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Disability rights: employment developments in Britain

LAURENTIA TRUTER*

1 Introduction

Disability does not equal *inability* to work. Unfortunately, research has shown that the contrary viewpoint is held by many employers and co-employees alike. Statistics have shown that disabled people in Britain suffer an unemployment rate two to three times that of the general population and that the length of unemployment is likely to be greater than that for the unemployed in general.¹ Where disabled people are employed, they are further disproportionately concentrated in less skilled, lower-paid occupations.² That is notwithstanding the fact that disabled people have been shown in many cases to be just as productive as able-bodied employees.³

These surveys bring to light a form of social discrimination and prejudice against disabled people, which is the product of ignorance of the abilities of this minority group. However, steps have recently been taken by different legislatures to address some of the problems experienced by disabled people.⁴ The most recent development in this regard is the adoption of the Disability Discrimination Act, 1995 by the British parliament. The act received royal assent on 8 November 1995.⁵ This act has followed a controversial path in light of the fact that it surpassed the Civil Rights (Disabled Persons) Bill, which was introduced by private members to parliament several times in the past without success, notwithstanding the fact that it enjoyed cross-party support.⁶ The government showed a change of heart towards anti-discrimination legislation after the political furore which ensued after the latest demise of the Civil Rights Bill. It was indeed a big step forward for a government that persisted previously that a voluntary approach (for example codes of good practice,

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¹ Editorial focus "Employing people with disabilities I: government support in the UK and Europe" 1990 *IRS Employment Trends* 4; Sly and Duxbury "Disability and the labour market: findings from the labour force survey" 1995 *Labour Market Trends* 439; Doyle *Disability, Discrimination and Equal Opportunities* (1995) 8-25.

² Editorial news "Disabled workers 'unsuitable', say 40% of employers" 1992 (45) *Equal Opportunities Review [EOR]* 9.

³ Editorial focus 1990 *IRS* 4.

⁴ See eg the Americans with Disabilities Act, 1990 (USA) and the Disability Discrimination Act, 1992 (Australia).

⁵ Lewis "Disability discrimination: the advent of the fair discriminatory dismissal?" 1995 *New Law Journal* 34.

⁶ This bill's provisions stretched much further than the provisions of the 1995 act. See Hamilton "Discrimination against disabled people — the case for legislation" 1992 *SCOLAG Journal* 135 for a summary of the contents of this bill. See also Clayson and Holgate "Countering disability discrimination" 1995 *Solicitors Journal* 442 who discuss the main differences between these two proposals.

sheltered placements and public awareness campaigns) was the best way to address discrimination against disabled people.⁷

2 *Disabled Persons (Employment) Act 1944*

This act (as amended) previously governed the position of disabled people. A register of disabled people was established. A person whose name appeared in this register was “a person registered as handicapped by disablement”.⁸ The main employment provision was the introduction of a quota scheme. Employers of a substantial number of employees were under a duty to employ a quota of persons registered as handicapped and to allocate vacancies for that purpose when they occurred.⁹ However, permits could be granted by the minister to exempt an employer from this duty. The quota was later set at 3%. Non-compliance was a criminal offence.¹⁰

The quota scheme proved to be a complete failure. A very small percentage of employers fulfilled their statutory duty.¹¹ Different reasons have been given as explanation. Disability rights movements see a lack of effective enforcement as the culprit and advocated the continued existence thereof.¹² Others see unawareness by employers of this duty, reluctance of the disabled to register or the lack of incentives as the main reasons. The viewpoint was also expressed that the system was outdated and ineffective and should therefore be abolished.¹³

Having considered the option of a strengthened quota scheme, the government decided to abolish the quota and the registration arrangements altogether in the new 1995 act. The provisions of the 1944 act have thus been replaced by a statutory right not to be discriminated against on grounds of disability.

3 *Disability Discrimination Act 1995*

3.1 Main provisions

The act defines disability as “a physical or mental impairment which has a substantial and long-term adverse effect on [a person’s] ability to carry out

⁷ Editorial “Equal opportunities for people with disabilities: proposals for reform” 1990 (33) *EOB* 24-27: An internal government committee explored the different options available and came to the conclusion that anti-discrimination legislation “would be too difficult to draft and uncertain in its application” (26). See also editorial “Abolition of disability quota scheme” 1990 *Industrial Relations Legal Information Bulletin* (407) 15.

