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The phenomenon of weight-based discrimination in South African employment

Summary

South African labour law is forever evolving to address new issues in the modern workplace. One such new consideration is weight-based discrimination. With obesity increasing worldwide, it permeates every aspect of life, not least of which the workplace. A range of preconceived notions about the overweight and the obese often cause employers' appearance prejudices to influence their employment decisions and practices, as is evident from the numerous court decisions worldwide dealing with weight-based discrimination in employment. This article first deconstructs the concept of 'weight discrimination', and then investigates the possible status of weight as a ground of unfair discrimination in South Africa. Even though South Africa is among the three most overweight nations in the world, and the country's judicial forums have already had to deal with a number of cases involving elements of weight-related bias in the workplace, no specific legislation or other measure exists to address this phenomenon. The right to dignity and equality is vehemently protected in the South African Constitution; yet, the legislature chose not to include weight in the specific prohibited grounds of discrimination. Thus, the article explores the possibility of bringing claims of weight-based discrimination under section 6(1) of the amended *Employment Equity Act*, as well as that of obesity being protected as a disability. Following a comparative overview of the legal positions in the United States of America, Australia, the European Union and the United Kingdom, the article concludes by suggesting possible solutions and recommendations to fill the void in South African labour law to effectively deal with weight-based discrimination in the workplace.

Die verskynsel van gewigsgebaseerde diskriminasie in die Suid-Afrikaanse werkplek

Die Suid-Afrikaanse arbeidsreg ontwikkel voortdurend om nuwe kwessies in die moderne werkplek te hanteer. Een so 'n nuwe oorweging is gewigsgebaseerde diskriminasie. Met vetsug wêreldwyd aan die toeneem, dring dit deur tot elke aspek van die lewe, veral ook die werkplek. Verskeie vooropgestelde idees oor oorgewig persone en vetsug beteken dikwels dat werkgewers se voorkomsvooroordele hul indiensnemingsbesluite en -praktyke beïnvloed, soos duidelik blyk uit al die hofuitsprake wêreldwyd wat met gewigsgebaseerde diskriminasie in die werkplek verband hou. Hierdie artikel ontleed eerstens die konsep van 'gewigsdiskriminasie' en ondersoek dan die moontlike status van gewig as 'n grond vir onbillike diskriminasie in Suid-Afrika. Al is Suid-Afrika onder die drie mees oorgewig nasies ter wêreld en moes die land se regsforums reeds 'n aantal sake rakende elemente van gewigsverwante vooroordeel in die werkplek aanhoor, bestaan daar

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geen spesifieke wetgewing of ander maatreël om die verskynsel te hanteer nie. Die reg op waardigheid en gelykheid word vurig beskerm in die Suid-Afrikaanse Grondwet; tog het die wetgewer gekies om nie gewig by die spesifieke verbode gronde vir diskriminasie in te sluit nie. Die artikel ondersoek dus die moontlikheid om eise van gewigsgebaseerde diskriminasie ingevolge artikel 6(1) van die gewysigde *Diensbillikheidswet* in te stel, sowel as om vetsug as 'n gestremdheid te beskerm. Na 'n vergelykende oorsig van die regstandpunt in die Verenigde State van Amerika, Australië, die Europese Unie en die Verenigde Koninkryk, sluit die artikel af deur moontlike oplossings en aanbevelings voor te stel om die leemte in die Suid-Afrikaanse arbeidsreg te vul om gewigsgebaseerde diskriminasie in die werkplek doeltreffend te hanteer.

1. Introduction

While hunger and starvation plague the globe,[1] a new enemy has emerged in the form of obesity. With 56 per cent of South African women and 29 per cent of South African men being overweight, and 27 per cent of the country's women and 10 per cent of men being obese, this will no doubt affect the South African employment realm.[2] The prevalence of obesity also increases the possibility that employers will be left to carry the additional costs associated with obesity, namely increased absenteeism and diminished productivity.[3] This not only poses a problem in itself, but increased discrimination against individuals or groups who are overweight or obese adds insult to injury.

In the past, being thin was associated with disease and illness, while being plump was considered attractive and constituted the norm.[4] In modern society, the converse applies. A quick glance at the television or browse through magazines suffices to confirm that thin is the desired body type in most of the modern world.

The prevalence of weight-based discrimination has increased by 66 per cent over the past decade, and has gained so much momentum that it is as common as race and age discrimination in contemporary society.[5] The social stigmatisation of, and prejudice against the overweight and obese stem from societal perceptions and values on body type, and permeate all areas of life, not least of which the modern workplace[6] where people spend 60 per cent of their time.[7] Weight discrimination is particularly significant, as it amounts to a violation of employees' right to dignity and equality. This could simultaneously lead to obesity being acknowledged as a possible disability, with the employer having to make 'reasonable accommodation' for the overweight-disabled employee.

1 Liviero 2014:46.
2 Liviero 2014:46.
3 Liviero 2014:46.
4 Rudin & Pereles 2012:137.
5 Rudin & Pereles 2012:137; Bento *et al.* 2012:3200, referring to Crandall 1994.
6 Chernov 2006:107.
7 Tugenhaft & Hofman 2014:6.

This article aims to address the legal void pertaining to the effective prohibition and management of (over)weight discrimination in the South African workplace, by considering the nature and scope of this phenomenon and the legal positions pertaining to it in the United States of America, Australia, the European Union, and the United Kingdom, in particular. The *Constitution of the Republic of South Africa* and the *Employment Equity Act*, the primary and secondary sources governing equality in the workplace, do not directly address this issue despite it being a significant problem at ground level. Considering the legal position pertaining to weight-based discrimination in the abovementioned comparative jurisdictions may thus provide valuable lessons for South Africa and assist in addressing this lacuna in South African labour law.

2. Deconstructing weight-based discrimination

Weight-based prejudice and discrimination is known as "weightism".[8] Being a clearly visible aspect of diversity, body shape and size also serve as a foremost consideration in the categorisation of people.[9] Research on the legal position of obese and overweight persons has increased significantly in recent years.[10] Blaine reports that weight-based discrimination and prejudice against individuals is indeed prevalent in contemporary society.[11] The overweight employee, however, is not the only one who suffers; obese employees cost their employers up to 50 per cent more in terms of time off than their thinner colleagues.[12] Nevertheless, as this article focuses on weight-based unfair discrimination in employment, a detailed study of the cost implications for employers falls outside the ambit of this article. Cognisance is also taken of inherent requirements of the job, and the relevance thereof in the employment of overweight individuals.[13]

It is important to distinguish between the concepts 'overweight' and 'obese'. Overweight refers to ranges of weight that are greater than what is normally considered healthy for a given height.[14] Obesity, on the other hand, refers to a specific group of individuals with a body mass index (BMI)[15] of 30 or greater. Persons with a BMI of 25+ are considered to be overweight,[16] while those with a BMI of 40+ are regarded as morbidly

8 Blaine 2012:144.
9 Blaine 2012:5, 139.
10 Blaine 2012:5, 139.
11 Blaine 2012:5.
12 Tugenhaft & Hofman 2014:6.
13 See, for example, Sanburn 2013.
14 Centres for Disease Control and Prevention 2014.
15 BMI may be described as a simple ratio of weight to height; weight in kilograms divided by the square of the individual's height in metres. See Schallenkamp *et al.* 2012:256.
16 Centres for Disease Control and Prevention 2014.

obese.[17] Rudin and Pereles also note that discrimination against the overweight becomes more severe as the individual's BMI increases.[18]

The American Medical Association recognises obesity as a disease,[19] which is further subdivided into mild obesity (20 to 40 per cent above the norm), moderate obesity (41 to 100 per cent above the norm) and morbid obesity (more than twice the norm).[20] Suffering from a disease such as obesity should thus be a protected trait, and any form of discrimination based thereon should be prohibited, despite any possible inconvenience to employers.

