DISCRIMINATION IN THE EMPLOYMENT CONTEXT ON THE GROUND OF RELIGION: AN EXAMINATION OF THE POSITION IN SOUTH AFRICAN AND EUROPEAN UNION LAW

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DECLARATION

I, Naima Ahmed, hereby declare that the work contain in this mini-thesis is my own work and that all the sources I have quoted have been indicated and acknowledged by means of complete references. It is being submitted for the LL.M Degree (Labour Law) in the Faculty of Law in the University of the Western Cape.

I further confirm that it has not been submitted for any other degree or any other university or institution of higher learning.

Naima Ahmed **December 2008**

Signed……..

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Key words

Employment Relationship

Employment Equity

Religion

Discrimination

Religious Discrimination

Employers Defence

Inherent Requirement of a Job

International Instrument

EU

EU Directive

ABSTRACT

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Master's mini-thesis, Faculty of Law, University of the Western Cape.

In this mini-thesis, I try to explore that the right to equality has brought with it the right not to discriminate against on various prohibited grounds, including religion. This mini-thesis examines the right not to be discriminated against on the ground of religion within the labour relationship context. The enquiry takes account of international instruments that impact upon the issue, but more particularly looks at the position in South Africa [where the Constitution and the several Acts relating to labour law are of special importance] and undertakes a comparative enquiry of the relevant provisions in the EU. The analysis highlights the many problems arising out of the need to have definitions for the vital terms and concepts relevant to the discussion, in particular, meaning of 'religion', 'discrimination', and 'inherent requirements of the job'.

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Chapter 1 Introduction

1.1 Background

In labour law equality is a broad idea of justice that can promote employment relationships equitably, taking into account a person or a group of person's personal position or circumstances. The employment relationship is an important legal notion widely used in many countries around the world to refer to the relationship between a person (known as the 'employee') who works for another person (known as the 'employer') under supervision and conditions in return for a remuneration [1]. The employer and employee (or worker) have reciprocal rights, duties and obligations created by the employment relationship following a contract of employment and the relevant employment legislation. An employment relationship based on a contract of employment is a cardinal component and characteristics of labour law[2]. The employee has a right to

[1] *SABC V McKenzie (1999) 20 ILJ 585 (LAC) at 588D* '...*a* person who is employed by or working for an employer and who receives or is entitled to receive remuneration...who works for another in terms of the common law contract of service'.

[2] 'Labour law is a body of legal rules which regulates relationships between employers and employees....' Basson et al Essential Labour Law (2000) 2ed vol 1 p-12

equality, which comes together with the right not to be discriminate unfairly on any prohibited ground such as religion.

1.2 Problem Area

The problem of discrimination based on religion can arise in many forms in the employment context. For example, the use of cannabis by Rastafarians can be regarded as a religious practice, and be treated differently from the general prohibition on the use of cannabis [3]. What actions taken by the employer constitute religious discrimination? Can a refusal to work on a religious holiday that results in dismissal be seen as unfair discrimination based on religion, or claimed as misconduct or a consequence of an operational requirement of a job [4]? What are the employer's defences to such a charge? An employer, who tries to establish that the alleged discrimination is not based on religion, must show that his action is fair irrespective of religious considerations. In this mini-thesis the researcher is going to examine the employment relationship between the employer and employee on the basis of the Employment Equity Act (EEA)[5] and the Constitutional approach to the right to equality and the anti-discrimination provision.

[3] *Prince v President of the Law Society of the Cape of Good Hope & others.* (2002) (3) BCLR 231 (CC).

[4] *FAWU & Others v Rainbow Chicken Farms* (2000) 1 BLLR 70 (LC).

[5] Employment Equity Act 55 of 1998 (EEA) .

1.3 Constitutional Approach

Besides the contractual rights that arise from the employment contract, South African employees also have certain fundamental rights[6], one of which is that of 'equality'. To promote equality is an international obligation[7] that imposes a positive duty on the state. The Constitution of the Republic of South Africa, Act 108 of 1996 (The Constitution) contains a Bill of Rights that, by including employment equity[8], is a way to fulfill the international obligation to promote equality. Section 7(1) of the Bill of Rights prioritises 'human dignity, equality and freedom'; while section 9(1) declares, 'everyone is equal before the law and has the right to equal protection and benefit of the law'. Section 9(2) states that 'equality includes the full and equal enjoyment of all rights and freedoms' and also provides one of the constitutional bases for the enactment of EEA.

Sections 9(3) and 9(4) of the Constitution contain the anti-discrimination clauses: the first sub-section includes religion as a prohibited ground and the latter sub-section provides another constitutional basis for the enactment of EEA in that it prescribes that 'national legislation must be enacted to prevent or prohibit unfair discrimination'. Thus the EEA has two main aspects: to promote equality by affirmative action measures and to prohibit

[6] Fundamental rights originate from, and are protected by, the Constitution (The Constitution of the Republic of South Africa 1996).

[7] South African Constitution complies with International Instruments that contains provisions for human dignity and equality (discuss next para).

[8] 'Everyone has the right to fair labour practices'-Section 23 of the Constitution

unfair discrimination. The focus of this thesis will be on the anti-discrimination provisions on the basis of religion of the EEA.

Various grounds for unfair discrimination by the state or an individual are listed in section 9(3) of the Constitution. This is not an exhaustive list, but does specifically include religion as a ground. Furthermore, section 15(1) grants everyone the right to freedom of religion. An individual, therefore, has the right to practise his/her religion, and cannot be unfairly discriminated against on that basis.

Section 39(1) of the Constitution provides that when interpreting the Bill of Rights, a court, tribunal or forum must consider international law (sub-section (1)(b)); and may consider foreign law (sub-section (1)(c)). International instruments are the guidelines for the national constitution to promote equality, prohibit unfair discrimination and take positive measure to ensure that right. A national constitution should include provisions to give effect to international obligations.

