

# **An exploratory analysis of the deficiencies of the South African employment equity framework to regulate the management of acquired brain injuries in the workplace**

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## **Abstract**

In the context of experiencing many changes in South Africa over the past two decades, particularly politically and socially, many aspects of our society needed transformation. In the drafting of a new constitution that secured the protection of human rights, and in particular employment rights and employment equity, one particular aspect still remains largely unchanged - the manner in which people with disabilities, particularly those who suffer from Acquired Brain Injuries (ABI) are accommodated in the workplace.

This article is based on an exploratory literature analysis of the ABI phenomenon and also assesses the policy framework, as well as the failure to implement what is already in existence. Examples are drawn from legal precedents, and the global context, and the provisional evidence leads to the understanding that there are deficiencies regarding the management of this particular issue in South Africa.

The role of specific employment strategies, such as generic skill and learnership programmes needs to be further explored and developed for this specific category of disability. Continued research in this field is proposed, and in particular the development of a more comprehensive policy framework, guidelines and procedures for organisations in South Africa to accommodate persons with acquired brain injuries, and to facilitate their return to the workplace.

## **Key phrases**

*Acquired Brain Injury (ABI); Affirmative Action (AA); Critical Disability Theory (CDT); Employment Equity (EE); Traumatic Brain Injury (TBI)*

## **1. INTRODUCTION**

Since the advent of the new constitution in South Africa in 1994, a new paradigm has evolved within the South African workplace regarding the management of people with disabilities, in preparing these employees to function successfully and contribute to the achievement of organisational goals, both nationally and internationally. This forms part of

the comprehension and alignment of the new constitutional requirements, and subsequent policies crafted to enable organisations to effectively manage people with disabilities in the workplace. This is generally achieved by coordinating efforts of individuals inside and outside the organisation.

One particular area that required changes, was the consideration of how constitutional provisions impact on the management of people with disabilities within the South African workplace. Ensuring equality and dignity to all citizens is protected by the law and the provision of access to opportunities which were previously withheld from many is imperative to function successfully and contribute to the achievement of organisational goals at all levels of society. These considerations have emanated from an ongoing debate regarding the legislation related to disabilities resulting from these constitutional provisions, and its impact on employment in the South African labour market (Hardy 2010:30).

## **2. ACQUIRED BRAIN INJURY AS A PHENOMENON**

The major theme of this article relates to this specific area of concern, ABI, which is a collective term for the phenomenon that would also include persons suffering from a variety of brain related dysfunctions, including traumatic brain injury and strokes. A division of disability in South Africa are individuals with ABI of which TBI is a subdivision and defined as follows: "Traumatic brain injury usually results from a violent blow or jolt to the head or body. An object penetrating the skull, such as a bullet or shattered piece of skull, also can cause traumatic brain injury" (McRuer 2006:2). According to McRuer (2006:2) mild traumatic brain injury may cause temporary dysfunction of brain cells, whereas more serious traumatic brain injury can result in bruising, torn tissues, bleeding and other physical damage to the brain that can result in long-term complications or even possibly death.

It is estimated that the prevalence of Acquired Brain Injury (ABI) in South Africa is higher than the worldwide average and accounts for more than a third of all deaths resulting from injuries (Brown 2006:124). Of those who survive, many live with significant impairment of brain functions. In particular, it is important to note that the incidence rate of Traumatic Brain Injury in South Africa is estimated at 1.5 to 3.5 times that of the estimated global rate, and therefore should be considered to be of significant importance (Harrison & Hancock 2013:1).

Furthermore, the incidence of neurotrauma is high amongst young people, which places a considerable burden on society and, in turn, affects their ability to become independent through attaining employment (Hardy 2010:2). Traditional perceptions of disabilities view

these individuals as paraplegic or their disabilities as limited to physical characteristics. There are however many other indicators of a person diagnosed with ABI as a disability which will be also referred to in this article (Akbar 2013).

