

The Duty of Employers to Return Disabled Workers Back to Employment: A Comment on the 2023 Draft Regulations on Rehabilitation, Reintegration and Return to Work

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Abstract

Persons with disabilities are a large, disadvantaged minority, comprising approximately 12% of the population. Since the COVID-19 pandemic, it has become essential for all stakeholders to formulate strategies to mitigate the potential loss of employment for all citizens in South Africa, including those who become disabled during employment. In 2008 South Africa ratified the *Convention on the Rights of Persons with Disabilities* (CRPD) and the *Optional Protocol to the Convention on the Rights of Persons with Disabilities*, thus committing itself to giving effect to its obligations, which include the reasonable accommodation of disabled employees. Article 26 of the CRPD mandates that state parties take effective and appropriate measures to enable persons with disabilities (PWDs) to attain and maintain maximum independence and physical, mental, social and vocational ability, and to ensure their social inclusion. Article 27 of the CRPD stipulates *inter alia* that States Parties shall safeguard and promote the realisation of the right to work, including the right of those who incur a disability during employment. South Africa does not have disability-specific legislation, and reasonable accommodation measures are set out in a fragmented manner in legislation, policies and other relevant codes. South Africa amended the *Compensation for Occupational Injuries and Diseases Act* 130 of 1993 in 2018 and again in 2023. On the 15th of June 2023 South Africa further published draft regulations on rehabilitation, reintegration and return to work, which require careful consideration and analysis by all role-players in a return-to-work (RTW) arrangement. It is unclear how the new amendments will affect the existing employer obligations to reasonably accommodate, as set out in other labour legislation. An analysis of the current duties will provide some recommendations for role clarification.

Keywords

Disability; reasonable accommodation; persons with disabilities; rehabilitation; reintegration; return-to-work; employer obligations.

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1 Introduction

The *Convention on the Rights of Persons with Disabilities* (CRPD)¹ entered into force on 3 May 2008.² It is the first international legally binding treaty aimed specifically at protecting the rights of persons with disabilities.³ It is expected of all ratifying States Parties to either amend their existing domestic laws or to enact new legislation in order to meet their obligations as set out in the CRPD.⁴

South Africa ratified the CRPD and the Optional Protocol to the CRPD in 2008, thus binding itself to the provisions relating *inter alia* to the return to work of disabled employees. Article 26 of the CRPD requires States Parties to take effective and appropriate measures to enable persons with disabilities to attain and maintain maximum independence and physical, mental, social and vocational ability, and to ensure their social inclusion. Article 27 stipulates *inter alia* that States Parties shall safeguard and promote the realisation of the right to work, including the right of those who acquire a disability during employment. Furthermore, all South African employers are to have designated reasonable accommodation duties related to reintegration, rehabilitation and return to work, as set out in legislation and relevant Codes of Good Practice, which will be discussed in this article.

The *Compensation for Occupational Injuries and Diseases Act* 130 of 1993 was amended in 2023.⁵ It contains important revised obligations for all employers. On the 15th of June 2023 South Africa further published draft regulations on rehabilitation, reintegration and return to work, which require careful consideration and analysis by all role-players in an RTW arrangement.⁶ It is unclear how the new amendments will affect the already existing employer obligations to reasonably accommodate, as set out in other labour legislation as well.

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¹ *Convention on the Rights of Persons with Disabilities* (2006) (hereafter CRPD).

² UN Department of Economic and Social Affairs Date Unknown <https://social.desa.un.org/issues/disability/crpd/convention-on-the-rights-of-persons-with-disabilities-crpd>.

³ UN Department of Economic and Social Affairs Date Unknown <https://social.desa.un.org/issues/disability/crpd/convention-on-the-rights-of-persons-with-disabilities-crpd>.

⁴ Article 4 of the CRPD.

⁵ GN 694 in GG 48431 of 17 April 2023 (*Compensation for Occupational Injuries and Diseases Amendment Act* 10 of 2022).

⁶ GN R3539 in GG 48787 of 15 June 2023 (Draft Rehabilitation, Reintegration and Return-to-Work Regulations) (hereafter the Draft Regulations).

The aim of this article is to investigate how the *Compensation for Occupational Injuries and Diseases Act 130 of 1993*,⁷ especially the 2023 COIDA amendments affect current employer obligations related to the reasonable accommodation of disabled employees. The purpose of this investigation is to provide some recommendations for role clarification in this regard. The discussion will commence with a discussion of the duty of employers to reasonably accommodate persons with disabilities as set out in the CRPD, as well as in other relevant legislation. It is followed by a discussion on how the COIDA amendments and draft regulations will influence these obligations, as well as a discussion of possible shortcomings in the draft. The article will then conclude with a reflection on the matter discussed and a conclusion.

2 The duty of employers to reasonably accommodate persons with disabilities⁸

2.1 *Convention on the Rights of Persons with Disabilities*⁹

Section 39(1) of the Constitution¹⁰ states as follows: "when interpreting the Bill of Rights, a court, tribunal or forum a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom; b) must consider international law; c) may consider foreign law."¹¹

Therefore, courts must take international law into account while interpreting the Bill of Rights, as stipulated in section 39(1)(b). It is further important to mention that section 231 and section 232 of the Constitution define the way in which international law is either adopted or incorporated into our national laws. If South Africa has ratified an international instrument such as the CRPD, it is bound to honour the provisions of that treaty.¹²

⁷ *Compensation for Occupational Injuries and Diseases Act 130 of 1993* (hereafter COIDA).

⁹ See Gresse "Reintegration, Rehabilitation, Reintegration and Return to Work of Disabled Workers" 53-64 for a detailed discussion of the CRPD as well as its application in South Africa.

¹⁰ *Constitution of the Republic of South Africa, 1996* (hereafter the Constitution).

¹¹ Please see Gresse "Reintegration, Rehabilitation, Reintegration and Return to Work of Disabled Workers", ch 4, for a critical analysis of RTW programmes in Malaysia and Australia. For instance, it is recommended that tax incentives be used to encourage RTW participation. Further, for any RTW programme to be effective, role clarification needs to be clearly set out in legislation. RTW programmes thus require a case management approach with clear RTW benefits and responsibilities. Employees, employers and health practitioners all need to have clearly defined duties.

¹² Section 233 of the Constitution, which deals with the application of international law, provides as follow: "When interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law."

The UN General Assembly established an *ad hoc* committee¹³ in December 2001 with the mandate to review proposals for an all-encompassing international convention that would protect and advance the rights of individuals with disabilities in accordance with the recommendations of the Commission on Human Rights and the Commission for Social Development, adopting a comprehensive approach to social development.¹⁴ The CRPD was developed by the *ad hoc committee* and presented to the General Assembly on 5 December 2006.¹⁵ The CRPD was unanimously accepted by the General Assembly on December 13, 2006 and came into force on the 3rd of May 2008¹⁶ and is the first global human rights convention of the 21st century.¹⁷ This convention is one of the most signed and ratified conventions of the UN, and an impressive number of African countries has ratified it.¹⁸

Of particular importance for this article is Article 27 of the CRPD, which sets out eleven steps Member States are required to take to safeguard and promote the realisation of the right to work. The following are directly relevant to this article. In terms of Article 27 of the CRPD, States Parties are required to: "a) Prohibit discrimination on the basis of disability with regard to all matters concerning all forms of employment, including conditions of recruitment, hiring and employment, continuance of employment, career advancement and safe and healthy working conditions." South Africa, being a State Party, is thus required to promote employment opportunities as well as career advancement for persons with disabilities in the labour market, including assistance in finding, obtaining, maintaining and *returning*¹⁹ to employment.²⁰ States Parties also need to ensure that persons with disabilities are reasonably accommodated at the workplace.²¹ Fasciglione²² argues that this section requires governments to enact legislation that obliges employers, in both the public and private sectors, to reasonably accommodate disabled workers. It will be necessary for employers to develop a policy which makes provision for flexible work schedules, equipment adjustments, changes to working hours and schedules, and adjustments to the work environment. Employers need to

¹³ Through the adoption of Resolution 56/168 (UN General Assembly *Comprehensive and Integral International Convention to Promote and Protect the Rights and Dignity of Persons with Disabilities* UN Doc A/RES/56/168 (2002)).

