



ILERA AFRICA

10TH REGIONAL CONGRESS

3 – 4 APRIL 2024

The detail is in the *Demons:*

Unravelling the interplay between inherent
requirements of the job, reasonable
accommodation and incapacity dismissals

Prof Rochelle Le Roux

Focus of presentation:

- *Damons v City of Cape Town* (2022) 43 ILJ 1549 (CC)
- ‘Interplay’ between Chapter II and III of the EEA.

Damons: the facts

- Operational firefighter negligently injured while on duty
- Accommodated in non-operational position
- Challenged policy on promotion of firefighters **ito Chapter II of EEA**
- Damons would never be able to meet fitness requirement for promotion
- Policy did not provide for promotion to a position of non-operational senior firefighter

Legislative backdrop

The EEA

Chapter II – prohibition of unfair discrimination

- Defences:
 1. affirmative action measures consistent with the purpose of the EEA
 2. inherent requirement of a job

Chapter III – affirmative action

- Requires designated employers to implement affirmative action measures for people from designated groups (ie black people, women and **people with disabilities**)
- Disability Code - the needs of persons with disabilities
- No right to affirmative action

Legislative backdrop

The EEA

Chapter II – prohibition of unfair discrimination

- Disputes:
Conciliation/Adjudication – s 10

Chapter III – affirmative action

- Disputes - enforcement procedure in Chapter V

Legislative backdrop

The LRA

- Three good reasons for dismissal: misconduct, incapacity and the operational requirements of the employer
- Procedural fairness key value
- Dismissal Code - guidance re misconduct and incapacity dismissals
 - Incapacity dismissal for ill health injury – reasonable accommodation by employer
- Section 187(1)(f) - dismissal automatically unfair dismissal if employer unfairly discriminated against the employee based on listed/ arbitrary ground such as disability
- Two defences – inherent requirement and age
- Disability and incapacity not the same

Damons: the two judgments

Minority:

- City cannot rely on inherent requirement defence
- Reasonable accommodation imposes a positive duty on City to accommodate

Majority:

- Employee cannot meet the inherent requirements of the job and inherent requirement defence is absolute

Final thoughts about *Damons*

Does the source of obligation to [reasonably] accommodate matter?

- Only designated employers have duty of reasonable accommodation ito Chapter III of the EEA
- All employers have this duty in case of potential incapacity dismissal
- Employer hardship only becomes relevant to designated employers in the case of reasonable accommodation of people with disabilities via the Disability Code
- In LRA/Dismissal Code, employer hardship probably implied and expected of all employers
- Determines the dispute resolution pathway:
 - reasonable accommodation envisaged by Chapter III of the EEA - compliance route
 - incapacity dismissal in terms of the LRA - arbitration route



THANK YOU!