In recent years, public concern and news coverage have increasingly started to focus on "the epidemic nature of obesity" in society.[21] Millions of people are obese, yet maintain their health, while a small portion of the world's population are morbidly obese and experience life-threatening health concerns.[22] Research has revealed that the overweight and obese also experience very negative stereotyping, including negative perceptions about their character and abilities, such as the belief that they are unattractive, lazy, self-indulgent, unhappy, asexual, lacking in self-esteem, uncooperative, socially inept and intellectually slow.[23]

In a study on obesity stereotypes, overweight persons were rated as "less active, intelligent, attractive, hardworking, popular, successful and outgoing than normal weight persons".[24] According to another study, obesity is perceived as less desirable than a substance abuse problem.[25] These beliefs and stereotypes about obesity and overweight persons reflect society's perception that weight is mutable and controllable.[26] Traditionally, it is argued that weight is manageable and that fat people must thus be doing something to cause their excessive weight, such as overeating and being lazy and passive.[27] Precisely these perceived perceptions perpetuate unfair stereotypes and lay the foundation for unfair discrimination in the workplace.

In fact, weight appears to be far less controllable and manageable than what people think.[28] Genetic influences on individuals' body size and their basic metabolism suggest that weight is not as controllable as was originally thought.[29] Some individuals can overeat to their heart's

17 Blaine 2012:140; Centres for Disease Control and Prevention 2014; Chernov 2006:107.
18 Rudin & Pereles 2012:138.
19 Hodges 2013:1.
20 Taussig 1994:929; Browne *et al.* 2010:2.
21 Blaine 2012:140.
22 Blaine 2012:140.
23 Jones 2012:2002; Blaine 2012:141.
24 Blaine 2012:141; Browne *et al.* 2010:3.
25 Blaine 2012:141.
26 Jones 2012:2002.
27 Blaine 2012:141.
28 Taussig 1994:932.
29 Blaine 2012:142; Goedecke *et al.* 2006:70.

content without gaining an ounce; others fail to lose weight, irrespective of what they eat or do – these predispositions appear to be mainly genetic.[30] Furthermore, dieting and weight-loss methods are notoriously ineffective,[31] with 90 per cent of dieters regaining the weight lost within a year.[32] An individual's weight can be attributed to interplay between various environmental, physiological, socio-economic, psychological and cultural factors, and is not merely a matter of willpower.[33]

Therefore, it has been conceded that being overweight must be an aspect of natural human diversity.[34] Overweight bodies, some say, should simply be viewed as being different and diverse, and should be accepted and not discriminated against and stigmatised,[35] as stigmatisation has severe psychological implications.[36]

Another perception regarding overweight and obese persons, especially in recent years, is that they necessarily are in ill health.[37] Naturally, obese employees have certain cost implications for employers; however, no statistics could be found to indicate that these costs would be higher than, for example, those associated with HIV/AIDS or any other life-threatening condition in employment. Various parties hasten to emphasise the "health scare" of being overweight.[38] However, only a small percentage of obese or overweight people cost companies more than their thinner colleagues; in fact, bullied employees cost their employers more.[39] Such perceptions about the health of overweight employees simply add to "an already negative and deeply discrediting stereotype", implying that obesity causes illness and that the obese somehow deserve the health problems resulting from their condition for allowing themselves to be overweight.[40] These ill-conceived perceptions should be nipped in the bud.

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30 Forhan & Sharma 2011:1; Blaine 2012:142.

31 Jones 2012:2009.

32 Blaine 2012:142.

33 Forhan & Sharma 2011:1-2; Taussig 1994:929; Rhode 2010:42.

34 Jones 2012:2007, referring to Saguy & Riley 2005:883.

35 Jones 2012:2008.

36 Goedecke *et al.* 2006:66.

37 Blaine 2012:142.

38 An increase in type 2 diabetes, coronary heart disease, hypertension and cancer have been noted, as per Goedecke *et al*. (2006:69).

39 Bullying costs USA employers an estimated $34.8 billion annually, due to increased absenteeism, lower productivity and legal costs. See Tepper (2007:262) with reference to Tepper *et al.* (2006).

40 Further mechanisms fuelling negative stereotypes against the overweight are the TV world, the media and social networking sites. This stigmatisation of overweight individuals by the media and the "victim-blaming approach" they portray perpetuate the disadvantage of these persons as a group, both in society and in employment. The media also encourage the misconception that weight is completely controllable, and continuously display "success" stories of persons who have lost significant quantities of weight (at least in the short term). See Blaine 2012:142, 148; Heuer *et al.* 2011:976, 977; Forhan & Sharma 2011:1; Bento *et al.* 2012:3201.

3. 'Weightism' in employment

Individuals bring all of themselves to work, which makes the workplace a significant outlet for social discrimination.[41] Discrimination against the overweight and obese is prevalent in the employment realm, resulting in many such workers being underemployed or unemployed because of the discrimination and prejudice they suffer.[42] Overweight and obese individuals are subjected to as much prejudice in the workplace as they are in other areas of life,[43] and Rhode reports that multiple surveys indicate that 90 per cent of obese persons endure humiliating comments about their weight from friends, family and colleagues.[44] Recent studies indicate that discrimination against overweight individuals has increased by 66 per cent over the past decade.[45]

Since overweight persons are perceived to be undisciplined, lazy, sloppy and lacking in capability, their competence and skill are often under suspicion in the workplace.[46] In addition, employers prefer not to have overweight persons in their employ for reasons of:[47]

- image – believing that customers and clients are more likely to be repulsed by obese employees and will consequently not support the business;[48]
- health-care costs and future health conditions[49] – being reluctant to hire such persons due to the risk of higher medical-aid costs, absenteeism[50] and costs associated with special accommodation in the workplace, and
- physical limitations – being less inclined to employ overweight persons, as excess weight may physically restrict employees in performing certain duties associated with a job.

