

[157] *Mtokonya v Minister of Police* [2017] ZACC 33; 2018 (5) SA 22 (CC); 2017 (11) BCLR 1443 (CC) at para 77.

> "Holding parties to pleadings is not pedantry. It is an integral part of the principle of legal certainty which is an element of the rule of law, one of the values on which our Constitution is founded. Every party contemplating a constitutional challenge should know the requirements it needs to satisfy and every other party likely to be affected by the relief sought must know precisely the case it is expected to meet. Moreover, past decisions of this Court have adopted this approach and in terms of the doctrine of judicial precedent we are bound to follow them unless we say they are clearly wrong".[158]

[118] The first judgment, in an understandable and well-intentioned attempt to right the wrong of Mr Damons' injury, goes well beyond the pleadings, to the prejudice of the respondent. And the observation made in the first judgment that if it was not clear before now how poverty coincides with disability to heap harm upon harm, then depriving the applicant of a substantive remedy because his pleadings do not make out a case for unfair discrimination is a clear demonstration, appears to be a retreat to pity reasoning. It bears repetition that pleadings fulfil an essential role in litigation – they foster legal certitude, which is a central element of the rule of law.

[119] A close reading of the pleadings reveals that the central issue is really very narrow. Mr Damons' case is that the City had discriminated against him unfairly by not waiving the requirement of physical assessment in the Policy and by failing to promote him in terms of the Policy. It was pleaded thus in his statement of case in the Labour Court:

> "8 On 1 April 2009, the City published an 'Advancement Policy' (the Policy) for its Fire and Rescue Service. The stated purpose of this Policy was to apply ostensibly uniform criteria for the advancement of firefighters to the post of Senior firefighter. It noted that inconsistencies in the advancement of firefighters had arisen due to the amalgamation of various municipal administrations into the so-called Cape Town Unicity following the promulgation of the Structures Act.

[158] *South African Transport and Allied Workers Union v Garvas* [2012] ZACC 13; 2013 (1) SA 83 (CC); 2012 (8) BCLR 840 (CC) (*Garvas*) at para 114.

. . .

11. *Damons met all the requirements for advancement . . . save that he was unable to complete the physical assessment due to his disability.*

12. Despite having applied for advancement, and despite having requested that the City relax the physical assessment requirement, the City refused to do so. On this basis, the City refused the application for advancement.

. . .

20. *The application of the Policy to Damons discriminated, and continues to discriminate, against him on the basis of the disability.*

21. It is alleged that such discrimination constitutes either direct discrimination, or alternatively indirect discrimination, inasmuch as the Policy is ostensibly neutral yet has the effect of prejudicing all firefighters with disabilities.

22. The aforesaid discrimination is unfair, inter alia, because:

    22.1 The requirement of a physical assessment is not an inherent requirement for all employees wishing to be advanced from the rank of firefighter to that of Senior firefighter.

    22.2 The City was obliged to continue employing Damons in terms of his current duties, but at the rank of Senior firefighter.

    22.3 The refusal to advance Damons is contrary to the stated purpose of the Policy itself.

    22.4 The application of the Policy to Damons prohibits his further career advancement and his entitlement to the benefits of employment within the City.

    22.5 Damons is ultimately treated differently to other employees employed as firefighters.

23. In the premises, the application of the Policy to Damons constitutes unfair discrimination, such being prohibited by the [Employment Equity Act]." (Emphasis added.)

[120] Stripped of all its verbiage and reduced to its essence, the applicant's case is that it is unfair discrimination for the respondent to refuse to advance him to the post of senior firefighter, and to refuse to waive the requirement of physical fitness contained in the Policy. The applicant sought advancement to the position of senior firefighter in terms of the Policy. He did not base his claim on any other policy or legislation. In

effect, he wanted to be promoted to the position of senior firefighter within the meaning of the Policy and for the requirement of physical fitness to be waived.

[121] The dispute to be adjudicated by the Labour Court was therefore simply whether the respondent was guilty of unfair discrimination by refusing to promote the applicant to the position of senior firefighter in terms of the Policy. This much is obvious from the relief the applicant sought in the Labour Court, namely:

> "24.1 An order declaring the conduct of the City to have amounted to unfair discrimination as contemplated by section 6(1) of the [Employment Equity Act].
> 24.2 An order directing the City to cease the aforesaid discrimination by withdrawing the application of the physical assessment requirement contained in the Policy to persons with disabilities.
> 24.3 An order directing the City to reconsider Damons' advancement application in the light of [the] order made in paragraph 24.2 above.
> 24.4 An order directing the City to pay to Damons compensation, alternatively damages, in such an amount as is just and equitable.
> 24.5 Costs of suit."

