

Is discriminating against employees living with cancer in the workplace justified?

Charles Maimela

LLB (Unisa) LLM (Unisa) LLD (Unisa)

Associate Professor, Department of Private Law, University of Pretoria

SUMMARY

This article interrogates the issue relating to employees living with cancer taking part in employment without being discriminated against based on their medical condition. It will be clearly outlined that cancer does not take away the ability of employees living with cancer to continue with work or enter into employment, which is what most employers and fellow employees believe based on the myth and stigma attached to cancer. This needs to be discouraged through proper education and creating awareness about cancer. This article will interrogate what cancer is and how it develops in the human body as well as the extent or impact of cancer on a patient to a point of leading to disability. The debate of whether cancer amounts to a disability in the South African context will be entertained and recommendations outlined with the aim of ensuring that employees living with cancer are not excluded in taking part in employment among other things. Focus will then shift to the most important aspect of this article which is discrimination, and to explore the different forms of discriminations as well as outline why employers tend to discriminate against employees living with cancer and can this conduct of employers be justified in any way in line with the South African legal system and the article will be incomplete if reference is not made to the English legal system. This is attributed to the fact that the South African legal system is built on the English legal system to a lesser or greater extent and lessons can be drawn from the English legal system due to the advances that have been made when it comes to the protection of employees living with cancer in the workplace. Recommendations will follow with the aim of providing a way forward for employees living with cancer in the South African market.

1 Introduction

Discrimination refers to treating employees differently by unjustifiably including some and unjustifiably excluding others from workplace activities and processes. For example, in the process of promotion, discrimination will take the form of unduly preferring certain employees over other employees who are in the same league of competence and hold similar qualifications.¹ It is important to note that there are different reasons why the employer may apply differentiation between employees. These reasons include, but are not limited to, qualifications,

1 Basson A *et al*, *Essential Labour Law* 5 ed (2009) 217.

experience, seniority and the operational requirements of the company.² Differentiation does not necessarily amount to discrimination but differentiation will become discrimination in cases where the differentiation is based on one or more of the listed grounds in section 6(1) of the Employment Equity Act 55 of 1998 (“EEA”).³ This view was confirmed in *NEHAWU obo Nquma v Department of Justice and Constitutional Development*, where it was held that the differentiation on the part of the employer was justified.⁴ In this case, a driver of the company argued that the employer unfairly discriminated against him by paying a fellow employee, who was also a driver, a higher salary than he was earning.⁵ However, the employer argued that the reason for the pay difference between the two drivers was that the comparator was in possession of a Code 11 drivers licence and could perform tasks that the applicant could not perform because the applicant was only in possession of a Code 8 drivers licence.⁶ The court held that the differentiation on the part of the employer was justified and did not constitute unfair discrimination as alleged by the applicant.⁷ The focus of this article will be on cancer as the ground of discrimination against employees in the workplace. First one needs to consider the meaning of cancer and how it develops in the human body, in order to gain a comprehensive understanding of this medical condition, before considering the legal implications in the context of workplace unfair discrimination law.

2 The meaning of cancer

As a point of departure, it is essential to consider the definition of the term “cancer”. In the twelfth century, Hippocrates, also known as the “Father of Medicine”, discovered cancer.⁸ Today, cancer is defined as a process where cells in the body grow in an irrepressible way.⁹ The word cancer is derived from the Latin word *crab*, which describes the way in which cancer spreads or appears in the human body, and which has a crab-like appearance.¹⁰ These include cancers from covering tissues,

2 Basson *et al*, 217.

3 S 6(1) of the EEA. See *HOSPERSA obo Venter v SA Nursing Council* 2006 6 BLLR 558 (LC) the Court in applying Article 1 of the International Labour Organisation Convention (No 111) held that for the purpose of s 6(1) of the EEA, discrimination should be interpreted as any distinction, exclusion or preference which has an effect of nullifying or impairing equality of opportunity or treatment in employment or occupation.

4 *NEHAWU obo Nquma v Department of Justice and Constitutional Development* 2017 1 BALR 76 (CCMA).

5 *NEHAWU obo Nquma v Department of Justice and Constitutional Development* para 76.

6 *NEHAWU obo Nquma v Department of Justice and Constitutional Development* para 77.

7 *NEHAWU obo Nquma v Department of Justice and Constitutional Development* para 77.

8 Barrow MV “Portraits of Hippocrates” (2001) 23 *Medical History* 85-88.

9 Friedberg E *Cancer Answers* (1993) 2.

10 David J *Cancer Care* (1995) 2.

skin cancer, mucous membrane cancer and cancer of the glands.¹¹ Further, the Regulations Relating to Cancer Registration,¹² define cancer as all malignant neoplasms and conditions suspected to be such, as contained in the International Classifications of Diseases for Oncology (“ICD-O”). Another word used to describe cancer is “*sarcoma*” which is the type of cancer that targets supporting body structures such as the bones, tendons, muscles, and fibrous tissues.¹³

From these definitions it becomes clear that cancer can spread through the human body until it is impossible to control. One can be sure that cancer is indeed a very dangerous disease that can affect any person.¹⁴ However, because of its complex nature, new knowledge is discovered daily and there is still a lot to be learned about cancer, both in the medical profession and society in general.¹⁵

3 Unfair discrimination on the basis of disability

For purposes of this discussion, it is important to describe what constitutes unfair discrimination in the workplace. Section 6(1) of the EEA states that no person may unfairly discriminate, either directly or indirectly, against an employee in any employment policy or practice, on one or more of the following grounds: race, gender, sex, pregnancy, marital status, family responsibility, ethnic or social origin, colour, sexual orientation, age, disability, religion, HIV status, conscience, belief, political opinion, culture, language, or birth. Cancer is not one of the listed grounds of discrimination in terms of section 6(1) of the EEA; however, it can be argued that disability as a listed ground surely includes cancer since the latter has the ability to render an employee temporarily or permanently disabled, owing to its aggressive nature. Disability can be defined as different functional limitations that occur in any group of

11 Scott RN *Cancer facts* (1979) 2.

12 S 1 of Regulations Relating to Cancer Registration GN R380 in GG 34248 issued in terms of the National Health Act 61 of 2003 dated 26 April 2011.

13 Heney D *et al*, *Rethinking Experiences of Childhood Cancer* (2005) 21.

14 Carnevali D and Reiner A *The Cancer Experience* (1990) 1. Further, it is a reasonable argument and an unfortunate fact that nearly anyone across the globe has had his or her life touched by cancer to a lesser or greater extent, such as they themselves being affected by cancer directly; or indirectly, having a family member or loved one affected by cancer. Cancer is a disease that preys on all of us; both young and old people are affected. Cancer holds no respect for national boundaries, ethnicity, race and social class because all of us are equal when it comes to the epidemic of cancer. Striking as much from within as without; cancer damages our individual and collective sense of health and well-being, and thus forms an integral part of our whole life. This is due to the fact that its human and economic effects are potent, measured each year in millions of productive years lost and billions of health care money spent. Cancer is a fearsome adversary, leaving tragedy in its wake; as we can see today cancer is the reason why millions of lives are lost annually. See Greenwald P *et al*, *Cancer Prevention and Control* (2001) 9.

15 Carnevali and Reiner 2.

people and in any country across the globe and can be in the form of intellectual impairments, physical impairments, sensory impairments, medical conditions, and mental illnesses; all of which can be temporary or permanent in nature.¹⁶ The Code of Good Practice relating to Disability in the workplace, that was adopted in 2001 (“the Code”), further strengthens the aspect of equality in the workplace by prohibiting unfair discrimination on the basis of disability. The aim of the Code is threefold and includes: to affirm the position of the EEA; to guide employers and employees on key aspects of promoting equal opportunities and fair treatment for people with disabilities as required by the EEA; and to help employers and employees understand their rights and obligations, promote certainty, and reduce disputes to ensure that people with disabilities can enjoy and exercise their rights in the workplace.¹⁷

3 1 The extent and meaning of the concept of disability

When dealing with the concept of disability, it is important to note that there are two schools of thought that facilitate a comprehensive understanding of disability. According to these schools of thought, there is a medical model and a social model of disability. The medical model of disability emphasises the medical condition or impairment of the person with a disability.¹⁸ For example, in the context of an employee diagnosed with cancer, the medical model focusses on the employee instead of the ability of the employee to perform work. For this reason, the medical model of disability is criticised as it personalises disability and makes it the problem of the individual concerned, which can be solved through a cure or the treatment of that disability.¹⁹ The social model of disability is based on the notion that the adverse circumstances which people with disabilities experience and the unfair discrimination which they are subjected to daily, do not emanate from their disability or impairment but rather from society.²⁰ In terms of this school of thought, society is characterised as being unable to accommodate people with

16 Art 17 of the UN Standard Rules on the Equalization of Opportunities for Persons with Disabilities Adopted by UN General Assembly Resolution 48/96 of 20 December 1993. Furthermore, please refer to the Code of Good Practice relating to Disability in the Workplace 19 April 2001. In terms of s 5 of the Code disability is defined as a long term, or recurring condition; having a physical or mental impairment, which substantially limits the ability of a person. This definition of disability without a doubt caters for chronic medical conditions like cancer, which have a long term or recurring element and have the ability to leave one with either a permanent or a temporary deformity.