Overweight and obese employees receive considerably less remuneration than thin employees,[51] which illustrates severe discrimination. Surveys and studies have revealed that overweight employees are paid up to 12 per cent less than their thin colleagues, even when performing the same

41 Chernov 2006:108.
42 Taussig 1994:927; O'Brien *et al.* 2013:455.
43 Blaine 2012:145; Jones 2012:1996.
44 Rhode 2010:94.
45 Pomeranz & Puhl 2013:469.
46 The employer's weight-based prejudice is more often linked with implicit employment practices and, as such, is more subtle and difficult to detect. See Blaine 2012:145; Rhode 2010:94.
47 Chernov 2006:108-109.
48 Schallenkamp *et al.* 2012:257.
49 It was estimated, in 2012, that obesity and its associated health costs had resulted in losses of R15 billion and 132 million workdays per annum in South Africa, according to Tugenhaft & Hofman (2014:6).
50 Tugenhaft & Hofman 2014:6.
51 Jones 2012:2003; Schallenkamp *et al.* 2012:256.

duties.[52] This has been confirmed in cross-cultural studies among adults in the United States of America, the United Kingdom and Canada.[53]

Overweight people are also less likely to be promoted than thinner employees, despite having similar qualifications and experience.[54] One study indicates that weight alone explains 34.6 per cent of discrepancies in employers' hiring decisions.[55] Performance assessments are another forum used for employer discrimination against the overweight employee.[56]

As the population of overweight employees continues to increase, so do the discrimination and prejudice against them. In April and July 2012, the Equal Employment Opportunity Commission (hereinafter EEOC) of the United States of America reached settlements in its first two major cases on weight-related workplace discrimination, grabbing the media's attention.[57] This form of discrimination, it is argued, will lead to more litigation, and aggrieved employees will continue to seek legal recourse and 'scurry about in the dark' for want of legal clarity on their position.

4. A comparative overview of weightism in employment

4.1 The International Labour Organisation (ILO)

The ILO's Discrimination (Employment and Occupation) Convention (No. 111) is aimed specifically at eradicating discrimination in the workplace and advancing equal opportunity for, and treatment of workers.[58] South African employment law considers Convention 111 as fundamentally important, and has stipulated that its *Employment Equity Act*[59] be interpreted in terms thereof. In the ILO's General Survey on the Fundamental Conventions concerning Rights at Work in light of the ILO Declaration on Social Justice for a Fair Globalization, 2008,[60] certain new grounds of unfair discrimination beyond those listed in Convention 111 are recognised. One such ground is "physical characteristics", which can be interpreted to include weight.[61] South Africa became a signatory to the convention in 1997.

In the conference report "Global Report under the follow-up to the ILO Declaration on Fundamental Principles and Rights at Work", the ILO also noted the prevalence of weight-based discrimination in employment in

52 Blaine 2012:146.
53 Browne *et al.* 2010:3.
54 Blaine 2012:146.
55 Jones 2012:2004.
56 Bento *et al.* 2012:3197.
57 Wilkie 2012.
58 Bronstein 2009:126.
59 55/1998:section 3(d).
60 ILO 2012.
61 The convention does not define "physical characteristics".

several countries, including the United States of America, the European Union and Australia.[62] Thus, overweight and obesity discrimination continues to escalate on the international employment stage, and requires proper regulation by law.

4.2 The United States of America

The United States of America (hereinafter USA) has no federal law prohibiting weight-based discrimination.[63] Although aggrieved employees may link their weight-based discrimination claims with an already protected ground under Title VII, they often rather opt to pursue it as a disability or a perceived disability under the *Americans with Disabilities Act* of 1990 and the *Rehabilitation Act* of 1973. The only other way to bring a weight-based discrimination claim against an employer is in terms of the statutes of those jurisdictions that do explicitly prohibit weight discrimination,[64] in terms of which employees need only prove that their weight was the basis of the discrimination.[65]

The courts use the guidelines of the *Americans with Disabilities Act* to determine the validity of weight-based discrimination claims.[66] However, as the *Act* does not specifically recognise obesity as a disability,[67] the EEOC set out to assist employers, employees and the judiciary in interpreting the statute.[68] The EEOC did not expressly exclude being overweight from the definition of impairment, but declared that only severe (morbid) obesity would qualify as an impairment for the purposes of the *Act*.[69] However, if employees can prove that their obesity is caused by an underlying

62 ILO 2011.
63 Just as there is no federal law banning discrimination based on appearance. See Staman 2007:2.
64 Jones 2012:1998.
65 Schallenkamp *et al.* 2012:254.
66 Staman 2007:2.
67 The *Americans with Disabilities Act* (as amended) defines a disability and its subcategories as follows (own emphasis added): "(1) Disability. The term "disability" means, with respect to an individual (A) a physical or mental impairment that substantially limits one or more major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment (as described in paragraph (3)). … (3) Regarded as having such an impairment. For purposes of paragraph (1)(C): (A) An individual meets the requirement of "being regarded as having such an impairment" if the individual establishes that he or she has been subjected to an action prohibited under this chapter because of an actual or perceived physical or mental impairment, whether or not the impairment limits or is perceived to limit a major life activity. (B) Paragraph (1)(C) shall not apply to impairments that are transitory and minor. A transitory impairment is an impairment with an actual or expected duration of 6 months or less. See the *Americans with Disabilities Act* 1990 (as amended) (P.L. 110-325):section 1210(1)-1210(3); Hodges 2013:1.
68 Hodges 2013:1.
69 Staman 2007:3; Hodges 2013:1.

disorder or condition such as a heart or thyroid condition, the obesity may constitute a disability.[70]

The following jurisdictions have legislation that explicitly prohibits appearance-based discrimination:[71]

- The state of Michigan, which prohibits discrimination based on "height and weight";[72]
- Santa Cruz (California), which prohibits discrimination based on "height, weight or physical characteristic";[73]
- Urbana (Illinois),[74] the district of Columbia[75] and Howard County (Maryland),[76] all of which prohibit discrimination based on "personal appearance", including weight;
- San Francisco (California)[77] and Binghamton (New York),[78] which both prohibit discrimination based on "weight and height"; and
- Madison (Wisconsin), which prohibits discrimination based on "physical appearance", including weight.[79]

4.2.1 Case law and weightism in the USA

The matter of the so-called "Heavy Hooters Girls"[80] was a weight discrimination claim brought under Michigan state law prohibiting weight-based discrimination. The Hooters restaurant chain has never concealed the fact that they prefer to employ attractive waitresses, and their mission statement explicitly confirms this as part of their brand identity.[81] Casandra Smith (weighing 132 pounds),[82] one of two former Hooters waitresses, instituted a weight discrimination claim against the restaurant[83] after she was placed on "weight probation" and instructed

70 Hodges 2013:1.
71 Certain other jurisdictions in the USA have attempted to pass legislation to govern weight discrimination, without success. These are Massachusetts, Nevada, Oregon, Utah and Mississippi. However, although these bills failed, they are still worthy to note because they serve as evidence that legislatures have taken cognisance of the weight discrimination problem in employment, and have attempted to take steps to combat this phenomenon.
72 Elliot-Larsen *Civil Rights Act* 453/1976:section 37.2202.
73 Santa Cruz Municipal Code:section 9.83.020.
74 City of Urbana Municipal Code:section 12-37.
75 District of Columbia Code:section 2-1401.01.
76 County of Howard Code:section 12.200.
77 City of San Francisco Administrative Code:section 12A.1.
78 Code of the City of Binghamton, N.Y. (chapter 45 – Human Rights Law):section 45-2; Jones 2012:2017.
79 Madison Code of Ordinances:section 39.03(1).
80 Barkacs & Barkacs 2011:105.
81 Barkacs & Barkacs 2011:106.
82 Elan 2010:78.
83 Barkacs & Barkacs 2011:109.