[122] The case was emphatically never about the applicant's possible advancement in the non-operational sphere. It solely concerned his advancement in the operational sphere for firefighters engaged in active duties. In that respect, the Policy applies. That much was common cause between the parties.

[123] This notwithstanding, the first judgment appears to suggest that the applicant's case was that the respondent had failed to set up a policy for the advancement of non-operational firefighters. And the first judgment quotes a passage from the record to elucidate the point. The suggestion does not bear scrutiny. It is necessary to repeat that the applicant's stated case, read with the common cause facts recorded in the pre-trial minute, was clearly based on the Policy. And the Policy concerned advancement in the operational sphere. The applicant sought relief in the Labour Court to the effect that he was entitled to advancement in terms of the Policy, in other words,

that admittedly the Policy did apply to him, but that it was unfair discrimination not to waive the requirement of physical fitness. It is plain from the terms of the order he sought, that his attack against the Policy is a challenge against the physical fitness requirement contained in the Policy on the basis that it unfairly discriminates against persons with disabilities.

[124] In his pleadings, the applicant clearly envisaged that the respondent should waive the requirement of physical fitness for persons with disabilities. Effectively, he seeks an order striking out the all-encompassing requirement of physical fitness. Properly understood, the applicant wants the Policy requirement of physical fitness to be waived in his case, in the sense that he wants to be advanced to the position of senior firefighter without having to meet that requirement prescribed in the Policy. In support of this, he argues that the Policy unfairly discriminates against him to the extent that it establishes physical fitness as a requirement for advancement. While mention may have been made of the applicant's discontent that his injury has stunted his career prospects generally, we cannot interpret the applicant's pleadings in the Labour Court and application in this Court as seeking anything other than advancement to the position of senior firefighter. Where the applicant suggests, for example, that the Policy discriminates because it "makes no distinction between disabled and abled firefighters", his complaint is that the requirement of physical fitness should not be applied to persons with disabilities, which implies that the absolute requirement of physical fitness contained in the Policy unfairly discriminates against those persons.

[125] His complaint, as framed, is certainly not that the respondent has not put in place a policy providing for his advancement into a non-operational position. The case was not about the respondent's supposed failure to set up some other career path for the applicant in a non-operational role. Not only does the pleaded case not advance that case, as I have demonstrated, but the applicant himself disavowed it in his evidence.

[126] The dispute that was adjudicated by the Labour Court accordingly turned exclusively on whether the respondent was guilty of unfair discrimination by refusing

to promote the applicant to the position of senior firefighter in terms of the Policy. The respondent consequently sought to meet the applicant's case by relying primarily on the provisions contained in section 6(2)(b) of the EEA.[159] The respondent's pleaded case was that section 6(2)(b) constitutes an exception to the statutory duty not to discriminate. For the sake of completeness and emphasis, the section provides that it is not unfair discrimination to exclude the applicant from advancement based on the inherent requirements for the job of senior firefighter. It pointed out in respect of learner firefighters:

> "The physical attributes required for the performance of tasks associated with specific key performance areas in the post requires that the incumbent be physically fit and able bodied . . . be required to perform heavy lifting and strenuous physical activities in confined areas and at elevated temperatures while wearing protective clothing and equipment weighing 25 kilograms."[160]

[127] Self-evidently, these also apply to firefighters seeking advancement to the post of senior firefighter, perhaps even more so. There are two essential requirements in the Policy for advancement to the post of senior firefigher, first, physical ability and fitness and, second, the requirement of continuous years of firefighting experience.

[128] The respondent also pleaded that—

> "the Applicant's prospects of advancement as a firefighter to the position of senior firefighter is limited due to the fact that it is an inherent requirement of a firefighter and senior firefighter to be physically fit and able. *This does not however limit the*

[159] For the sake of completeness and emphasis, that section is repeated:

> "(2) It is not unfair discrimination to—
>
> . . .
>
> (b) distinguish, exclude or prefer any person on the basis of an inherent requirement of a job."

[160] This emanates from *The Standard on Comprehensive Occupational Medical Program for Fire Departments 2003 Edition of the USA National Fire Protection Association* (NFPA 1582), which sets out the job tasks required of firefighters in Cape Town.

> *Applicant's prospects of advancement in respect of any other line of employment within [the] Fire & Rescue Services or the Respondent generally*." (Emphasis added.)