⁸ s 6(1)–(4).

⁹ s 9(1).

¹⁰ s 9(6). See Doyle (n 1) 32–37 on the quota scheme.

¹¹ See eg editorial 1992 (45) *EOB* 9; editorial 1990 (33) *EOB* 25. Even state departments didn’t meet the quota — editorial “Kirklees metropolitan council: positive action for disabled people” 1993 (50) *EOB* 17.

¹² McKay “Disabled people and employment: how effective is the law?” 1994 *SCHOLAG Journal* 156. No employer has been prosecuted for non-compliance since 1975 — Hamilton 1992 *SCHOLAG* 135.

¹³ Editorial “Consultation document on tackling discrimination against disabled” 1994 (57) *EOB* 27.

normal day-to-day activities".¹⁴ A disabled person means a person with such a disability. Schedule 1 to the act supplements these definitions by further defining the concepts of "long term effects" and "day-to-day activities". The government tried to create a common-sense definition which fitted the accepted perceptions of what a disability is and who a disabled person is. Undoubtedly, however, litigation will arise in future to determine the extent of the concept of impairment.¹⁵

Noteworthy is the fact that severe disfigurement can also fall within the definition of disability. Because people are judged on their aesthetic appearance, this is a rare example where a form of social rather than a pure medical disability is recognised.¹⁶

As mentioned above, the quota system has been repealed in the field of employment. Part II of the new act now governs the employment position of disabled people. This part will be subject to regulations (yet to be published) which can alter the provisions regarding employment discrimination. The employment provisions will not apply to employers with less than 20 employees.¹⁷ Section 4 makes it unlawful for an employer to discriminate against a disabled applicant or current employee on the ground of his/her disability. This possible discrimination ranges from recruitment, offer of employment, terms of employment, training and promotion to dismissal of the employee.¹⁸

The meaning of "discrimination" is set out in section 5:

"(1) For the purposes of this Part, an employer discriminates against a disabled person if —
 (a) for a reason which relates to the disabled person's disability, he treats him less favourably than he treats or would treat others to whom that reason does not or would not apply; and
 (b) he cannot show that the treatment in question is justified."

The defence of justification will only be upheld if it is both material to the circumstances of the particular case *and* substantial. The burden of proof will lie on the employer. Obviously this defence only applies if the employer has indeed treated the disabled person less favourably for a disability-related reason.¹⁹

Section 5 continues:

"(2) an employer also discriminates if —
 (a) he fails to comply with a section 6 duty imposed on him in relation to the disabled person; and
 (b) he cannot show that the failure to comply with that duty is justified."

The duty to make reasonable adjustments, contained in section 6, is not a general duty but arises when arrangements by the employer or the physical

¹⁴ s 1(1). People with past disabilities such as mental illnesses are also covered under the act — s2(1).

¹⁵ Doyle *Disability Discrimination: The New Law* (1996) 16-29. Some illnesses are meant to be excluded for example anti-social behaviour. Ministerial guidance can be issued in future. To interpret the definitions it will be useful to examine the discussions during passage of the bill through parliament.

¹⁶ Doyle (n 15) 29. This would pertain to people with facial stains, obvious birth marks, severe burns etc. Potential exclusions are "deliberately acquired disfigurements" such as tattoos.

¹⁷ Sec s7 of the act.

¹⁸ Doyle (n 15) 43, 50-52.