to join a gym, despite having received good reviews and a promotion.[84] She was counselled and disciplined about how her uniform fits, and was instructed to lose weight and improve her looks to "fit better into the extra-small size uniform that she was required to wear".[85] After the counselling session, Smith was placed on a "30 day weight probation", which information the Hooters officials allegedly shared with the other employees at the restaurant.[86] The Hooters officials also informed her that they would understand if she felt that she could not lose the weight and wanted to resign.[87] The case was submitted for arbitration and the outcome is unclear.[88]

Several other aggrieved employees in the USA have attempted to allege weight-based discrimination, with varied degrees of success.[89] Most have attempted to litigate under the *Americans with Disabilities Act*, arguing that obesity constitutes a disability and a perceived disability in terms of the *Act*.[90] The first federal court decision to recognise weight-based discrimination as a disability was *Cook v Rhode Island, Department of Mental Health, Retardation, and Hospitals*,[91] where the applicant applied for a position as an institution attendant at a state-run facility for the mentally handicapped.[92] Although the applicant had more than five years' experience in a similar position as well as an immaculate performance record, she was not appointed, because she was "too fat for the job".[93] The applicant alleged weight-based discrimination, pursued the claim in court, and eventually won the case with obesity being recognised as a disability.[94]

In the case of *Gerdom v Continental Airlines Inc*.,[95] a stewardess was suspended and later dismissed, because she exceeded the airline's weight limit for stewardesses.[96] Stewardesses of the airline were weighed on a monthly basis, and if found to exceed the weight limit, were put on a weight-loss programme.[97] In terms of the programme, the "overweight"

84 Elan 2010:78; Barkacs & Barkacs 2011:109.
85 Elan 2010:78; Barkacs & Barkacs 2011:110.
86 Barkacs & Barkacs 2011:110.
87 Barkacs & Barkacs 2011:110.
88 Roth 2010.
89 Toledano 2013:703.
90 Toledano 2013:703.
91 10 F.3d 17 1st Cir. 1993.
92 *Cook v Rhode Island, Department of Mental Health, Retardation, and Hospitals*:21.
93 *Cook v Rhode Island, Department of Mental Health, Retardation, and Hospitals*:21.
94 It must be noted, however, that the applicant was morbidly obese and her employer "perceived" her obesity to be a disability. See *Cook v Rhode Island, Department of Mental Health, Retardation, and Hospitals*:28; Taussig 1994:927, 928, 950.
95 692 F.2d 602 9th Cir. 1981.
96 *Gerdom v Continental Airlines Inc*.:604.
97 *Gerdom v Continental Airlines Inc*.:604.

stewardess had to lose at least two pounds per week, failing which she faced suspension and dismissal.[98] The airline contended that the weight-loss programme was implemented to ensure that the airline's customers would be served by "thin, attractive women, whom executives referred to as 'Continental's girls'".[99] The court found in favour of the stewardess, as similarly situated men were not treated in the same way and the weight regulations applied to women only.[100]

In *McDuffy v Interstate Distributor Co*.,[101] a truck driver was suspended without remuneration because of his weight.[102] The court found in favour of the employee and awarded him $109,000 in damages as a result of the employer's assumption that his morbid obesity made him unfit to perform the duties of his job.[103]

In a similar matter, *Nedder v Rivier College*,[104] an obese professor was regarded as substantially limited in her ability to perform her employment duties because of "arcane stereotyping", and the court held that a triable issue existed on this ground.[105],[106]

4.3 Australia

Similar to the USA, Australia does not have a national law that prohibits weight-based discrimination, but did become a signatory to the ILO's Convention 111 in 1973. The state of Victoria is the only Australian state that boasts a prohibition on weight discrimination. The *Equal Opportunity Act* of 2010 prohibits discrimination based on "physical features", including weight.[107]

Weight-based discrimination in employment has been prevalent in Australian workplaces for many years. Over a decade ago (2000/2001), the Victorian Equal Opportunity and Human Rights Commission had registered 104 complaints based on "physical features", 29 of which pertained to weight;[108] since 1995, the Commission has registered over 600 "physical features" complaints.[109]

98 *Gerdom v Continental Airlines Inc*.:604.
99 *Gerdom v Continental Airlines Inc*.:604.
100 *Gerdom v Continental Airlines Inc*.:605.
101 Multnomah City. Cir. Ct. No. 0409-09172, 2005.
102 Alexander Hamilton Institute 2008.
103 Alexander Hamilton Institute 2008.
104 944 F. Supp. 111 D.N.H. 1996.
105 *Nedder v Rivier College*:113, 120.
106 For more examples, see *EEOC v Watkins* 463 F.3d 436 6th Cir. 2006*; Lamoria v Health Care & Retirement Corp* 584 N.W.2d 589 Mich. Ct. App. 1998*; PS2 LLC, D/B/A Boston's Gourmet Pizza v Childers* 910 N.E.2d 809 Ind. Ct. App. 2009.
107 *Equal Opportunity Act* 2010 (Victoria):section 4.
108 Waring 2011:199.
109 Warhurst *et al.* 2009:134.

4.3.1 Case law and weightism in Australia

The Victorian Equal Opportunity and Human Rights Commission listed the following case study in its 2012/2013 annual report, which was resolved through conciliation:[110]

> The complainant applied for a position as a driver with a transport company. He was offered the position, but when the respondent became aware that he weighed over 130 kg, the job offer was withdrawn as the company considered he was too large to be a driver. When notified of the complaint, the respondent agreed to attend a conciliation conference. The complaint was resolved, without admission of liability, with the respondent agreeing to pay the complainant $5,000 compensation.

In the case *of Hill v Canterbury Road Lodge Pty*,[111] a complainant alleged direct discrimination based on her physical features, namely her weight.[112] At that time, the complainant had weighed 120 kilograms.[113] She alleged that she had suffered loss of earnings, pain and suffering because of the discrimination.[114] Management staff of the business made remarks about her weight, and referred to the "need to get rid of her".[115] The tribunal stated that direct discrimination would have taken place, if the complainant were less favourably treated than others in the same or similar circumstances on the basis of her weight.[116] The tribunal accepted evidence that the employers had, on several occasions, stated that the complainant was "too fat" and that they wanted to dismiss her,[117] and consequently held that the employee's weight was a substantial reason for her termination and upheld her complaint.[118] The complainant was awarded $2,500 in damages.[119]

4.4 The European Union in general

The European Union (hereinafter EU) – of which many member countries, including the United Kingdom, are signatories to the ILO's Convention 111 – does not have legislation explicitly outlawing discrimination based on weight, nor is weight expressly included in the list of prohibited grounds in section 14 of the European Convention on Human Rights or article II-81(1) of the Charter of Fundamental Rights of the Constitution. Nevertheless, one significant case currently being heard by the European Court of

110 Victorian Equal Opportunity and Human Rights Commission 2013:45.
111 2004 VCAT 1365.
112 *Hill v Canterbury Road Lodge Pty*:3(1), 4(9).
113 *Hill v Canterbury Road Lodge Pty*:4(7).
114 *Hill v Canterbury Road Lodge Pty*:4(8).
115 *Hill v Canterbury Road Lodge Pty*:3(4).
116 *Hill v Canterbury Road Lodge Pty*:5(12).
117 *Hill v Canterbury Road Lodge Pty*:10(45).
118 Waring 2011:200.
119 Rhode 2010:136.

Justice may change the position of weight discrimination in workplaces across Europe.