[129] It explained further that the applicant is—

> "unable to advance as an unrehabilitated firefighter, but has prospects for promotion in other supporting roles within the Fire and Rescue Services such as in the Command and Control Centre or disaster risk management or an administrative post of the respondent as a whole."

[130] Based on a conspectus of the pleadings, and the basis on which this matter was litigated in the Labour Court, it is crystal clear that this case is about whether the physical fitness requirement in the Policy and the City's application of the Policy to the applicant constituted unfair discrimination, and no more.

[131] Before going any further, it is necessary to address the applicant's reliance on the fact that he had retained the designation of "firefighter" after being transferred to a non-operational post following his injury, and thus retained the right to advancement under the Policy. He also sought to rely on an alleged condition attached to his acceptance of the offer to be transferred to a non-operational post. That condition was allegedly to the effect that his transfer to that post would not prejudice his prospects for future promotion. The argument is ill-conceived and fails on several grounds. My finding in this regard is in line with that of the first judgment, but I list all grounds hereunder for clarity and emphasis.

[132] First, it is clear from the final outcome of the incapacity enquiry that this "condition" was not included. But even if it were included, it could hardly have been intended that the applicant would be free to advance and be promoted to any position he chose, irrespective of whether he could meet the inherent requirements of the job. Secondly, while it is true that the applicant retained the title of firefighter, he was, as the applicant's counsel accepted, a "firefighter in name only". The alternative positions to which the applicant was transferred were in non-operational divisions, first in the

Finance and Billing Section and then in the Fire and Life Safety Education Section. These positions do not require him to do physically demanding work.

[133] Thirdly, in any event, the Policy applies only to operational firefighters and, again, the applicant admitted that he was non-operational. This aspect has been extensively addressed and nothing more need be said about it.

[134] In all the circumstances, it could never have been the intention of any party – or policy-maker – to either withdraw the requirement of physical ability and fitness in the Policy or to create an exception to the Policy entitling the applicant to advancement as an operational firefighter. Such circumstances include the permanent nature of the applicant's disability, the core functions of a firefighter, the reasons for and content of the Policy, the record of the incapacity proceedings and the common cause facts recorded in the pre-trial minute.

Is physical fitness an inherent requirement of the job of a senior firefighter?

[135] The principle that physical fitness is an inherent requirement for the post of senior firefighter plays a crucial role in this case. Inherent requirements of the job refer to elements of a job that are essential to its outcome and part of its core activities. In *TDF Network Africa*, in dealing with whether a requirement is inherent or inescapable in the performance of a job, it was held that—

> "the requirement must be rationally connected to the performance of the job. This means that the requirement should have been adopted in a genuine and good faith belief that it was necessary to the fulfilment of a legitimate work-related purpose and must be reasonably necessary to the accomplishment of that purpose."[161]

[136] The first judgment correctly finds that physical fitness is an inherent requirement for the job of a senior firefighter. It regards this aspect of the case as uncontroversial.

[161] *TDF Network Africa* above n 31 at para 37. See also *Department of Correctional Services* above n 95 at para 23, where an inherent requirement was explained as "a permanent attribute or quality forming . . . an essential element . . . and an indispensable attribute which must relate in an inescapable way to the performing of a job".

And it correctly sets out the applicant's concession in this regard that "[t]he applicant acknowledges that the Policy does not discriminate unfairly against employees on any ground. He accepts that he cannot be operational. However, he argues that in applying it, the respondent differentiates him from others similarly situated". Of course, at the core of the applicant's case is that the Policy was not being applied consistently, since others occupy posts as senior firefighters without performing any physical tasks. The short answer to this, correctly furnished by the first judgment, is that this is a historical anomaly as explained by Mr Schnetler in his uncontested evidence. And, as stated, it was common cause that since the inception of the Policy, no firefighter has been advanced without having successfully completed the practical assessment.

[137] The reasoning in the first judgment in concluding that the application of section 6(2)(b) of the EEA to require a firefighter to be physically fit to be operational is not unfair discrimination, cannot be faulted. And it rightly observes that the Labour Court "correctly characterised the inherent requirement of the job as a complete defence to the claim of unfair discrimination", and that the Labour Appeal Court also saw the matter correctly.

[138] Section 6(2)(b) provides a complete defence to the applicant's claim of unfair discrimination, which means these findings of the Labour Appeal Court are really the end of the matter. Notwithstanding this trite principle of labour law, the first judgment invokes the principle of "reasonable accommodation" to reach the conclusion that the applicant's claim of unfair discrimination is good in law. I disagree.