¹⁹ Doyle (n 15) 62.

features of the premises occupied by the employer, cause a substantial disadvantage for the disabled person in comparison with able-bodied persons. The duty to make reasonable adjustments is an essential part of anti-discrimination provisions, because it places a duty on employers to re-examine previous norms and policies so as to ensure equal opportunities in future. A few examples of possible adjustments are altered working hours, modifying equipment, modifying procedures for testing or assessment and restructuring of job descriptions.²⁰ Factors taken into account to determine whether steps taken were reasonable in the circumstances, will include financial costs to the employer, the extent to which the step would prevent the effect in question and the practicality thereof.²¹

The duty not to discriminate also extends to independent contract workers.²² The employer can also be vicariously liable for the discriminatory acts of his employees.²³ The normal requirements will have to be satisfied and it will thus be possible for the employer to show that the employee acted outside the scope of his employment. The individual employee can still be liable even if the employer can establish a defence. It will therefore be wise in such a case to join both the employer and the employee who committed the discriminatory act as defendants.²⁴

Another interesting aspect is that trade organisations are also bound by the provisions of the act. The organisations are covered to the extent that they are employers. An amendment at report stage in the house of lords, however, also has the effect that they are covered by the act in respect of their relationship with their members and prospective members.²⁵ A trade organisation is defined as "an organisation of workers, an organisation of employers or any other organisation whose members carry on a profession or trade for the purposes of which the organisation exists".²⁶ Three forms of discrimination are covered: discrimination against applicants for membership, discrimination against existing members and discrimination by way of victimisation. A trade union will contravene the prohibition against discrimination by, for example, requiring higher membership fees from a disabled person than the normal fee; refusing membership on ground of disability; refusing a member certain benefits or by depriving a member of his membership. Obviously the reason for the unfavourable treatment must be the person's disability. The defence of justification also applies here. The same principles regarding the "reasonable adjustment duty" (referred to above), will apply.²⁷

Trade unions must realise that they have a responsibility to further disabled people's rights in the workplace. Their aim must be to encourage disabled

²⁰ See s 6(3).

²¹ s 6(4). See editorial news "Government issues disability consultation document" 1994 (57) *EOR* 27.

²² s 12 and 68(1).

²³ Editorial "Disability Discrimination Act" 1995 (9) *Employment Law* 1-2.

²⁴ *Read v Tiverton District Council and Bull* 1977 IRLR 202 — although the case concerned sex discrimination the same principle will apply. See also *Tower Boot Co Ltd v Jones* 1995 IRLR 529 for vicarious liability in case of racial harassment.

²⁵ s 13-14.

²⁶ s 13(4).

²⁷ Examples will be the need to ensure that the buildings occupied by the union are accessible to its disabled members in wheelchairs and that union literature is available in braille form for people with visual impairments.

people to apply for jobs, to ensure that the workplace is accessible, to ensure equal conditions of employment, to promote training of disabled people and to ensure full participation in trade union activities.²⁸

A complaint by a person that any of the provisions contained in part II of the act has been contravened, may be presented to an industrial tribunal for adjudication.²⁹ The tribunal can give any order that it deems "just and equitable", including a declaration of rights, an order for compensation or a recommendation to reduce the effect of the discriminatory treatment.³⁰ If an order for compensation is made, an amount for injury to feelings can be included. There is no maximum amount of compensation that can be awarded. The power of the tribunal to make recommendations can only be used to reduce the effects of the discrimination on the plaintiff. The tribunal can thus not effect changes for the benefit of a wider class of persons who are not party to the proceedings.³¹

Lastly it must be mentioned that a National Disability Council is established under the act.³² This will be an advisory body with no enforcement powers. The council will advise the secretary of state on the elimination of discrimination, matters related to the enforcement of the act and can prepare codes of good practice when required to do so.

3.2 Critique of the act

Some of the main points of criticism are the following:

(a) Although the government strove to achieve a simple definition of "disability", some critics feel that the definition is too vague and could potentially exclude people who need the protection provided for.³³ During the discussion stage, however, amendments were made to the original definition to include progressive conditions³⁴ as well as someone who has had a disability.³⁵ Some writers have voiced concern about the powers of the secretary of state to limit the application of the act through regulations.³⁶

The act's employment provisions only apply to employers with more than 20 employees. Some think that this threshold is much too high and that too many employers could be excluded from the anti-discrimination duty.³⁷ Others feel that all employers should be covered anyway, as was the position under the

²⁸ For a view on the role of trade unions in this regard see Trade Union Congress *Disability and Discrimination in the Workplace: Guidelines for Negotiators* (1993).