In recent years, investigators have broadened the scope of research to identify the needs of individuals at various stages following ABI. A significant gap that has to be addressed relates to the employment of these individuals following ABI and the manner in which diversity in the workplace affects these individuals. There also is a dearth of literature and scientific work in this area, and this article is proposed as a precursor to such research, and proposed to explore the deficiencies.

The two distinct categories of persons affected by ABI that exist in relation to returning to the workplace are as follows:

- those with long established brain injury who have not worked for many years, and;
- those who have relatively recently suffered from ABI (Japp 2005:59).

Most organisations do not have the necessary human resource policies and procedures to assist affected individuals. The focus of this article is to analyse the deficiency in needed provisions and actions within organisations, and the reasons why people with ABI's are not gaining employment in sufficiently high numbers, both globally and in South Africa. With the publications that were reviewed, no conclusive evidence of such studies of persons with acquired brain-injuries could be established. One 'brain-injury focussed study' that was reviewed was that of Nell and Ormond-Brown (1991:289-296) whose data was collected before 1994. The study was done only in Johannesburg, South Africa. This is a clear indication that research regarding ABI in South Africa is minimal.

In another South African study, Schneider, Claasens, Kimmie, Morgan, Naicker, Roberts & McLaren (1999:4) found that, following ABI, individuals experience many difficulties, which may include access to social welfare services, education, transport and most of all employment. This article will also centre on the importance of diversity management in the workplace and the impact that it has on accommodating these individuals in the workplace. Finally, in the conclusion, we will describe possible solutions and recommendations.

### **3. GLOBAL TRENDS IN ASSESSING ABI**

South Africa has strategically advanced in the workplace due to the transformation of labour processes and legislation. The influence of the new system of labour process has created a dramatic shift to the form of the management of work in South Africa.

In the current phase of globalisation, labour markets have been evolving in the direction of greater economic insecurity and greater levels of most forms of inequality, adversely affecting the opportunity of people to live a life of decent work and satisfactory employment.

The statement by the Universal Declaration of Human Rights in Article 23 is that everyone has the right to work, to a free choice of employment and a favourable condition of work, as well as the right to protection against unemployment (UNHR 2008). Most samples in the global context show that approximately 30 percent of people affected by ABI return to employment although a 2003 study by Kreutzer and his colleagues found in that 42 percent were employed and 34 percent were stably employed three years after their injury date (Kreutzer, Harwitz, Walker, Sander, Sherer & Bogner 2003:128-138).

It also affects spouses who become caregivers, as well as colleagues and companies who need to consider to either adapt to brain-injured employees or find and train a new staff member (Smallhorne 2011:1). It therefore requires that globally all organisations need to provide more employment opportunities, but additionally need to actively promote and seek to employ post-ABI employees so that they can enjoy sustainable employment.

#### **4. PROBLEMS ASSOCIATED WITH ABI PERSONS GAINING AND SUSTAINING EMPLOYMENT**

The current business atmosphere requires organisations to become accustomed to progressively more complex technological, political, economic and legal frameworks. Employers are required to adhere to stringent legal stipulations that pertain to the workplace (Dundon & Rollinson:2007:276).

Regardless of efforts to ensure that employment associations remain sound, and that the fit among the parties adds significance to the organisation's pursuit for achievement, the employment relationship between the employee and the employer will inevitably have an impact on the management of people with ABI in the workplace.

##### **4.1 Challenges on the organisational level**

Problems that need to be considered when accommodating individuals with ABI are difficulties with physical changes and affected thinking abilities, such as challenges with problem solving and memory, which can be managed through mentoring by supervisors in the workplace.

Thus, management needs to ensure that employees are well aware of the challenges and problems that people with this specific disability are faced with, so that they are able to accommodate and manage them effectively. During the management of people with ABI, organisations need to be made aware that the reasonable accommodation for people with ABI differs from that of other disabilities that are managed in the workplace. This is due to specific challenges that ABI persons face (Akbar 2013).

#### **4.2 Challenges on the team level**

Behaviour and social skills can delay the success of post-acute treatment (Mccalla & Conrad 2007:4). These issues must be addressed in order to promote and ensure employability, and this can be achieved with team building workshops in the organisation. Addressing these challenges with occupational and speech language therapy sessions can promote a greater ease of transition into the work place.