Reasonable accommodation?

[139] I believe that the first judgment's approach to reasonable accommodation is based on a misunderstanding of the role of, and the interplay between, reasonable accommodation in a position and the inherent requirements of that job. While Chapter II of the EEA deals with the prohibition on unfair discrimination, Chapter III contains the affirmative action provisions. Included in the affirmative action measures is the "reasonable accommodation for people from designated groups in order to ensure

that they enjoy equal opportunities and are equitably represented in the workforce of a designated employer".

[140] The Code endorses the principle that "employers must reasonably accommodate the needs of persons with disabilities" and that "the aim of the accommodation is to reduce the impact of the impairment of the person's capacity to fulfil the essential functions of the job". The Code lists various forms of reasonable accommodations that are all aimed at enabling an employee with disabilities to do the job that they are employed to do. In other words, they 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. Accommodation beyond this would cease to be reasonable, because it would effectively require an employer to employ someone who cannot possibly perform the inherent requirements of the job.

[141] In this case, it is common cause that the applicant cannot meet the inherent requirements of the job of a senior firefighter. It is also not contested that no amount of reasonable accommodation will enable the applicant to meet the inherent requirement of physical fitness for a senior firefighter. Section 6(2)(a) would not avail the applicant since, at most, it would require the respondent to reasonably accommodate him. In the present instance, once the respondent has successfully raised the defence that physical fitness is an inherent requirement of the post of a senior firefighter, the question of reasonable accommodation falls away.

[142] If the first judgment's 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.

[143] In my view, the first judgment's approach subverts 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. In the context of the present matter, it ignores the role of the Compensation for Occupational Injuries and Diseases Act,[162] the legislation that is already in place for ameliorating the consequences of workplace injuries. It further ignores the existing obligation on large employers, like the respondent, to put in place affirmative action measures that would widen employment opportunities for disabled persons.

Undue hardship and the significance of international law instruments

[144] A further area of disagreement with the first judgment is its detailed discussion of "undue hardship". While this concept has been used in case law,[163] and is seen far more extensively in international case law, the EEA does not deal with it at all. There is, therefore, no need to consider this aspect. It is similar to the approach to "reasonable accommodation". This case simply concerns a section 6(1) claim of unfair discrimination and a successful section 6(2)(b) defence. That is the end of the matter as I see it. The rest of the discussion on the other aspects is superfluous and *obiter dictum*.

[145] The wide-ranging discussion in the first judgment on international instruments is useful and instructive, but it does not assist in answering the central question in this case. That answer is found in the pleadings, the common cause facts, and the section 6(2)(b) defence. Like the first judgment, I would uphold the respondent's

[162] 130 of 1993.

[163] *Abel v Dialogue Group (Pty) Ltd* (2009) 30 ILJ 2167 (CCMA). It may be that this concept is in fact an importation from Canadian law, where it exists as "undue hardship". See for example: Canadian Human Rights Act, 1985; Canadian Human Rights Code, R.S.O. 1990, c. H.19 at section 17; and *County of Brant* above n 135. While this Court *may* consider such foreign law, it is of course not binding.

section 6(2)(b) defence to the pleaded case. Where I part ways with my Sister, is her finding for the applicant on his unfair discrimination claim on a basis which was not pleaded at all, namely the employer's failure to set up a policy for advancement for non-operational firefighters. This is not permissible, and it is made in the face of the applicant's attorney preventing the respondent's witness from giving evidence on the opportunities that were available to the applicant in the non-operational sphere of the respondent's Fire and Rescue Services and elsewhere.

Conclusion

[146] The respondent has, on the common cause facts, reasonably accommodated the applicant, not in the post of a senior firefighter to which he seeks to be advanced, but in an alternative post, first in the Finance and Billing Section and then in the Fire and Life Safety Education Section. The respondent was not under any legal obligation to do so by allowing him to work in the Fire and Rescue Service's operational section. He is excluded from this section as he cannot meet the inherent requirement of physical fitness. This is a complete defence to a claim of unfair discrimination.

[147] Leave to appeal must be granted, but the appeal must fail with no order as to costs.

Order

[148] The following order is made:

1. Leave to appeal is granted.
2. The appeal is dismissed.

For the Applicant:	Z Feni and D Kela instructed by Qhali Attorneys
For the Respondent:	B Conradie instructed by Bradley Conradie Halton Cheadle