

Employer duties towards pregnant and lactating employees in the hospitality industry in South Africa

Professor Advocate Stella Vettori*
Graduate School of Business Leadership, UNISA
Email: vettom@unisa.ac.za
Tel: 011 652 0207

Abstract

The hospitality industry or sector in South Africa is characterised by the employment of unskilled mainly young female employees. Consequently, it is inevitable that many of these employees will at some time be pregnant or lactating. Therefore it is important for both employees and employers to be aware of their respective rights and duties in this regard. The employer has a duty to protect pregnant and lactating employees from work situations that are unsafe or hazardous to their health or the health of their babies. However, the employer is also obliged to reasonably accommodate pregnant and lactating employees by finding alternative work for them that is not unsafe to their health and well-being and that of their babies. It is obvious that an employer may not always be in a position to provide such reasonable accommodation for lactating or pregnant employees. Recourse to South African and international case law and legislation sheds light on the practical implementation of the employer's duty to reasonably accommodate lactating and pregnant employees. This article serves to inform employers of the lengths they need to go to find alternative work for pregnant or lactating employees so as to not fall foul of discrimination legislation.

Key Words: Inherent requirements of the job; reasonable accommodation; discrimination; undue hardship

Introduction

Uncertainty of the law does not bode well for commercial expediency. When the answer to a question is determined with reference to relative and subjective concepts such as fairness and reasonableness there is bound to be grey areas where there is a lack of consensus amongst the legal fraternity. South African labour law is concerned with the attainment of fairness for both the employer and the employee.¹ A balancing of the interests of both employers and employees must ensure that employers are able to not only be sustainable, but also make profits, while at the same time the human dignity of employees must be protected. It is when the interests of employers and those of employees clash, that the undefinable and elusive concepts of fairness and reasonableness must be applied in a practical manner to balance these competing interests. Ultimately it all boils down to balancing the legitimate rights and interests of employers and employees so as to achieve economic viability for employers while at the same time preserving the human dignity of employees.

The purpose of this article is to determine how to achieve this balance with reference to how far an employer must go to accommodate a pregnant or lactating employee in order to avoid falling foul of the law.

* Stella Vettori. BA LLB (Wits) LLM (UNISA) LLD (UP). Professor, School of Business Leadership, University of South Africa .

¹ S 23 of the Constitution provides that everyone has the right to fair labour practices.

According to research undertaken by the Labour Research Service, the hospitality industry is...”dominated by young, black, female workers in low skill, low pay employment.”²Given the fact that young women play such a pivotal role as employees in the hospitality industry, it is important for employers in the hospitality industry to understand what their duties towards pregnant and lactating employees are and for pregnant and lactating employees to know what their rights are.

Legislation for safe working environments

On the one hand an employer is obliged to protect pregnant and lactating employees from workplace hazards. One way of doing so is to find ways of “reasonably accommodating” the pregnant or lactating employees. The obvious means of reasonable accommodation such an employee is by finding reasonable alternative work for her. However, it is not always practical or expedient to reasonably accommodate such an employee. When this is the case the employer runs the risk of falling foul of anti- discrimination legislation if it prevents the employee from working for a period of time in order to protect her and her child from workplace hazards. It is ironic that an employer’s attempts to protect an employee or her child from health risks can possibly amount to unfair discrimination.

In the hospitality industry, pregnant women working in restaurants and hotels are more likely to have nausea in the first trimester of the pregnancy as a consequence of the smells of the food. Pregnant women whose work involves picking up heavy things or standing for long periods of time, for example waitresses in restaurants, or bending over (for example chamber maids who make up beds all day) are more susceptible to back pain and sciatica in the later months of pregnancy.³ Furthermore employees in the hospitality industry are exposed to very long working hours especially in peak tourist seasons. It is common knowledge that pregnant and lactating women need more rest than others for their wellbeing and that of their babies. Furthermore, due to the prevalence of nausea or morning sickness pregnant employees should ideally not have to work on the very early morning shifts. In order to provide employees with work environments that are safe and risk free, an employer has an obligation to protect pregnant and breastfeeding employees from workplace hazards.