17 S1 Code of Good Practice relating to Disability in the Workplace.

18 Olivier MP and Smit N *Labour Law and Social Security Law* (2002) 230.

19 Olivier and Smit 230-231.

20 Chapter 1 of the White Paper on Integrated National Disability Strategy: The Social Model of Disability 1997 1.

disabilities; and disability is not seen as an inability which takes away the affected person's ability to do work.²¹

The social model of disability is also known as the human rights model of disability because it centralises the person with a disability and his or her human dignity as enshrined in the Constitution of the Republic of South Africa, 1996 ("Constitution") without any focus on the impairment.²² The social model of disability is in line with the notion of substantive equality. In this context, Ngwenya argues that no country follows the social model of disability in its purest form, but that a combination of both the medical and social models of disability is required when disability is interpreted for an improved understanding.²³ This view is to be supported because cancer can be construed as a disability in terms of both the medical and social models of disability. The challenges that employees living with cancer experience at the hands of employers who view cancer as only a problem of the employee concerned, takes the form of a medical model to disability; whereas the myths and the stigma that society attaches to cancer result in discrimination against employees living with cancer, which is in line with the social model of disability.

Persons who claim unfair discrimination on grounds other than the ones listed in the EEA must, first of all, convince the court that the unlisted or 'arbitrary' ground on which they claim to be discriminated against affects them adversely or may potentially affect them in an adverse manner. Once the court is satisfied that this has been shown the affected employee will have to prove the alleged unfair discrimination on the basis of the unlisted ground.²⁴ According to section 11 of the EEA, the employee who claims unfair discrimination on an arbitrary ground must prove the discrimination and that it was unfair. This was confirmed in *Ndudula v Metrorail PRASA (Western Cape)*,²⁵ which concerned a dispute about the salary scales of employees who were in the same position and doing the same work. Two new employees who were appointed as section managers received higher remuneration than the other section managers in the company with long service of employment.²⁶ The aggrieved employees, who were the applicants in this matter, argued that the conduct of the employer amounted to unfair

21 Chapter 1 of the White Paper on Integrated National Disability Strategy: The Social Model of Disability 1997 1-2.

22 S 10 of the Constitution of the Republic of South Africa, 1996. See Wookman S *et al*, *Constitutional Law of South Africa: Student Edition* (2007) 35.

23 Ngwenya C "Interpreting Aspects of the Intersection between Disability, Discrimination and Equality: Lessons for the Employment Equity Act from Comparative Law. Part I (Defining Disability)" 2005 16 *Stellenbosch Law Review* 211.

24 S 6(1) of the EEA, prohibits unfair discrimination on the basis of race, sex, disability, religion, HIV status, culture and language in the employment context.

25 *Ndudula v Metrorail PRASA (Western Cape)* 2017 38 ILJ 2565 (LC).

26 *Ndudula v Metrorail PRASA* 2565.

discrimination in terms of section 6(1) of the EEA, but failed to specify exactly which ground of discrimination they were referring to in the circumstances.²⁷ The employer, as the respondent in the matter, argued that a mistake was made and that it had corrected the matter by informing the two newly appointed section managers that they were appointed on a wrong salary scale. Furthermore, the employer argued that there was no discrimination as alleged by the applicants but merely a mistake that was corrected.²⁸ The court held that since the applicants failed to show which form of discrimination they alleged to have suffered in terms of section 6(1) of the EEA (length of service was not found to be an arbitrary ground) combined with the employer's acknowledgement of the error, the claim of the applicants was dismissed and the cost order as requested by the applicants against the respondent employer was rejected by the court.²⁹

With regard to people who suffer from a progressive or recurring condition such as cancer, South African law follows the medical model and not the social model of disability. Ngwena argues that the non-recognition of progressive conditions such as cancer, which can leave a person with a temporary or permanent impairment, makes a person vulnerable to discrimination in both society and in the workplace and that the employer should be under a duty to provide reasonable accommodation.³⁰ However, in as much as employers are required to embrace diversity in the workplace, they are not expected to incur undue hardships in the process of embracing diversity through reasonable accommodation.³¹ The type of reasonable accommodation required will, therefore, depend on the nature and essential functions of the job, the work environment, and the nature of the specific impairment experienced by each individual concerned.³² At this stage, it is very important to take into consideration that reasonable accommodation on the part of the employer is based on three interrelated criteria which justify its purpose. First, the reasonable accommodation must effectively remove the barriers or obstacles which prevent an individual employee, who is otherwise qualified, from being able to carry out his or her duties.³³ Secondly, the accommodation must allow the individual employee with a disability to enjoy equal access to the benefits and opportunities of employment, such as the right to promotion in the workplace.³⁴ Thirdly, employers can adopt the most cost-effective means which is consistent with the two criteria outlined above.³⁵

27 *Ndudula v Metrorail PRASA* 2565.

28 *Ndudula v Metrorail PRASA* 2566.

29 *Ndudula v Metrorail PRASA* 2567-2568.

30 Ngwena 2005 *Stellenbosch Law Review* 230.

31 Bernard RB "Reasonable accommodation in the workplace: To be or Not to be?" 2014 *PER/PELJ* 2880.

32 BC Public Service *A Managers Guide to Reasonable Accommodation* (2008) 5.

33 BC Public Service 5-6.

34 BC Public Service 6.

35 BC Public Service 7.

The principles above outline the basic manner in which the employer can reasonably accommodate an employee living with a disability in the workplace. One can surely argue that these three criteria serve as the yardstick with which to determine if the duty to provide reasonable accommodation has been fulfilled on the part of the employer. When considering whether this duty has been fulfilled, the court will take into account the rational and proportional relationship between the measure employed and the purpose it seeks to achieve.³⁶ In the context of this article, the purpose of employing reasonable accommodation measures would be to accommodate employees living with cancer to continue working, despite their medical condition, in order to overcome the effect which their condition may possibly have on their working ability.

In South Africa, a great deal of focus is only directed towards people with actual disabilities which fall under the legislative definition, leaving out a large number of people who suffer from progressive conditions such as cancer. This is contrary to the current position in countries like England, where cancer is recognised as a progressive condition which constitutes a disability (more on the English approach to this topic will be discussed later on in the article). This is surely in line with the argument raised by Ngwena and Pretorius, that disability must be interpreted in a generous manner, without imposing the substantial limitation requirement on people with disabilities, which tends to exclude those people who suffer from progressive conditions such as cancer.³⁷ Substantial limitation has caused many people with disabilities to suffer unfair discrimination as imposed by employers and fellow employees. Therefore, their suffering is not experienced because of their disabilities being substantially limiting in themselves, but they suffer because of the approach which people adopt in their engagements towards people who have disabilities.³⁸ This is the common trend when it comes to discrimination against employees living with cancer, because most of them are discriminated against unfairly in the workplace, not because they are unable to work but merely because they have cancer.³⁹ It is to be noted that the dismissal of an employee living with cancer on the basis of the cancer and not the capacity of the employee amounts to automatically unfair dismissal in terms of section 187(1)(f) of the Labour Relations Act 66 of 1995 ("LRA").⁴⁰ This was found to be the position in

36 BC Public Service 7.

37 Ngwena C and Pretorius L "Conceiving Disability, and Applying the Constitutional Test for Fairness and Disability: A Commentary on *IMATU v City of Cape Town*" 2007 28 *Industrial Law Journal* 747.