1.4 International Obligations

There are several international instruments that contain the provision for freedom of religion, that indicate democratic values and respect for human dignity and equality. Article 18 of the Universal Declaration of Human Rights of 1948 states:

'Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have a religion or whatever belief of his [her] choice.'

The International Covenant on Civil and Political Rights (ICCPR) of 1966 (entry into force 23 March 1976) in Article 18(1) also states:

'Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching'.

This protection extends to those professing belief in no religion, which includes humanist, atheist, rationalist and agnoistic beliefs.

The South African Constitution complies with International law by granting the right of religious freedom. However, there is no definition of religious freedom in the Constitution. International law, for example ILO Convention 111, Article 18(1) of the ICCPR, gives some content to the notion of religious freedom that will be discussed later.

1.5 The European Union

In the year 1992 the Maastricht Treaty[9] changed the name of the 'European Community', introduced a new form of co-operation between the Member States of European Country, and created a new structure, which is political and also economical, known as the 'European Union' (EU).

In the EU, equality on the grounds of race, ethnic origin, sexual orientation, religion, belief, age and disability was recognised in the Amsterdam Treaty[10]. Article 13 was included later as a legal basis for legislation to prohibit discrimination on these grounds. In 2000 the EU adopted two further non-discrimination laws, in accordance with the provision of Article 13 of the Amsterdam Treaty, known as Directives. The Directives set out general objectives that the Member States are obliged to achieve.

One of the anti-discrimination EC Directives, 2000/78, prohibits direct or indirect discrimination with regard to employment and occupation on the grounds of religion or belief, disability, age or sexual orientation. In 1998 the EU decided to draft a Charter of Fundamental Rights, which will reflect the Union's human rights policy, and raise awareness thereof among the citizens of Europe. Article 10 of The Charter of

[9] Signed in Maastricht in 7 November 1992 and entered into force 1 November 1993.

[10] The Amsterdam Treaty 1997, signed on 2 October 1997 and entered into force 1 May 1999.

Fundamental Rights of the European Union (The Charter)[11] provides for freedom of thought, conscience and religion. Article 20 contains a non-exhaustive list of the grounds of discrimination, which include religion or belief.

To consolidate the former Treaty on European Union, in 2003 the Treaty of Nice[12] entered into force. It tries to reform the EU so that it can work efficiently with new 27 Member States.

On 13 December 2007 the Treaty of Lisbon was signed (not ratified yet) to amongst other goals make the EU democratic. Its main objects were to make the EU closer, more developed, efficient, able to tackle challenges posed by today's global change, and to meet European citizens' expectation for a better life.

1.6 Value of Comparison with other legal system

As mentioned above, when interpreting the Bill of Rights in the South African Constitution, foreign law may be considered and in that context it is relevant to compare EU law. South African provisions are directed primarily at the individual level and the relationship between employer and employee; the EU provisions are similar in nature and, therefore, relatively easy to examine in a comparative enquiry. The EU develops equality law by realising the approach of equal treatment, and establishes equality law on

[11] The Charter of Fundamental Rights of the European Union 2000.

[12] Treaty of Nice amending the Treaty of European Community, signed 26 February 2001 and entered into force 1 February 2003.

different particular grounds, for example, sex equality. Directives are adopted on different grounds to give effect to these equality laws. Whilst the EU has a general provision that protects discrimination on the ground of religion (Directive 2000/78 refers to religion), there is no specific Directive (for example, the Race Directive 2000/43) that deals specifically with this form of discrimination. The EU has, however, developed its approach to discrimination on other grounds, for example, sex, age in the 2000/78 Directive and that will provide the EU with guidelines in its determination of discrimination on the basis of religion, and may form a valuable comparative approach for South African courts in giving content and meaning to religious discrimination in the workplace.

1.7 Analysis of Comparisons

Comparison with different labour law systems can be valuable and the foreign law can be adopted if that law or provision is suitable to our national labour relations system. Apart from the fact that section 39(1) (c) of the Constitution provides for the possibility of receiving foreign law, a consideration of foreign law could provide a range of solutions, or ways of dealing with, a particular problem. By examining the foreign solutions one can acquire a better insight into the nature of a problem, as well as the most appropriate way to deal with it. It must always be borne in mind, however, that the adoption of a foreign law solution into one's own legal system must be consistent with the latter; in order to be so, the foreign legislation may require more adaptation.

The preamble of the EEA states that one of the purposes is to give effect to South Africa's obligation as a member states of the ILO and section 3(d) requires the Act to be interpreted 'in compliance with the international law obligations of the Republic, in particular those contained in the ILO Convention (No 111) concerning Discrimination in Respect of Employment and Occupation'.

In the employment context the EU prohibits discrimination by imposing positive duties on the state to promote equality. As Fredman points out: 'such duties go beyond compensating identified victims and are aimed at restructuring institutions'[13]. Three important Directives were adopted in EU Law for the improvement of economic and psychological conditions and of the social and educational infrastructure. One of these is Directive 76/207/EEC[14] on equal treatment with regard to access to employment, vocational training, promotion and working conditions, aimed at eliminating all discrimination between men and women, both direct and indirect, in the world of work and providing an opportunity for positive measures, which has been amended by Directive 2002/73[15]. These Directives (76/207/EEC, 2002/73) of the EU are not directly related to religious discrimination but are based on human rights law providing equal treatment and positive measures in the workplace.

Directive 2000/78 deals with the prohibition of discrimination based on religion or belief.

[13] In C. Barnard EC Employment Law 3rd Ed (Oxford University Press) (2006) at 431.

[14] Council Directive 76/207/EEC (OJ [1976] L39/40).

