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EQUALITY, DISABILITY AND THE EMPLOYMENT EQUITY ACT: FILLING IN THE GAPS

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When you presume, you are not treating me as the person I am; when you do not presume, you are treating me as the person I am in a minimal sense; when you recognise and respond to the person I am, you are treating me as the person I am in a maximal sense. – Elizabeth Spelman, "On Treating Persons as Persons" (1978)

The social world that we inhabit is largely our own creation. Once aware of the plasticity of existing arrangements – the degree to which they are constructs of our collective wills – we may conclude that it is often our structuring of a set of tasks or a workplace, rather than the handicap itself, that causes functional impairment. And although we cannot control all the accidents of biology and fate that leave people blind, deaf or maimed, we may exercise our freedom to control the legal effects and social consequences that these brute facts bring in their train. – Anon "Employment Discrimination Against the Handicapped and section 504 of the Rehabilitation Act: An Essay of Legal Evasiveness" (1978)

1 Introduction

Deputy Vice-Chancellor, Professor Faurie, and Dean of the Faculty of Law, Prof Henning, I am deeply honoured and privileged to be invited to deliver my inaugural lecture. I am grateful for your kind and generous words of introduction. If at the end of my academic career I can live up to your praises and accomplish only half of what you ascribed to me, I shall feel justified to emulate that biblical giant, St Paul and say: 'I have run the race, I have kept the faith, and I have fought a good fight.' I say this in all humility for an academic's work is never finished. Acquiring knowledge and disseminating knowledge is an eternal task. My lecture is but a small contribution to the development of ideas which I am privileged to share with all of you tonight.



Deputy Vice Chancellor, Dean of the Faculty of Law, ladies and gentlemen, let me begin my humble lecture by rendering something of a brief explanation of my own title. The focus of my lecture tonight is equality. The country is South Africa and the context is entry into, and advancement in employment of people with disabilities. This is set against the background of the Employment Equity Act, and of necessity, the South African Constitution.

To allow me to focus sufficiently on equality, I have decided not to raise issues that belong to another lecture. In this connection, I have chosen not to raise questions about what is meant by a person with a disability. Instead, I chosen to accept that the definition in the Employment Equity Act which describes people with disabilities as 'people who have a long-term or recurring physical or mental impairment which substantially limits their prospects of entry into, or advancement in, employment' is sufficiently certain as a background to my lecture. Whilst the meaning of disability, is capable of admitting degrees of vagueness and can, indeed, lead to differences of opinion, nonetheless, what is explained in the Code of Good Practice and the Technical Assistance Guidelines, by way of supplementing the Employment Equity Act, provides, in the majority of cases, a sufficient guide for employees, their representatives and employers. People with significantly limited physical mobility, hearing and sight, and many other physical as well as mental impairments form obvious categories of persons falling under the umbrella of the term 'people with disabilities.'

Turning to equality, the title of my lecture suggests, rather boldly, that South Africa's Employment Equity Act has some shortcomings in that certain things are missing. I shall maintain that this is the case. My task then is to support my claim by identifying the gaps. I shall also attempt to suggest possible solutions. Let me begin by tabulating for you what I regard as significant gaps in the Employment Equity Act.

In essence, I have identified three gaps. I shall call them problems:

- First, is the problem of reinforcing the invisibility of people with disabilities
- Second, is the problem of confusing reasonable accommodation and affirmative action
- Third, is the problem of failure to provide a strong machinery for developing disability standards

But before addressing these problems, it is fitting that I say something about equality and its link with people with disabilities and the workplace.

2 The nature of equality

In speaking to equality, I can do no better than begin by repeating the profound words of a feminist scholar, Elizabeth Spelman, who said:

When you presume, you are not treating me as the person I am;
when you do not presume, you are treating me as the person I am in a minimal sense;
when you recognise and respond to the person I am, you are treating me as the person I am in a maximal sense.

Trying to give content to the meaning of legal equality can be difficult. Equality is not a fixed concept with permanent features and unchanging boundaries. Rather, it is a product of human imagination. Equality is a flexible concept whose content has, over time, been shaped by changing human aspirations. Many, though not all, societies have since moved away from a classic idea of equality that simply looks at 'equal treatment' at a superficial level, but without considering whether the so-called equal treatment benefits some, but disproportionately disadvantages others. This model of equality, popularly known

as formal equality, which is associated with the thinking of the Greek Philosopher, Aristotle, is what Elizabeth Spelman is implicitly distancing herself from in the words I quoted not so long ago.

What Spelman is appealing to is a kind of equality that is sensitive to the full range of human diversity and experience. It is a kind of equality that can be described as contextual equality in that it recognises underlying socio-economic and other differences. In order to treat people equally, it is sometimes necessary to recognise that they are different. The person who is wheelchair-bound, cannot conceivably compete equally for a job if he or she is expected to climb a flight of stairs in order to get to an office on the 12th floor of a building.