38 Ngwena and Pretorius 2007 *Industrial Law Journal* 747-748.

39 *Pharmaco Distribution (Pty) Ltd v Lize Elizabeth Weideman* (JA104\2015) [2017] ZALCJHB (4 July 2017).

40 S 187(1)(f) of the Labour Relations Act 66 of 1995 states that a dismissal is automatically unfair if the employer, in dismissing the employee acts contrary to s 5 or if the reason for the dismissal is that the employer unfairly discriminated against an employee, either directly or indirectly, on any arbitrary ground, including but not limited to race, gender, sex, ethnic or social, origin, colour, sexual orientation, age, disability, religion, belief, political opinion, culture, language, marital status or family responsibility.

the case of *Pharmaco Distribution (Pty) Ltd v Lize Elizabeth Weideman*.⁴¹ In this case, the conduct of the employer in dismissing the employee on the basis of her disability was found to constitute an automatically unfair dismissal.⁴² This was attributed to the fact that the employee was suffering from bipolar disorder and it had no effect on the ability of the employee to do her work but the employer wanted her to undergo a psychometric assessment, which was contrary to her right to privacy. Based on the refusal of the employee to go for such a test, she was dismissed by the employer.⁴³ The conduct of the employer was found to be unlawful and amounting to discrimination against the employee on the basis of her disability.⁴⁴ The employer was ordered to compensate the employee in the amount of R222 000 for the violation of her right to human dignity and an additional R15 000 for the automatically unfair dismissal in terms of section 50(2)(b) of the EEA.⁴⁵

However, the conduct of the employer in dismissing the employee for a diagnosis of cancer can be justified in a case where the cancer has resulted in or affected the capacity of the employee to perform his or her duties effectively in the workplace. The employer must show or prove that reasonable accommodation in terms of section 15(2) of the EEA was provided but still the concerned employee is unable to execute his or her duties due to cancer, then in such a case the conduct of the employer in dismissing the employee will be lawful.⁴⁶ In cases of unfair discrimination on the part of the employer, it is the duty of the concerned employee who alleges the discrimination on the part of the employer to prove it in terms of section 11 of the EEA.⁴⁷

3 2 Examples of case law regarding unfair discrimination

In South African law, employees who suffer discrimination on the basis in unlisted ground such as cancer, carry a heavy burden in succeeding with their claim, because they first have to prove that they will objectively be adversely affected by the unlisted ground before moving on to prove that discrimination occurred on the part of the employer.⁴⁸ A number of decisions are relevant in this discussion, which will be outlined below.

41 *Pharmaco Distribution (Pty) Ltd v Lize Elizabeth Weideman* 223.

42 *Pharmaco Distribution (Pty) Ltd v Lize Elizabeth Weideman* 223.

43 *Pharmaco Distribution (Pty) Ltd v Lize Elizabeth Weideman* 224.

44 *Pharmaco Distribution (Pty) Ltd v Lize Elizabeth Weideman* 224.

45 *Pharmaco Distribution (Pty) Ltd v Lize Elizabeth Weideman* 225.

46 S 15 (2) of the Employment Equity Act 55 of 1998 places an obligation on employers to provide reasonable accommodation in the workplace in order to achieve equity and diversity in the workplace.

47 S 11 of the Employment Equity Act 55 of 1998 deals with the burden of proof when discrimination is alleged and needs to be proved.

48 Basson *et al.*, (2009) 217 and S 6(1) of 55 of 1998.

3 2 1 *Harksen v Lane NO and Others*

In *Harksen v Lane NO and Others*,⁴⁹ the court held that the crux of an unspecified ground of discrimination must be comparable to the specified grounds. In other words, the particular ground ought to also relate to personal attributes or characteristics which, if used as a basis for discrimination, could impair the fundamental human dignity of persons or adversely affect them in a comparably serious manner.⁵⁰ This case involved the provisions of the Insurance Act, which were found to be discriminating against spouses who were solvent and married out of community of property to the insolvent spouse. This was because the solvent spouse's estate would be taken into account when the sequestration of the estate of the insolvent spouse was taking place, and this was found to be contrary to the provisions of the Bill of Rights and not in the interest of the administration of justice.⁵¹

3 2 2 *Hoffmann v South African Airways*

Another case of interest in South African law which deals with unfair discrimination in the workplace is the landmark case of *Hoffmann v South African Airways* ("*Hoffmann*").⁵² In this case, the applicant was living with HIV and applied for a position as cabin attendant with South African Airways ("SAA").⁵³ The applicant went through all the stages of the interview process and was one of the successful applicants for the position in question. The problem only arose when the applicant had to undergo a pre-employment medical examination including blood tests, where it was discovered that the applicant was HIV positive which resulted in the company refusing to employ the applicant.⁵⁴

The company argued that it was not possible to employ an HIV positive candidate as the nature of the job required an individual who was healthy, and who would not contract any communicable disease, which would possibly put the lives of other colleagues and airline passengers in danger.⁵⁵ Furthermore, the company argued that it was not only in the best interests of the company to reject the applicant, but also in the best interests of its passengers to do so.⁵⁶ The applicant approached the High Court to challenge the constitutionality of SAA's decision which resulted in him being granted leave to appeal to the

49 *Harksen v Lane NO and Others* (CCT9/97) [1997] ZACC 12; 1997 (11) BCLR 1489; 1998 (1) SA 300 (7 October 1997). See also *National Union of Metal workers of South Africa and Others v Gabriel (Pty) Ltd* (2002) 23 ILJ 2088 (LC) in which it was held that when an employee claims unfair discrimination on an unlisted ground, the employee must show that the discrimination impacted on their human dignity.

50 *Harksen v Lane* 1489.

51 *Harksen v Lane* 1490.

52 *Hoffmann v South African Airways* 2001 1 SA 1 (CC).

53 *Hoffmann v South African Airways* 1365.

54 *Hoffmann v South African Airways* para 40.

55 *Hoffmann v South African Airways* para 40.

56 *Hoffmann v South African Airways* para 41.

Constitutional Court. The plaintiff based his claim on the violation of his rights to human dignity, equality and freedom; as well as the right not to be unfairly discriminated against on the basis of race, gender, religion, HIV status, family or marital status.⁵⁷ Ngcobo J was of the view that persons who live with HIV are often marginalised and unfairly discriminated against in society, due to the stigma attached to the disease. These people are vulnerable in our society because where matters of employment are concerned, attention is unduly placed on their HIV status, instead of being directed at their abilities and level of education.⁵⁸ Ngcobo J further explained that the duty rests upon the courts and all the various state organs to ensure that people living with HIV/AIDS are fully protected from any form of discrimination and abuse. SAA as an organ of state is compelled and bound by the Constitution and thus it must uphold the values of the Constitution, which includes the prohibition of unfair discrimination against any person.⁵⁹ It was on the basis of this reasoning that the court came to the decision that SAA unfairly discriminated against the applicant on the basis of his HIV status, and ordered SAA to employ the applicant as he was appropriately qualified and competent to do the work in question.

3 2 3 Standard Bank of South Africa v Commission for Conciliation, Mediation and Arbitration

Another example in this context is the case of *Standard Bank of South Africa v Commission for Conciliation, Mediation and Arbitration*.⁶⁰ Ms Ferreira, an employee of Standard Bank, worked as a loan consultant for a period of 17 years.⁶¹ Her job entailed using the company car to travel and meet with clients. On 2 February 2002 she was involved in a car accident while on duty and sustained serious back injuries which later developed into fibromyalgia; a disorder that causes pain and fatigue.⁶² As a result of her condition, the employee was moved from being a consultant to the position of a receptionist, and then later to data capturing, and finally ended up shredding papers; which was work that was done by the cleaning personnel of the company.⁶³ Owing to the demotion she experienced after the accident, she was demotivated and unhappy in her job and thus wanted to resign from the company. Furthermore, she was not provided with the necessary assistance she required, since her request for the provision of headsets and a computer

57 *Hoffmann v South African Airways* para 41.

58 *Hoffmann v South African Airways* para 41.

59 *Hoffmann v South African Airways* para 41.