²⁹ s 8(1).

³⁰ Editorial "Remedies for discrimination" 1989 *IDS Brief* (395) 7–10. These are the same remedies available in sex and race discrimination cases.

³¹ Doyle (n 15) 256–261.

³² Part VI s 50–52.

³³ Editorial news "Employment committee calls for a wider definition of disability" 1995 (62) *EOR* 12.

³⁴ such as cancer patients or HIV-positive persons.

³⁵ eg someone with a mental problem that has been cured. See schedule 1 of the act.

³⁶ Davies "Current developments: Disability Discrimination Bill, 1995" 1995 *Journal of Social Welfare and Family Law* 233. See also Lewis 1995 *New Law Journal* 36 and editorial 1994 (57) *EOR* 7.

³⁷ In the USA, since July 1994, firms with less than 15 employees have not been bound by the anti-discrimination legislation. See Postol and Kadue "An employers guide to the Americans with Disabilities Act" 1991 *John Marshall Law Review* 695.

Civil Rights Bill. Government reasoned that small business had to be protected from prescriptive legislation.³⁸

(b) The definition of discrimination also caused some concern. Only direct discrimination is addressed in section 5. Uncertainty arose whether indirect discrimination was also covered by the act. "Direct discrimination" occurs when the ground on which a distinction between groups of people is based, is unfair *as such*. "Indirect discrimination" is a more subtle form of discrimination where a seemingly neutral provision/requirement has a discriminatory *effect* by unreasonably excluding a certain group of people.³⁹ Some writers interpret the act so as to exclude indirect discrimination.⁴⁰ The government's reaction was that indirect discrimination was not explicitly included because of the fact that different disabilities all had their own problems. It would therefore be difficult to assess the "disproportionate impact" as required in indirect discriminatory cases. Indirect discrimination would, according to them, anyway be covered by the "duty to make reasonable adjustments"⁴¹ and that it was the intention of the government that indirect discrimination should be covered.⁴²

(c) This brings us to another problem, namely the question what is meant by "reasonable adjustments"? This clause will be open to interpretation problems. It is a factual question that needs to be determined in each individual case. The government hopes that this duty will be clarified in secondary legislation published at a later stage. The duty only arises if the arrangements or physical features place the disabled person at a *substantial* disadvantage. It appears to create quite a high threshold for the operation of the duty. For the employer it is further not as stringent a test as the one included in the original Civil Rights Bill, namely that the employer will only be excused from his duty to make adjustments if it causes him "undue hardship".⁴³

(d) The National Disability Council is only an advisory body. There is thus no enforcement body to monitor the application of the act similar to the commissions established in connection with race and gender discrimination.⁴⁴ It would have been helpful if the National Disability Council could have been more pro-active and able to assist disabled people, for example by investigating complaints of discrimination.⁴⁵ Reliance on the tribunal court is not necessarily the most cost-effective and speedy remedy. The question also arises whether the courts are accessible to disabled people.

Notwithstanding the above, the passage of this legislation to prohibit discrimination against disabled persons must be welcomed. It represents a fundamental change in society's attitude towards disabled people and disability. Although the Disability Discrimination Act, 1995 is not without its problems and probably does not go as far as disability rights activists

³⁸ Doyle (n 15) 46. Despite this exemption it was calculated that the act would cover 83% of employers.

³⁹ Hunter *Indirect Discrimination in the Workplace* (1992) 3–7.

⁴⁰ See for example Clayson and Holgate 1995 *Solicitors Journal* 443.

⁴¹ Editorial 1994 (57) *EOR* 29.

⁴² HC Deb Standing Committee E, col 143 (Paice). See Doyle (n 15) 55–56.

⁴³ Editorial 1994 (57) *EOR* 29. The undue hardship-test is applied in the USA: Postol and Kadue (n 37) 722. Also see Doyle (n 15) 67–73.

⁴⁴ Davies (n 36) 234; Myers "Disability Discrimination Bill" 1995 *New Law Journal* 1156.