4.4.1 Case law and weightism in the EU

In June 2014, the European Court of Justice considered the matter of *Kaltoft v The Municipality of Billund*,[120] leading the court to reflect upon whether or not obesity should be classified as a disability under the EU's Employment Equality Directive.[121] In this case, one Karsten Kaltoft, a Danish child-minder weighing about 160 kilograms, alleged that he had been discharged from his employment after 15 years for being overweight.[122] His employer, the Billund local authority, contended that Kaltoft had been dismissed because of the decline in the number of children, and because he was unable to perform some functions of his job, such as tying children's shoelaces, and was instead enlisting other employees' assistance for these tasks.[123] Kaltoft denied this and claimed that he was able to perform all the inherent requirements of job.

In July, the Advocate-General of the court stated that obesity may very well constitute a disability for the purposes of discrimination law, but added that, in his opinion, only severe obesity would create the applicable limitations to qualify as a disability, namely hampering the individual's ability to participate in professional life.[124] A BMI of 40 was suggested as a threshold.[125] The Advocate-General also issued a reminder that whether obesity is self-inflicted or not was irrelevant, and that it may be compared to an injury sustained while playing a dangerous sport (which may be considered as a disability, regardless of how it was caused).[126]

The court's ultimate decision will, of course, be binding throughout the EU, compelling all member states to treat obesity as a disability in employment, if the complaint is upheld.[127] Employers will be forced to consider reasonable accommodation of overweight employees, and ensure that these employees are not discriminated against or harassed because of their weight.[128] Even if the court rules that obesity does not constitute a disability in the employment realm, employers will still need to "think carefully" about how overweight employees are treated in the workplace, as these employees may also institute other claims, such as a constructive unfair dismissal.[129]

120 2014 EUECJ C-354/13 O.
121 This directive prohibits employment discrimination based on disability. See *Kaltoft v The Municipality of Billund*:3.
122 *Kaltoft v The Municipality of Billund*:2, 10.
123 *Kaltoft v The Municipality of Billund*:9.
124 *Kaltoft v The Municipality of Billund*:55, 56, 58, 60.
125 *Kaltoft v The Municipality of Billund*:56.
126 *Kaltoft v The Municipality of Billund*:58.
127 BBC News 2014; Bowcott 2014.
128 Yahoo Finance UK & Ireland 2014; Brenlund 2014.
129 Brenlund 2014.

This case has caused a media frenzy across EU countries, especially in the United Kingdom.[130]

4.5 The United Kingdom

As is the case with the EU in general, the United Kingdom (hereinafter UK) does not have a law explicitly governing weight discrimination in employment. Case law in this regard is also scarce. However, as UK courts are bound to uphold the judgements of the European Court of Justice, the latter's judgement in the matter discussed above may alter UK law indirectly.

The UK *Equality Act*[131] does not expressly recognise obesity as a disability, although this may happen in appropriate circumstances.[132] The act states the following in relation to disability:

> 6 Disability
>
> A person (P) has a disability if-
>
> P has a physical or mental impairment, and
>
> The impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities.

4.5.1 Case law and weightism in the UK

In *Walker v SITA Information Networking Computing Ltd*,[133] an obese employee weighing 137 kilograms alleged that his obesity amounted to a disability and should be covered by the *Disability Discrimination Act*.[134] In this case, the complainant experienced an array of medical issues relating to his obesity.[135] The Employment Appeal Tribunal launched an in-depth investigation into whether or not obesity would constitute an impairment for the purposes of the *Act*, and eventually concluded that it did, particularly as the complainant was substantially impaired.[136]

This case has opened the doors to the recognition of weight-based discrimination in employment in the UK, acknowledging that it may constitute a problem and should be afforded due consideration by employers. The outcome of this case will be strengthened by the European Court of Justice case mentioned above, if the latter succeeds.

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130 Killings 2014.
131 *Equality Act* 2010.
132 Yahoo Finance UK & Ireland 2014.
133 EAT/0097/12.
134 *Disability Discrimination Act* 1995; *Walker v SITA Information Networking Computing Ltd*:2(6).
135 *Walker v SITA Information Networking Computing Ltd*:1(2), 1(3).
136 *Walker v SITA Information Networking Computing Ltd*:5(14), 7(21), 7(22).

5. South Africa

South Africa has the highest overweight and obesity rates in sub-Saharan Africa,[137] and is among the three most overweight nations in the world after the USA and the UK.[138] Seven out of every ten women and four out of every ten men have significantly more body weight than what is deemed healthy.[139] Altogether 61 per cent of the country's population are overweight, obese or morbidly obese, and an estimated 2.8 million South Africans die every year as a result thereof.[140] With such shocking obesity rates, it goes without saying that overweight individuals are spread across South African society and workplaces, and are therefore also likely to experience some weight-related form of discrimination at work.

5.1 The South African legal position on weight discrimination

South Africa does not have a law explicitly prohibiting discrimination based on weight, and neither section 9(3) of the South African *Constitution* nor section 6(1) of the *Employment Equity Act* lists weight as a prohibited ground of discrimination. Obesity is also not expressly recognised as a disability in South African law. Disability is included in the list of prohibited grounds of both section 9(3) of the *Constitution* and section 6(1) of the *Employment Equity Act*, but there is no single agreed upon definition for it.[141] However, in South Africa, the Code of Good Practice: Key Aspects on the Employment of People with Disabilities provides the following generally accepted and endorsed definition:[142]

> The scope of protection for people with disabilities in employment focuses on the effect of a disability on the person in relation to the working environment, and not the diagnosis or the impairment.
>
> People are considered as persons with disabilities who satisfy all the criteria in the definition:
>
> (i) having a physical or mental impairment;
>
> (ii) which is long term or recurring; and
>
> (iii) which substantially limits their prospects of entry into, or advancement in employment.

137 Malan 2014.
138 SMASA 2014.
139 Malan 2014.
140 SMASA 2014.
141 Pretorius *et al.* 2001:7-26(1).
142 Code of Good Practice: Key Aspects on the Employment of People with Disabilities 2002:item 5; Pretorius *et al.* 2001:7-27. Own emphasis added.

Section 1 of the *Employment Equity Act* defines reasonable accommodation as follows: "Any modification or adjustment to a job or to a working environment that will enable a person from a designated group to have access to or participate in employment."[143] Designated groups are defined as "black people, women and people with disabilities".[144] Therefore, an individual with a disability will be entitled to reasonable accommodation in the workplace – a claim also supported by the Code of Good Practice mentioned above.[145]

5.1.1 The role of weight and obesity as a disability in the South African context

In order to consider whether obesity may constitute a disability in the South African context, one needs to evaluate what a disability is. The definition of a disability provided by the Code of Good Practice is further set out as follows:[146]

> 5.1.1 Impairment
>
> (i) An impairment may either be physical or mental or a combination of both.
>
> (ii) 'Physical' impairment means a partial or total loss of a bodily function or part of the body. It includes sensory impairments such as being deaf, hearing impaired, or visually impaired.
>
> (iii) 'Mental' impairment means a clinically recognized condition or unless that affects a person's thought processes, judgment or emotions.
>
> 5.1.2 Long-term or recurring
>
> (i) 'Long-term' means the impairment has lasted or is likely to persist for at least twelve months.
>
> (ii) 'Recurring impairment' is one that is likely to happen again and to be substantially limiting (see below). It includes a constant chronic condition, even if its effects on a person fluctuate.
>
> (iii) 'Progressive conditions' are those that are likely to develop or change or recur. People living with progressive conditions or illnesses are considered as people with disabilities once the impairment starts to be substantially limiting. Progressive

143 *Employment Equity Act* 55/1998:section 1.
144 *Employment Equity Act* 55/1998:section 1.
145 Code of Good Practice: Key Aspects on the Employment of People with Disabilities 2002:item 6.
146 Code of Good Practice: Key Aspects on the Employment of People with Disabilities 2002:item 5. Own emphasis added.

recurring conditions which have no overt symptoms or which do not substantially limit a person are not disabilities.