Research points to the importance of addressing these deficits using a supportive rehabilitation team approach which focuses on assessing the wide range of physical, cognitive and functional variables (Vandiver, Johnson & Christofero-Snider 2003:445).

Returning to work is an important aspect of brain injury recovery and rehabilitation. The ability to achieve successful employment not only leads to financial stability and independence, it also provides a sense of purpose, well-being and social status. For individuals lacking the necessary work skills, therapy and interventions by trained professionals can help survivors reach employment goals (Mccalla & Conrad:2007:5).

#### **4.3 Challenges for the individual or at a personal level**

Therapists can help individuals with brain injuries match their skills with meaningful jobs and to help them acquire new skills or regain abilities. Assistance is often necessary in order to return to work and attain employment goals. During the management of ABI in the workplace, it is vital that the organisation makes other employees within the organisation aware of this form of disability so that co-workers are conscious of how they could accommodate these individuals (Hashim & Wok:2014:194). This allows the organisations to implement “organisational fit” for employees with ABI and allows other employees to understand the difficulties of the people in their workforce, which will result in a developed and diverse workforce. Both employers and co-workers perceived that their organisations have provided a conducive organisation climate, a comfortable work environment and reasonable adjustment for their employees with disabilities.

Employees with disabilities are found loyal and committed. They are often satisfied within the job. Organisational loyalty and commitment are predicted by the organisations' ability to restructure their job design to suit the needs of employees with disabilities. Alternative options could be found if an employee does not fit his/her current job anymore due to the brain injury (Hashim & Wok:2014:201).

#### **4.4 Equality in the work place: discrimination and affirmative action**

The concepts of discrimination and affirmative action will be used to support the description of how the phenomenon of ABI has been managed. This article will further describe the objectives and aims of affirmative action and the concepts of discrimination that impact on the management of ABI in the workplace. This will be followed by a description of what the law prescribes with regards to discrimination and affirmative action in respect to disability in the workplace as well as aspects that pertain to the employability of people with ABI.

To manage equity in the workplace in terms of discrimination and affirmative action without reference to the Constitution of South Africa would be problematic. The Constitution offers the precepts and parameters regarding the enforcement of human rights in South Africa. It is the Constitution that also provides broad measures that foster protection and the advancement of people who have been disadvantaged by unfair discrimination in South Africa (Dupper & Garbers 2010:16).

#### **4.5 Equality in the workplace in relation to the stipulations of the constitution**

Section 9 of the Constitution of the Republic of South Africa, Act 108 of 1996, provides the basis for employment equality by asserting that:

- Everyone is equal before the law and has the right to equal protection and benefits of the law.
- Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons or categories of persons, disadvantaged by unfair discrimination, may be taken.

Section 9(3) of the Constitution further declares, "The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth"

This section plays a pivotal role in South African organisations and links legislation to the management of diversity in the workplace which entails the management of an organisation's workforce diversity in a manner that will result in the eradication of discrimination against any form of disability and diversity, employing people with disabilities like ABI. Govender (1998:338) asserts that to understand the relationship between the right not to be unfairly discriminated against and the right to equality before the law is central to the appreciation of the right to equality. It is also vital to point out that it is impossible to talk about equality without mentioning the concept of discrimination.

The Constitution therefore provides a foundation for the new South Africa based on the values of human dignity; achievement of equality; the promotion of human rights and freedoms; non racism; and non-sexism (McGregor 2007:6).

Organisations employing persons with ABI should consider that they are not only implementing the constitution in terms of its provisions for securing human rights, but are also allowing individuals the right to human dignity, as returning to work improves the recovery process of a person with ABI. Special benefits and merit should perhaps be granted to all organisations who comply in this manner.

## **5. THE EMPLOYMENT EQUITY POLICY FRAMEWORK IN SOUTH AFRICA**

McGregor (2007:5) argues that when the final Constitution in South Africa was completed, it paved the way for a transition to democracy, in that it included equality as a value and a substantive human right, thus confirming a formal approach to equality and outlawing unfair discrimination.