This obligation is contained in section 26 of the Basic Conditions of Employment Act⁴ (BCEA) provides as follows:

- (1) *No employer may require or permit a pregnant employee or an employee who is nursing her child to perform work that is hazardous to her health or the health of her child.*
- (2) *During an employee’s pregnancy, and for a period of six months after the birth of her child, her employer must offer her suitable, alternative employment on terms and conditions that are no less favourable than her ordinary terms and conditions of employment, if—*
 - (a) *the employee is required to perform night work, as defined in section 17(1) or her work poses a danger to her health or safety or that of her child; and*

² Michelle Taal “Organising in the Hospitality Sector in South Africa” *Labour Research Service South Africa*, November 2012, 12.

³ Adrienne Fox “Accommodating Pregnant Employees” *HRM Magazine* 2014 vol 59 no 2 (accessed on 13 July 2016 at www.shrm.org/hrmmagazine/editorialcontent/2014/0214).

⁴ 75 of 1997.

(b) *it is practicable for the employer to do so.*

Section 26 of the BCEA is silent on what an employer should do in situations where no suitable alternative work is available or it is not practicable for the employer to provide a suitable alternative for the pregnant or breastfeeding employee who performs night work or works in a risk area.

The Minister of Labour in terms of section 87(2) of the BCEA issued a Code of Good Practice on the Protection of Employees During Pregnancy and After the Birth of a Child. The Code is intended to guide all employees and employers concerning the application of section 26 of the BCEA. The Code sets out the various hazards that can be encountered in a workplace and provides guidelines to employers in respect of the identification and assessment of the hazards at the workplace. Furthermore the Code provides in terms of Item 5.3 that where appropriate, the employer should maintain and compile a list of employment positions not involving risk to which pregnant or breastfeeding employees could be transferred to. The Code, like section 26 of the BCEA is, however, silent on what is expected of an employer where no suitable alternative work is available or if it is not practicable for the employer to provide suitable alternative work.

South African ant-discrimination legislation

The Constitution

The rights to equality, dignity and to make decisions concerning reproduction are constitutionally protected rights. Section 9 of the Constitution provides *inter alia* as follows:

- (1) *Everyone is equal before the law and has the right to equal protection and benefit of the law....*
- (3) *The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.*
- (4) *No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.*
- (5) *Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair."*

Section 10 of the Constitution provides that:

Everyone has inherent dignity and the right to have their dignity respected and protected.

Section 12 of the Constitution provides as follows:

Everyone has the right to bodily and psychological integrity, which includes the right -

- (a) *to make decisions concerning reproduction;*
- (b) *to security in and control over their body; and*
- (c) *not to be subjected to medical or scientific experiments without their informed consent.*

Section 39(1) of the Constitution provides that when interpreting the Bill of Rights which provides for the protection of rights such as the right to dignity, equality and to make decisions concerning reproduction, 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.*

It is in the context of this constitutional imperative that the relevant foreign law is considered in this article. Furthermore, the constitutional mandate to consider foreign law renders foreign case law relevant in the light of the fact that our courts have not yet fully developed and interpreted the legislative provisions regarding the parameters of certain justifications or defences for discrimination.

The Employment Equity Act

The EEA was enacted to protect the right to equality of employees and has as its primary objectives the promotion and protection of an employee's constitutional rights to equality and dignity and the elimination of unfair discrimination in employment.⁵

Section 6(1) of the EEA provides 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, ethic or social origin, colour, sexual orientation, age, disability, religion, HIV status, conscience, belief, political opinion, culture, language, birth or on any other arbitrary ground.

Section 6(1) prohibits unfair discrimination in any employment policy or practice. In section 1 an employment policy or practice is defined as follows:

"Employment policy or practice" includes, but is not limited to-

- (a) recruitment procedures, advertising and selection criteria;*
- (b) appointments and the appointment process;*
- (c) job classification and grading;*
- (d) remuneration, employment benefits and terms and conditions of employment;*
- (e) job assignments;*
- (f) the working environment and facilities;*
- (g) training and development;*
- (h) performance evaluation systems;*
- (i) promotion;*
- (j) transfer;*
- (k) demotion;*
- (l) disciplinary measures other than dismissal; and*
- (m) dismissal.*

⁵ *IMATU & another v City of Cape Town* [2005] 11 BLLR 1084 (LC) see par 117.