⁴⁵ Davies (n 36) 234–236, Doyle (n 15) 210.

would like to see, it is a step forward for a government that at first was not convinced of the necessity of such legislation. The focus on individual claims and rights is a paradox, as discrimination is in essence a wrong done to a group. Nevertheless, the efficacy of the legislation will be tested in future and it is just fair to give this piece of legislation the chance to improve (*inter alia*) the employment position of disabled people.

4 *Policy proposals for South Africa*

It seems as if South Africa took note of this international trend towards anti-discrimination legislation to protect the rights of the disabled community. With the recently published document *Policy Proposals for a New Employment and Occupational Equity Statute*, the aim is to remove unjustified barriers to employment for all South Africans.⁴⁶ It proposes to address the employment position of especially three historically disadvantaged groups namely black people, women and, important for purposes of this discussion, persons with disabilities. Although this is only a policy document, which makes an in-depth discussion impossible, some interesting comparisons can be drawn with the British legislation.

The policy document aims to eradicate not only disability discrimination. It was formulated to redress past policies which caused inequalities both inside and outside the labour market. Through eradication of employment discrimination, it strives to further both social and economic equality between all. The proposals apply to *all* employers, employees and applicants for employment.⁴⁷ The process of consultation on the green paper will determine to what extent differentiation between the protected classes will be allowed.⁴⁸ In contrast, the British Disability Discrimination Act, 1995 focuses only on disabled people. It is therefore narrower in respect of the subject covered. At the same time, however, it is much wider on the issues addressed, namely employment, access to goods and services, access to premises and public transport. Both legislatures, however, foresee that the statutory measures will encompass only the most important equality provisions and that further details will be provided in regulations and codes of good conduct. The employment provisions of the 1995 act cover only employers with more than 20 employees⁴⁹ as the government wanted to protect small business from prescriptive legislation. It covers both applicants for work and current employees. The inclusion of all employers, as in the case of the South African proposals, is to be welcomed. The size of the enterprise should not be a justification for discrimination.⁵⁰

⁴⁶ *Government Gazette* 17303 of 1 July 1996. It was drafted by the department of labour: directorate equal opportunities for inclusion in a new Employment and Occupational Equity Statute. Comments could be made till 31 August 1996.

⁴⁷ 33 of the document (4.2.1).

⁴⁸ It seems that the document tends to focus more on gender and race discrimination — 12 (1.3.1) of the proposals. It will be interesting to see how much consideration will be given to the special needs of disabled people in future.

⁴⁹ s 7 of the act.

⁵⁰ The size of the enterprise will be an example of a factor which the court can take into account to determine whether an employer has fulfilled his duties under any statutory measure.

Both documents forbid discrimination in hiring, promotion, training, pay, benefits and retrenchment. The policy proposals make it clear that they intend to cover all forms of discrimination. Harassment on the job, which involves unwanted or unsolicited attention based on someone's personal characteristics, is also explicitly prohibited. It prohibits *unfair* discrimination.⁵¹ Some confusion exists regarding the application of the 1995 act in relation to indirect discrimination.⁵² However, according to the government (during discussion stage) it was intended to be covered. Justification for the less favourable treatment can be shown by the employer, making it comparable to the "unfair" criteria of the South African proposals. The act also makes provision for a duty on the employer to make "reasonable adjustments" in certain circumstances so as to prevent discrimination which might be caused by arrangements of the employer or the physical structure of the building that he occupies.⁵³ This correlates with some of the proposals made by the department of labour, for example to restructure recruitment and training procedures, to make buildings more accessible through physical changes or to investigate flexible working hours.⁵⁴ In both cases it is expected from employers to set non-discriminatory procedures in place.