¹⁴ Lord *et al* 2010 *SPDP* 4.

¹⁵ Lord *et al* 2010 *SPDP* 4.

¹⁶ Harpur 2012 *Disability and Society* 3.

¹⁷ Quinn 2009 *TJCLCR* 33; also see Devi, Bickenback and Stucki 2011 *European Journal of Disability Research* 249.

¹⁸ Mpedi and Nyenti 2015 *CICLASS* 2. See UN 2017 <http://www.un.org/disabilities/documents/maps/enablemap.jpg> for a map dated September 2017 on the countries who have signed and/or ratified the CRPD and its Optional Protocol.

¹⁹ Own emphasis.

²⁰ Article 27(1)(e) of the CRPD.

²¹ Article 27(1)(i) of the CRPD.

²² Fasciglione "Article 27 of the CRPD" 151.

be proactive and inform employees also of their responsibilities in relation to reasonable accommodation. The duty is explained as follows:

It can be argued that measures are appropriate if they facilitate access to and participation in working life, job advancement and training on an equal footing with others for a person with disabilities requesting them. The identification of appropriate measures must be made on the basis of an individual assessment of the specific job, the needs of the person with a disability and a realistic assessment of what the employer is capable of providing. This process should be interactive and participatory to be effective, and all information related to the reasonable accommodation request should be handled with confidentiality.²³

Article 26 of the CRPD obliges States Parties to take effective and appropriate measures to enable persons with disabilities to attain and also to maintain maximum independence, optimal mental and physical health, and social and vocational ability, and to be fully included and participate in all aspects of life. It thus requires States Parties to have comprehensive habilitation and rehabilitation services and programmes in place, which will require several stages. Oliver *et al*²⁴ explains that Article 26 thus entails the establishment of a multi-faceted rehabilitation programme and services aimed at providing for the following, *inter alia*: early intervention paired with a multi-disciplinary assessment of needs and strengths; the promotion of community and social participation and inclusion; and RTW programmes which should be voluntary and available to people with disabilities as close to their own communities as possible, including those resident in rural areas.²⁵

Gresse argues that it will be important for role-players to remember that interventions should focus not only on the individual, but also on the social, physical, and legislative environments in which they will be implemented. South Africa needs to contemplate the hurdles to be overcome and identify contingency plans to deal effectively with any shortcomings. For instance, inadequate staff training and a lack of coordination in state departments evident at present are of concern.

Reasonable accommodation measures need to be applied on a case-by-case basis.²⁶ Article 26(3) specifically requires States Parties to ensure that assistive devices and technology are made available to individuals. Article 26(2) requires State Members to ensure that initial and continuous training is provided to all professional rehabilitation service providers. In reference to this sub-article, Gresse submits as follows: "In that respect, South Africa must ensure that it introduces holistic rehabilitation services and sufficient staff

²³ Fasciglione "Article 27 of the CRPD" 151.

²⁴ Olivier *et al Rehabilitation, Reintegration and RTW of Workers* 32. This is determined by Art 26(1)(a) and (b) of the CRPD.

²⁵ Olivier *et al Rehabilitation, Reintegration and RTW of Workers* 32. This is determined by Art 26(1)(a) and (b) of the CRPD.

²⁶ Gresse *Reintegration, Rehabilitation, Reintegration and Return to Work of Disabled Workers* 132.

capacity to ensure quality services. It will also require a multi-disciplinary approach to assess the needs and involvement of the community."²⁷ Article 27(1)(k) of the CRPD further requires States Parties to promote vocational and professional rehabilitation, job retention and RTW programmes for persons with disabilities.²⁸

2.2 Current employer obligations to reasonably accommodate persons with disabilities

It is important to consider the current employer obligations related to reasonable accommodation and how the Draft Regulations²⁹ will impact on it once it becomes law in South Africa.

Olivier *et al* correctly submit that the management of disabilities and diseases and the RTW of disabled or injured employees are areas in need of reform, especially in a developing country such as South Africa.³⁰ The absence of a suitable RTW framework often results in employees becoming unemployed and dependent on disability pension or incapacity compensation.³¹

There are several further factors that play an important role in the RTW of ill or injured employees, such as the type of rehabilitation services being provided, the emotional well-being of the employee, access to services, conditions in the workplace, and the length of the rehabilitation.³² Hence, Gresse emphasises that it is of utmost importance that the rehabilitation and return to work of an employee needs to be managed in a "collaborative and coordinated manner and require different role-players (both governmental and non-governmental) to succeed".³³ The emphasis is thus on a coordinated effort; however, it becomes difficult if duties are dealt with in a fragmented manner across different pieces of legislation, as illustrated below.

2.2.1 The Code of Good Practice: Key Aspects on the Employment of People with Disabilities of 2002

The Code of Good Practice³⁴ was initially adopted by the Department of Labour in 2002. Item 3.1 of the Code clearly states that the Code is not an

²⁷ Gresse *Reintegration, Rehabilitation, Reintegration and Return to Work of Disabled Workers* 50.

²⁸ Article 27(1)(k) of the CRPD.

²⁹ The Draft Regulations are discussed later in the article. The Draft Regulations, which were published in June 2023, in conjunction with the COIDA amendments, contains detailed and far-reaching RTW obligations for different stakeholders. See GN R3539 in GG 48787 of 15 June 2023.

³⁰ Olivier *et al* "Selected Perspectives" 9.

³¹ Olivier *et al* "Selected Perspectives" 9.

³² Ramano *Perceptions and Practices of Occupational Therapists* 48.

³³ Gresse *Reintegration, Rehabilitation, Reintegration and Return to Work of Disabled Workers* 141.

³⁴ GN 1085 in GG 39383 of 9 November 2015 (Code of Good Practice on Employment of Persons with Disabilities, revised) (hereafter the Code).

authoritative summary of the law, nor does it on its own create further rights and obligations. However, when courts and tribunals interpret the *Employment Equity Act* 55 of 1998 (EEA), they must consider it. Item 3.1 further provides that employers, employees and relevant organisations should use the "Code to develop, implement and refine disability equity policies and programmes to suit the needs of their own workplaces."

The Code provides guidance on what reasonable accommodation may entail by providing some workplace examples of reasonable accommodation, such as rearranging workstations; making changes to systems and materials for assessments and training; modifying facilities and equipment; shifting the responsibility of non-essential tasks to another person; and modifying leave and working hours etc. The Code further states that in cases where employees are injured or disabled while on duty, the employer has a more onerous burden to accommodate the employee. This author supports the view of Marumoagae, who emphasises the importance of consultation with employees in order to find ways to accommodate them, and employees, on the other hand, need to be upfront about their disabilities.³⁵ Ngwenya and Pretorius correctly submit that the Code provides a solid framework on which various stakeholders (employers, workers and representative organisations, for example) can build, improve and execute policies and initiatives to protect persons with disabilities' constitutionally guaranteed rights.³⁶

The Code has a designated section that deals with the reasonable accommodation of persons with disabilities.³⁷ It provides that all employers are required to reasonably accommodate the needs of persons with disabilities to reduce the impact of the impairment "of the person's capacity to fulfill the essential functions of a job."³⁸ Item 6.2 provides that employers need to conduct an assessment and thereafter adopt effective measures, both with reference to quality and cost,³⁹ to remove barriers that may hinder the person from performing the job and enjoying equal access to the benefits and opportunities of his employment. The Code further states that the employer's duty to accommodate reasonably is qualified, since the employer is not obliged to accommodate if doing so would impose an "unjustifiable hardship on the business of the employer."⁴⁰ It is, however, essential to note that the specifics

³⁵ Marumoagae 2012 *PELJ* 352.

³⁶ Ngwenya and Pretorius 2003 *ILJ* 1838.

³⁷ Item 6 of the Code.

³⁸ Item 6.1 of the Code.

³⁹ In other words, the Code also contains a qualifier with reference to costs, unlike the draft regulations, which do not limit the employer's duty to accommodate reasonably.