60 *Standard Bank of South Africa v Commission for Conciliation, Mediation and Arbitration* 2008 4 BLLR 356 (LC).

61 *Standard Bank of South Africa v Commission for Conciliation, Mediation and Arbitration* 356.

62 *Standard Bank of South Africa v Commission for Conciliation, Mediation and Arbitration* para 20.

63 *Standard Bank of South Africa v Commission for Conciliation, Mediation and Arbitration* para 21.

in order for her to work effectively was not met by management.⁶⁴ The company rejected her application for resignation because the company doctor was of the view that she could fully recover and was still capable of working.⁶⁵

The employee was later called in by management and directed to resume her old post of a loan consultant. She was happy and appreciated that the company realised her commitment to the company, but her excitement was short-lived as she was dismissed in two months' time after being granted the position.⁶⁶ The employer justified this dismissal on the basis that she was not appropriately competent as she required a substantial amount of time off in order to receive medical treatment.⁶⁷ The Commission for Conciliation, Mediation and Arbitration ("CCMA") ruled in favour of the employee and held that the company discriminated against her on the basis of her disability and failed to reasonably accommodate her and so place her in a position to carry out her duties effectively.⁶⁸ This decision was also affirmed by the Labour Court.⁶⁹

In view of the abovementioned court decisions, it is arguable that courts recognise the broad meaning of the concept of disability based on the facts of each case. For purposes of this article, one could possibly rely on the decision in the *Hoffmann* case, among others, to support the enforcement of the right of equality in instances of employees living with cancer and the Code of Good Practice relating to Disability in the Workplace in terms of sections 6 and 7 respectively in which employers are encouraged to ensure that there is diversity in the workplace through their advertising and selection process with the aim of ensuring that people with disabilities are catered for in the workplace.⁷⁰ However, taking into account the fact that litigation is an expensive and time-consuming exercise it must be emphasised that the law ought to readily and directly serve as protection for the rights of persons living with cancer.

64 *Standard Bank of South Africa v Commission for Conciliation, Mediation and Arbitration* para 21.

65 *Standard Bank of South Africa v Commission for Conciliation, Mediation and Arbitration* para 22.

66 *Standard Bank of South Africa v Commission for Conciliation, Mediation and Arbitration* para 23.

67 *Standard Bank of South Africa v Commission for Conciliation, Mediation and Arbitration* para 23.

68 *Standard Bank of South Africa v Commission for Conciliation, Mediation and Arbitration* para 24.

69 *Standard Bank of South Africa v Commission for Conciliation, Mediation and Arbitration* paras 24-25.

70 *Hoffmann v South African Airways* paras 41-42 and please refer to the Code of Good Practice relating to Disability in the Workplace in terms of ss 6 and 7 respectively of the Code which calls for diversity in the workplace which includes employees living with disability.

3 3 The statutory meaning and scope of unfair discrimination

There rests a duty upon the government to ensure that legislation is developed in such a way that it can accommodate employees living with cancer from unfair discrimination. Currently, cancer is not one of the listed grounds of unfair discrimination in terms of the definition provided in the EEA.⁷¹ A generic approach ought to be established to recognise chronic diseases which have the ability to render a person incapable of working for either a temporary or long-term period. Such an approach will assist in eliminating the challenge of the lack of recognition of certain diseases under the listed grounds for discrimination and thus expand the protection measures which are in place for employees living with cancer and others facing similar challenges. It is important to emphasise that there is a need to amend section 6(1) of the EEA to include disabilities inflicted by chronic medical conditions as a listed ground of discrimination, instead of recognising a select few of diseases therein.

It is interesting to note that HIV/AIDS is one of the listed grounds of unfair discrimination which are prohibited in terms of the EEA.⁷² This is attributed to the fact that HIV/AIDS is a widespread disease.⁷³ One can argue that the inclusion of HIV/AIDS in the statutory provision of the EEA is because of the greater awareness and education invested in educating people about HIV/AIDS.⁷⁴ There is more knowledge and understanding on the part of employers and broader society about the disease, though unfortunately, this is not the case when it comes to cancer.⁷⁵ Despite the high mortality rate of HIV/AIDS, the survivors of this disease and its victims often experience some kind of abuse and unfair discrimination which is attributed to the stigma that society attaches to the disease.⁷⁶ The same view can apply to cancer patients, who also suffer from socio-economic hardships due to the myth and ignorance surrounding cancer.

71 S 6(1) of 55 of 1998 prohibits unfair discrimination of employees who suffer from any form of disability including cancer from its broad interpretation in the workplace on the part of the employer.

72 In terms of S 6(1) of 55 of 1998, it states that no person may unfairly discriminate, directly or indirectly, against any employee in any employment policy or practice, on one or more grounds including race, sex, gender, pregnancy, marital status, family responsibility, ethnic or social origin, colour, sexual orientation, age, disability, religion, HIV status, conscious, belief, political opinion, culture, language and birth.

73 HIV/AIDS is one of the diseases which claim millions of lives of people especially in the developing parts of the world such as Africa. The unfair discrimination of an employee owing constitutes unfair labour practices in terms of s 186(2) of 66 of 1995.

74 Ambasa-Shisanya CR *Cultural Determinants of Adoption of HIV/AIDS Prevention Measures and Strategies among Girls and Women in Western Kenya* (2009) 2-3.

75 CancerNet <http://www.cancer.net/coping/relationships-and-cancer/cancer-and-workplace-discrimination>, accessed on 2014-02-03.

76 Page J *et al*, *Working with HIV/AIDS* (2006) 118.

Some of these myths include that cancer is contagious and that the people who live with cancer are unable to work.⁷⁷

Having listed the grounds for unfair discrimination, the Act goes further to define unfair discrimination and to exclude certain specified conduct from the scope of unfair discrimination. In terms of section 6(2) of the EEA, it would not amount to unfair discrimination on the part of the employer to take affirmative action measures consistent with the purpose of the Act, and to distinguish, exclude or prefer any person on the basis of an inherent requirement of a job (which is the operational needs of the employer).⁷⁸ Unfair discrimination may take two forms; direct and indirect discrimination.⁷⁹ The next paragraphs will discuss the concepts of direct and indirect discrimination. This discussion will consist of an analysis of these two concepts as illustrated in case law, legislation, and the opinions of various authors.

4 Direct discrimination

4.1 A theoretical view of direct discrimination

Direct discrimination is relatively easy to recognise and occurs where a differentiation or distinction between employees is clearly and expressly based on one or more of the prohibited grounds of discrimination listed in section 6(1) of the EEA.⁸⁰ Direct discrimination occurs when people are differentiated from each other because they possess particular characteristics which are disvalued by others.⁸¹ For example, where an employer clearly treats a woman less favourably than a man in the same position simply because the employee is a woman; or where the employer selects employees with disabilities for purposes of retrenchment.⁸² Direct discrimination on the part of the employer can also occur where the employer treats an employee with a disability less favourably than someone without a disability in the same or similar circumstances. For example, denying a person a job or a promotion

77 Farley SP *et al*, "Work disability associated with cancer survivorship and other chronic conditions" 2008 17 *Psycho-Oncology* 91-92.

78 S 6(2) of 55 of 1998 champions for affirmative action measures in order to redress disadvantaged people from designated groups in order to ensure that they are equitably represented in the employment context. This includes, black people, women and disabled individuals.

79 Martin LL *et al*, *Lessons from the black working class* (2015) 151-152. See *Harmse v City of Cape Town* (2003) 6 BLLR 557 (LC) 16-18, in which the court held that a distinction between direct and indirect discrimination is not so fundamental that it is not possible for the respondent to reply meaningfully to a claim without knowing whether a claim of direct or indirect discrimination is being relied on. Waglay J found that failure by an applicant to specify whether discrimination is direct or indirect does not render a claim excipiable.

80 Martin *et al*, *Lessons from the black working class* 153.

81 Basson *et al*, *Essential Labour Law* 218.

82 Basson *et al*, *Essential Labour Law* 218 and further refer to Steenkamp A *et al*, *Labour Relations Law: A Comprehensive Guide* (2011) 651.

merely because they are living with cancer or have a history thereof.⁸³ This conduct constitutes direct discrimination and can further be challenged as an unfair labour practice.⁸⁴ The focus of this discussion will now shift to enquiring why employers tend to discriminate against employees living with cancer.