The document on the policy proposals, however, then goes a step further than the British act. According to the document employment equity requires not only a ban on unfair discrimination, but also that measures be implemented to encourage employers to "undertake organisational transformation to remove unjustified barriers to employment for all South Africans and to accelerate training and promotion for individuals from historically disadvantaged groups".⁵⁵ Therefore employers will be required to draw up employment equity plans in consultation with employees and other stakeholders.⁵⁶ Nowhere in the Disability Discrimination Act, 1995⁵⁷ is an employer required to formulate disability policies or to treat a disabled person more favourably than he would treat others.⁵⁸

The affirmative action proposals contained in the policy document are based on principles inherent to both the interim constitution and the new 1996 Constitution of South Africa adopted by the constitutional assembly. Equality of every person before the law is recognised. Everyone must have full and equal enjoyment of all rights and freedoms. Therefore, both direct and indirect discrimination on grounds such as race, gender, age and disability is forbidden.⁵⁹ However, it is believed that past discrimination can only be remedied by provisions of preferential treatment of historically disadvantaged

⁵¹ 6 and 34.

⁵² See discussion above at 3.2 (c).

⁵³ s 6 of the act.

⁵⁴ See ch 4 of the proposals.

⁵⁵ 6 (1.5.2).

⁵⁶ 8 36-38. An organisational audit will have to be done to determine the extent of change needed.

⁵⁷ Under the Companies Act, 1985 s234, however, directors of registered companies with more than 250 employees must disclose in their annual director's report actual implementation of any policy during the last financial year.

⁵⁸ s 6(7). No mandatory positive discrimination is intended. See Doyle (n 15) 64. The statutory quota as governed by the Disabled Persons (Employment) Act, 1944 has been repealed.

⁵⁹ s 8 of the interim constitution 1993 and s9 of the newly adopted one. The 1996 constitution further mandates the enactment of anti-discrimination legislation to try and prevent it from happening — see s9(4).

groups. With that in mind special provision is made for an exception to the equality-principle, namely affirmative action programmes.⁶⁰ Affirmative action involves treating a group of people *differently* in order to improve their chances of obtaining a particular good or a proportion of certain goods.⁶¹ Both the interim constitution and the new one formulate the possibility of preferential treatment in permissive terms.⁶² The new 1996 constitution reads as follows:

“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.”⁶³

Whether these principles contained in the bill of rights will have an influence on private enterprise, is determined by section 8(2) of the 1996 edition of the constitution. It explicitly states that both natural and juristic persons are bound by these provisions as far as applicable. The uncertainty whether the constitution also has horizontal application has thus been addressed. The employment equity plans envisaged by the policy proposals are an acknowledgement of this possibility.⁶⁴

The new Labour Relations Act 66 of 1995 also contains provisions regarding discrimination and affirmative action measures. Section 187 of the act governs automatically unfair dismissals. One possibility mentioned is where the employer dismisses an employee for a reason related to discrimination, both direct and indirect, on any arbitrary ground including disability.⁶⁵ This is in line with the anti-discrimination proposals contained in the equity document. Discrimination against an employee can also constitute an unfair labour practice under the Labour Relations Act.⁶⁶ The act also contains a clause permitting affirmative action measures as an exception to the anti-discrimination principle.⁶⁷

It seems as if the employment equity proposals aim to give effect to these permissive clauses in both the constitution and the Labour Relations Act, 1995. Once the policy proposals are recorded in legislation it will be *mandatory*

⁶⁰ See Rautenbach and Malherbe *Wat staan in die Grondwet* (1994) 12-16. The terms “positive action” or “reversed discrimination” are also sometimes used.

⁶¹ See eg Brassey “Affirmative action — the objectives” 1995 *Employment Law* 132.

⁶² The wording of the new constitution bears a stronger inclination towards such affirmative action programmes than the 1993 version. Last mentioned only stated that such programmes will not constitute an infringement of the equality principle. Further, if a contextual approach is followed in interpreting this section, the court might foresee mandatory compliance, as affirmative action is also entrenched in other sections, for example the property clause and the education clause. Affirmative action has thus been emphasised as a means to address previous wrongs.

⁶³ s 9 — own italics.

⁶⁴ See further s 195(1)(i) of the constitution regarding the duties of the public service in this regard: “Public administration must be broadly representative of the South African people and need to redress the imbalances of the past to achieve broad representation.”

⁶⁵ The dismissal may, however, be fair if the reason is based on an inherent requirement of the particular job — s 187(2).