⁴⁰ Item 6.11 of the Code, which defines unjustifiable hardship as "action that requires significant or considerable difficulty or expense. This involves considering, amongst other things, the effectiveness of the accommodation and the extent to which it would seriously disrupt the operation of the business."

of the application of this provision may vary from employer to employer.⁴¹ The duty to accommodate will usually be triggered when the work environment changes or the impairment affects the employee's ability to perform the essential functions of his job.⁴² The reasonable accommodation may be temporary or even permanent, depending on the extent and nature of the disability.⁴³

It must be noted that the Code does not create additional rights, and since it is not an authoritative summary of the law, courts and tribunals that interpret and apply the EEA must consider the Code. It is thus still essential for employers to develop, implement and improve their disability equity programmes and policies to suit the specific needs of a workplace.⁴⁴

2.2.2 *Schedule 8 of the LRA: Code of Good Practice on Dismissals*

Section 188(2) of the *Labour Relations Act* (LRA) provides as follows: "any person considering whether or not the reason for dismissal is a fair reason or whether or not the dismissal was effected in accordance with a fair procedure must take into account any relevant code of good practice issued in terms of this Act."

The Code of Good Practice on Dismissals pertains when an employer contemplates dismissal on the basis of incapacity. Item 11 of the Code provides as follows:

11. Any person determining whether a dismissal arising from ill health or injury is unfair should consider
 - (a) whether or not the employee is capable of performing the work;
 - (b) if the employee is not capable—
 - (i) the extent to which the employee is able to perform the work;
 - (ii) the extent to which the employee's work circumstances might be adapted to accommodate the disability, or, where this is not possible, the extent to which the employee's duties might be adapted; and

⁴¹ Item 6.13 of the Code.

⁴² Item 6.5 of the Code.

⁴³ Item 6.8 of the Code. Also see *Damons v City of Cape Town* (CCT 278/20) [2022] ZACC 13 (30 March 2022) para 78, in which the court argued that reasonable accommodation entails more than mere participation. It also needs to enable an employee not only to participate in employment but also to advance in employment. To achieve this the work environment must be innovative and re-imagine the current situation. Further, see *International Management Limited v Sayiti* 2025 1 BLLR 9 (LAC) para 68, where the Labour Appeal Court explained that the scope of reasonable accommodation could extend only to "those adjustments or measures that are reasonable in the circumstances for the employer to make or implement. This factual enquiry posits an objective test that engages with considerations of practicability and cost, the availability of suitable alternative employment, available resources, and the like."

⁴⁴ Cole and Van der Walt 2014 *Obiter* 521.

- (iii) the availability of any suitable alternative work.

The Code thus also recognises the employer's duty to adapt the employee's work circumstances or duties to accommodate his disability. Item 10 further unpacks the duties of the employer. If an employee is temporarily unable to work, the employer must investigate the extent of the incapacity or injury. In the event that it becomes apparent that the employee will be absent for a duration that may be deemed "unreasonably long" given the circumstances, the employer is required to explore all other options, including a leave of absence or temporary replacement, before taking any action that may result in termination. The Code of Good Practice on Dismissals also lists other factors which need to be considered, such as the nature of the job and the extent of the illness or injury. The employee must be allowed the opportunity to state his case and to be assisted by a trade union representative or a colleague.⁴⁵

2.2.3 *Technical Assistance Guidelines on the Employment of Persons with Disabilities of 2017 (TAG)*⁴⁶

The TAG indicates that designated employers in terms of the EEA and the Code "should reasonably accommodate the needs of people with disabilities."⁴⁷ The aim is once again to reduce the impact of the impairment on the person's capacity to perform the essential functions of the job. The type of accommodation required depends on certain variables such as the job itself, the work environment, the essential functions of the position and then also the specific impairment.⁴⁸

Item 6.2 sets out the criteria for reasonable accommodation measures by explaining that reasonable accommodation measures include three inter-related factors:

1. The accommodation must remove the barriers to performing the job for a person who is otherwise qualified. The employer must take steps, wherever *reasonably practicable*,⁴⁹ to mitigate the effect of an individual's disability to enable him or her to play a full part in the workplace in order to achieve his or her full potential.
2. Secondly, it must allow the person with a disability to enjoy equal access to the benefits and opportunities of employment. All staff must have equal

⁴⁵ Item 10(2) of the Code.

⁴⁶ Department of Labour 2017 http://disabilityinfosa.co.za/wp-content/uploads/technical_assistance_guide.pdf (hereafter TAG).

⁴⁷ Item 6.1 of the TAG.

⁴⁸ The TAG also contains practical recommendations of reasonable accommodation measures such as the removal of physical barriers and access to information and technology (equipment and software), workstation modifications, the adjustment of work schedules, the adjustment of the nature and duration of the duties of the employee at work, either on a temporary or a permanent basis, the reallocation of non-essential job tasks, and any other modifications to the way the work is usually performed or has been performed in the past – see Item 6.1 of TAG.

⁴⁹ Own emphasis.

rights to promotion. The employer must take all *reasonable*⁵⁰ steps to ensure that the working environment does not prevent people with disabilities from accessing or retaining positions for which they are suitably qualified.

3. Thirdly, employers can adopt *the most cost-effective means*⁵¹ consistent with the above two criteria. If the individual cannot perform the essential job functions with reasonable accommodation, the employer need not employ the person. The employer need not create a new job for the person with the disability, nor must the employer reallocate essential functions to another employee. An employer may be required to restructure a job by reallocating non-essential, marginal job functions, but only if the applicant or employee with a disability can perform the essential functions of the job, with or without reasonable accommodation.

As in the Code of Good Practice on Dismissals, as was discussed above, there is also a limitation on the employer's duty to accommodate. There is, however, no reference to quality-assured, cost-effective measures, in contrast to item 6.2 of the Code.

Items 6.3.7 and 6.3.8 deal with the retention, health and safety of employees. Employers are required to ensure the retention of existing staff by means of rehabilitation, training and other suitable measures. If an existing employee becomes disabled, the employer's first priority should be to keep the employee in her/his current position before exploring other options, such as redeploying her/him. Item 6.3.7 also contains a qualifier specifically referring to the operational requirements of the employer. It is stated that, based on the operational requirements of the organisation, employers must consider requests from employees with disabilities for reduced, part-time or alternative duties. Employers need to remain in contact with the employee and, where reasonable, encourage an early return to work. Such an outcome may require vocational rehabilitation, adjustment to work arrangements, transitional work programmes and, where appropriate, temporary or permanent flexible working times. Even though the duty is onerous, it is still limited to the objective operational requirements of the organisation.

Regarding item 6.3.8, employers are obliged to "provide and maintain a working environment that is safe to all employees." The needs of employees with disabilities must also be recorded as part of the organisation's ongoing health and safety audit; the needs of employees with disabilities must be included. The TAG also refers to the undue hardship qualifier, which involves considering the "effectiveness of the accommodation and the extent to which it would seriously disrupt the operation of the business."⁵² It is important to remember that what is an undue hardship in one organisation may not be an

⁵⁰ Own emphasis.

⁵¹ Own emphasis.

⁵² Item 6.12 of the TAG.

undue burden for others. However, expense should not be used as a shield to provide reasonable accommodation.