[15] OJ [2002] L269/15.

1.8 Outcome of the Study

We have seen that both sections 15(1) and 9(3) of the South African Constitution, as well as EC Directive 2000/78, protect persons against discrimination on religious grounds. Religious freedom indicates that each person, or employee, has this right to exercise and practise their religion, whatever their religion or religious belief. The protection against religious discrimination may be problematic when the definition of 'religion' itself is uncertain.

The outcome of this enquiry will be to determine the content and extent of religious freedom, and the ways in which actions by an employer could constitute unfair discrimination in respect thereof. Cases that highlight the problems will be examined. There will first be a discussion of the employment relationship context within which discrimination on several grounds, including religion can occur. Chapter 2 examines the South African position, and then the EU position is looked at in Chapter 3. Thereafter in Chapter 4 specific attention will be paid to analysing what constitutes discrimination on the ground of religion. Chapter 5 will conclude the mini-thesis by providing the findings from the research.

Chapter 2 Employment Relationship in South African Law

In this chapter the researcher will discuss the history of South African labour law, specific reference will be made the labour rights included in the Constitutional provision that give effect to the obligations contained in international instruments. The definition of an employee, the rights of the employee and the defence against the violation of that right by the employer will be analysed.

2.1 Historical Background

Nearly 150 years ago, prior to the discovery of gold and diamonds, the employment relationship in South Africa was regarded as a 'master and servant' relationship. When the mining industry developed, white workers were more secure than black workers[16]. South Africa has a long history of apartheid based on inequality and discrimination and deprived the majorities fundamental dignity. In 1992 it was found by the International Labour Organisation (ILO) that South Africa had the highest levels of inequality of any country in the world[17]. This inequality and imbalances will not be effectively normalized by measures taken by the labour market alone. The existing labour relations and

[16] for more detail see also Urmila Bhoola, -National Labour Law Profile: South Africa, (Completed March 2002) http:// www.ilo.org/public/english/dialogue/ifpdial/info/national/sa.htm (accessed on March 2008).

[17] O C Dupper Essential Employment Discrimination Law (2004)1ed at p 1

employment equity legislations are therefore part of a much wider vision of reconstruction and development[18]. The Constitution of South Africa, Act 108 of 1996 (the Constitution) was adopted on May 1996 (and enforced 1997) is the supreme law of theRepublic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled[19].

Equality is one of the important rights guaranteed by the Constitution (section 9). The establishment and implement action of equality in the workplace is the fundamental principle entrenched by the Constitution as well as labour legislation, in particular the Employment Equity Act, and the Promotion of Equality and Prevention of Unfair Discrimination Act[20] both enacted to promote and give effect the right to equality as contained in the Constitution. The EEA and PEPUDA are equality legislation elaborated its content to achieve equality by eliminating existing unfair discrimination and take positive measure to protect and advance person who were disadvantaged by past discrimination. As the Constitution is the supreme law of the land the Constitutional protection of rights in labour relations will firstly be analysed.

[18] O C Dupper (fn 17) at 2

[19] Section 1 and 2 of the Constitution.

[20] PEPUDA (Promotion of Equality and Prevention of Unfair Discrimination Act[20] 4 of 2000) (as amended).

2.2 Labour Rights in the Constitution

Chapter 2 of the Constitution enshrines the fundamental rights of all and affirms the democratic values of human dignity, equality and freedom[21]. The Bill of Rights contains various protective provisions relating to labour relations. Section 9 of the Constitution deals with equality, and reads as follows:

> '(1) Everyone is equal before the law and has the right to equal protection and benefit of the law.
>
> (2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance person or categories of persons, disadvantaged by unfair discrimination may be taken.
>
> (3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.
>
> (4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.
>
> (5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.'

[16] Section 7(1) of the Constitution.

Section 9(1) of the Constitution provides that equal protection and benefit of the law. This is the primary source to interpret employment equity and to formulate understanding of the nature, scope and limits of the employer's obligation to promote equaity. The concept of equality is extended with reference to 'formal equality' and 'substantive equality'. Formal equality means the mere prohibition of unequal treatment. Substantive equality means to treat differently and in doing so to bring a previously disadvantaged group to a level enables the achievment of the substantively equal outcomes[22]. It is assumed that as individuals everyone is basically similarly placed and that an application of the law in accordance with an standard of strict neutrality best serves to avoid preference or prejudice. It is this starting point that is questioned by those who subscribe to a substantive view of equality.

> 'A formal equality approach fails to recognise underlying patterns of group-based disadvantage which belie the appearance of individual similarity. Because this is not fully appreciated, similarity of treatment may, in certain circumstances, reinforce rather than redress social disadvantage[23].

In the past, certain categories of South African people suffered unfair discrimination. The Constitutional Court has developed the approach to the determination of equality and subsequently applied the substantive approach to equality in a number of cases.

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[22] Chapter 11 at 543 D du Toit et al Labour Relations Law: A Comprehensive Guide, 5th Ed

[23] Kentridge 'Equality' in Chaskalson et al Constitutional Law of South Africa (1996).

In *Harmse v City of Cape Town and Others*[24] the Court stated that 'in the absence of the full development of the concept of substantive equality our soceity will continue to be characterised by deep-rooted inequality and injustice.'

In *National Coalition for Gay and Lesbian Equality v Minister of Justice & Others*[25] Ackermann J made the same view in stating that

> 'Particularly in a country such as South Africa, persons belonging to certain categories have suffered considerable unfair discrimination in the past. It is insufficient for the Constitution to merely ensure, through its Bill of Rights, that statutory provosions which have caused such unfair discrimination in the past are eliminated. Past unfair discrimination frequently has ongoing negative consequences, the continuation of which is not halted immedietly when the initial causes therefore are eliminated, and unless remedied, may continue for a substantial time and even indefinitely. Like justice, equality delayed is equality denied'[26].