The South African workplace is protected by the Employment Equity Act, Act 55 of 1998, (EEA), and this Act does not prohibit discrimination on its own, however unfair discrimination is prohibited (Dupper *et al.* 2010:38-45).

One reason for the concern about organisational ability to manage diversity is the suspicion that women and minorities, such as individuals with ABI are not growing in their careers to a degree commensurate with their own talents (Callan 2008:4). It is essential that organisations evaluate and monitor the progress of women and minorities (e.g. people with disabilities) so as to ensure that they are given equal opportunity and not discriminated against, when it comes to aspects such as promotion for example.

The question is raised, that if women and minorities in the past have faced such difficulties and obstacles in being promoted to the higher levels of their organisation, how can organisations then be expected to even create basic capacity to manage the future demands for an increasingly diverse group of employees (Callan 2008:4). This statement is clear evidence that there is an essential necessity for organisations to implement human resource strategies and government to implement policies that will assist all employers in attaining a diverse and positive environment.

According to Cho (2011:22) the idea of workplace diversity is not new, and in particular much progress in the engineering and construction world has been made. Section 6(1) of the EEA, declares, “no person may unfairly discriminate, directly or indirectly, against an employee, in any employment policy or practice, on one or more grounds including race, gender, sex, pregnancy, marital status, family responsibility, ethnic or social origin, colour, sexual orientation, age, disability, HIV status, conscience, belief, political opinion, culture, language and birth”.

Having highlighted what is regarded as grounds for unfair discrimination, as stated above, it is also necessary to define and describe the forms of unfair discrimination and illustrate them by using appropriate examples. Dupper *et al.* (2010:46) argue that it is important to look at the differences between differentiation, discrimination and unfair discrimination. Moreover, an understanding of these terms is increased by differentiating between direct and indirect discrimination. Differentiation in the workplace entails the employer treating employees or applicants differently by excluding certain groups, such as those with different disabilities through labour policies. On the other hand, discrimination has negative intentions, while differentiation may be regarded as a precondition of discrimination (Dupper *et al.* 2010:46).

Differentiation becomes discrimination if it can be proved that it was conducted on unacceptable grounds. As stated above, according to the list of all the grounds, as per the stipulations of the EEA, it is also possible to allege discrimination on the grounds that are not listed under employment equity as the list is not exhaustive (Basson 2009:86).

### **5.1 Legal case precedents challenging employment discrimination**

A South African example of this is the Court case: *IMATU and Another v City of Cape Town* (2005:11) in which the court was prepared to recognise unlisted grounds for discrimination, namely diabetes, even though diabetes could be controlled through medication. Yet the employee was discriminated against on the grounds of his diabetic condition.



The Court case: *Hoffman v SAA Airways* (2000:21) is also a good example. Hoffman was not offered a job by SAA because of his HIV status. The Constitutional Court ruled in favour of Hoffman. The court recognised that HIV status is listed on the EEA but not listed in the Constitution. This is referred to as the *Harksen Test* which occurs when the discrimination at hand is based on unlisted grounds. Therefore, the applicant must prove to the court that discrimination and unfairness prevailed (Dupper *et al.* 2010:48). These cases examined the discrimination against employees due to a medical condition.

Not many disputes have been taken to court with regard to ABI as most individuals do not pass the recruitment phase. In South Africa, therefore the EEA was put in place to redress past discrimination and injustices, and hence the EEA uses affirmative action (AA) as a powerful policy instrument to correct the past injustices.

## 5.2 A case for affirmative action

The United States of America was one of the first proponents of affirmative action (AA). (Laher:2007:65). However, the distinction between that country and South Africa is that, in USA, black people were a minority, while the perpetrators of discrimination in this case Whites, was the minority. The South African Constitution and the EEA both ensure that there is equality in the workplace and prohibit direct and indirect discrimination. Direct discrimination is easy to recognise because here the differentiation is clear between the employees. In the Court case: *Teamsters v United States* (1977:431), the US Supreme Court described direct discrimination as 'disparate treatment', (direct discrimination) and is the most easily understood type of discrimination.

