

A BILL

entitled

HUMAN RIGHTS (UNREASONABLE HARDSHIP) AMENDMENT ACT 2011

WHEREAS it is expedient to amend the Human Rights Act 1981, to give greater protection to disabled persons against discrimination in the workplace;

Be it enacted by The Queen's Most Excellent Majesty, by and with the advice and consent of the Senate and the House of Assembly of Bermuda, and by the authority of the same, as follows:

Citation

1 This Act, which amends the Human Rights Act 1981 ("the principal Act") may be cited as the Human Rights (Unreasonable Hardship) Amendment Act 2011.

Amends section 6

2 In section 6 of the principal Act (employers not to discriminate), subsections (9C) and (9D) are deleted and replaced with the following—

"(9C) Notwithstanding subsections (9A) and (9B), a disabled person shall not be considered disqualified for an employment by reason of his disability if it is possible for the employer, or prospective employer, to modify the circumstances of the employment so as to eliminate the effects of the disabled person's disability in relation to the employment, without causing unreasonable hardship to the employer, or prospective employer.

(9D) For the purpose of subsection (9C), "unreasonable hardship" shall be construed in accordance with Schedule 1.

(9E) The Minister may give general directions of a policy nature to the Human Rights Commission, relating to the application and interpretation of Schedule 1, and the Human Rights Commission shall give effect to any such directions."

Inserts Schedule 1

3 Schedule 1 of this Act is inserted as Schedule 1 to the principal Act.

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Commencement

4 This Act shall come into operation on such day as the Minister may appoint by Notice published in the Gazette.

SCHEDULE 1

(section 6(9D) )

UNREASONABLE HARDSHIP

Meaning of “unreasonable hardship”

1 For the purpose of section 6(9C) and in this Schedule, “unreasonable hardship” arises in circumstances where modification of a disabled person’s employment or prospective employment to eliminate or reduce the effects of the disabled person’s disability would be unreasonably—

- (a) costly;
- (b) disruptive; or
- (c) extensive,

or where making such a modification would unreasonably alter the nature or operation of the employer’s business.

Meaning of “modification”

2 In this Schedule, “modification” means a change to any aspect of a person’s employment (including the work itself, the place of work, apparatus or facilities) so as to enable the disabled person to carry out the employment.

Determining the existence of unreasonable hardship

3 For the avoidance of doubt the determination as to whether a modification would impose unreasonable hardship, on an employer, the modification shall be considered on a case-by-case basis, taking the following factors into account—

- (a) factor 1 is the composition of the workplace; that is the overall size of the employer’s workplace with respect to the—
  - (i) number of employees;
  - (ii) structure of the workforce;
  - (iii) number of specialized jobs performed by employees;
  - (iv) number and type of facilities;
  - (v) employer’s turnover;
- (b) factor 2 is the financial implications, concerning the employer’s workplace, with respect to—
  - (i) the nature and cost of the modification, and the cost of the modification shall be considered unreasonable where the cost is so high that it affects the survival of the employer’s business. Such factors shall be quantifiable and may include cost factors such as—
    - (A) capital and operating costs; and

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- (B) subject to subparagraph (a), the costs of restructuring (what may be an unreasonable cost for a small employer may not be unreasonable for a larger employer and if the modification to be made also requires the employer to fundamentally change the type of business that it does, this may also be unreasonable);
- (ii) the type of operation of the employer, including the—
  - (A) structure and functions of the workforce;
  - (B) geographical distance between the main place of employment and an alternative regional place of employment; and
  - (C) administrative or fiscal relationship of the facility involved in making the modification to employment;
- (iii) the availability of alternative funding (such as grants of monetary gifts received from charitable organizations) that can be applied to the modification;
- (c) factor 3 is the impact on safety, concerning the employer's workplace, with respect to the impact on the safety of—
  - (i) the disabled employee; and
  - (ii) the general public.

### Determining the existence of unreasonable hardship- allowances

4 (1) An employer does not, however, have to eliminate or relocate an essential function (such as a fundamental duty of the employee's job). This allowance is granted because an employee with a disability, who is unable to perform essential functions of a job (with or without reasonable adjustments), is not a qualified employee. Further, an employer is not required to lower production standards, whether qualitative or quantitative, that are applied uniformly to employees with or without disabilities. An employer may, however, have to provide reasonable adjustments to enable an employee with a disability to meet the production standards.

(2) For the avoidance of doubt it shall be unreasonable for the providers of public services that affect public safety, to make an adjustment to the provision of public services when—

- (a) to do so would cause their operational staffing levels to fall below 90% operational efficiency; or
- (b) the provider of public services is experiencing an existing staffing shortage below 90% operational efficiency.

(3) For the purpose of subparagraph (2), the "providers of public services that affect public safety" means the—

- (a) Bermuda Fire and Rescue Service;
- (b) Bermuda Police Service; and

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(c) Department of Corrections.

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### EXPLANATORY MEMORANDUM

This Bill seeks to give greater protection to disabled persons, against discrimination, in the workplace.

Clause 1 gives the Bill its citation.

Clause 2 amends section 6, of the principal Act, by deleting and replacing subsections (9C), (9D), and (9E) to indicate, respectively, that: (1) a disabled person shall not be considered disqualified for employment, by reason of his disability, if it is possible for an employer or prospective employer to modify the circumstances of employment so as to eliminate the effects of the disabled person's disability- without causing unreasonable hardship to the employer; (2) Schedule 1 shall be used for construing the meaning and existence of "unreasonable hardship" in the workplace; and (3) the Minister can give guidance, by way of general directions of a policy nature, to the Human Rights Commission, regarding the application and interpretation of Schedule 1.

Clause 3 inserts Schedule 1, as Schedule 1, in order to indicate the meaning of unreasonable hardship and the factors (the composition of the workplace, financial implications concerning the employer's workplace, and the impact on safety concerning the employer's workplace) to be taken into account in order to determine the existence of unreasonable hardship in the workplace.

Clause 4 adds the commencement provision to this Bill.