Though South Africa's own brand of equality is still evolving, its focus is not in doubt. Equality in South Africa has been shaped by history. It has been shaped by the need to break from a past where unfair discrimination was institutionalized. The achievement of equality is an integral part of establishing a society based on democratic values, social justice and fundamental human rights. South Africa's brand of equality is firm on distancing itself, at a deeper level, from unfair discrimination in all its manifestations in a quest to respect the dignity of each person and free their potential. To emphasise the unique character of equality has under the South African Constitution, Justice Kriegler said this in the *Hugo* case:

The South African Constitution is primarily and emphatically an egalitarian Constitution. The supreme laws of comparable states may underscore their principles and rights. But in the light of our own particular history, and our vision for the future, a Constitution was written with equality at its centre. Equality is our Constitution's focus and its organising principle.

The Constitutional Court has described equality under the South African Constitution as 'substantive equality' to distinguish it from formal equality. In one of the earliest cases that came before the country's highest court, the Constitutional Court, Justice Goldstone conveyed what substantive equality means in practice when the learned judge said:

The prohibition on unfair discrimination in the interim Constitution seeks not only to avoid discrimination against people who are members of disadvantaged groups. It seeks more than that. At the heart of unfair discrimination lies a recognition that the purpose of our new constitutional and democratic order is the establishment of a society in which all human beings will be accorded equal dignity and respect regardless of their membership of particular groups...We need, therefore, to develop a concept of unfair discrimination which recognises that although a society which affords each human being equal treatment on the basis of equal worth and freedom is our goal, we cannot achieve that goal by insisting upon identical treatment in all circumstances before that goal is achieved. Each case, therefore, will require a careful and thorough understanding of the impact of the discriminatory action upon the particular people concerned to determine whether its overall impact is one which furthers the constitutional goal of equality or not. A classification which is unfair in one context may not necessarily be unfair in a different context.

I venture to suggest that what Justice Goldstone said in this case is in fact a legal formulation of what Elizebeth Spelman is saying, which is: Treat me as I am. Justice Goldstone's statement has special significance for people with disabilities. Going back to my example of a person bound in a wheelchair, it means that the fact of being in a wheelchair should never be used as a natural and automatic reason for denying a qualified person a job opportunity. Rather, it is a reason for seeking ways and means of accommodating that person. It is a reason for placing upon the employer a *duty* to explore the practicability as well as feasibility of implementing alternative ways of facilitating the person in a wheelchair in taking up a job, such as by relocating the office to the ground floor or providing a lift. This duty, which is described in the Employment Equity Act as reasonable accommodation, is a direct consequence of the *right* to equality of the

person with a disability. It is, and it must be emphasized, an *enforceable right* rather than a mere favour or privilege at the mercy of the employer. I shall return later to it later.

With equality in mind, let me now go back to what I said were gaps in the Employment Equity Act. I begin with the problem of the invisibility of people with disabilities.

3 First, is the problem of reinforcing the invisibility of people with disabilities

Much of our contemporary debates on equality in South Africa have focused on race. This is understandable, of course, given South Africa's history of colonialism and more particularly apartheid which put 'racial worth' as the defining characteristic of personhood. Albeit to a less extent, equality debates have also focused on gender equality to reflect a change from a past where women were for the most part appendages of men. It is not by chance, for example, that there the South African Constitution created a Commission for Gender Equality. There is danger, though, that when race and gender are elevated, other disadvantaged groups may become less and less noticeable, unless deliberate legislative and other steps are taken to also raise their profile.

People with disabilities are possibly the most disadvantaged group in our society. Historically, they have been at the receiving end of discrimination and indifference. This discrimination and indifference is most pronounced in the workplace where people with disabilities have the highest unemployment rate and the lowest remuneration. Available evidence suggests that even allowing for the fact that for many people with severe disabilities employment is not possible, or if it is possible, it would be excessively costly, many people with disabilities are excluded from employment not on the basis of lack of competence to carry out the tasks associated with the job, but on account of discrimination. This

discrimination can take the form of prejudice but more often it comes in the form of failure to accommodate the needs of the person with a disability in order to support them in performing the job.

I would not suggest, for a moment that nothing has been for people with disabilities. Indeed, it is a step in right direction that the Constitution, the Employment Equity Act and the Equality Act (which regulates equality in areas where the Employment Equity Act does not apply) expressly mention disability as a ground that is protected against discrimination. It is also a step in the right direction that government has, from time to time, come up with official policy that seeks to realize the human rights of people with disabilities in the workplace and elsewhere including the *Integrated National Disability Strategy* of 1997. Rather my point is that not enough has been done, in the workplace and elsewhere.

It is not enough to simply say, as the Employment Equity Act does, that discrimination on the ground of disability is unlawful and that people with disabilities are a designated group that are entitled to affirmative action measures. The Employment Equity Act does not say anything about the manner in which disability discrimination may be different from say discrimination on the grounds of race, sex or gender. It does not provide guidance on what steps can and should be taken to overcome disability discrimination. Instead, these matters are all assigned to codes of practice and technical assistance guidance. This is not enough as the codes of practice and the technical assistance guidelines are unlikely to convey the kind or urgency and importance that employers associate with legislation. My argument is not that there is no place for codes of practice and technical assistance guidelines. Rather it is that when one is dealing with a new area of law such as disability law, it is not useful to leave virtually the bulk of guidance to codes and guidelines that are not law in the strict sense and are received as such by employers.