Our courts have also made it clear that reasonable accommodation requires hands-on interaction between employers and their employees to determine which mechanisms may be necessary to accommodate the employee's disability. This may require the assistance of technical experts.⁵³

In *Smith v Kit Kat Group (Pty) Ltd*⁵⁴ the Labour Court embarked on a journey that provided excellent guidelines to all employers on their duty to accommodate the disability of their employees. It was suggested, for instance, that employers need to consult with their employees to determine the mechanisms necessary to accommodate their disabilities. They may even be required to acquire the services of technical experts. In *Standard Bank of South Africa v Commission for Conciliation, Mediation and Arbitration*⁵⁵ the Labour Court emphasised that it is the employer who bears the onus of proving that he attempted to accommodate the employee, and he is obliged to consider *all*⁵⁶ options. The employer also has to motivate whatever accommodation is refused or offered.⁵⁷ Further, in *SA Transport and Allied Workers Union v Old Mutual Life Assurance Co SA Ltd*⁵⁸ the court also emphasised that employers must ensure that *all*⁵⁹ possible alternatives, other than dismissal, are considered. It is further essential for all employers to act in good faith and keep an open mind throughout the consultation process.⁶⁰

With reference to undue hardship, our courts have also interpreted it in a generous manner. In *Sun International Management Limited v Sayiti*⁶¹ the court emphasised that an enquiry regarding reasonable accommodation is always context-specific. Further, employers were reminded to provide cogent evidence to demonstrate that the reasonable accommodation would cause undue hardship.⁶² The court further reminded employers that even if the accommodation is pertinent, if they fail to provide evidence that such

⁵³ See *Smith v Kit Kat Group (Pty) Ltd* 2017 38 ILJ 483 (LC) para 59.

⁵⁴ *Smith v Kit Kat Group (Pty) Ltd* 2017 38 ILJ 483 (LC).

⁵⁵ *Standard Bank of South Africa v Commission for Conciliation, Mediation and Arbitration* 2008 29 ILJ 1239 (LC).

⁵⁶ Own emphasis.

⁵⁷ See *Standard Bank of South Africa v Commission for Conciliation, Mediation and Arbitration* 2008 29 ILJ 1239 (LC) paras 356-390.

⁵⁸ *South African Transport and Allied Workers Union v Old Mutual Life Assurance Company South Africa Limited* 2005 26 ILJ 293 (LC).

⁵⁹ Own emphasis.

⁶⁰ *South African Transport and Allied Workers Union v Old Mutual Life Assurance Company South Africa Limited* 2005 26 ILJ 293 (LC) para 84.

⁶¹ *Sun International Management Limited v Sayiti* (JA 13/23) [2024] ZALAC 52 (21 October 2024).

⁶² *Sun International Management Limited v Sayiti* (JA 13/23) [2024] ZALAC 52 (21 October 2024) para 45.

impairment will have ramifications on their business operations, they cannot argue that the accommodation will cause undue hardship.⁶³ In *Standard Bank of South Africa v Commission for Conciliation, Mediation and Arbitration*⁶⁴ the court explained that there is no hard and fast rule when it comes to determining what constitutes undue hardship. In other words, each case has to be determined on its own merits.⁶⁵

2.2.4 *Compensation for Occupational Injuries and Diseases Act 130 of 1993, as amended, and the Regulations on Rehabilitation, Reintegration and Return to Work*

The Committee of Inquiry into a Comprehensive System of Social Security for South Africa recommended in 2002 that governments enact laws requiring market reintegration.⁶⁶ In 2016 the Department of Labour announced that amendments to COIDA had reached an advanced stage.⁶⁷ The issue was further debated at NEDLAC in 2017.⁶⁸ The *Compensation for Occupational Injuries and Diseases Amendment Act 10 of 2022*⁶⁹ was published on the 17th of April 2023. It is essential to consider if the amendments would allow workers to be successfully rehabilitated, reintegrated and returned to work. Currently COIDA has the following aim:

To provide for compensation for disablement caused by occupational injuries or diseases sustained or contracted by employees in the course of their employment, or for death resulting from such injuries or diseases; and to provide for matters connected therewith.⁷⁰

The aim of the *COIDA Amendment Act* currently is as follows:

To amend the *Compensation for Occupational Injuries and Diseases Act, 1993*, so as to amend, substitute, insert, delete and repeal certain definitions and sections; to provide for matters pertaining to the Board and its members; to provide for the Commissioner to perform certain functions that were previously performed by the Director-General; to further provide for matters pertaining to the rehabilitation, re-integration and return to work of occupationally injured and diseased employees; to regulate the use of health care services; to provide for the Commissioner to review pension claims or awards; to provide for

⁶³ *Sun International Management Limited v Sayiti* (JA 13/23) [2024] ZALAC 52 (21 October 2024) para 49.

⁶⁴ *Standard Bank of South Africa v Commission for Conciliation, Mediation and Arbitration* 2008 29 ILJ 1239 (LC).

⁶⁵ *Standard Bank of South Africa v Commission for Conciliation, Mediation and Arbitration* 2008 29 ILJ 1239 (LC) para 99.

⁶⁶ Guthrie *et al* 2002 <https://microdata.worldbank.org/index.php/citations/5186> 114.

⁶⁷ Department of Labour 2017 <http://www.labour.gov.za/DOL/documents/annual-reports/annual-report-pfma/2017/annual-report-of-the-department-of-labour-2016-2017>.

⁶⁸ NEDLAC 2017 <http://nedlac.org.za/development-chambers-2/>.

⁶⁹ *Compensation for Occupational Injuries and Diseases Amendment Act 10 of 2022* (hereafter the *COIDA Amendment Act*).

⁷⁰ COIDA Long title.

administrative penalties; to regulate compliance and enforcement and to provide for matters connected therewith.⁷¹

The effective date of this Amendment Act is not yet known, but employers are encouraged to be proactive and to comply with such amendments in the meantime.⁷² Further, on the 15th of June 2023 the Draft Regulations on Rehabilitation, Reintegration and RTW was published for public comment.⁷³ It is important that all role-players take cognisance of these proposed amendments to successfully return workers back to work.⁷⁴

First and foremost, it is essential to examine some of the definitions in the amended regulations, as well as in the Amended Act.⁷⁵ The definition of occupational disease has now been broadened to include post-traumatic stress disorders.⁷⁶ Rehabilitation is defined as follow: "measures, services and facilities, also in the form of clinical, vocational and social rehabilitation provided for in Chapter VIIA of the Act, provided with a view to the reintegration of employees exposed to an occupational injury or disease, back into work and to enable them to attain and maintain where reasonable and practicable, maximum independence, full physical, mental, social and vocational ability, and full inclusion and participation in all aspects of life."

Section 42 of the Act deals with employee obligations in that employees shall be required to submit to a medical examination⁷⁷ for the purposes of rehabilitation. The prescribed remuneration for the medical examination or rehabilitation shall be paid by the party who required such an examination or rehabilitation. If the employee is unable to attend the examination or rehabilitation, the employee or designated medical practitioner needs to inform the party who requested it thereof. The medical practitioner will then examine the employee at a time and place as agreed upon.⁷⁸ It is argued that the medical practitioner will need to work in close collaboration with assigned vocational therapists and employer managers in order to ensure that the medical diagnosis and treatment are in line with the treatment plan as well as the RTW arrangements.

⁷¹ *COIDA Amendment Act* Long title.

⁷² Collier, Coster and Nkosi 2023 <https://www.webberwentzel.com/News/Pages/recent-changes-to-coida-an-overview-of-key-amendments.aspx>.

⁷³ GN R3539 in GG 48787 of 15 June 2023 (hereafter the Draft Regulations).

⁷⁴ Gresse *Reintegration, Rehabilitation, Reintegration and Return to Work of Disabled Workers* ch. 5.4 in which a detailed RTW model is suggested for South Africa.

⁷⁵ Not all the amendments fall within the ambit of this article and not all of the amendments will thus be discussed.

⁷⁶ Section 1 of the *COIDA Amendment Act*.

⁷⁷ It is recommended that the medical examination should be only one of the steps in a well-coordinated return-to-work plan. Medical practitioners need to further work in close collaboration with vocational therapists and case managers to be sensitive to timelines in order to successfully return the employee back to work.

⁷⁸ Section 42 of the *COIDA Amendment Act*.