Barofsky argues that employers discriminate against employees living with cancer because they seek to avoid making contact with members of an undesirable group, in this case employees living with cancer; and even do so at the risk of financial loss through litigation and legal sanctions.⁸⁵ Fobair and Hays attest that discrimination perpetuated by an employer towards employees living with cancer is typically self-imposed discrimination, which is associated with passive coping skills; negative self-esteem; poor body image; decreased energy and depression on the part of the employee living with cancer.⁸⁶ Skipper argues that most employers discriminate against employees living with cancer in different ways, including denying them employment benefits such as promotion or providing them with reasonable accommodation. In other circumstances, employers even refuse to employ people living with cancer, because they regard this as a burden to them and the company at large.⁸⁷ Skipper points out that such discrimination can be attributed to the myths and false notions which employers have about cancer such as the myth that cancer is considered a contagious disease.⁸⁸ All of this highlights the extreme erroneous misunderstanding of cancer which calls for a better understanding and awareness of cancer.⁸⁹ A common thread runs through the different views which the authors express as the reasons why employers discriminate against employees living with cancer; that is the general ignorance towards the disease which emanates from the stigma attached to this disease since ancient times.

83 McKeena MA *et al*, "Workplace discrimination and cancer" 2007 29 *Work* 313.

84 S 186(2) of 66 of 1995 is very instrumental in outlining as to what constitutes unfair labour practices on the part of the employer as outlined above.

85 Barofsky I *Work and illness: the cancer patient* (1989) 22.

86 Hays DM "Adult survivors of childhood cancer" 1993 10 *Cancer Supplement* 3306.

87 Skipper PL *et al*, "Cancer survivors at work: Job problems and illegal discrimination" 1989 16 *Oncology Nursing Forum* 41.

88 Skipper *et al*, 1989 *Oncology Nursing Forum* 41.

89 Skipper *et al*, 1989 *Oncology Nursing Forum* 41.

4 2 Examples of court cases dealing with direct discrimination

4 2 1 *Association of Professional Teachers v Minister of Education*

In *Association of Professional Teachers v Minister of Education*,⁹⁰ a female teacher was denied a housing subsidy by the Department of Education (“Department”). The decision of the Department was based on the policy that was in place which provided that female teachers were not entitled to a housing subsidy, except in cases where their spouses were permanently and medically unfit to partake in employment.⁹¹ The applicant teacher challenged this policy on the basis that it was directly discriminating against her on the basis of sex.⁹² In this case the Industrial Court was of the view that such exclusion of female teachers from the housing subsidy was based on sex and marital status and it was totally irrelevant for the subsistence of the employer-employee relationship.⁹³ The court found that the exclusion of female teachers in the housing subsidy amounted to direct unfair discrimination.⁹⁴

4 2 2 *Swart v Mr Video (Pty) Ltd*

The issue of direct discrimination was further dealt with in the case of *Swart v Mr Video*.⁹⁵ In this case, unfair discrimination was based on the age of an employee. The employer in this case was an owner of a chain of video stores who was in the process of opening a new store in Pretoria.⁹⁶ The employer advertised that a new assistant who was 25 years old or younger was required. The applicant who was twenty-eight years old called the employer and indicated her interest in the job and filled in some forms in the process. She went for the interview with her friend whereafter the employer employed her friend instead, because she was 25 years old.⁹⁷ The employer argued that the applicant was not fit for the job as she was older and would not take instructions from younger colleagues.⁹⁸

On conciliation, the argument of the employer was rejected and the conduct of the employer was viewed as direct discrimination on the basis of the gender and age of the applicant.⁹⁹ There was no evidence to suggest that the applicant would not comply with lawful instructions

90 *Association of Professional Teachers & Another v Minister of Education & Others* (1995) 16 ILJ 1048 (LC).

91 *Association of Professional Teachers v Minister of Education* 1048.

92 *Association of Professional Teachers v Minister of Education* para 18.

93 *Association of Professional Teachers v Minister of Education* para 18.

94 *Association of Professional Teachers v Minister of Education* paras 19-20.

95 *Swart v Mr Video (Pty) Ltd* (1998) 19 ILJ 304 (LC).

96 *Swart v Mr Video* 304.

97 *Swart v Mr Video* para 17.

98 *Swart v Mr Video* para 17.

99 *Swart v Mr Video* para 18.

from colleagues, and the inherent requirements of the job did not in reality call for an age restriction to be placed on potential employees.¹⁰⁰ The employer was ordered to give the advertised position to the applicant due to the unfair discrimination endured by the applicant at the hands of the employer.

5 Indirect discrimination

5.1 A theoretical view of indirect discrimination

Indirect discrimination is differentiation resulting from a measure that has discriminatory effects without differentiation explicitly revealing itself in its formulation.¹⁰¹ For example, indirect discrimination occurs where a policy is implemented in such a way that it creates an imbalance of treatment or benefits that are issued within a particular group.¹⁰² Knowles and Prewitt provide an ideal definition of this concept. They state that indirect discrimination refers to behaviour that has become so well institutionalised, that the individual or employee generally does not have to exercise choices to operate in a discriminatory nature.¹⁰³ The rules and procedures of a large organisation or workplace have already restructured the choice.¹⁰⁴ The individual employee only has to conform to the operating norms or rules of the organisation or workplace and the institution will impose the discrimination.¹⁰⁵

From the above definition, it is clear that indirect discrimination or institutionalised discrimination as it is often called, means that the particular organisation or workplace promotes or champions values, structures, and processes that deny equal opportunities to a certain group of employees. This may occur in respect of employees living with cancer.¹⁰⁶ In this instance discrimination will not arise from a single individual but will be seen as a pervasive process across the organisation in excluding people from a certain group. Indirect discrimination simply refers to a process which may seem to be objective or neutral, but which in fact aims to place barriers on a particular group of people so as to exclude them.¹⁰⁷ Examples are to exclude people from employment based on height or weight, and in the present context, employees living

100 *Swart v Mr Video* para 18.

101 Rautenbach and Malherbe *Constitutional Law* (2009) 359.

102 Van Reenen TP "Equality, Discrimination and Affirmative Action: An Analysis of S 9 of the Constitution of the Republic of South Africa" 1997 12 *SA Public Law* 159.

103 Knowles and Prewitt *Institutional and Ideological Roots of Racism: In A. Aguirre Sources: Notable Selections in Race and Ethnicity* (1998) 22.

104 McCrudden D "Institutional Discrimination" 1982 2 *OJLS* 303.

105 McCrudden 1982 *OJLS* 303-304.

106 Blyton P and Noon M *The Realities of Work: Experiencing work and employment in contemporary society* (2007) 290.

107 Tobler C *Indirect Discrimination: A Case Study into the Development of the Legal Concept of Indirect Discrimination in the Workplace* (2005) 294.

with cancer on the basis of their illness.¹⁰⁸ Indirect discrimination may be two-fold in the sense that it may refer to intentional or unintentional conduct on the part of the employer.¹⁰⁹

5 2 Examples of court cases dealing with indirect discrimination

5 2 1 *Leonard Dingler Employee Representative Council v Leonard Dingler (Pty) Ltd*

The case which serves as authority where indirect discrimination is concerned is that of *Leonard Dingler Employee Representative Council v Leonard Dingler*.¹¹⁰ This case involved indirect discrimination on the part of the employer against a particular group of employees.¹¹¹ This case centred on the issue of three retirement benefits offered by the employer, which included a staff benefit fund, pension fund, and provident fund.¹¹² All members of the staff benefit were white personnel who were paid on a monthly basis, except for the four white employees in the company who were not part of the staff benefit. All the members of the pension fund benefits were black and were paid on a weekly basis.¹¹³ Members of the provident fund benefit were black employees who were paid on a monthly basis, as they were permanent members of staff in the company.¹¹⁴ The conduct of the employer towards contributing more to the staff benefits and less on both the pension and provident fund benefits was found to constitute unfair discrimination on the basis of race.¹¹⁵

Furthermore, the court found the conduct of the employer as perpetuating the disadvantage which black employees faced in the past, in this context by limiting them to being eligible for the pension and provident fund benefits only. The employer was contributing less respectively towards the two schemes to which these black employees belonged.¹¹⁶ The court came to the decision to reserve its judgment as it saw it fit since it was in the best interests of justice to allow the two parties to come to a solution. This would allow the employer to rectify the matter to ensure that there is no indirect discrimination affecting black

108 Tobler *Indirect Discrimination: A Case Study into the Development of the Legal Concept of Indirect Discrimination in the Workplace* 295. See also the landmark case of *Hoffmann v South African Airways* as discussed above.