To promote constitutional right to (substantive) equality affirmative action or measure may appear as a form of discrimination and a number of contextually relevent factors must be considered to determine whether the discriminatory action can promote substantive equality or not. These include the position of the complainants in soceity;

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[24] 2003 (LC) at para 45.

[25] *National Coalition for Gay and Lesbian Equality v Minister of Justice & Others* [1998] 12 BCLR 1517 (CC) at 1546.

[26] fn 25 at para 49.

their vulnerability and history (for instance whether the group the complainants belong to has suffered from patterns of disadvantage in the past); the purpose, nature and history of the discriminatory provision[27].

In *Minister of Finance & Another v Van Heerden*[28] the Constitutional Court explained the Constitutional right in a comprehensive way that

> 'comprehensive understanding of the Constitution's conception of equality requires a harmonious reading of the provisions of section 9. Section 9(1) proclaims that everyone is equal before the law and has the right to equal protection and benefit of the law. On the other hand, section 9(3) prascribes unfair discrimination by the state against anyone on any ground including those specified. Section 9(5) renders discrimination on one or more of the listed grounds unfair unless its fairness is established. However, section 9(2) provides for the achievement of full and equal enjoyment of all rights and freedoms and authorises legislative and other measures designed to protect or advance persons or categories of persons disadvantaged by unfair discrimination.'

The disparities created by discriminatory laws and practice of the past have produced disadvantages for certain categories of people that cannot redressed by repealing these

[27] fn 25 above paras 14 and 26.

[28] (2004) 12 BLLR 1181 (CC) at para 28.

discriminatory laws. Further action is required. In the explanatory memorandum of the Employment Equity Bill[29], it is said that

> 'Apartheid has left behind a legacy of inequality. In the labour market the disparity in the distribution of jobs, occupations and incomes reveals the effects of discrimination against black people, women and people with disabilities. These disparities are reinforced by social practices which perpetuate discrimination in the employment against these disadvantaged groups, as well as by factors outside the labour market, ... These disparities cannot be remedied simply by eliminating discrimination. Policies, programmes and positive action designed to redress the imbalances of the past are therefore needed'.

In the employment context anti-discrimination provision originated from section 9(4) of the Constitution and was subsequently enacted national legislation to protected discrimination, for example, The EEA was enacted to achieve equality and remove discrimination in the workplace and also give effect to the apparent intention of section 9(2) of the Constitution[30]. Section 9 (2) is considered the link between affirmative action and the achievement of substantive equality. To give effect to the interpretation of the meaning of unfair discrimination in the South African context the court has developed practical tests for determining equal protection under section 9(1) and unfair discrimination under section 9(3) and 9(4) of the Constitution. Historically, South

[29] Explanatory memorandum to the Employment Equity Bill Government Gazette no 18481 (December 1997).

[30] 'Equality includes the full and equal enjoyment of all rights and freedoms'.

African discriminatory employment practices and unfair behaviour creates a huge imbalance through out the country and to remove that imbalance the constitutional discrimination clause was designed to rectify[31]. The prohibition of unfair discrimination in the EEA is interpreted against the background of the Constitutional Court's endorsement of substantive equality and in compliance with the methodology developed by the court to give effect to that concept.

Equality is one of the fundamental rights as well as a foundational value in the Constitution, however, in so far as the exercise of this right is concerned it is important to bear in mind that the application of the right may be limited in accordance with the provisions of the limitation clause in the Constitution.

2.2.1 Limitation Clause

Section 9 (1), (2) and (3) provides for equality for all, however, the application of the right may be limited as long as such a limitation is in terms of a law that is reasonable and justified in terms of the limitation clause 36 of the Constitution. This section provides that:

> '(1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open

[31] Courts and tribunals have generally used a different methodology from that of the Constitutional Court in interpreting the concept of unfair discrimination in terms of other applicable labour legislation, e.g. LRA, however, many of the relevant cases were decided before the Constitutional Court standardised its own approach in *Prinsloo v Van der Linde* (1997) 6 BCLR 759 (CC) and *Harksen v Lane No* (1997) 11 BCLR 1489 (CC) .

and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including-

(a) the nature of the right;

(b) the importance of the purpose of the limitation;

(c) the nature and extent of the limitation;

(d) the relation between the limitation and its purpose; and

(e) less restrictive means to achieve the purpose.

(2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.'

The limitation clause is to be considered at the stage of proportionality, which is to the criteria of 'reasonableness', between the infringement and the purpose, effect and importance of the infringing provision[32]. In *S v Makwanyane*[33] the Court stated that the application of the limitation clause involves a process of 'weighing up of competing values, and ultimately an assessment based on proportionately...which calls for the balancing of different interests'.

In balancing different interests, the relevant considerations include the nature of the right that is limited and its importance to an open and democratic society based on freedom and equality, the extent of the limitation, its purpose and the importance thereof to such a society, its efficacy and whether the legislation could have been tailored in a less

[32] *National Coalition for Gay and Lesbian Equality v minister of Justice* (1998) 12 BCLR 1517 (CC) at 1538 F.

[33] (1995) 6 BCLR 665 (CC) at para 104.

restrictive manner[34]. In *Harksen v Lane* Goldstone J stated that the enquiry under the limitation clause entails:

> 'a weighing of the purpose and effect of the provision in question and determination as to the proportionality thereof in relation to the extent of its infringement of equality.'