Section 85 of the Act provides that if the accident record of an employer for a certain period is more favourable than that of other employers in comparable businesses, or if the employer is participating in the rehabilitation of employees as prescribed, such an employer may be entitled to a rebate on any assessment⁷⁹ paid or payable by him or her.⁸⁰ Gresse argues that, even though the use of positive incentives is a step in the right direction, it must be expected of at least large employers to have mandatory disability management programmes in place, the establishment of which can be motivated by both positive and negative incentives. Negative incentives such as the payment of fines need to be included.⁸¹

Of particular importance is chapter VIIA, which provides for the rehabilitation and reintegration of employees. Section 70A(1) provides that, subject to the provisions of the Act, either the Compensation Fund, the employer individually liable or the licensee, as the case may be, has certain obligations to fulfil. They are obliged to offer resources, services and benefits to help employees who have been injured to recover so that they can resume employment, or to minimise any disability brought about by their illnesses or injuries. The rehabilitation benefits provided in subsection (1) may consist of the following:

- (a) clinical rehabilitation and the provision of assistive devices for the purpose of physical and psychological recovery of the employee and to reduce any disability resulting from an occupational injury or disease;
- (b) vocational rehabilitation to assist an employee to maintain employment, obtain employment, regain or acquire vocational independence; and
- (c) social rehabilitation to assist in restoring an employee's independence and social integration to the maximum extent practicable.

If one considers the amended chapter, it seems as if there is a dual obligation on both the Compensation Fund and the employer to rehabilitate the worker. It is not clear, however, how the dual responsibility will be managed and how tasks will be divided. It is thus necessary to consider the amended regulations which were published earlier this year. It is essential to consider the proposed obligations of all the relevant role-players and to consider whether more amendments will be necessary in the future.

2.2.4.1 Important definitions

The Draft Regulations aim to define certain key terms, which definitions are necessary in order to establish legal certainty and role clarification. For

⁷⁹ It is the author's respectful submission that rebates should be given not only for favourable accident records or participation in rehabilitation, but also for an organization's successfully returning an employee to work within a specified time. Rehabilitation is only one of the steps in an RTW programme.

⁸⁰ Section 52 of the *COIDA Amendment Act*.

⁸¹ Gresse *Reintegration, Rehabilitation, Reintegration and Return to Work of Disabled Workers* 217.

instance, assistive devices are defined to include any facility such as an item; piece of equipment; software programme or product system in order to maintain, increase or improve functional capabilities.⁸²

It is not clear why the definition of reasonable adjustment is not aligned to the definition in other pieces of legislation. For instance, reasonable accommodation is defined differently in the *Employment Equity Act* 55 of 1998. In terms of the EEA, it is defined as follows: "any modification or adjustment to a job or to the working environment that will enable a person from a designated group to have access to or participate or advance in employment."⁸³

In terms of the TAG, reasonable accommodation is explained to mean alterations or modifications to the way a job is "normally performed, [and] should make it possible for a suitably qualified person with a disability to perform as everyone else."⁸⁴ The type of reasonable accommodation required is dependent on certain factors, such as the job itself; its essential functions; the work environment and the specific impairment.⁸⁵

The *Convention on the Rights of Persons with Disabilities* defines reasonable accommodation as follow: "necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms."⁸⁶ It will be interesting to see how this duty is interpreted by our courts. Will it be necessary to move beyond the inherent requirements of the pre-injury or pre-illness position and consider other relevant factors, such as the employee's unique skill set and the employment relationship as a whole, including the employment contract and operational and organisational requirements?⁸⁷

Undue hardship is not defined in the EEA, but it is defined in the Code of Good Practice: Key Aspects on the Employment of People with Disabilities in item 6 as follows: "Unjustifiable hardship is action that requires significant or considerable difficulty or expense and that would substantially harm the viability of the enterprise. This involves considering the effectiveness of the accommodation and the extent to which it would seriously disrupt the operation of the business." This yardstick was also defined in the case of *Standard Bank of South Africa v Commission for Conciliation, Mediation and Arbitration* in

⁸² For instance, this may include mobility devices, hardware, software and peripherals which assist persons with disabilities. Assistive devices include specialised assistive devices and technology.

⁸³ Section 1 of the *Employment Equity Act* 55 of 1998.

⁸⁴ Item 6.1 of TAG.

⁸⁵ Item 6.1 of TAG.

⁸⁶ Article 2 of the CRPD.

⁸⁷ See Gresse *Reintegration, Rehabilitation, Reintegration and Return to Work of Disabled Workers* 349.

which the Labour Court defined it as follows: "Unjustifiable hardship means more than mere negligible effort. Just as the notion of reasonable accommodation imports a proportionality test, so too does the concept of unjustifiable hardship. Some hardship is envisaged. A minor interference or inconvenience does not come close to meeting the threshold but a substantial interference with the rights of others does."⁸⁸

It is also worrying that there is no reference to undue hardship in either section 1 or anywhere else in the Draft Regulations, which means that reasonable accommodation in this context is thus without any qualifier, which could result in a hefty burden on employers, especially smaller organisations.

The Draft Regulations define return to work to mean: "a set of workplace processes designed to facilitate the workplace reintegration of persons who experiences a reduced work capacity due to occupational injury or disease. The injured or diseased individual's needs, the work environment, the enterprise needs, and the legal responsibilities are considered as part of a coordinated effort focussed on job retention aimed at protecting and promoting health, well-being and workability."⁸⁹

The Draft Regulations also define a case manager⁹⁰ and a disability manager, and there is a particular emphasis on a skillset and/or qualification which will be required. This will contribute to a more specialised and hands-on approach. However, it will be necessary for COIDA also to reflect the requirements.

The Draft Regulations attach a very narrow definition to an "injured employee" since there is only reference to a "physical impairment" in its definition.⁹¹ This definition implies that only temporary illness or injury will fall under the ambit of the Regulations. It is this author's submission that the definition should be broadened to also make provision for psycho-social disability⁹² in order to align

⁸⁸ *Standard Bank of South Africa v Commission for Conciliation, Mediation and Arbitration* 2008 29 ILJ 1239 (LC) para 93.

⁸⁹ Regulation 1 of the Draft Regulations.

⁹⁰ A case manager is defined as a "health professional appointed by the Compensation Fund or Licensee to conduct case management for the injured employee, which includes the collaborative process of assessment, planning, facilitation, case co-ordination, evaluation and advocacy for options and services to meet individuals and families through communication and available resources to create quality and cost outcomes". A disability manager is defined as a "suitably trained individual who performs various functions about RTW and rehabilitating systems, such as design, coordination and implementation of RTW programme" – see Regulation 1 of the Draft Regulations.

⁹¹ Section 1 of the Draft Regulations defines an injured employee as "an employee whose prospects of securing, returning to, or advancing in current employment and substantially reduced as a result of a severe physical impairment sustained at work and liability accepted by the Fund/Licensee."

⁹² Psychosocial disability can be defined as "a mental illness (a health condition involving changes in emotion, thinking and behaviour or a combination of these), such as depression or schizophrenia, that prevents someone from being able to function fully

with the recently updated definition of occupational diseases,⁹³ which specifically includes post-traumatic stress disorders.

The Regulations need to contain a detailed definition of disability in order for employers to understand the extent of their responsibilities as it relates to RTW. For instance, regulation 4(3) of the Draft Regulations provides that if an employee suffers a disability as a result of an occupational injury or disease, the Compensation Fund, licensee or employer, with the consent of the employee, is to provide the employee with access to rehabilitation programmes in order to restore the employee's health and independence, as well as to enable the employee's participation in the labour market and society to the maximum extent possible. Regulation 4(1) deals with the management of occupational injuries and diseases and provides that the Compensation Fund, licensee or employer is obliged to provide "access to facilities, services and benefits" aimed at rehabilitating employees with an occupational illness or injury in order that they may return to the labour market.

2.2.4.2 Functions of role-players and identified shortcomings

Compensation Fund

The Draft Regulations aim to assign designated functions to the respective role-players, which will undoubtedly assist in coordinating the rehabilitation and return-to-work process for employees. The duties of the Compensation Fund can be summarised as follows:

1. to provide facilities designed to rehabilitate and assist injured workers and workers suffering from occupational diseases or injury in their work or labour market, and to carry out any activity to meet this objective;
2. to make employees and employers aware of RTW processes and their obligations;
3. to ensure that financial resources are available to support the creation, implementation, and maintenance of rehabilitation and RTW programmes;
4. to provide the necessary support to stakeholder organisations to meet the RTW goals;
5. to take steps to increase stakeholder relations and recognition of their own efforts relating to rehabilitation and RTW programmes;
6. to finance all reasonable clinically appropriate medical expenses, as well as cost effective assistive devices and technology to support rehabilitation;

within society, for example limiting their access to education or employment" – see New South Wales Health 2023 <https://www.health.nsw.gov.au/mentalhealth/psychosocial/foundations/Pages/psychosocial-what-is.aspx>.