The Employment Equity Act⁶ (EEA) provides two defences against unfair discrimination, namely affirmative action⁷ and inherent requirements of the job (IROJ).⁸ In order to succeed with the defence of IROJ an employer must also prove *inter alia* that it cannot “reasonably accommodate” the employee through for example restructuring or a transfer.⁹ An employer is therefore obliged to “reasonably accommodate” an employee who cannot do the job as a result of an inherent requirement of the job or if the employer does not want to expose the employee to workplace risks or hazards in terms of section 26 of the BCEA.

On the one hand an employer is obliged to protect pregnant and lactating employees from workplace hazards. One way of doing so is to find ways of: “reasonably accommodating” the pregnant or lactating employees. The obvious means of reasonable accommodation such an employee is by finding reasonable alternative work for her. However, it is not always practical or expedient to reasonably accommodate such an employee. When this is the case the employer runs the risk of falling foul of anti- discrimination legislation if it prevents the employee from working for a period of time in order to protect her and her child from workplace hazards. It is ironic that an employer’s attempts to protect an employee or her child from health risks can possibly amount to unfair discrimination.

In the hospitality industry, pregnant women working in restaurants and hotels are more likely to have nausea in the first trimester of the pregnancy as a consequence of the smells of the food. Pregnant women whose work involves picking up heavy things or standing for long periods of time, for example waitresses in restaurants, or bending over (for example chamber maids who make up beds all day) are more susceptible to back pain and sciatica in the later months of pregnancy.¹⁰ Furthermore employees in the hospitality industry are exposed to very long working hours especially in peak tourist seasons. It is common knowledge that pregnant and lactating women need more rest than others for their wellbeing and that of their babies. Furthermore, due to the prevalence of nausea or morning sickness pregnant employees should ideally not have to work on the very early morning shifts.

The employer must show that it “reasonably accommodated” the employee in order to abide by the provisions of the BCEA and also in order to succeed in a defence based on IROJ against a claim of unfair discrimination.

Therefore what is meant by “reasonable accommodation is key to unravelling the extent of employer’s duties towards lactating and pregnant employees. Before exploring the practical implications of the employer’s duty to reasonably accommodate an employee, it necessary to briefly discuss what is meant by IROJ.

The meaning of IROJ

The term IROJ is not defined in the EEA. Our courts have given a strict interpretation to the word “inherent”. The courts have held IROJ refers to the necessity of the possession of a particular personal characteristic that is necessary for the person to effectively fulfil his or her

⁶ 55 of 1998.

⁷ The defence of affirmative action against a claim based on unfair discrimination is beyond the scope of this article.

⁸ S 6(2)(a) of the Employment Equity Act 55 of 1998 provides that it is not unfair discrimination to take affirmative action measures consistent with the purpose of the Act. Subsection (b) provides that it is not unfair discrimination to “distinguish, exclude or prefer any person on the basis of an inherent requirement of the job.”

⁹ Dupper *et al* 85.

¹⁰ Adrienne Fox “ Accommodating Pregnant Employees” HRM Magazine 2014 vol 59 no 2 (accessed on 13 July 2016 at www.shrm.org/hrmmagazine/editorialcontent/2014/0214).

duties in a particular job.¹¹ The courts have adopted a stringent test for IROJ to qualify as a defence against a claim based on unfair discrimination. This means that it refers to the ability of an incumbent to do the job as opposed to the degree of performance of the job. The fact that someone who possesses the necessary characteristic would in all probability perform the job better than the incumbent, is not sufficient to justify the discrimination. Hence, the constitutional rights to equality and dignity trump the employer's operational interests or requirements. (*Hoffman v South African Airways*,¹² *IMATU & another v City of Cape Town*,¹³ *Whitehead v Woolworths (Pty) Ltd*¹⁴ *Dlamini & others v Green Four Security*¹⁵)