The conducting of balancing process was explained in *National Coalition for Gay and Lesbian* as follows:

> 'The balancing of different interests must still take place. On the one hand there is the right infringed; its nature; its importance in an open and democratic society based on human dignity, equality and freedom; and the nature and extent of the limitation. On the other hand there is the importance of the purpose of the limitation. In the balancing process and in the evaluation of proportionality one is enjoined to consider the relation between the limitation and its purpose as well as the existence of less restrictive means to achieve this purpose'[35].

As equality is the most important and foundation right guaranteed by the Constitution, a court should be extremely careful before upholding a justification of an act that limits the right to equality[36]. In *Fraser v Children's Court, Pretoria North*[37] it was said that the

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[34] See also *President of RSA v Hugo* at para 112 and *Harksen v Lane No* at para 102-106.

[35] at para 1539 D.

[36] *Lotus River, Ottery, Grassy Park Residents Association v South Peninsula Municipality* (1999) 4 BCLR 440 (C) 452G, 454F.

[37] (1997) 2 BCLR 153 (CC) at 161 F.

'guarantee of equality lies at the very heart of the Constitution, it permeates and defines the very ethos on which the Constitution is premised.'

The courts have to be very careful in each case that by the virtue of the limitation clause discrimination be regarded as permissible to the extent that it is reasonable and justifiable. The limitation clause requires a purpose that is justifiable in an open and democratic society based on human dignity, equality and freedom for justification of the infringement of the right not to be discriminated against unfairly. The enforcement of religious views was held in *Prince v President of the Law Society of the Cape of Good Hope*[38]. In this case the purpose of the Drugs and Drug Trafficking Act No. 140 of 1992 mainly control the use of dependence-producing substances, was considered an important objective when deciding whether the Act is justifiably in limiting the right of freedom of religion of members of the Rastafarian religion.

The right to equal protection and benefit of the law is a fundamental right but in terms of the general application of law it can be limited on a reasonable basis. There are a number of cases[39] which were discussed where the Constitutional Court promote equality, especially substantive equality and applied limitation clause very carefully on the basis of the fact of each case. The right to equality and therefore the right not to be discriminated against, are not only entrenched in the Constitution, but are also formulated in terms of national legislation. The analysis of this will be my next point.

[38] (1998) 8 BCLR 976 (C) at 986 E-F

[39] Mentioned above in fn (27, 28,29,31).

2.2 Labour Rights in the Legislation

After the democratisation of South Africa the country's labour law was amongst the first areas of law to be reformed. The main employment law statutes of South Africa are the following:

The Labour Relations Act 66 of 1995 (as amended) (LRA)

The Employment Equity Act 55 of 1998 (EEA)

Basic Conditions of Employment Act 11 of 2002 (as amended) (BCEA)

As mentioned, to promote the achievement of equality and eliminate unfair discrimination the Constitution in section 9(4) provides for the enactment of national legislation. In the employment context the EEA was enacted and designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination. The aim of employment equity is to provide positive remedies that are designed to eliminate discriminatory workplace practices and to provide equitable opportunities for employment. The purpose of the Act is to eradicate unfair discrimination and advance those groups who have been disadvantaged as a result of discrimination caused by laws and social practices, and not to seek retribution for past injustice[40].

The EEA must be interpreted in compliance with the Constitution, particularly as regards the right to equality enjoined by the Preamble, and with the Discrimination (Employment

[40] See Explanatory memorandum to the Employment Equity Bill Government Gazette no 18481 (December 1997).

and Occupation) Convention of the International Labour Organisation (ILO Convention 111)[41].

Section 3 of the EEA States-

'This Act must be interpreted -

a. in compliance with the Constitution;

b. so as to give effect to its purpose;

c. taking into account any relevant code of good practice issued in terms of this Act or any other employment law; and

d. in compliance with the international law obligations of the Republic, in particular those contained in the International Labour Organisation Convention (No. 111) concerning Discrimination in Respect of Employment and Occupation.'

The ILO Convention 111 is one of the key conventions that deals with the employment context. South Africa ratified this Convention, which requires member states to declare and pursue a national policy designed to promote 'by methods appropriate to national conditions and practice, equality of opportunity and treatment in respect of employment and occupation, with a view to eliminating any discrimination in respect thereof[42].'

The EEA provides in section 55 that the Minister may, by notice in the Gazette and on the advice of the Commission for Employment Equity[43] make any regulation regarding

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[41] Discrimination (Employment and Occupation) Convention (ILO No. 111), 362 U.N.T.S. 31, *entered into force* June 15, 1960.

[42] Article 2 of ILO Convention.

[43] Established under section 28 of the EEA.

any matter that the Act requires or permits to be prescribed and any administrative or procedural matters that may be necessary or expedient to achieve the proper and effective administration of the Act[44]. Any conflict that may arise between the provision of the EEA and any other law, the provisions of the EEA will prevail, except in the case of the Constitution or an Act of Parliament that expressly amends the EEA[45].

The EEA imposes a duty on employers to eliminate unfair discrimination and also provide a framework for the attraction, development, the advancement and retention of an employer's human resources. An employer can increase productivity, motivation and resourcefulness in the workplace when they invest in their people and treat them with fairness and equity. It will be possible when employees will secure by eliminating the historical barriers that prevent the advancement of the designated groups (for example black people, women etc). The implementation of effective employment equity strategies will assist employers to maximise human resource development through the eliminating all form of unfair discrimination and barriers and by promoting affirmative action. A religious belief or practice should be respected in the workplace and employees will not directly, indirectly discriminated or harassed for practicing his/her religion.

In the employment relationship the employer and employee are two main parties and it is important to know the definition of an employee and their protection in the eyes of the law.

[44] See Employment Equity Regulations Government Notice R1360 as amended (Government Gazette Vol 413 no 20626 23 November 1999).

[45] Section 63 of the EEA.