Undoubtedly disparate treatment is the obvious evil (Dupper *et al.* 2010:46). The employer simply treats some people less favourably than others because of their race, colour, religion, sex, disability or national origin. Another example may be denying contract workers benefits whereas fulltime employees are fully covered in terms of benefits like medical aid, and subsidised pension provisions. In addition, indirect discrimination may be more difficult to identify because the policies may be neutral and seem accommodative to all (Basson 2009:86).

Higginbotham (2000:188) argues that, during Apartheid, the legal system and the judiciary were operating in unison to oppress blacks in society; this was especially evident in the workplace and other structures of society. Inequality in the workplace was regarded as the

norm; employers used preferential treatment for white people. This also meant that black people were excluded in the workplace, educational institutions and in broader society.

Affirmative action therefore was needed as a policy to diminish racial inequality, especially in the workplace. This was also done to ensure diversity in the workplace, and to promote a strong economy (Higginbotham 2000:187). Affirmative Action (AA) can be defined as policies and “ ... programmes seeking to provide economic and educational benefits to persons based upon their membership in a racial or gender group that has been discriminated against by law” (Higginbotham 2000:187).

Generally, a politicised judiciary can result in the misinterpretation and reinterpretation of affirmative action policies. In South Africa affirmative action policies has been likened to ‘reverse racism’ by some opposition political parties. This political view can obviously deter the implementation of AA policies. The ruling party, therefore needs legislative and governmental commitment to ensure implementation without the allegations of unfair discrimination. With these constitutional checks and balances in place to support the legislature, the implementation of AA is less likely to be deterred (Higginbotham 2000:187).

Affirmative action has achieved a certain measures of success, but what is evident is the elevation of middle class people to another level, leaving the majority of underpowered people in poverty. AA has effectively started reducing inequalities in the workplace; however, there is still a lot to be done with respect to disabilities such as ABI. “This approach goes beyond ‘meeting the numbers’ of affirmative action by attempting to encourage awareness and respect for diversity in the workplace” (Callan 2008:342). This is imperative as it allows the policy of affirmative action and diversity to be put in to practice.

This process is conducted through various types of educational and training activities, including the so called ‘valuing-difference’ approach that attempts to improve interpersonal relationships in diverse organisational settings. This can be achieved by achieving goals of equality and improved working relationships (Callanan 2008:342). This assists overcoming barriers of women and minorities, such as ABI individuals in organisations as it increases communication among employees and managers. Section 6 of the EEA protects an employee against unfair discrimination and defines an employee as any person other than an independent contractor who:

- works for another person or for the State and who receives, or is entitled to receive, any remuneration; and

- in any manner assists in carrying on or conducting the business of an employer. (Section 1 of the EEA).

Dupper *et al.* (2010:50), states that some of the inclusions of the EEA are for the protection of the applicant. This is where the person applying for employment is protected against unfair discrimination, whereas the employee is protected against discriminatory policies and practices of an employer. This protection of the prospective applicant also ensures that applicants are not unfairly discriminated against in the workplace. This can be difficult to uphold as many employers continue for example to use a disclaimer on all adverts stating that if the applicant is not contacted by a certain period, he/she must assume that the application was not successful. This practice makes it even more difficult for people to have recourse, and particularly when it comes to people with disabilities such as ABI.

### **5.3 Diversity and discrimination in the workplace**

Discrimination is still deep and widespread in the workplace. Even though there is an increase in black middle class employees, at the same time more and more people within targeted groups, and with disabilities are still being discriminated against and cannot penetrate the workplace (Laher:2007:91).

Legislation needs to support and protect these employees. This includes the Labour Relations Act, EEA and the affirmative action laws. The South African community needs to learn from the lessons learned by the United States and other countries in ensuring that discrimination is diminished in all forms and against all minority groups.