Whether being pregnant or lactating qualifies as an IROJ will depend on the surrounding circumstances.¹⁶ In the event that it does qualify as an IROJ, the employer must still prove that it took the necessary steps to reasonably accommodate the employee. Therefore irrespective of whether the employer can make use of the defence of IROJ or not, the employer must still prove that it did all that was necessary to reasonably accommodate the pregnant or lactating employee in the circumstances. The duty not to discriminate unfairly against an employee entails within it the duty to reasonably accommodate an employee. As stated by Pillay J in *Standard Bank of South Africa v Commission for Conciliation, Mediation and Arbitration and Others*¹⁷ "[d]ismissal on a prohibited ground of discrimination is automatically unfair. Implicit, therefore, in the duty to accommodate employees is the employer's obligation to prevent discrimination." In similar vein, in a matter before the Commission for Conciliation, Mediation and Arbitration (CCMA)¹⁸ the applicants alleged that they had been discriminated against on the grounds of pregnancy because they were placed on maternity leave as opposed to the employer finding alternative positions for them as it had done for other pregnant employees. The Commissioner found that section 26 of the BCEA read together with the Code of Good Practice on the Protection of Employees during Pregnancy and after Childbirth and the provisions of the EEA, provide for a duty to reasonably accommodate the applicant. The Commissioner found that even though the applicants were placed on maternity leave on full pay, the leave was unilaterally imposed on the applicants before they would ordinarily have been obliged to take it. The Commissioner therefore concluded that even though the unilateral imposition of maternity leave by the employer on the applicants was to prevent the applicants from working in hazardous conditions during their pregnancies, the employer had not done enough to find alternative positions for them and to reasonably accommodate them. Consequently, the Commissioner concluded that the employees had been discriminated against by the employer on the grounds of pregnancy.

The meaning of 'reasonable accommodation'

Whether an employer wishes to mount a defence of IROJ against a claim based on unfair discrimination or to prove that it has abided by the provisions set out in section 26 of the BCEA, an employer must also prove that it has reasonably accommodated the employee.

In South African law the concept of "reasonable accommodation" arises in the context of dismissal based on incapacity. In terms of the Labour Relations Act, 66 of 1995 Guidelines for

¹¹ See for example, *Whitehead v Woolworths* (1999) 20 ILJ 2133 (LC); *Hoffman v South African Airways* (2000) 21 ILJ 2357 (CC); *IMATU v City of Cape Town* (2005) 26 ILJ 1404 (LC); *Department of Correctional Services v POPCRU* [2013]7 BLLR 639 (SCA).

¹² 2001(1) SA 1 (CC) par 34.

¹³ (2005) 26 ILJ 1404 (LC).

¹⁴ [1999] 8 BLLR 862 (LC).

¹⁵ [2006] 11 BLLR 1074 (LC).

¹⁶ A detailed discussion pertaining to circumstances where being pregnant or lactating could be considered an IROJ is beyond the scope of this article.

¹⁷ [2008] 4 BLLR 356 (LC); (2008) 29 ILJ 1239 (LC) par 79.

¹⁸ *Tabane and others/Impala platinum Ltd* [2015] 8BALR 873 (CCMA).

Incapacity Dismissal, the employer has to *inter alia* “investigate the extent of the incapacity or the injury... (and)... all the possible alternatives short of dismissal”¹⁹ in order to justify the dismissal. To this end “the employer must enquire into the extent to which it can adapt the employee’s work circumstances to accommodate the disability. If it is not possible to adapt the employee’s work circumstances, the employer must enquire into the extent to which it can adapt the employee’s duties. Adapting the employee’s work circumstances takes preference over adapting the employee’s duties because the employer should, as far as possible, reinstate the employee.”²⁰

The employer must try and avoid dismissals and to this end must consider relevant factors including “the nature of the job, the period of absence, the seriousness of the illness or injury and the possibility of securing a temporary replacement” for the employee.²¹

The EEA Code of Good Practice: On the Employment of People with Disabilities (EEA Code) elaborates on the adaptations referred to in the LRA Guidelines. The EEA defines “reasonable accommodation” as “any modification or adjustment to a job or to a working environment that will enable a person from a designated group to have access to or participate or advance in employment”²² The EEA Code provides some practical insight on ways of accommodating people with disabilities: Item 6.9 of EEA Code provides:

Reasonable accommodation includes but is not limited to -

(i) adapting existing facilities to make them accessible;

(ii) adapting existing equipment or acquiring new equipment including computer hardware and software;

(iii) re-organizing workstations;

(iv) changing training and assessment materials and systems;

(v) restructuring jobs so that non-essential functions are re- assigned;

(vi) adjusting working time and leave; and

(vii) providing specialized supervision, training and support in the workplace.”

The concept of “reasonable accommodation” is also found in section 26 of the BCEA,²³ requiring an employer to “offer her suitable, alternative employment on terms and conditions that are no less favourable than her ordinary terms and conditions of employment, ifit is practicable to do so.”