109 Vandenhoe W *Non-discrimination and Equality in the View of the UN Human Rights Treaty Bodies* (2005) 84.

110 *Leonard Dingler Employee Representative Council v Leonard Dingler (Pty) Ltd* (1998) 19 ILJ 285 (LC).

111 *Leonard Dingler Employee Representative Council v Leonard Dingler* 285.

112 *Leonard Dingler Employee Representative Council v Leonard Dingler* para 33.

113 *Leonard Dingler Employee Representative Council v Leonard Dingler* para 33.

114 *Leonard Dingler Employee Representative Council v Leonard Dingler* para 34.

115 *Leonard Dingler Employee Representative Council v Leonard Dingler* para 34.

116 *Leonard Dingler Employee Representative Council v Leonard Dingler* para 35.

employees in the company, especially in relation to employee benefits.¹¹⁷

5 2 2 Dlamini v Green Four Security

In *Dlamini v Green Four Security*,¹¹⁸ the employer imposed a rule on all security guards of the company which provided that they were not allowed to wear a beard. The employees who were applicants in this case were dismissed by the employer for refusing to shave off their beards on the basis of their religious convictions as they were members of the Nazarene religion which required them not to shave their beards.¹¹⁹ They further argued that the policy of the employer indirectly discriminated against them on the basis of religion.¹²⁰ The court held that not shaving a beard was not a fundamental rule or principle of the Nazarene church as argued by the applicants, and such application by the applicants was dismissed on the basis that the no-beard policy of the employer was justified, as it was not violating the right of the applicants to freedom of religion. However, it is important to note that despite the fact that the court did not rule in favour of the applicants, dress code or appearance policies in the workplace have the ability to indirectly discriminate against a group of employees either culturally or religiously.¹²¹ The reasoning of the court was based on the fact that the applicants had based their claim on false grounds as they could not prove that not shaving their beards was a part of their religious practices.¹²²

6 The position of employees living with cancer in South Africa

Cancer affects millions of people who are of working age on a daily basis. This has a detrimental effect on the ability of cancer patients to partake in employment or continue with employment in South Africa.¹²³ The type of cancer which a person is diagnosed with serves as the strongest indication of whether that particular employee will have a short or long-term impairment. Cancer of the nervous system, leukaemia, and lung cancer have all been known to negatively affect the employee living with cancer's ability to work; thus being one of the contributory factors to a low employment rate of cancer patients in particular.¹²⁴ In addition, the treatment mechanisms that are employed to treat cancer patients tend to have adverse side effects and have been found to have long-term

117 *Leonard Dingler Employee Representative Council v Leonard Dingler* para 35.

118 *Dlamini & Others v Green Four Security* [2006] 11 BLLR 1074 (LC).

119 *Dlamini & Others v Green Four Security* 1074.

120 *Dlamini & Others v Green Four Security* para 10.

121 *Dlamini & Others v Green Four Security* para 10.

122 *Dlamini & Others v Green Four Security* para 11-12.

123 Haines C *The New Prescription: How to Get the Best Health Care in a Broken System* (2011) 115.

124 Kraus EK *Chartbook on Disability in the United States* (1996) 39-40.

effects which adds to the cancer patient's inability to maintain employment.¹²⁵

Some of the adverse effects of cancer which have an impact on the employment of cancer patients, is that the employee will have to take time off in order to regularly consult with their doctor, and as prescribed by the doctor; the employee may have to work for a limited time; the employee may become temporarily disabled; and additionally, the employee may have to resign from their employment for the purposes of receiving treatment or dealing with the physical and psychological distress of being diagnosed with cancer.¹²⁶ These are the common occurrences that cancer patients typically experience, especially if their condition deteriorates. However, there are cases in which cancer patients are treated successfully. Therefore, it is crucial for an employee living with cancer to be able to resume work after having been treated successfully. Job reinstatement forms part of the healing process for surviving cancer patients, which then leads to normality and stability.¹²⁷

In 2009 it was estimated that one in every four South Africans is living with cancer; which is a cause for concern.¹²⁸ This figure indicates that cancer frequently manifests itself in people who are both young and old. This fact plays a part and contributes to the growth of the youth unemployment rate in South Africa, which stands at 47.5% as reported by the National Union of Metal Workers of South Africa ("NUMSA").¹²⁹ Similarly, in England it is estimated that employees living with cancer contribute to one out of four unemployed persons; and it has been found that this number is expected to grow in future.¹³⁰ These statistics are worrying and require urgent attention through the collaboration of various relevant stakeholders, in order to ensure that employees living with cancer remain employed despite the status of their health. Therefore, it is important to note that cancer is a disease that does not target specific people or individuals, but affects all people either directly or indirectly, irrespective of race, colour, sex, religion or creed.¹³¹

Since most employees living with cancer are still young and capable of working, it is very important for them to be able to return to work or be employed, as this forms part of the healing process for cancer patients.¹³² Furthermore, job reinstatement is essential for purposes of returning to normal and regaining independence and financial stability

125 Weeks JC "Employment among Survivors of Lung Cancer and Colorectal Cancer" 2010 28 *JCO* 1700.

126 Weeks 2010 *JCO* at 1701.

127 Mc Lain RF *Cancer in the Spine Comprehensive Care* (2006) 2.

128 Bradshaw D "The burden of non-communicable diseases in South Africa" 2009 7 *Series* 374.

129 NUMSA <http://www.numsa.org.za/article/south-africas-youth-unemployment-crisis/> (date accessed: 2016-04-18).

130 Verbeek JH "Cancer survivors and unemployment: a meta-analysis and meta-regression" 2009 301 *JAMA* 753-754.

131 Huber J *Cancer with Joy: How to Transform Fear into Happiness and Find the Bright Side Effects* (2012) 13.

in order to claim back one's daily routine of work and family responsibilities.¹³³ The phase in which an employee living with cancer must return to work is not an easy one, especially after being absent for a long period. In most instances, the employee will isolate himself or herself upon returning from such a lengthy period of leave, owing to the depressing nature of cancer and the stigma attached thereto.¹³⁴ However, the relationship, which the employee living with cancer initially had with the line manager and fellow employees, is very important in the entire process of re-integrating the employee in the workplace. If the relationship between the employer and employee was good prior to the cancer, then the employer would be more willing to assist with the re-integration of the employee, without problems.¹³⁵ The position is not the same in cases where prior to the circumstances, the relationship between the employer and the employee was not good. In such cases, the employer is less likely to assist the employee with the re-integration.¹³⁶ This form of conduct by the employer will surely amount to unfair discrimination because the duty of the employer to reasonably accommodate the employee must not be based on personal feelings; but is a legally binding duty, as enshrined in terms of section 15(2)(c) of the EEA.¹³⁷

7 The protection of employees living with cancer in England and the Equality Act of 2010

Discrimination towards employees living with cancer in England has been rising steadily over the past few years. The discrimination includes denying some of these cancer-stricken employees sick leave and which results in them missing some of their doctor's appointments.¹³⁸ Employees living with cancer are often harassed by employers and fellow employees to an extent where they feel like abandoning their jobs.¹³⁹ The British Government has thus identified a number of considerations which can assist employees living with cancer to be fully rehabilitated and capable of returning to work after being diagnosed with cancer.¹⁴⁰ Among other things, these include providing fast and cost-effective treatment to employees living with cancer, providing personal

132 Huber *Cancer with Joy: How to Transform Fear into Happiness and Find the Bright Side Effects* 14.

133 Mazumdar M "Employment after a Breast Cancer Diagnosis: A Qualitative Study of Ethnically Diverse Urban Women" 2012 37 *J Community Health* 763.

134 Loesser JD and Fitzgibbon DR *Cancer Pain* (2012) 25.

135 Cooper AF, *et al* "Cancer survivors and employers' perceptions of working following cancer treatment" 2010 60 *Occupational Medicine* 612.