5.1.3 Substantially limiting

(i) An impairment is substantially limiting if, in its nature, duration or effects, it substantially limits the person's ability to perform the essential functions of the job for which they are being considered.

(ii) Some impairments are so easily controlled, corrected or lessened, that they have no limiting effects. For example, a person who wears spectacles or contact lenses does not have a disability unless even with spectacles or contact lenses the person's vision is substantially impaired.

(iii) An assessment to determine whether the effects of an impairment are substantially limiting, must consider if medical treatment or other devices would control or correct the impairment so that its adverse effects are prevented or removed.

(iv) For reasons of public policy certain conditions or impairments may not be considered disabilities. These include but are not limited to

(a) Sexual behaviour disorders that are against public policy;

(b) self-imposed body adornments such as tattoos and body piercing;

(c) compulsive gambling, tendency to steal or light fires;

(d) disorders that affect a person's mental or physical state if they are caused by current use of illegal drugs or alcohol, unless the affected person is participating in a recognized programme of treatment;

(e) normal deviations in height, weight and strength; and conventional physical and mental characteristics and common personality traits;

(f) an assessment may be done by a suitably qualified person if there is uncertainty as to whether an impairment may be substantially limiting.

Clearly, obesity is not expressly recognised as a disability according to this definition, and complainants of such discrimination have not yet expressly alleged it as such. This article will return to the potential of such recognition being afforded in the South African context.

5.2 Case law and weightism in South Africa

In *NUM & Nongalo, P v Libanon Gold Mine*,[147] an employee was dismissed for being overweight and unfit to work underground, as the employer contended that the ability to work underground was an inherent requirement of the job.[148] The court rejected the employee's claim that the employer had failed to make a sufficient effort to find him alternative employment or provide him with reasonable accommodation.[149] This case illustrates that an employer may discriminate against and even dismiss employees based on their weight, provided that it is directly linked to the inherent requirements of the job. It also illustrates that, as South African labour law currently stands, employers are not obligated to provide reasonable accommodation to overweight or obese employees, as obesity is not a recognised disability.

In *PSA obo October v Department of Community Safety, Western Cape*,[150] an employee's various illnesses were directly related to his obesity, which resulted from his own voluntary behaviour and not his working conditions.[151] The court held that the employer, having attempted to assist the applicant,[152] exercised its discretion fairly in dismissing the employee.[153] Clearly, then, a relevant consideration would be whether employees' obesity stems from their working conditions or their own voluntary conduct. An employer's attempts to reasonably accommodate the obese employee further illustrate an element of fairness on the employer's part, should a dispute arise.

Corobrik Natal (Pty) Ltd and Construction & Allied Workers Union[154] involved an employee who refused to comply with his employer's reasonable instruction and was consequently dismissed for insubordination and misconduct.[155] The employee ascribed his inability to comply with the instruction to health reasons, including his obesity.[156] The employer arranged for the employee to be examined by medical practitioners, who found that the employee was indeed fit to perform his duties and that exercise would be beneficial to him.[157] From this case, it appears that employees will not be entitled to weight-related reasonable accommodation

147 1993 1 ICJ 8.1.38.
148 *NUM & Nongalo, P v Libanon Gold Mine*:1.
149 The court held that the termination of the employee was not unfair and the application was dismissed; *NUM & Nongalo, P v Libanon Gold Mine*:1.
150 2010 19 PSCBC 3.5.1.
151 *PSA obo October v Department of Community Safety, Western Cape*:24.
152 The employer suggested that the employee join a gym, and offered to pay. See *PSA obo October v Department of Community Safety, Western Cape*:7.
153 *PSA obo October v Department of Community Safety, Western Cape*:25.
154 1991 12 ILJ 1140 ARB.
155 *Corobrik Natal (Pty) Ltd and Construction & Allied Workers Union*:1.
156 *Corobrik Natal (Pty) Ltd and Construction & Allied Workers Union*:3.
157 The arbitrator in this case held that the dismissal of the employee was fair. See *Corobrik Natal (Pty) Ltd and Construction & Allied Workers Union*:1, 3.

unless medical evidence confirms that their weight restricts their ability to perform their functions.

In *Velen and West 'n Bell Catering Equipment*,[158] the employer cited as one of the reasons for having dismissed the employee the latter's excessive weight, having fallen through a ceiling on a customer's premises, as well as that the employee had been accused, on several occasions, of being overweight, sleeping on the job and using other employees to assist him with his work.[159] This case suggests that an employer is entitled to dismiss employees for incapacity, if their weight prevents them from performing certain job functions. It also implies that it is acceptable for an employer to accuse employees of being overweight and covertly link their job performance to their weight in the absence of medical evidence to the contrary.

These and other judicial developments indicate that the position regarding weight-based discrimination in employment is ambiguous, which leads to varied decisions that fail to provide any legal certainty or clarity. Although South African labour law does not currently govern weight-based discrimination in employment, it does, however, offer possibilities in this regard. Weight discrimination could be challenged either as an infringement of the right to dignity and equality, or may be alleged as a possible disability.

6. Weight-based discrimination in the South African workplace: The possibility of protection

The primary consideration for regulating weight-based discrimination by law is that every person, irrespective of size and body weight, has the right to a life of dignity, respect[160] and equality. Such persons should be allowed to live beyond the parameters that society and employers view as healthy or acceptable, without facing stigma, prejudice and shame.[161]

6.1 Legal recourse for victims of weight-based discrimination in South Africa

6.1.1 An equality and dignity-based approach

As mentioned, weight discrimination may be alleged as a violation of an employee's right to equality and dignity. Employees will be able to bring such a claim under section 6(1) of the *Employment Equity Act*, as it is argued that appearance (and thus weight) discrimination amounts to both an unlisted analogous ground of unfair discrimination – which

158 2005 26 ILJ 2500 BCA.
159 *Velen and West 'n Bell Catering Equipment*:7.
160 Taussig 1994:962.
161 Jones 2012:2027.

the *Employment Equity Amendment Act* preserves by using the word "including" – as well as an arbitrary ground – a new introduction by the *Amendment Act*.

As an unlisted analogous ground, weight will have to satisfy the three-stage test of unfair discrimination currently endorsed by the judiciary

- Stage 1: Differentiation

  Differentiation occurs when an employer treats certain job applicants or employees differently from others, or uses an employment policy or practice to exclude certain groups.[162] In a case of weight-based prejudice, an employer would differentiate between employees or job applicants based on their weight either through their conduct or an employment policy or practice.