The words in section 26 of the BCEA “ifit is practicable to do so” provide very little guidance to assist in determining under what circumstances an employer would have “reasonably accommodated” an employee. International law dealing with the protection of pregnant and

¹⁹ Schedule 8, item 10(1) of the LRA Code of Good Practice: Dismissal.

²⁰ *Standard Bank of South Africa v Commission for Conciliation, Mediation and Arbitration and Others* [2008] 4 BLLR 356 (LC); (2008) 29 ILJ 1239 (LC) pars 74 and 75.

²¹ Schedule 8, item 10(1) of the LRA Code of Good Practice: Dismissal.

²² S 1 of EEA.

²³ The provisions of this section are set out under heading 2 above.

lactating employees provide some insight regarding the meaning of “reasonable accommodation.”

The International Labour Organisation's (ILO) Maternity Protection Convention 200 (No. 183) and Recommendation 200 (No. 191) deal with the protection of pregnant and breastfeeding employees. South Africa has not ratified the Maternity Convention, however, section 26 of the BCEA gives effect thereto.

The Maternity Convention applies to all employed women including women employed in atypical forms of employment and seeks to promote equality for all women in the workplace and the health and safety of the mother and child. In terms of Article 3 of the Maternity Convention all member states are to adopt appropriate measures to ensure that pregnant or breastfeeding women are not obliged to perform work which has been determined by the competent authority to be prejudicial to the health of the mother or child, or where an assessment has established a significant risk to the mother's health or that of the child.

Section 6 of the Recommendation recommends that in the case of a pregnant or nursing employee working in a job where significant risk has been identified the employer must take measures to:

1. eliminate the risk;
2. adapt the employees working conditions;
3. transfer the employee to another post without loss of pay, and if this is not feasible;
4. provide the employee with paid leave.

The protection of pregnancy, maternity and parenthood is an aim of the European Union (EU). Legislation in the form of treaty provisions and directives have been developed. The EU considers the right to equality and not to be discriminated against on the grounds of pregnancy and maternity as fundamental human rights.

The protection of pregnant and breastfeeding women in the workplace is provided for in Council Directive 92/85/EEC of 19 October 1992 in the Introduction of Measures to Encourage Improvements in the Safety and Health at Work of Pregnant Workers and Workers who have Recently Given Birth or are Breastfeeding (the Directive).

The Directive provides protection to pregnant workers, a worker who has recently given birth and a worker who is breastfeeding. In terms of the Directive employers shall conduct an assessment of any risks to safety and health and possible effects on pregnancy and breastfeeding and decide on the measures to be taken.

The Directive leaves it up to each countries' national legislation to determine whether the leave granted to an employee where adaption of her working conditions or a transfer to another position is not feasible, will be paid or unpaid. The ILO Recommendation, speaks of paid leave in accordance with national legislation. The international legislation and the EEA Code provide examples of “accommodation” such as the adaptation of working conditions or a transfer. The problem is that there is uncertainty as to the lengths that the employer must go to in order to implement these actions. In other words there is little guidance as to what accommodation is “reasonable”. Recourse to the Canadian case law dealing with the Canadian equivalent of the South African IROJ, namely, a *bona fide* occupational requirement (BFOR) provides more insight as to the lengths an employer must go to in order to render the accommodation “reasonable”.

In Canada discrimination in employment on the basis of any of the prohibited grounds is not a discriminatory practice if:

*"any refusal, exclusion, expulsion, suspension, limitation, specification or preference in relation to any employment as established by an employer to be based on a bona fide occupational requirement."*²⁴

In *British Columbia (Public Service Employee Relations Commission) v BCGSEU*²⁵ the Canadian Supreme Court revisited the test for a BFOR and devised a three step approach for determining whether a *prime facie* discriminatory standard is a BFOR.

The first step is to determine whether the employer adopted the standard for a purpose rationally connected to the performance of the job. The objective of the standard must be identified. The employer must demonstrate that there is a rational connection between the general purpose and the objective requirements of the job. The focus in this first step is not on the validity of the particular standard but validity of its general purpose. In order to be a legitimate general purpose there must be a rational connection with the performance of the job.