## **6. THE EXPERIENCES OF SOUTH AFRICAN ORGANISATIONS IN IMPLEMENTING EFFECTIVE EMPLOYMENT STRATEGIES FOR AND PEOPLE WITH ACQUIRED BRAIN INJURIES**

One of the ways in which South African organisations can assist people with ABI is through the notion of 'reasonable accommodation'. A person with a 'moderate' ABI may still need some assistance with a return to work facilitation (Ghaemi 2006:22). Typically, persons with more than moderate ABI's would require more attention, and such cases would require post-acute rehabilitation, as an 'in-patient' or on an intensive 'out-patient' based at a convenient facility (Ghaemi 2006:22).

Depending on the nature of the ABI, taking learnership courses at a college in tandem with therapy, will get the person back into a learning mode, and allow them to risk failure without

the dishonour or economic consequences of job failure. At some point, a vocational assessment will be done to determine what the person is qualified to do. If it is believed he/she can return to the old job with support, and it is common to see a 'job coach' hired to make this happen (Ghaemi 2006:22). A coaching process allows for much more involvement between a supervisor and employee. This allows supervisors to more closely measure the performance of the employee (Japp 2005:96).

The job coach is involved on a daily basis with the injured worker, getting him readjusted to the workplace, and troubleshooting problems for him until he grows comfortable. The second approach is to establish sound human resources practices and policies in order to facilitate this process. This aspect can be identified as a limitation in the case of ABI's, as there are no existing theories, literature or secondary data available for people with traumatic brain injury and stroke. Such studies need to utilise definitions and experiences of respondents as well as findings of interviews to build a base of knowledge in this key area of employment of people with ABI's. Employment is a right of citizenship and a social determinant of health, but employment rates remain low for persons with disabilities (Japp 2005:96).

The purpose of a study by Chau (2001:64) is to examine the principles and practices guiding work integration within the fields of intellectual disability (ID), brain injury (BI) and mental illness (MI) and identify best practices to support transitions to employment. The study drew upon an occupational perspective to analyse the current literature. The findings reveal that the needs and benefits of employees are recognised across disability groups but that philosophical perspectives guiding work integration differ. With reference to MI, the process of recovery is seen as one in which work plays an important role. In ID work is also viewed as a planned outcome that is part of the developmental process, and in the field of BI, outcomes of employability and employment are emphasised (Chau 2001:164).

A common theme across the three disability groups (intellectual disability, brain injury, and mental illness) is that in order to facilitate work integration, the person, the job and the work environment are important factors in need of examination. Evidence pointing to the effectiveness of the supported employment model is increasing across these three populations. A framework for guiding the development of further research and for promoting changes to support work integration is presented in Chau's study. Critical Disability Theory (CDT) is a framework for the analysis of disability which focuses on disability and challenges the assumptions which shape society.

According to Shallice (2002:943) “CDT is derived from the critical social theory first outlined by Max Horkheimer which has today become a diverse family of critical theories which offer various approaches to social inquiry.” The components of CDT are often approached within an interdisciplinary disability studies framework, but by grounding CDT within the critical theory tradition. The conception of CDT adopts particular philosophical approaches which derive from that tradition which is not necessarily engaged within the idea of Disability Studies (Hosking 2006:2). This theory is significant to the employability of persons from an ABI background as it provides literature and an understanding of disabilities in the workplace and allows for future research to clearly distinguish the need for assisting a fraction of disabilities such as ABI’s in employment.

## **7. CONCLUSION**

The incidence of ABI places a considerable burden on individuals in gaining both a means of independence and employment. South African legislation stipulates that there is provision for employment for people with disabilities; however, there is a lack of application as well as a lack of existing research and literature that indicate that reasonable accommodation is made for these individuals in the workplace.

This article raises awareness of the failure to establish policies, procedures and guidelines that should be in place in order to facilitate the management of ABI integration and employment practices. The extent to which people with ABI are aware of legislation and policies that affect their employment chances and opportunities is another issue to be explored. There are limited studies or academic literature on the employment of people with acquired brain injuries in South Africa. It is proposed that methods be established, both globally and locally, to aid South African organisations to implement effective employment strategies for people with ABI’s.

Due to the growth and impact of globalisation on organisations, it is important that management take heed of differences between contexts and in the workplace and implement appropriate managerial strategies that will assist in the management of workers with ABI.

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