⁶⁶ Schedule 7 (transitional arrangements) s 2(1)(a). For purposes of this section “employee” includes an applicant for employment — see s 2(2)(a) of the same Schedule.

⁶⁷ Schedule 7 s 2(2)(b): “—an employer is not prevented from adopting or implementing employment policies and practices that are designed to achieve the adequate protection and advancement of persons or groups or categories of persons disadvantaged by unfair discrimination, in order to enable their full and equal enjoyment of all rights and freedoms.”

for an employer to establish employment equity plans and to implement them in his organisation.

The 1995 act creates a static, advisory body named the National Disability Council. This body will advise the secretary of state in connection with application and regulation of the act, but will have no enforcement powers. In case of any infringement the individual must present a claim to the industrial tribunal. Enforcement thus lies with the court. In contrast a whole institutional framework is foreseen by the policy document in which the department of labour, the directorate for equal opportunities and the labour inspectorate are keyrole players.⁶⁸ There will be a strong element of compulsion contained in the legislation. For example, some employers will have to admit their equity plans for scrutiny to the department of labour, an inspector will visit different organisations to ensure that these plans are implemented, state contracts will be awarded on the basis of the employer's adherence to the policy and employers that constantly fail in this regard will face punitive measures.⁶⁹ It is further envisaged that the Commission for Conciliation, Mediation and Arbitration [CCMA] will play an important role in both the anti-discrimination and employment equity aspects of the proposed bill.⁷⁰ A party can only approach the labour court if it is clear that the dispute cannot be settled by the CCMA after it was referred, following failure of the internal appeal mechanisms.⁷¹ Important also is that, unlike the act, the proposals permit class action suits by representatives of stakeholders.⁷²

5 Conclusion

It appears that the South African legislature foresees more encompassing legislation regarding employment, than that adopted by the British parliament. Both anti-discrimination measures and the development of employment equity plans are envisaged. However, the proposals do not only deal with the needs of disabled people. Time will tell whether these proposals are equally introduced in relation to the different historically disadvantaged groups. Although it sets as its aim the elimination of race, gender and disability discrimination and the promotion of equal opportunities for all, it still (perhaps unwittingly) creates the impression that gender and race equality are seen as priority areas. One can hope to be proven wrong. Only then can we move away from charity and welfarism to civil rights for and integration of the disabled community.

SAMEVATTING

DIE ARBEIDSREGTELIKE POSISIE VAN GESTREMDE PERSONE IN BRITTANJE

Diskriminasie teen gestremde persone is gebaseer op 'n sosiale persepsie van gestremdes eerder as op ware kennis van hierdie minderheidsgroep se vermoëns. Die belangrikste bepalings rakende die

⁶⁸ See ch 5 of the document.

⁶⁹ *ibid.*

⁷⁰ This is in accordance with the aims of dispute settlement set out in the new Labour Relations Act 66 of 1995.

⁷¹ 41.

⁷² 42.

werksposisie van gestremde persone ingevolge die onlangse *Disability Discrimination Act, 1995* in Brittanje word ondersoek. Daar word beoog dat die gedeelte van die wet met betrekking tot arbeidsregtelike bepalings binnekort in werking kan tree. Die wet stel 'n reg daar om nie teen gediskrimineer te word op grond van gestremdheid nie. Hierdie reg geld vir sowel aansoekers vir werk as vir huidige werknemers. Daar word verder 'n plig op werkgevers geplaas om in sekere omstandighede "redelike aanpassings" te maak aan byvoorbeeld die werksplek. Enkele punte van kritiek op die wetgewing word ook uitgelig. Die mening word uitgespreek dat Suid-Afrika kennis moet neem van internasionale ontwikkelings rakende die regte van gestremde persone. 'n Kort vergelyking tussen die Britse reg en die onlangs gepubliseerde Suid-Afrikaanse *Green Paper: Policy Proposals for a New Employment and Occupational Equity Statute* word getref. Alhoewel die beleidsdokument omvattende voorstelle bevat, word die mening uitgespreek dat gelyke regte vir gestremde persone dalk nie as 'n prioriteitsaak in Suid-Afrika gesien word nie.