2.3 Definition of an Employee

An employment relationship is regulated between employer and employee within the workplace. The relationship can be contractual and according to the employment contract there must be present the employer's supervising or controlling of the manner of the work[46]. The 'dominant impression test' is one of the tests to determine employment relationship. It regards no single indicator as determinative but requires an examination of the relationship as a whole in order to arrive at a 'dominant impression' as to whether it is based on a contract of employment or a contract for the performance of independent services.[47] Generally a statute, and the legal relationship between the employer and the employee, will determine their rights and obligations and protect a worker who falls under the legal definition of 'employee'. These rights and obligations are primarily determined by the contract or agreement[48] and the realities of the relationship, not simply what the parties have chosen to call it[49].

If the parties intend to conceal the true nature of the relationship to change or avoid the employees rights or employers duties, the courts will give effect to the true nature of the

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[46] *Colonial Mutual Life Association v Macdonald* 1931 AD at 434-5, *R v AMCA Services* 1959 (4) SA 208 (A) at 212H.

[47] D du Toit et al Labour Relations Law: A Comprehensive Guide, 5th Ed Butterworths (2006) at 76.

[48] *Smit v Workmen's Compensation Commissioner 1979 (1) SA 51 (A) at 64.* Though this test has been criticized, the courts have followed it both under the old *(Dempsey v Home Property (1995) 3BLLR 10 (LAC)* and new statutory regimes *(e.g. Medical Association of SA v Minister of Health (1997) 18 ILJ 528 (LC) at 536C-E. Liberty Life Association of Africa Ltd v Niselow (1996) 17 ILJ 673 (LAC) at 683D-E.*

[49] *SABC V McKenzie* (fn 1above) para10.

relationship between them as determined by the evidence[50]. However, it is still difficult to resolve the problems relating to those workers who are employed as 'atypical' employees[51] and sometimes it could be complicated to determine whom the statute should protect. As we shall see, the protection accorded by the EEA against discrimination extends to 'employees' only, and workers will be 'employees' if they are subject to the control of their employers.

2.3.1 Legislation

The employment relationship is regulated between employer and employee and essentially it should be a legal relationship. Employers and employees have rights, which are enforceable by law against each other. A legal relationship must be regulated by law and for that purpose it is important to know the legislative definition of an 'employee'.

Section 1 of the EEA provides –

'employee' means any person other then an independent contractor who-

(a) works for another person and for the State and who receives, or entitled to receive, any remuneration; and

(b) in any manner assists in carrying on or conducting the business of an employer.'

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[50] *Denel (Pty) Ltd v Gerber* (2005) 9 BLLR 849 (LAC).

[51] D du Toit (fn 47 above) at 73-78.

Section 213 of the LRA provides the following definition of an 'employee'-

'(a) any person, excluding an independent contractor, who works for another person or for the State and who receives, or is entitled to receive, any remuneration; and

(b) any other person who in any manner assists in carrying on or conducting the business of an employer.'

2.3.2 Jurisprudence

The person who is hired for an identified contract period and paid a monthly salary in return for his personal services during fixed working hours is an employee. In the *Borcherds v CW Pierce & F Sheward t/Lubrite Distributors*[52] the Court found the object of the contract to be the main determinant in classifying a person as an employee.

In *SA Broadcasting Corporation v McKenzie*[53] the Court established some important characteristics of the contract of employment:

(1) the object is the rendering of personal services by the employee to the employer; (2) the employee will be at the beck and call of the employer to render personal services at the employer's behest; (3) the services to be rendered in a contract of employment are at the disposal of the employer who, subject to repudiation, may or may not decide to have them rendered; (4) the employee is subordinate to the will of the employer ; (5) on the death of the employee the contract of employment is also terminated; (6) a contract of employment terminates on expiration of the period of service.

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[52] (1991) 12 *ILJ* 383 (IC).

[53] (1999) 20 *ILJ* 585 at 586 (LAC).

2.3.3 Analysis

The first part of the LRA definition clearly excludes the independent contractor from the definition of employee. The second part is wide enough to include independent contractors who are not expressly excluded.

The courts have adopted the 'dominant impression test', which considers a multiplicity of factors in determining the employment relationship. The courts looks at the whole gamut of indications in order to determine if the main or dominant impression created by all the relevant factors points to an employment relationship or not. In terms of this test no single factor is considered determinative, and a court must examine the relationship in its entirety and weigh up the different factors, so as to arrive at an overall or dominant impression, which indicates an employment relationship[54].

According to Brassey[55]

> 'when we have to establish if an individual is an employee or not, we are looking for indications of a social relationship where one person is obliged to place his or her capacity to work at the disposal of another. This differs from an independent contractor who does not deliver a capacity to work but a finished product or completed result.'

[54] 'Distinction Between Employees And Independent Contractors' in (1997) 7 *Labour Law News And Court Reports* Number 1.

[55] *The Nature of Employment* (1990) 11 *ILJ* 889.

Both the 'dominant impression' test and the determination of Brassey's distinction depend to some extent on the evaluation of a range of factors: the parties' intention as stated in the contract, fixed salary, individual risk of profit and loss, personal nature of the services rendered and other facilities, fixed working hours, etc.[56]

In *Building Bargaining Council (Southern & Eastern Cape) v Melmons Cabinets CC & Another*[57] the Court found that the right of both employees and independent contractors to earn a living is recognized by the Constitution. The law takes a special interest in people who hire out their labour as employees. The Court applied the 'dominant impression' test to distinguish between an employee and an independent contractor. If the employer alleges that it is in a relationship with an independent contractor, the party alleging the contrary must show that the independent contractor relationship is a sham and that the true relationship is one of employment.