The second step is that the employer must have adopted the standard in an honest and good faith belief that it was necessary to the fulfilment of the legitimate work related purpose with no intention to discriminate. The Supreme Court called this the *"subjective element of the test."*

The third step and last hurdle an employer has to overcome is that the employer must show that the standard is reasonably necessary to accomplish the legitimate work related purpose. In order to meet this part of the test the employer must show that it is impossible to accommodate individual employees sharing the characteristics without imposing undue hardship upon the employer. The Supreme Court stated: *"...yet the standard, if it is to be justified under human rights legislation, must accommodate factors relating to the unique capabilities and inherent worth and dignity of every individual, up to the point of undue hardship. [An employer has a] duty to accommodate an employee to the point of undue hardship."* The Supreme Court held that some of the important questions that can be asked in the course of this analysis are:

- i) Has the employer investigated alternative approaches that do not discriminate?
- ii) If so, why were they not implemented?
- iii) Is the standard properly designed to ensure that the desired qualification is met without placing an undue burden on those to whom the standard applies?

Regarding the factors that may be considered when assessing an employer's duty to accommodate an employee to the point of undue hardship the Supreme Court mentioned *"the financial cost of the possible method of accommodation, the relative interchangeability of the workforce and facilities, and the prospect of substantial interference with the rights of other employees."* This test is known as the "Meiorin test".

The Meiorin test was applied by the Canadian Supreme Court in *British Columbia (Superintendent of Motor Vehicles) v British Columbia (Council of Human Rights)*²⁶ which

²⁴ S 15 Canadian Human Rights Act.

²⁵ [1999] 3 S.C.R. 3.

²⁶ [1999] 3 S.C.R. 868.

involved a blanket refusal to grant a driver's licence to persons with homonymous hemianopia (loss of visual field) without individual assessments.

Regarding the third step of accommodating up to the point of undue hardship the Supreme Court held that:

"In order to prove that its standard is "reasonably necessary", the defendant always bears the burden of demonstrating that the standard incorporates every possible accommodation to the point of undue hardship, whether that hardship takes the form of impossibility, serious risk or excessive cost."

The Canadian Supreme Court in *Hyrdo-Québec v Syndicat des employ'e-e-s-de techniques professionnelles et de bureau d'Hydro-Québec*²⁷ had to consider whether dismissal of an employee who was regularly absent and assessed by a psychiatrist as not being able to work on a continuous and regular basis with continuing absenteeism, was justified.

Regarding undue hardship the Supreme Court stated:

"Thus, the test for undue hardship is not total unfitness for work in the foreseeable future. If the characteristics of an illness are such that the proper operation of the business is hampered excessively or if an employee with such an illness remains unable to work for the reasonably foreseeable future even though the employer has tried to accommodate him or her, the employer will have satisfied the test. In these circumstances, the impact of the standard will be legitimate and the dismissal will be deemed to be non-discriminatory."

It is clear that "reasonable accommodation" and "undue hardship" are two sides of the same coin. In terms of Canadian law business inconvenience will not be considered when determining hardship. In *Central Alberta Dairy Pool v Alberta (Human Rights Commission)*²⁸ the Supreme Court set out some factors to be taken into account in determining undue hardship. These include financial cost, problems of morale of other employees and interchangeability of work force and facilities. The court pointed out that the determination of whether cost implications cause undue hardship to the employer will be influenced by considerations such as the size of the employer's operation and the ease with which the work force and facilities can be adapted to the circumstances.

In similar vein the EEA Code also acknowledges that an accommodation that is 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.²⁹

The EEA Code defines "unjustifiable hardship" as:

*"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."*³⁰

The South African Supreme Court of Appeal (SCA) in *Department of Correctional Services and another v POPCRU and others*³¹ alluded to the Canadian three phase test in deciding

²⁷ 2008 SCC 43 par 18.

²⁸ [1990] 2 S.C.R. 489.

²⁹ Item 6.13 of EEA Code.

³⁰ Item 6.12 of EEA Code.

³¹ [2013] 7 BCLR 809 (SCA).

that the employer's dress code which required short and neat hairstyles was not an IROJ. The employees refused to cut their dreadlocks due to their cultural and religious beliefs and were dismissed. The SCA held that:

"A policy is not justified if it restricts a practice of religious belief - and by necessary extension, a cultural belief - that does not affect an employee's ability to perform his duties, nor jeopardise the safety of the public or other employees, nor cause undue hardship to the employer in a practical sense. No rational connection was established between the purported purpose of the discrimination and the measure taken. Neither was it shown that the department would suffer an unreasonable burden if it had exempted the respondents."