⁹³ See s 1 of the *COIDA Amendment Act*.

7. to cultivate partnerships and designated service providers' arrangements with stakeholders in order to streamline services in order to reduce the costs of clinical, vocational and social rehabilitation, including the reporting thereof; and
8. to monitor, assess and review the implementation of rehabilitation and the RTW policy.

Upon considering the above section, several concerns arise. Will a designated RTW department be established to oversee design and implementation? Will the Department of Employment and Labour also assist with stakeholder relations as well as financial support? Will employers be mandated to make employer contributions to co-finance the rehabilitation? The implementation of these Regulations will require careful planning as well as a few pilot projects. The Draft Regulations refer to a "licensee" but it is unclear who this appointee will be and how functions will be shared between the Compensation Fund and the so-called licensee. It is recommended that a distinction be drawn between the pilot and post-pilot phases of RTW implementation. Further, it is the author's submission that the current set of functions needs to be broadened to include the following list of functions:⁹⁴

- the appointment of disability managers for all cases, and case managers for small organisations;
- the specialised training of disability managers;
- the use of a case management approach to RTW;
- an increase in the number of facilities where physical and vocational rehabilitation can occur, with quality control measures in place (in conjunction with the Department of Health);
- the development of RTW and disability management protocols and manuals for different industries;
- the continuous improvement of the electronic platform in order to have an online centralised system where all services are delivered in a prompt and coordinated manner, and the development of databases of best practices;
- the improvement of quality control measures and the establishment of a conflict resolution procedure;
- the provision of advisory and information services relating to RTW and job retention, and the giving of guidance to employers on aspects such as work schedule adjustments, work capacity and the vocational retraining of workers;

⁹⁴ Gresse *Reintegration, Rehabilitation, Reintegration and Return to Work of Disabled Workers* 397-398.

- the recognition of non-designated employers who appoint case managers on their own accord;
- the continuing provision of advisory and information services to general practitioners;
- the identification of other measures to motivate all role-players to remain active and motivated;
- the support of case managers appointed by designated employers;
- the establishment of a Job Placement and Retraining Unit to allow for re-employment and retraining in a wide range of sectors in the open labour market;
- the analysis of RTW compliance reports;
- the identification of strategies to reduce the number of days it takes to return workers to work and the formulation of other strategies relevant to the RTW process, such as an RTW manual for employees suffering from mental illness;
- the continuation of the RTW programme with international best practices;
- the obtaining of NIDMAR⁹⁵ certification and a disability management curriculum in order to train disability managers at organisation level;
- the establishment of a call centre to assist all parties with RTW-relevant inquiries; and
- the appointment of an RTW Inspectorate with the authority to enter workplaces and issue RTW improvement notices in instances where employers are in contravention of their RTW obligations.⁹⁶

Obligations of employers

Regulation 8 sets out the obligations of employers as well as the obligations of employers who will be individually liable. These will include the following:

1. To provide and maintain, as far as reasonably practicable, a safe working environment and to identify and mitigate occupational hazards.⁹⁷
2. To take all reasonable steps which may be necessary to provide prompt first aid treatment.⁹⁸
3. To coordinate the required access and assistance to enable a disability or case manager from the licensee or the Fund to perform its designated functions.⁹⁹

⁹⁵ See NIDMAR 2023 <https://www.nidmar.ca>.

⁹⁶ Gresse *Reintegration, Rehabilitation, Reintegration and Return to Work of Disabled Workers* 397-398.

⁹⁷ Regulation 8(1)(a) and 8(1)(b) of the Draft Regulations.

⁹⁸ Regulation 8(1)(c) of the Draft Regulations.

⁹⁹ Regulation 8(1)(d) of the Draft Regulations.

4. To ensure that all work-related injuries and occupational diseases are reported to the Fund or the licensee by the health and wellness representative and to submit the reporting data on an annual basis.¹⁰⁰
5. To establish and maintain a system for rehabilitation and RTW reporting for employees who have an occupational illness or injury.¹⁰¹
6. To keep rehabilitation and RTW reports for a period of not less than forty years.¹⁰²
7. To organise vocational guidance, skills development initiatives, reasonable accommodation, and placement.¹⁰³
8. To provide support and assistance to employees during work for rehabilitation, treatment or assessment.¹⁰⁴
9. To design and implement rehabilitation and RTW policies and programmes in line with legislation and regulations.¹⁰⁵
10. To ensure that rehabilitation and RTW cases are integrated into the relevant structures to implement and monitor the programme at the workplace.¹⁰⁶
11. To provide reasonable, transitional or temporary work to allow the injured employee to work safely in the RTW process.¹⁰⁷
12. To "modify work areas; duties; equipment or processes; assistive devices; technology in accordance with the injured employee's capacity to allow for reasonable accommodation." This may entail the following:
 - reviewing duty allocation;
 - transferring the injured employee to an alternative placement;
 - altering working hours;
 - making provision for a work trial;
 - training the employee.¹⁰⁸
13. To communicate with the injured or ill employees regarding RTW processes and methods promptly and openly in order to find alternative placement.¹⁰⁹
14. To consult with all the relevant stakeholders in order to remove difficulties from the workplace which may have an impact on the employee's rehabilitation and RTW.¹¹⁰

¹⁰⁰ Regulation 8(1)(g) and 8(1)(e) of the Draft Regulations.

¹⁰¹ Regulation 8(1)(a) of the Draft Regulations.

¹⁰² Regulation 8(1)(h) of the Draft Regulations.

¹⁰³ Regulation 8(1)(i) of the Draft Regulations.

¹⁰⁴ Regulation 8(1)(j) of the Draft Regulations.

¹⁰⁵ Regulation 8(1)(k) of the Draft Regulations.

¹⁰⁶ Regulation 8(1)(l) of the Draft Regulations.

¹⁰⁷ Regulation 8(1)(m) of the Draft Regulations.

¹⁰⁸ Regulation 8(1)(n) of the Draft Regulations.

¹⁰⁹ Regulation 8(1)(o) of the Draft Regulations.

¹¹⁰ Regulation 8(1)(p) of the Draft Regulations.

15. To ensure that the employee who is undergoing rehabilitation is able to return to his original position if it is reasonably practicable to do so, or where appropriate, to a suitable alternative position "until such time where evidence of incapacity has been provided" after diagnosis of an occupational disease or an occupational injury.¹¹¹ This may include the arrangement of appropriate vocational training and placement.¹¹²
16. To not dismiss an employee for incapacity or reduce the rate of his remuneration or amend the terms and conditions of his employment to less favourable ones as a result of an injury whilst on duty, the contracting of an occupational disease, without the employer's reporting the reasons for dismissal to the chief Inspectorate and the Fund or the licensee in writing.¹¹³
17. To duly notify the Compensation Commissioner, in the prescribed manner, if an employee is able to resume his duties or if the employer is unable to retain the employee after "all efforts have been made to preserve the employment" of the injured or diseased employee.¹¹⁴

The next section will include a reflection on and/or a critique of the employer's obligations.

Reflection

It is pertinent to briefly reflect on the proposed employer obligations, since Regulation 8 contains primary responsibilities for all employers in South Africa. Even though some of the objectives of Regulation 8 are plausible, it will place a very heavy burden on employers, especially smaller organisations. The first observation that can be drawn relates to the possible duplication of duties, as items 10 and 11 of the Code of Good Practice¹¹⁵ already mandate employers to accommodate employees reasonably.¹¹⁶ The new COIDA amendments and the *Occupational Health and Safety Act* mandate employers to maintain workplace health and safety.¹¹⁷ With reference to the duty not to dismiss the employee, it is the author's submission that the following factors need to be taken into account. Firstly, if the employee refuses to participate in the rehabilitation process, will the employer be exempted from such a duty?