The Act includes all 'employees', standard and non-standard, and only excludes 'independent contractors'. Employees in standard employment are those employed on a full time basis for an indefinite period. Non-standard employment includes fixed term employment, e.g. seasonal, periodical, part-time, and casual employment[58]. When a person falls within the definition of an 'employee', the Act applies to him and to his employer, irrespective of whether he is a full time, part time, temporary or casual employee. The various categories of employees included in the definition enjoy

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[56] Fn 52 above .

[57] (2001) 3 BLLR 329 (Labour Court, Port Elizabeth).

[58] *Labour Law News and Court Reports* (1996) March 5 (number 8) at page 1.

protection for the purposes of the law of unfair discrimination. The South African legislation, notably the LRA and the BCEA, does not draw a distinction between full-time employees and most part-time employees; and the courts have tended to extend minimum labour law protection to all employees, regardless of category[59].

The protection offered by the EEA is to employees and the prohibition to discriminatory conduct by all persons including, but not limited to, employers. The EEA protect employee by prohibiting unfair discrimination in section 6(1):

> 'No person may unfairly discriminate, directly or indirectly, against an employee, in any employment policy or practice, on one or more grounds, including race, gender, sex, pregnancy, marital status, family responsibility, ethnic or social origin, colour, sexual orientation, age, disability, religion, HIV status, conscience, belief, political opinion, culture, language and birth.'

This section applies and includes only employees and in course of employment policy or practice. Employment policy or practice is defined in a manner that includes all aspect of the employment relationship. Section 1 of the EEA states that:

> 'employment policy or practice' includes, but is not limited to--
>
> (a) recruitment procedures, advertising and selection criteria;
>
> (b) appointments and the appointment process;
>
> (c) job classification and grading;
>
> (d) remuneration, employment benefits and terms and conditions of employment;

[59] 'Extending Labour Law and Social Security Protection: The Predicament of the Atypically Employed' Marius Oliver (1998) 19 *ILJ* part 4.

(e) job assignments;

(f) the working environment and facilities;

(g) training and development;

(h) performance evaluation systems;

(i) promotion;

(j) transfer;

(k) demotion;

(l) disciplinary measures other than dismissal; and

(m) dismissal.

In *Woolworths (Pty) Ltd v Whitehead*[60] Willis JA found that:

> 'a decision made in regard to a single individual can hardly be described as a "policy" or "practice". It is respectfully submitted that this is incorrect. Such an interpretation not only strains at the wording of the section but would, in practice, all but defeat the purpose of the Act (section 2).'

The meaning of 'employee' is extended for purposes of section 6, 7 and 8 of the EEA to include applicants for employment (section 9). Most of the employment practices or policies referred to in section 6(1) are inapplicable to job applicants. The most typical ground on which job applicants have instituted procedings have been the non-appointment of such applicants as a result of alleged unfair discrimination.

[60] (2000) 6 BCLR 640 (LAC) at 665.

All of the above protection against and provisions regulating are applicable in South Africa. To enable a comparative analysis this study will in the following chapter explore the European Union employment relationship.

Chapter 3 Employment Relationship in the European Union

3.1 Introduction

This chapter is going to discuss briefly the following aspects of the EU: structure of EU, legislature, how EU works in or regulates, the field of employment and deals with the employment relationship and the provision of equal treatment, and the measures EU provides to prevent the breach of the right of equal treatment, that is, not to discriminate against anyone on any of the prohibited grounds including religion.

3.2 Brief Historical Background and the Decision-Making Process of the European Union

Historical Background

After the end of the World War II, in 1950, the European Union began life as the European Coal and Steel Community (ECSC) in 1951 (Treaty of Paris) and went on to become the European Economic Community (EEC) in 1957 (Treaty of Rome). The European Community (EC) also referred to as the European Union, consists of 27 countries. Formed in 1957, the EC aimed to achieve a unique peaceful, stable and strong economic partnership between the founding Member States. ECSC the pre cursor to the

EC began to unite the European countries, founder of the EC- Belgium, France, Germany, Italy, Luxembourg and The Netherlands in order to achieve lasting peace.

The important Treaties for the EU are-

- **The EEC Treaty of Rome (1957)**

The Treaty of Rome established the European Economic Community (EEC)[61]. The aims of the EEC Treaty of 1957 were to development a Common Market, subsequently renamed the single market intended to establish transformed conditions of trade and manufacture within the territory of the Community and which involves the free circulation of goods, capital, people and services within the EU. A common market progressively develop the economic policies of the Member States, to promote harmonious development of economic activities throughout the Community, to increase stability and raise the standard of living, and to promote closer relations between the Member States. Article 2 of the EEC Treaty states-

> 'The Community shall have as its task, by establishing a common market and progressively approximating the economic policies of member states, to promote throughout the community a harmonious development of economic activities, a continuous and balanced expansion, an increase in stability, an accelerated raising of the standard of living and closer relations between the states belonging to it.'

[61] 25 March 1957 signed by Belgium, France, Germany, Italy, Luxembourg and the Netherlands. In force 1 January 1958.

The 1960s was a period when the EU countries agreed to abolish custom duties at internal borders, and also agreed to joint control over food production. A customs union between EU Member, which involves the application of a common external tariff on all goods entering the market. A free trade area is a designated group of countries that have agreed to eliminate tariffs, quotas and goods between them as a result of a free trade agreement between the countries. Customs Union was the earliest milestone of the EU.

In 1968 the internal tariff barriers were abolished. In subsequent years little was done to move from this basic customs union to a full single market. Internal market means the free movement of people; free movement of European citizens within the Union and the right to visas, asylum and immigration. In 1973 three new member states joined the EU and the EU helped bring jobs to the poorer areas[62] of Europe. In 1981 Greece became the tenth Member State. Though the EU countries abolished custom duties, trade could not freely flow across the EU borders. The main obstacles are differences in national regulations[63].