I would say that in order to highlight the plight of people with disabilities as well as lay down the law, so to speak, South Africa needs dedicated or special disability legislation which compares to say, the Americans with Disabilities Act, the Australian Disabilities Act and the British Disabilities Act. South Africa needs comprehensive disability legislation.

Let me now address the second gap – confusing reasonable accommodation with affirmative action.

4 Second, is the problem of confusing reasonable accommodation and affirmative action

Reasonable accommodation, as mentioned, earlier is a duty arising from the right of the person with a disability to be treated equally. It seems, however that the Employment Equity Act primarily sees reasonable accommodation as an affirmative action measure. The Employment Equity Act requires every employer to implement affirmative action measures for people from designated groups in order to achieve employment equity. People with disabilities, along with black people and women, are a designated group. As such, they are entitled to a range of affirmative action measures. According to the Employment Equity Act, affirmative action measures are 'measures designed to ensure that suitably qualified people from designated groups have equal employment opportunities and are equitably represented in all occupational categories and levels in the workforce of a designated employer.' Affirmative action measures that ought to be implemented by a designated employer must include 'making 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.'

I would say that there is a fundamental problem with seeing reasonable accommodation as primarily affirmative action duty. Seeing reasonable

accommodation as an affirmative action measure gives the impression that under the Employment Equity Act, reasonable accommodation is the same as affirmative action and employers are only required to provide accommodation if the issue is one of affirmative action only and not unfair discrimination. However, it is important to appreciate that though reasonable accommodation and affirmative action are not one and the same thing. Though the two concepts share a similarity, there are, nonetheless, distinguishable legal concepts. The similarity is that both address equality. Both concepts constitute a departure from the neutrality of the formal equality or equal treatment model. Both concepts are conscious recognising individual differences, as well as the historical or systemic exclusion of certain groups from participating meaningfully in socio-economic life. Both concepts challenge the status quo; they challenge prevailing norms and standards that have historically served dominant groups. Reasonable accommodation and affirmative action require positive action rather than inaction. They serve to dismantle patterns of systemic discrimination and help to prevent discrimination in the future. However, to treat them as the same would be overlook important differences.

Affirmative action is primarily about remedying a history of disadvantage and marginalisation, but through the route of group preferment, rather than an individualised assessment of disadvantage and need. Once an individual belongs to a designated group, they are eligible for preference by a designated employer. Affirmative action assigns preference to one group at the expense of another group. Ultimately, affirmative action seeks to achieve representivity. It generally connotes a plan to change the composition of a particular group by means of a quota, goal or other preferential treatment that serves to achieve a desired rate of participation by members of a group that has been disadvantaged by discrimination in the past.

Reasonable accommodation, on the other hand, does not import preferment of a certain group. It does not aim at achieving a particular rate of participation by

people with disabilities. Instead, it requires an individualised assessment of disadvantage and need so as to establish eligibility. Reasonable accommodation is not meant to confer an advantage, but to overcome discrimination in an individual case. Take, for example, the provision of a screen reader for a person with a visual impairment which might address the disadvantage faced by that person. The screen reader does not amount to group preferment. It is not intended to confer an advantage as it would be of little or no use to a person without a visual impairment. Thus reasonable accommodation is a tool for eliminating barriers that are disempowering to people that are different.

5 Third, is the problem of failure to provide a strong machinery for developing disability standards

I now address my third and final gap. I will be brief and say that in order to make a real impact in the workplace for people with disabilities, you need the presence of a proactive body that has an ongoing responsibility to develop standards for removing barriers to equality for people with disabilities. The United States has one in the form of the Equal Employment Opportunities Commission. Our courts cannot fulfil this role and neither can our Employment Equity Commission. The development of standards by judges depends on the chance of litigation. We have yet to have a case in South Africa where judged deliberate of employment-related disability discrimination. As for the Employment Equity Commission, it cannot possibly fulfil the role of developing disability standards as its statutory functions are limited to essentially advising the Minister of Labour on codes of good practice.

6 Conclusion

I would like to end my lecture, not by repeating what I have already said but by quoting from a eloquent statement on what our position should be on disability:

The social world that we inhabit is largely our own creation. Once aware of the plasticity of existing arrangements – the degree to which they are constructs of our collective wills – we may conclude that it is often our structuring of a set of tasks or a workplace, rather than the handicap itself, that causes functional impairment. And although we cannot control all the accidents of biology and fate that leave people blind, deaf or maimed, we may exercise our freedom to control the legal effects and social consequences that these brute facts bring in their train. – Anon “Employment Discrimination Against the Handicapped and section 504 of the Rehabilitation Act: An Essay of Legal Evasiveness” (1978)

Deputy Vice-Chancellor, Dean of the Faculty of Law, ladies and gentlemen, what we need is disability legislation that reflects this ideal. I thank you for listening.

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