- Stage 2: Discrimination

  Discrimination may be established in two ways – either by linking the differentiation with an already prohibited ground of discrimination listed in section 6(1) of the *Employment Equity Act*, or by linking the differentiation with an unlisted ground.[163] However, in order to be considered an unlisted ground of discrimination, the differentiation must first satisfy the test established in *Harksen v Lane NO and Others*.[164] According to this test, it will have to be shown that the "ground is based on attributes and characteristics which have the potential to impair the fundamental human dignity of persons as human beings or to affect them in a comparably serious manner" as members of a vulnerable group.[165] As weight-based discrimination is not specifically listed as a prohibited ground in section 6(1) of the *Employment Equity Act*, it will have to be alleged as an unlisted ground. According to the *Harksen* test, therefore, it will have to be shown that an employer's weight-based prejudices have the potential to impair the victim's fundamental human dignity or affect the victim in a comparably serious manner.

  As judging and disadvantaging an employee based on weight strikes at the very foundation of the individual's dignity, offending both the employee's personal autonomy and psychological self-worth, it undoubtedly results in gross unfairness. It is argued that weight discrimination impairs the fundamental human dignity of those employees subjected to it, and affects them in a manner similar to persons discriminated against because of other defining attributes or characteristics, such as their race or gender.

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162 However, differentiation is not synonymous with discrimination. Differentiation is a neutral term and may not be negatively motivated. See Dupper *et al.* 2004:33.

163 Dupper *et al.* 2004:36.

164 1997 11 BCLR 1489 CC:1510F.

165 Dupper *et al.* 2004:36; Grogan 2013:97; McGregor & Germishuys 2014:94, 95.

- Stage 3: Unfairness

  The *Harksen* test dictates that unfairness is established by focusing on the impact of the discrimination on the complainant and others similarly situated.[166] In this regard, the courts will consider a number of factors, including the worth and value of victims' attributes, exploitation suffered by them, as well as their vulnerability and past patterns of disadvantage and prejudice.[167] As weight-based discrimination is not a listed ground of prohibited bias, unfairness will have to be proven and, in terms of the *Harksen* test, the impact of the discrimination on the complainants will, therefore, have to be assessed.

  In *Kadiaka v Amalgamated Beverage Industries*,[168] the Labour Court held that discrimination is unfair if it is "purposeless, or for a purpose of insufficient importance to outweigh the rights of the job-seeker or the employee, or if it was morally offensive".[169] Kruger argues that stereotyping of complainants (or prejudice suffered by them) has been used in determining the impact that the discrimination has had on them.[170] Stereotyping or prejudicing of employees based on their weight may, therefore, also be used to help determine the impact of the discrimination on the complainants. It is argued that weight discrimination has a severe impact on employees on the receiving end. It not only diminishes their self-worth and dignity, but also implies that weight outweighs merit, hard work and achievement.[171]

  To judge individuals because of their weight, and imply that they are less significant and worth less than persons who weigh less, perpetuates a pattern of disadvantage and prejudice in employment. It is argued, therefore, that discrimination based on weight is unfair.

At the same time, the new arbitrary grounds introduced by the amended section 6(1) of the *Employment Equity Act* also warrant investigation in the context of weight discrimination. The inclusion of the words "or on any other arbitrary ground" in the amended provision strengthens a possible claim by employees who allege unfair weight-based discrimination in the workplace, even though the meaning and scope of "arbitrary ground" is still uncertain. "Arbitrary" clearly amounts to a category of unspecified grounds, but is not likely to be interpreted in the same manner as the unlisted analogous grounds, as that would render the amendment pointless.[172] Therefore, as submitted by Du Toit and Potgieter, this addition was possibly meant to widen the net of discrimination grounds that may

166 *President of the Republic of South Africa and Another v Hugo* 1997 6 BCLR 708 CC:755E-F; Pretorius 2013:16.
167 *Harksen v Lane NO and Others* 1997 11 BCLR 1489 CC:1510F; Pretorius 2013:16.
168 1999 20 ILJ 373 LC.
169 Grogan 2005:91.
170 Kruger 2011:493.
171 Mahajan 2007:170; Zakrzewski 2005:432.
172 Du Toit & Potgieter 2014:24-25.

not necessarily be analogous to the listed grounds, but are nonetheless arbitrary "in the sense of being random, subjective, capricious or haphazard", and consequently infringe the right to equality.[173]

Grogan states that an employee alleging an arbitrary ground will still have to prove that the ground is worthy of protection,[174] and argues that "arbitrary" may be defined as discrimination that is based on some irrelevant criterion.[175] De Villiers, in turn, suggests that the origin of an arbitrary ground may be located in the employer's personal preferences resulting from certain characteristics that are not of primary relevance to the employment relationship.[176]

For want of legislative or judicial guidelines to define and interpret the concept, it is argued that when an employment policy or practice discriminates against employees based on their weight, and a certain weight limit is not an inherent requirement of the job, such discrimination is based on an irrelevant criterion or personal whim of the employer, and is consequently arbitrary. In addition, when an employer uses the employee's weight as the basis for decision-making in any employment policy or practice, and such conduct cannot be justified in terms of the *Employment Equity Act*, it is subjective, capricious, random and haphazard, and infringes the employee's right to equality and dignity.

6.1.2 An obesity and disability approach

Sufficient evidence supports the suggestion that obesity may be a disability, particularly in its more advanced stages.[177] However, in order to consider whether obesity may constitute a disability in a legal sense, it needs to be tested against the definition of a disability discussed earlier.[178]

- A physical or mental impairment

  Some regard obesity as a "physical impairment", as it amounts to a physiological condition that affects several bodily systems.[179] Obesity may indeed satisfy the "physical impairment" element, since excessive body weight may partially limit bodily functions. Excessive weight may prevent an employee from engaging in strenuous physical tasks, impair walking, and give rise to other restrictive health issues and illnesses. However, it is suggested that this may only be the case in advanced

173 Du Toit & Potgieter 2014:25.
174 Grogan 2014:107.
175 Grogan 2007:280.
176 De Villiers 2014:182.
177 Taussig 1994:957.
178 See the definition of a disability as set out in the Code of Good Practice under par. 5.1.
179 The WHO defines an "impairment" to be "any loss or abnormality of psychological, physical, or anatomical structure or function". Considering this, it is argued that excessive body weight may, in fact, be tantamount to a physical abnormality. See Pretorius *et al.* 2001:7-30(1); Taussig 1994:957.

stages of obesity. Obesity may also be argued to be a disability when it is caused by an underlying physiological condition, which in itself may limit a bodily function. In addition, obesity may be considered a "mental impairment" if it is caused by a compulsive eating or another mental disorder that results in a "voluntary" form of obesity.[180]

- Long-term or recurring

  Obesity may satisfy the "long-term" requirement if an employee has maintained a particular level of obesity or body weight for a period of 12 months or more. Likewise, an employee may satisfy the "recurring" element if an individual is obese, loses sufficient weight,[181] but is likely to regain this weight in the near future, and the obesity is likely to be substantially restrictive.

  Obesity may also be a progressive condition, as weight fluctuates and an employee may gain more weight over time, leading to a higher BMI. This, however, is only possible once the condition becomes substantially restrictive.