¹¹¹ Regulation 8(1)(q) of the Draft Regulations

¹¹² Regulation 8(1)(r) of the Draft Regulations.

¹¹³ Regulation 8(1)(s) of the Draft Regulations.

¹¹⁴ Regulation 8(1)(t) of the Draft Regulations.

¹¹⁵ Code of Good Practice on Dismissals (Schedule 8 of the *Labour Relations Act*).

¹¹⁶ These obligations were discussed in section 2.2.2 of this article.

¹¹⁷ See s 8(1) of the *Occupational Health and Safety Act* 85 of 1993 which provides as follow: "(1) Every employer shall provide and maintain, as far as reasonably practicable, a working environment that is safe and without risk to the health of his employees." Further, the 2023 COIDA draft sub-regulation 8(1)(b) places an obligation on employers to identify, assess, evaluate and mitigate occupational hazards.

Secondly, it will be necessary to add the "undue hardship" qualifier to this sub-section, as was suggested earlier in this article.¹¹⁸

The National Employers' Association of South Africa (NEASA) expresses an opinion similar to the author's above and submits that an amendment to sub-regulation 8(1)(m) will be necessary in order to qualify the burden currently placed on employers. It submits that the sub-regulation be amended as follows:

- (m) provide reasonable, transitional or temporary work, *where possible, practicable and necessary*, to allow the injured employee to work safely in the RTW process;
- (n) *where possible, practicable and necessary*, modify work areas, duties, equipment or processes in accordance with the injured employee's capacity to allow for reasonable accommodation and assistive devices and technology where appropriate. This could include a review of duty allocation, transferring the injured employee to an alternative placement; altering the employee's working hours, making provision for a work trial; and/or giving the employees training, *to the extent that any measures of accommodation and/or placement does create undue hardship for the employer, in relation to the ability of the employee to execute their job on the same or substantially same level as prior to the workplace injury or disease.*

With reference to sub-regulation 8(1)(q), which deals with the duty to return employees to their original positions, NEASA submits that this sub-section may lead to operational issues for employers, especially in instances where employees perform specific functions that the organisation cannot operate without, even if it is for a short duration. In such an instance, it may not be possible for the employer to reserve the original work, since another employee may be out of necessity appointed to that position.¹¹⁹ We must keep in mind that employers are still bound by relevant codes and guidelines before dismissal for incapacity may occur. It is further the author's submission that the size of the organisation should be considered when determining the extent of the employer's duty to provide reasonable accommodation, reserve the original position, or find alternative work, since smaller organisations do not have much leeway in between different positions.

Further, for how long would employers be expected to retain ill or injured employees in re-assigned positions?¹²⁰ Suppose the employee can no longer meet the inherent requirements of the position he was appointed to after

¹¹⁸ See the argument in section 2.2.3 of this article.

¹¹⁹ NEASA *Submission to the Department* 12.

¹²⁰ In Victoria, Australia, employers (except if exempted) are obliged to provide injured workers with suitable or pre-injury employment for a period of 52 weeks – see Gresse *Reintegration, Rehabilitation, Reintegration and Return to Work of Disabled Workers* 324-325.

undergoing a rehabilitation process, should that finding be enough to lodge incapacity proceedings?

Regulation 10 deals with the costs and benefits of rehabilitation. The regulation reads as follows:

For the purposes of costs of rehabilitation:-

- (a) the costs for clinical, social rehabilitation, and Assistive Devices and Technology and vocational rehabilitation for previously employed workers with a permanent disablement as contemplated in sub-regulation (1), shall be borne by the Fund, and/or Licensee, including the costs of supplying, maintaining, and repairing Assistive Devices and Technology which have been issued in accordance with the guidelines and costs as published annually in the government gazette.
- (b) the costs of vocational rehabilitation for employees returned to work, as contemplated in sub-regulation (1), shall be borne by the employer and employer individually liable, including the costs of and reasonable accommodation.¹²¹

With reference to the above, NEASA submits that this regulation is a major concern due to the fact that a distinction is drawn between employees who are able to resume employment in their original position and those who are not. NEASA argues that it appears, from a reading of these sub-regulations, that the Compensation Fund or licensee will be responsible for the costs related to assistive devices and rehabilitation if the employee cannot return to work or be accommodated in another position at the employer. However, the employer is responsible for paying for the employee's rehabilitation and any necessary accommodations if the worker can return to work in the same capacity as before or in a different accommodating function. Once again, this places a huge responsibility on all employers in South Africa and may not be feasible for smaller organisations. The responsibility should be shared between the employer and the Fund. NEASA is concerned about this distinction and submits as follows:

It remains within the mandate of the Fund or Licensee to foot the bill of any of the rehabilitation of an employee that suffered an injury on duty or occupational disease, regardless of their ability to return to work in the same position or another position. Sub-regulation 10(1) already includes vocational rehabilitation, - counselling, re-skilling and/or up-skilling, altering of the work environment, adjusting and enhancement of tools of trade as part of the 'rehabilitation benefits', and the regulations stipulate that the Fund or a Licensee are to provide these benefits. Consequently, regardless of the permanency of an employee's impairment, the Fund or Licensee are [sic] to carry any and all of the costs of these benefits.¹²²

Regulation 13 determines that all employers are obliged to draft a reintegration and RTW policy. The policy must be freely accessible and must be

¹²¹ Regulation 10(2)(a)-(b) of the Draft Regulations.

¹²² NEASA *Submission to the Department* 15.

communicated to all employees in writing. It needs to contain the following information:

- a) Procedures to ensure that employees return to work.
- b) The provision of reasonable accommodation measures as well as assistive devices and technology.
- c) A health and wellness plan which makes provision for an early return to work.
- d) The re-skilling of employees for alternative work.
- e) The consequences of non-compliance with the plan.
- f) Trustworthy support and interventions by employers, employees, healthcare providers and insurers.

Regulation 13 does not provide any conflict resolution procedure or protocol, a necessary element in any workplace policy. If not here, it has to be listed as a separate clause in the Regulations. It does not contain any reference to the obligations of the employee or of the Compensation Fund or licensee, disability managers, and/or case managers. It also does not make provision for dismissal protection as prescribed by regulation 8(1)(s) of the Draft Regulations. Formulating a detailed RTW policy may be challenging for some employers as well, especially employers who do not have a designated human resource department. It is further the author's submission that one must be careful not to follow a blanket approach when it comes to the disability management of employees, since most cases will be different from one another. It is suggested that a best practice model and/or case management model should be adopted in organisations to allow for tailor-made policies. In this context occupational disability must always be viewed holistically and in the context of the relationship between the individual and the socio-political milieu of the workplace, according to the ecological/case management paradigm. However, Schultz and Stowell argue that a system-based responsibility approach is required for this model to optimally function, as well as a multi-disciplinary effort by the relevant stakeholders, with a particular emphasis on the early prevention of disability.¹²³ RTW is thus mainly informed by stakeholders' perspectives and is assessed within the context of a complex interaction among different role-players.¹²⁴

It is proposed that South Africa consider adopting a case management approach, which may include the following:¹²⁵ care assessment, including personal interviews with the employee; and assistance with the creation,

¹²³ Schultz and Stowell 2007 *Journal of Occupational Rehabilitation* 336.

¹²⁴ Knauf and Schultz "Current Conceptual Models of Return to Work" 31.