In the United States of America the definition of "discrimination" includes not making reasonable accommodations".³² There, an IROJ is termed a *bona fide* occupational qualification (BFOQ). In *Usery v Tamiami Trail Tours*³³ the United States Court of Appeal had to decide whether age was a BFOQ for drivers of passenger buses. The employer had a policy that it would not consider applications for the positions of drivers from applicants between 40 and 65 years of age. The reason was motivated by safety considerations.

The Court of Appeal set out the test for a BFOQ as follows:

- i) The BFOQ must be reasonably necessary to the operation of the business in the sense that the essence of the business operations of the employer will be undermined.
- ii) The employer must have reasonable cause (i.e. a factual basis for believing that all or substantially all of the class of persons being discriminated would be unable to perform safely and efficiently the duties of the job, alternatively if it is impossible or highly impractical to deal with the victim of the discrimination on an individualised basis the employer may apply a reasonable general rule. In deciding that the employer's rule was a BFOQ the Court of Appeal held that the greater the safety factor, measured by the likelihood of harm and the probable severity of the harm, the more stringent the job qualifications may be. The stringent job rule was not unrelated to the essence of the business and was not unreasonable in light of the safety risk.

This overview of the concept of reasonable accommodation demonstrates that in South Africa, Canada and the United States of America a strict approach is taken when giving meaning to the concepts of IROJ, BFOR and BFOQ. In all three countries, the measuring tool used to determine whether an employer has gone far enough to accommodate an employee is the concept of "undue hardship". Again in all three jurisdictions the employer must demonstrate that it will suffer substantial hardship. Mere business inconvenience or the employer's operational requirements are not sufficient. The hardship must be substantial in that it will alter the essence of the business. On the other hand, however, the employer need not prove that accommodation is absolutely impossible.³⁴

The fact that the determination of whether reasonable accommodation is sufficient is dependent to a large extent on whether the hardship suffered by the employer is "undue" implies firstly that some hardship is to be expected and secondly an aspect of proportionality

³² The definition of "discrimination" in s 102(5)(A) of the Americans with Disabilities Act 42 USCA of 1990 reads : "*not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity.*"

³³ 531 F2d 22.

³⁴ *Hyrdo-Québec v Syndicat des employ'e-e-s-de techniques professionnelles et de bureau d'Hydro-Québec* 2008 SCC 43.

is introduced. Therefore the interests of the employee have to be weighed against the interests of the employer. Since the right to equality and dignity are core constitutional rights in all three jurisdictions, the employer is expected to endure hardship that goes beyond mere loss of income that will not debilitate the employer. Simply stated, the employee's rights to dignity and equality must trump an employer's interest in making more profit. A big organisation is normally in a position to endure more "hardship" than a small enterprise before the integrity and very essence of the organisation is compromised or affected. Therefore the Canadian courts³⁵ and the EEA Code³⁶ both recognise that what constitutes undue hardship for a small enterprise may not constitute undue hardship for a big organisation. All surrounding circumstances including the size of the enterprise must therefore be taken into account in assessing whether the hardship is undue or an "unreasonable burden"³⁷ on the employer.

Conclusion

Employers must draft policies that achieve the appropriate balance of interests between employers and employees so as to not discriminate unfairly against employees. To this end employers must make genuine attempts to adapt the workplace and/or the duties of pregnant or lactating employees, or thoroughly investigate the possibility of temporarily transferring the employees to suitable alternative positions, so as to retain them in employment. All options must be seriously considered even at the employer's cost provided that such cost is not disproportional to the reasonable accommodation. The employer cannot adopt a one size fits all policy. Each case must be evaluated on its own merits. Every possible alternative position including creating a temporary position by combining various temporary duties must be genuinely considered. These alternatives must only be discarded in circumstances where their implementation will result in undue hardship to the employer.

³⁵ *Central Alberta Dairy Pool v Alberta (Human Rights Commission)* [1990] 2 S.C.R. 489.

³⁶ Item 6.13 of EEA Code.

³⁷ This was the term used to describe the concept of undue hardship by the SCA in *Department of Correctional Services and another v POPCRU and others* [2013] 7 BCLR 809 (SCA).