- Substantially limits entry into, or advancement in employment

  According to the definition, an impairment will be substantially limiting if it limits an employee or job applicant's ability to perform the inherent requirements of a job. Thus, in order for obesity to be substantially limiting, it must inhibit the individual's ability to perform the inherent functions of the job, which will of course vary from one job to another.

  The definition also states that an assessment to determine whether a condition will be substantially limiting must consider whether medical treatment or other devices could control or correct the impairment, in order to rectify or remove the adverse effects. When considering whether obesity can be medically controlled or rectified, weight reduction surgery may be an option, as would be weight reduction programmes involving diets and exercise. It is argued, however, that employees should not have to undergo non-essential surgical procedures to conform to employer stereotypes, especially since the surgery itself may have adverse consequences. It has also been noted above that an individual's weight is mainly determined by genetics[182] and is not necessarily voluntary. Up to 25 per cent of variation in body fat can be attributed to genetics, whereas culture and lifestyle account for the rest.[183]

  The definition provides that, for reasons of public policy, certain conditions or impairments cannot constitute disabilities. These include normal deviations in weight. However, no indication is given of what would constitute a "normal deviation". For this reason, it is suggested

180 Taussig 1994:958.
181 If the individual's BMI decreases to below 30.
182 Goedecke *et al.* 2006:70.
183 Goedecke *et al.* 2006:70.

that individuals who are merely overweight will not qualify as having a disability. Obesity, on the other hand, can be viewed as being beyond a normal deviation in weight, and can thus possibly amount to a disability.

In summary, therefore, obesity may constitute a disability in terms of South African law, although only if it meets certain requirements. Obesity will only be a disability if it stems from a psychological disorder or partially limits a bodily function. It may only constitute a disability if it is substantially limiting. Furthermore, obesity will only be considered a disability if it constitutes an abnormal deviation in weight, thereby excluding all other overweight employees. Overweight or obese individuals who do not meet these requirements are thus left unprotected, even though they may face equally severe employer prejudice because of their weight.

6.1.3 Reasonable accommodation, and the employer's position

According to the Code of Good Practice: Key Aspects on the Employment of People with Disabilities, employers should make reasonable accommodation for the needs of people with disabilities, with the aim of reducing the impact of the impairment on the individual's capacity to perform the inherent requirements of the job.[184] The most important consideration is that the person with a disability must ultimately be able to perform the inherent requirements of the employment position, with or without reasonable accommodation.[185] Consequently, if the individual is unable to discharge the inherent requirements of the employment position in question, even with reasonable accommodation, he or she should not be employed.[186]

In applying reasonable accommodation, there appears to be three primary considerations:[187]

- Whether the employee or job applicant is suitably qualified, which entails that the individual must have the required qualifications, experience, prior learning and/or the ability to become able to perform the particular job (within a reasonable time).

184 Code of Good Practice: Key Aspects on the Employment of People with Disabilities:item 6.

185 Pretorius *et al.* 2001:7-34.

186 Thus, for example, if the employment position is that of a fireman or a personal trainer that requires fitness and agility, an obese individual would most likely not be able to discharge the inherent requirements of the job. If, however, the employment position is for an administrative position in an office building, reasonable accommodation in the form of an elevator service or a parking space closer to the building may assist an obese person to discharge the inherent requirements of the job.

187 Pretorius *et al.* 2001:7-34–7-44; Code of Good Practice: Key Aspects on the Employment of People with Disabilities.

- Choosing the appropriate reasonable accommodation, which may vary from making adaptations to facilities and equipment, reorganising the work environment or restructuring jobs, to adjusting leave and working hours and providing specialised support, training and supervision in the workplace.
- Whether the reasonable accommodation will impose a disproportionate burden on the employer, which needs to be assessed against the employer's financial resources and the structure of the working environment.

Employees who succeed in establishing their obesity as a disability will thus be entitled to tailored reasonable accommodation, provided that they have the necessary qualifications, the employer can make available appropriate reasonable accommodation to the employee, and it does not impose a disproportionate burden on the employer. Reasonable accommodation for an obese employee could include allocating a parking bay closer to the workplace, restructuring the job to exclude extensive or strenuous physical activity, transferring the person to a more appropriate job, or possibly financing a gym membership or other training and weight-loss programme.

Authors agree that employers should, in future, be compelled to make reasonable accommodation for overweight and obese employees, and should be able to provide legitimate and non-discriminatory reasons for the employment decisions made in relation to such employees.[188]

The employer, in turn, may raise three defences to a claim of weight discrimination, namely that the action taken was not discriminatory or that the discriminatory action was not unfair; that the action was taken in terms of affirmative action measures (it is, however, suggested that this defence will generally not apply in cases of weight-based discrimination), or that the discriminatory action was justified by the inherent requirements of the job in question.[189]

7. Conclusion

Certain individuals suffer severe discrimination and prejudice in the workplace because of their weight. The notion that they are responsible for their own plight and the shaming of such persons contribute to this unfair stigmatisation and prejudice. The influence of the media and the weight-loss industry further aggravates the misconception that weight is always voluntary and controllable.

Those employees who fall within a jurisdiction where weight-based discrimination is formally outlawed have the benefit of having their claims decided based on the actual discrimination suffered. The prevalence and

188 Rudin & Pereles 2012:140.
189 *Employment Equity Act*:sections 6(2)(a), 6(2)(b).

nature of these claims in the comparative jurisdictions serve to indicate the prevalence of the problem as well as the need for legal intervention. It further illustrates that the statutory regulation of weight-based discrimination has not opened the floodgates of frivolous litigation nor injected absurdities into these legal systems. The employees in these jurisdictions have merely been afforded an opportunity to have their cases decided based on their actual claims, namely having suffered discrimination due to their weight. The case law discussed also illustrates that judicial forums are indeed willing to rule in favour of employees with legitimate claims and who have been subjected to unfair discrimination.

In South Africa, employees who suffer weight-based discrimination may not rely directly on a prohibited ground of unfair discrimination in terms of section 6(1) of the *Employment Equity Act*, as weight is not specifically listed. However, they may bring an unfair discrimination claim based on an unlisted analogous ground or an "arbitrary ground", although no such cases have arisen since the amended *Employment Equity Act* took effect. Their obesity may also be alleged as a disability if it is severe enough to constitute an abnormal deviation in weight.

As the position will remain unclear in the absence of legislative reform and judicial precedent, however, it is suggested that legislative reform be implemented to address the problem. An amendment to section 6(1) of the *Employment Equity Act* to expressly include weight as a protected ground would help address the current lacuna in South African labour law, and grant protection to these vulnerable employees who are discriminated against and suffer employment detriment because of their weight. This is regarded necessary despite the new possibility of claiming under the "arbitrary ground" provision, as the fairly heavy onus of proof associated with an "arbitrary ground" claim may simply load an additional burden onto an already vulnerable category of employees in South Africa. In addition, an expansion of the ambit of disability in terms of section 6(1) is also suggested in order to include (morbidly) obese employees as well. Finally, employers are encouraged to adopt employment policies to address the issue until such time as legislative intervention takes place.

> ... [E]ach of us can practice rights ourselves, treating each other without discrimination, respecting each other's dignity and rights.[190]

190 C Bellamy, American educator. http://www.brainyquote.com/ search_results.html?q=bellamy (accessed on 27 October 2014).

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