¹²⁵ This is not a closed list.

execution and management of a medical care plan in coordination with the client's family and healthcare professionals, including the monitoring of treatment outcomes and promoting economic healthcare.¹²⁶ It also entails assessing the work environment to determine appropriate adjustments.¹²⁷

NEASA argues that the obligation incurred by regulation 13 of the Draft Regulations should be scrapped in its entirety. It further submits that each case and instance of an occupational disease and/or injury is unique and different. Each and every employee is also unique, and employees' recovery processes will differ from one another. Lastly, it must be borne in mind that each employee's skill set is different from others'. Hence, the "possibility of accommodating an injured or impaired employee in an alternative position will differ."¹²⁸ NEASA further argues that if a policy is so general in nature, it may not be capable of practical implementation, it may lose its purpose, and implementing it may become a "tick-box compliant exercise", and hence the "possibility of accommodating an injured or impaired employee in an alternative position" may be dissipated.¹²⁹ The author submits that instead of having a general policy, employers should instead be expected to draw up individualised RTW plans after consultations with all relevant role-players, service providers and/or practitioners.¹³⁰

Regulation 3 of the Draft Regulations imposes a further obligation on employers, stating that employers may appoint or designate one of their employees as a health and wellness representative for their organisation. NEASA correctly observes that "may" implies that employers can appoint these representatives. Collier *et al* have the same argument and point out that regulation 3, when read in conjunction with regulation 7, may on the other hand imply differently since regulation 17 sets out very *specific*¹³¹ obligations for these representatives. They will liaise between the Compensation Fund or licensee, the ill or injured employee, and the medical and rehabilitation service providers. It is further required that they have the necessary skills, competence, and knowledge to execute their duties and to further educate the employees and the rehabilitation service providers on their rehabilitation and RTW rights and obligations. The representatives also have hefty administrative burdens since they are required to provide reports, do needs analyses after claims have been submitted, actively manage the approved rehabilitation programme to ensure it is of quality as well as cost-effective, work in close

¹²⁶ Olivier *et al* "Selected Perspectives" 10.

¹²⁷ Olivier *et al* "Selected Perspectives" 10.

¹²⁸ NEASA *Submission to the Department* 13.

¹²⁹ NEASA *Submission to the Department* 16.

¹³⁰ Once again, the regulations are at times confusing since the drafting of an RTW plan is implied by regulation 17(d) of the Draft Regulations, which states that the representative of the organisation needs to draft an RTW plan in collaboration with the employee's supervisor and vocational service provider.

¹³¹ Own emphasis.

collaboration with the employee's supervisor and occupational therapist to develop an RTW plan,¹³² ensure that the employee receives the RTW plan; provide support and information to the employee; maintain and protect a case file; and lastly foster partnerships and collaborate with public and private community agencies to ensure robust RTW and integration. This author submits that it might be a tall order to expect the representative to foster networks. Further, if one considers regulation 16(1)(d), it appears that one of the duties of a case manager is to network, communicate and coordinate with relevant stakeholders and professional environments. It is this author's respectful submission that regulation 17(1)(h) thus be removed.

It is this author's submission that the regulation, specifically regulation 7(d), contains a major flaw in that the employee is not involved in the drafting of the RTW plan. An employee cannot be expected to submit himself to a disability management process¹³³ if he was not part of the consultative and drafting phase of the RTW plan. Further, this is quite an extensive list, and specialised training in disability management would be necessary. The Draft Regulations set out the duties of disability managers as well as case managers in regulations 15 and 16 respectively, and it is not clear at this stage how the respective role-players will work together since some of their duties may be duplicated.¹³⁴ Another contradiction is evident in regulation 15(1)(b), where it is stated that the employee will be consulted in the development of the rehabilitation plan. With reference to case managers, it is stated in regulation 16(1)(c) that they will be responsible for the "promotion of the RTW approach". The exact aim of this sub-regulation is not clear. Further, sub-regulation 16(1)(c) determines that the case manager will be responsible for the provision of an "early, tailored, client-centred and coordinated intervention" to employees who have an occupational illness or injury. Is this not similar to the drafting of an individualised RTW plan, as set out in regulation 12, which may once again, lead to confusion regarding who will be responsible at the end of the day for creating, drafting and revising such RTW plans?

¹³² Regulation 7(d) of the Draft Regulations.

¹³³ See regulation 9 of the Draft Regulations, which sets out the duties of the ill or injured employee. For instance, s/he needs to submit her/himself and participate in the rehabilitation and RTW plan *inter alia* actively.

¹³⁴ For instance, regulation 15(1)(c) of the Draft Regulations provides that the disability manager must develop and/or revise a rehabilitation plan in consultation with the employer, employee and medical service provider. Interestingly, regulation 15(1)(e) then states that the disability manager must also approve the rehabilitation programme, which might be a conflict of interest since the person who develops it is also responsible for approving it. The duties of the employees and service providers are unpacked in regulations 9 and 19-21 respectively. As was stated in the introduction to this article, the focus of the article is on employer obligations. An analysis of *all* role-players' obligations will form part of a second article in a series of articles.

3 Conclusion

The amendments to COIDA and the introduction of RTW-specific regulations are long overdue and their publication is definitely a milestone for South Africa in order that it may meet its international and constitutional obligations related to the reintegration, rehabilitation and return to work of ill or injured employees. However, the success of these proposed regulations will entirely depend on whether they are promulgated in a theoretically sound manner and, secondly, on whether or not they are capable of being implemented robustly by all the relevant stakeholders. However, the regulations in their current format require reconsideration and amendment, as discussed in this article.

Most importantly of all, proper role clarification is necessary for all the role-players involved in the RTW process, from the preventative phase up until the return to employment. The fact that there are several Acts, policies, regulations, and Codes of Good Practice that all contain duties related to reasonable accommodation, rehabilitation and RTW may not only lead to a duplication of duties but also to uncertainty about who bears the responsibility to perform certain tasks. Gresse argues that South Africa has a clear constitutional mandate to enact independent disability laws to remove barriers not only in the employment context but also in society at large.¹³⁵

Context is always important, and the context of each workplace and the individual circumstances of employees need to be considered and factored into the rehabilitation and return-to-work process. The core obligations related to rehabilitation need to be captured in the legislation. However, the implementation and design of RTW policies should be tailored for each organisation and on a case-by-case basis. One must thus be guarded against following a blanket approach in a disability management context. Further, small organisations cannot be expected to carry the same responsibilities as large organisations, especially in the context of the obligation of employers to pay for all rehabilitation-related costs, as was discussed earlier in the article. It is also necessary to think about policies to protect temporary workers and those employed in the informal sector.

Obligations need to be qualified, and employers cannot be expected to accommodate employees if doing so truly creates an undue hardship for the organisation as a whole. However, employers need to remember that a claim of undue hardship needs to be supported with sufficient evidence. A holistic approach is crucial in a disability management process, and it will be essential not only to consider the inherent requirements of the pre-injury position in the quest for reasonable accommodation, but also to consider the genuine and reasonable requirements thereof. It is necessary to consider the skillset, the

¹³⁵ Gresse *Reintegration, Rehabilitation, Reintegration and Return to Work of Disabled Workers* 349.

abilities, the employment contract, the agreed-upon RTW plan, the organisation's requirements and the employment relationship as a whole when determining how the employee may be accommodated and whether it is possible for him to return to his pre-injury position.¹³⁶

Lastly, it will be necessary to get the buy-in and support of stakeholders from role-players not mentioned in the Draft Regulations, such as trade unions and employer representative bodies, since they play a key role in disability management awareness amongst workers.

To conclude, the Draft Regulations are a step in the right direction for RTW arrangements in South Africa, but they do not obviate the requirement of careful planning, of the establishment of industry-specific pilot projects, and the devotion of time, resources and the commitment of all the stakeholders involved in the unique South African context.

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¹³⁶ Gresse *Reintegration, Rehabilitation, Reintegration and Return to Work of Disabled Workers* 349.

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List of Abbreviations

COIDA	Compensation for Occupational Injuries and Diseases Act 130 of 1993
CRPD	Convention on the Rights of Persons with Disabilities (2006)
EEA	Employment Equity Act 55 of 1998
ILJ	Industrial Law Journal
LRA	Labour Relations Act 66 of 1995
EEA	Employment Equity Act 55 of 1998
NEASA	National Employers' Association of South Africa
NIDMAR	National Institute of Disability Management and Research
PELJ	Potchefstroom Electronic Law Journal
PWDs	persons with disabilities
RTW	return-to-work
SPDP	SP Discussion Paper
TAG	Technical Assistance Guidelines on the Employment of Persons with Disabilities (2017)
TJCLCR	Texas Journal on Civil Liberties and Civil Rights
UN	United Nations