136 Cooper, *et al* 2010 *Occupational Medicine* 612-613.

137 S 15 (1) 55 of 1998.

138 Bailey C and Corner J *Cancer Nursing Care in Context* (2009) 623.

139 Devane C "Making the Shift, Providing Specialist Work Support to People with Cancer" 2013 1 *Macmillian Cancer Support* 11.

140 Devane 2013 *Macmillian Cancer Support* 12.

and psychological agencies to employees living with cancer in helping them to cope with cancer symptoms in order to build self-confidence regarding their ability and skills to work; providing empowerment to the employee to set achievable goals which will boost their self-confidence; and having the employer modify the workplace for the employee returning to work in order to assist the employee to perform his or her duties.¹⁴¹

Over 100 000 people of working age are diagnosed with cancer every year in England,¹⁴² and almost half of these people continue to work when they are diagnosed with cancer and have to make changes to their working habits; with around four out of ten of them changing jobs or leaving work altogether due to the unfair discrimination in the workplace.¹⁴³ Some of the injustices that employees face as a result of cancer include how they tend to not be allowed some time off from work in order to see their doctors.¹⁴⁴ This has resulted in the government providing effective treatment mechanisms to cancer patients, with the aim of alleviating discrimination in order for employees living with cancer to return to work and not require further time off or reasonable accommodation.¹⁴⁵ It is important for employees living with cancer to, as far as possible, continue to work and earn a living. Blanpain describes the importance of work in the life of any human being:

“Work is a fundamental aspect in the life of any person, it gives the individual means of financial support and most importantly, it gives one a contributory role to society. A person’s work is an essential component of his or her sense of identity, self-worth, and emotional well-being. Accordingly, the working conditions where a person works are very important in shaping or developing

141 Devane 2013 *Macmillian Cancer Support* 13.

142 Blanpain R *The Changing World of Work* (2009) 24.

143 Hope “Cancer discrimination in the workplace” *Mail Online* 2 May 2014. Examples of the two incidences in which employees living with cancer suffered unfair discrimination in the workplace in England owing to their cancer are: In 2006 a designer and studio manager never got the justice that he deserved due to the injustices he suffered in the hands of the employer. Jack had colon cancer that resulted in him being unfairly discriminated against by the employer. The employer refused Jack time off, he constantly reduced his salary when he was not at work; though he was working from home; took away some of his responsibilities, harassed him and constantly abused him verbally. All of this occurred despite the commitment of Jack working day and night and additionally, working at home, which led to unrecognised efforts. When Jack approached management for assistance, he was informed that he can sell his house or car to comply with his medical bills. Owing to the depression, ailing health, financial and work stress which Jack had endured; he died on his way to work. Another unfair discrimination case of cancer in the workplace occurred in 2010. A man by the name of Paul Ware, who was diagnosed with blood cancer, asked for time off from the employer and as a result, his employment was terminated. The employer reasoned that he was not fully committed to the company as a result of his cancer. He questioned this decision in the equality court, but due to expensive legal costs, he was forced to accept a settlement from the employer, which was very low.

144 Bailey and Corner *Cancer Nursing Care in Context* 624.

145 Bailey and Corner *Cancer Nursing Care in Context* 625.

the whole compendium of psychological, emotional and physical elements of a person's dignity and self-respect."¹⁴⁶

Considering the importance of employment in the general makeup of any human being, it is important that the right to work for employees living with cancer be protected through, *inter alia*, legislative reform to ensure their survival in both society and the workplace. Furthermore, the government developed means to protect disabled employees and employees living with cancer in the workplace from unfair discrimination.¹⁴⁷ In England, cancer is recognised as a progressive condition which could result in a disability and thus render an employee living with cancer to be regarded and protected as a disabled employee.¹⁴⁸

In contrast, South Africa has not yet developed a framework recognising cancer management in the workplace. It is in this regard that South Africa should take note of the developments in England in improving the current situation.¹⁴⁹

The aim of the Equality Act,¹⁵⁰ is to bring harmonisation, simplification and modernisation of equality laws, through the express declaration that every human being is entitled to equal protection and benefit under the law regardless of their background or social being.¹⁵¹ The Equality Act makes provision for protective features under section 4, which include age, disability, gender reassignment, marriage and civil

146 Blanpain *The Changing World of Work* 24.

147 Krebs and Pelusi (2015) 1 *JCE* 1 13.

148 Krebs and Pelusi (2015) 1 *JCE* 1 14.

149 Krebs and Pelusi (2015) 1 *JCE* 1 15.

150 Equality Act 2010. This is the Act that seeks to take away any form of discrimination which people suffering from disability can experience at the hands of other people such as the employer. The Disability Discrimination Act 1995 (DDA) is important to take into account, as it was one of the first pieces of legislation in England that was used to fight unfair discrimination on the basis of disability in the workplace. The Disability Discrimination Act 1995 was replaced in 2005; but finally, in 2010 the EA was developed which is considered as a combination of various pieces of legislation which fight unfair discrimination in one legislation. According to the EA, cancer is recognised as a disability and all people with cancer are protected by this legislation.

151 S 2 of 2010. The importance and broad scope of the EA as outlined above is affirmed by the reasoning of Ashtiany, who argued that the EA is one of the pieces of legislation that makes England one of the progressive countries across the globe. This is attributed to the fact that the EA is a codification and simplification of existing laws because it brings together 9 major pieces of legislation and around 100 statutory instruments. Ashtiany further argues that the reach of the EA is far greater than the codification and simplification of existing laws, because the intention of this Act is to bring together a coherent set of provisions for the twenty-first century and to enhance the existing law at the same time. This argument is indeed correct because this Act makes provision for the rights of all people in spite of their socio-economic status, disability or ill health because that aim of this Act is to attain equality as outlined in the purpose of the Act. See Ashtiany "The Equality Act 2010: Main Concepts" 2011 3 *IJDL* 29-30.

partnership, pregnancy and maternity, race, religion or belief, sex and sexual orientation.¹⁵² Hepple,¹⁵³ argues that the reason why the Equality Act provides a specific list of prohibited grounds of discrimination is because the open-ended approach to defining the prohibited grounds is subject to abuse and criticism. It is argued that such an approach, as adopted by the European Convention on Human Rights, is not clear and specific.¹⁵⁴

Hepple's view can be supported because having a specific list of prohibited grounds makes it easy for people to immediately know and understand their rights, and it gives them certainty without having to first make an inquiry regarding the interpretation of the law in order to establish the rights to which they are entitled. Similar to the position in England, South African law also makes provision for the prohibition of discrimination on the basis of the grounds listed in section 9 (the equality clause) of the Constitution.¹⁵⁵ The understanding of "disability", however, differs in these two jurisdictions. In terms of section 6 of the Equality Act,¹⁵⁶ in England a person is said to have a disability if he or she has a physical or mental impairment and the impairment has a substantial and long-term adverse effect on the person's ability to carry out normal day to day activities.¹⁵⁷ This definition of disability was taken further by the British Council of Organisations for Disabled people, an

152 S 4 of 2010.

153 This is the Act that seeks to take away any form of discrimination which people suffering from disability can experience on the hands of other people such as the employer. The Disability Discrimination Act 1995 (DDA) is important to take into account, as it was one of the first pieces of legislation in England that was used to fight unfair discrimination on the basis of disability in the workplace. The Disability Discrimination Act 1995 was replaced in 2005; but finally, in 2010 the EA was developed which is considered as a combination of various pieces of legislation which fight unfair discrimination in one legislation. According to the EA, cancer is recognised as a disability and all people with cancer are protected by this legislation.

154 Hepple B "The New Single Equality Act in Britain" 2010 2 *TERR* 12.

155 S 9(3) of the Constitution of the Republic of South Africa, 1996 states that the state may not unfairly discriminate directly or indirectly against anyone on one or more grounds including race, gender, sexual orientation, sec, age, religion, belief, disability, culture, language and birth.

156 S 6 of 2010.

157 S 6(1)(a)-(b) of 2010. The aspect of a substantive and adverse effect was also discussed in the court case of *Swift v Chief Constable of Wiltshire, SCA Packaging Ltd v Boyle* HL 2009. In this case the court made an inquiry as to what constitutes a substantive and adverse effect which could have an impact on the ability of an employee to continue or do work, and the court held that the following questions needs to be answered in the affirmative for the condition of one to be recognised as a disability that has the ability to substantively and adversely affect the ability of an employee to do work. Firstly, was there impairment on the employee? Did the impairment have a substantial adverse effect on the ability of the employee to do work? Did the adverse effect cease to have a substantial adverse effect on the ability of the employee to continue to do work and if so, when was this? Lastly, an inquiry will deal with the aspect as to whether the same adverse effect on the employee is likely to occur again in the near future.

organisation which champions for the rights of disabled people in society.¹⁵⁸ In terms of the British Council of Organisations for Disabled People, disability is defined as “the disadvantage or restriction of activity caused by a society which takes little or no account of people who have impairments and thus excludes them from mainstream activities”.¹⁵⁹

In terms of the UN Convention on the Rights of Persons with Disabilities (“Convention”), it is argued that a disability is an evolving concept which is not stagnant; and therefore has to be accommodated by the adaptation of legislation.¹⁶⁰ The Convention states that since the definition of a disability is evolving, it must not be seen as something that resides within an individual as a result of his or her impairment. Disability must be understood within the context of the interaction between an individual with his or her environment.¹⁶¹ This understanding is supported and recommended in this article, because health conditions such as cancer may lead to disability, because of the impact cancer may have on the individual’s interaction with his or her environment, and more specifically, the workplace.

8 Possible solutions to address unfair discrimination

In South Africa, employees living with cancer often accept a reduction of their salary, as they face the risk of taking unpaid leave due to the fact that employers are not willing to pay them when they are not at work.¹⁶² Employees living with cancer are also at risk of facing unfair labour practices such as demotion and not being considered for promotion even if they are qualified, merely because of their condition.¹⁶³ Such discriminatory conduct on the part of employers must be avoided as it is in conflict with section 2 of the EEA, which aims to achieve equity in the

158 The British Council was established in 2006 as an advisory body with the aim of protecting and championing the rights of disabled people due to the hostile environment they experience in the workplace through discrimination. This Organisation has grown incredibly and has committed staff members that are well qualified and it provides guidance as well as advice to employers and government as to how employees who suffer from disability need to be treated and protected from unfair discrimination. Please refer to the British Council guide on promoting disability equality 2009 11.

159 British Council of Organisations of Disabled People *British Council guide on promoting disability equality* http://britishcouncil.org/sites/default/files/promoting_disability_equality.doc, accessed on 2016-10-22.

160 Hendricks A “Selected Legislation and Jurisprudence: UN Convention on the Rights of Persons with Disabilities” 2007 2 *Eur. J. Health. L* 273.

161 Hendricks 2007 *Eur. J. Health. L* 274.

162 Radebe “Challenges of employees living with cancer in South Africa” *Citizen* 15 May 2015.

163 Two sources which provide authority for this view are Radebe *Citizen* 15 May 2015 and Health24 [http://www.health24.com/Medical/Cancer/News/ Empowering-cancer-patients-in-the-workplace-20130509](http://www.health24.com/Medical/Cancer/News/Empowering-cancer-patients-in-the-workplace-20130509) accessed 2014-07-16.

workplace by promoting equal opportunity and fair treatment for all employees through the elimination of unfair discrimination; and implementing affirmative action measures to redress the disadvantages in employment experienced by designated groups, in order to ensure equitable representation in all occupational categories and levels in the workplace.¹⁶⁴ In terms of section 1 of the EEA, people from designated groups include black people, women and people with disabilities.¹⁶⁵

A solution to addressing either direct or indirect discrimination in the broad society and particularly in the workplace involves finding a framework of how to approach differences and how to accommodate them without any pejorative connotations. A starting point is recognising that differences are rational, due to the diverse nature of our country that consists of different people from different backgrounds. It is logical to acknowledge that due to the diversity in our country, one should establish an understanding that a group is not different by itself, but only different from another group and that the other group is in turn different from the first.¹⁶⁶ The difference is not the problem of the group in which differences are evident; however, it is the product of a comparison which needs to be embraced due to the diverse nature of our society and the historical background which we have.

Based on this reasoning, it is clear that all forms of discrimination can be defeated if people and organisations only learn to tolerate each other's differences and instead embrace such differences without making assumptions about the capabilities of other people by judging them because they are different. This will be possible if we adopt the reasoning of Finley, who argued that the very idea of a norm means that whatever is considered normal can take on a quality of objective reality. Such reasoning will make it possible to observe our differences as human beings.¹⁶⁷ Disability or disease must be seen as a normal way of life. Furthermore, employees living with cancer face discrimination in the form of unfavourable performance appraisals and unfair hiring practices; this is attributed to the discrimination which is imposed on employees living with cancer by employers who do not view cancer as a way of life and thus normal, as argued by Finley.¹⁶⁸

164 S 2 of 55 of 1998.

165 S 1 of 55 of 1998.

166 Hunter R *Indirect Discrimination in the Workplace* (1992) 12.

167 Finley LM "Transcending Equality Theory: A way out of the maternity and the workplace debate" 1986 86 *CLR* 1118.

168 Fow NR "Cancer rehabilitation: An investment in survivorship: As more people survive the disease, focus shifts on improving quality of life" 1996 9 *REHAB Manage* 48. An example of a cancer employee who has experienced unfair discrimination from the employer because of his cancer is that of Paul; a 46-year-old man who resides in London, who was diagnosed with blood cancer in 2010. He disclosed his medical condition to the employer and the employer immediately fired him on the basis of his cancer, and the employer argued that he was not fully committed 100 per cent to the company. This happened after Paul dedicated his life to the company,

It is argued that employees living with cancer are discriminated against on the basis of cancer because the employee living with cancer has lower job satisfaction and is less productive, seeing as the employee would be away in most instances to receive treatment.¹⁶⁹ Furthermore, employers argue that employees living with cancer create a financial burden for the company as integrating them would result in paying higher workers' compensation and disability coverage contributions.¹⁷⁰ McKeena argues that these arguments or allegations on the part of employers and fellow employees persist despite an absence of information or evidence to substantiate the claims that employees living with cancer are unable to work or continue with work.¹⁷¹ This article is written in support of the aforementioned view by McKeena for the reasons outlined above that cancer does not prevent an employee from working, and that work actually forms part and parcel of the treatment of cancer due to the psychological and physical benefits which come with the fulfilment of being employed.¹⁷²

From the above, it is clear that the discrimination of employees living with cancer is merely based on ignorance about cancer and the stigma, which is attached to cancer. Such discrimination must surely be avoided, and provisions such as section 15(2) of the EEA,¹⁷³ should be implemented. The Act provides for reasonable accommodation ought to be provided by the employer as one of the measures of eliminating unfair discrimination which includes to amend workplace conditions and providing flexible working conditions for the employee. For this purpose, employers will have to be extremely conscious and informed about the realities of diversity and disabilities; as this will help them to adhere to their legal obligations, such as the provision of reasonable accommodation.

which now saw him as incompetent due to the cancer. Paul took the employer to court in order to fight this unfair discrimination, but due to the high legal costs which he could not afford, he settled for an offer of compensation from the employer. The compensation was not that much, but it assisted him in settling some of his expenses and his venture to get a new job in order to start a new life and reaffirm his role in society, which one could say, was stolen by the company. See also http://www.macmillan.org.uk/Aboutus/News/Latest_News/Riseincancerpatientsfacingdiscriminationatwork.aspx, accessed 2016-02-11. In South Africa, many employees living with cancer suffer unfair discrimination in the hands of employers but are afraid to come out due to the stigma that is attached to cancer and not wanting to lose their work in the process, hence a lack of reported incidences in this respect.

169 Adams JE "Judicial and regulatory interpretation of the employment rights of people with disabilities" 1991 22 *JARC* 28.

170 Adams 1991 *JARC* 28-29.

171 McKeena *et al*, 2007 29 *Work* 314.

172 McKeena *et al*, 2007 316.

173 S 15(2) of 55 of 1998.

9 Conclusion

From the above assessment it is evident that employees living with cancer are discriminated against based on ignorance and the stigma attached to the disease. This means that the discrimination by employers and fellow employees against employees living with cancer cannot be justified, and as already recommended greater awareness about cancer and the amendment of workplace policies can serve as some of the factors to mitigate the discrimination which employees living with cancer experience in the workplace, among other things.