[62] The EU may be one of the richest parts of the world, but there are big internal disparities of income and opportunity between its regions. Through its regional policy the EU transfers resources from affluent to poorer areas. The aim is to modernise backward regions so that they can catch up with the rest of the Union.(www.Europa.co.za Europa-Activities of the European Union- Regional Policy) (accessed on October 2008).

[63] The single market is the core of today's Union. Yet to make it happen, the EU institutions and member countries strove non-stop for seven years from 1985 to adopt the hundreds of laws needed to sweep away the technical, regulatory, legal, and bureaucratic barriers that stifled free trade and free movement. (Internal Market) Europa- EU at a galance. (accessed on October 2008).

- **The Single European Act 1986 (the SEA)**

The Single European Act 1986 (the SEA)[64] was significant in its institutional and substantive reforms and represents the first major attempt at revising the EEC Treaty since its original enactment. Subsequently, the SEA provided for the adaptation required of the EEC to achieve the internal market. The SEA was signed to remove the problems with free-flow trade, and that created the 'single market'. The SEA revised the EEC Treaties of Rome in order to add new momentum to European integration and to complete the internal market.

- **The Maastricht Treaty on European Union (1992)**

The Treaty on European Union (TEU) was agreed and signed by the Member States in Maastricht in February 1992. The EEC Treaty was officially changed the name of the European Economic Community to the 'European Community' (EC) Treaty. Maastricht Treaty introduced much more co-operation between the Member States and created a new economic and political structure with 'three pillars'. First pillar consists of, European Community, the European Coal and Steel Community (ECSC) and Eurotom. The second one establishes common foreign and security policy and the third pillar concerns is the area of justice and home affairs. Together these pillars create the European Union (EU).

[64] Signed in 1986 in Luxembourg and the Hague and entered into force on 1 July 1987.

- **The Amsterdam Treaty (1999)**

The Treaty of Amsterdam amended and renumbered the EC Treaties. The consolidated versions of the EC Treaties are attached to it and changed the Articles of the Treaty on European Union, identified by letters A to S, into numerical form.

- **The Nice Treaty (2001)**

The Treaty of Nice consolidated the former EC Treaties. This Treaty deals with reforming the institutions so that the Union could progress efficiently with its 25 member states.

In 2004 many European citizens of the EU decided to formulate a Constitution to make Europe more democratic, but it was not ratified by France and The Netherlands and could not came into force.

- **The Treaty of Lisbon (2007)**

Recently the Treaty of Lisbon[65] was signed and is still waiting to be ratified by 27 Member States before it can enter into force. The main objectives of the Treaty are to make the EU more democratic, meeting European citizens' expectations for high

[65] Signed 13 December 2007.

standards of accountability, openness, transparency and participation; and to make the EU more efficient, effective and able to tackle today's global challenges. In order to create a real internal services market by 2010, the Services Directive 2006/123/EC, the Council of 12 December 2006 on services in the internal market[66] aims to achieve freedom of provision of services between member states. This Directive falls under the framework of the 'Lisbon Strategy' and purposes four main objectives for creating an internal services market:

* to ease the freedom of establishment for providers, and the freedom of provision of services in the EU;
* to strengthen rights of recipients of services as users of the latter;
*to promote quality of services;
* to establish effective administrative co-operation among the Member States.

This Directive establishes a general legal framework that favours freedom of establishment for providers as well as the free movement of services, between the Member States, while guaranteeing a superior level of quality.

The European citizens became closer to each other after the unification of Germany. They were more conscious of their environment, began to act jointly about their defence and security matters and gradually, communication became much easier for the EU people. In 1993 the single market was completed with four freedoms: free movement of

[66] Official Journal L376 of 27 December 2006.

goods, services, people and money. From 1 January 2002 the Euro became the new currency for most of the Europeans, coins and notes circulate freely between the countries and have one common face and same value.

Decision-Making Process

In the EU there are three main decision making bodies: The European Parliament, The Council of the EU (the Council) and the European Commission. The European Parliament represents the people of the EU. The Council of the EU represents the Member States, is the EU's main decision-making body. The European Commission represents the common interests of the EU, and is the main executive body.

The foundation of the EU is based on Treaties. The Treaties are known as the primary sources of EU's legislation and law made by the Community Institutions in exercising the powers conferred on them by the Treaties is referred to as 'secondary' legislation. Secondary legislation mainly consists of regulations, directives and recommendations adopted by the EU institution[67]. Those secondary sources have a direct impact on the EU

[67] Amending Treaties are giving power to set broad policy goals and establish institutions with the necessary legal powers to implement those goals. These legal powers include the ability to enact legislation which can directly affect all Member States. National courts are required to enforce the Treaties that their Member States have ratified, and thus the laws enacted under them, even if doing so requires them to ignore conflicting national law, and (within limits) even constitutional provisions.
The main legislative acts of the EU come in two forms: Regulations and Directives. Regulations become law in all member states the moment they come into force, without the requirement for any implementing measures, and automatically override conflicting domestic provisions. Directives require member states to

citizen in their daily lives. All of the European Member States of the EU have voluntarily and democratically agreed to bind themselves to the rule of laws, which are the 'Treaties'. The Treaties signed by the Member States, have gradually developed, changed and been amended to allow Member States to integrate more closely with each.

Regulations are binding upon all Member States and are directly applicable within all such States. Directives are binding as to the end to be achieved while leaving some choice as to form and method of implementation open to the Member States. Recommendations and opinions have neither binding force nor direct effect.

The founding Treaties of the EU did not cover fundamental rights. Gradually the European Court of Justice has developed the system of respect to the fundamental rights throughout the Community. The Court has decided that fundamental rights should be based on the general principles of Community law and the constitutional traditions of the Member States and the International Treaties binding each Member State and also the European Commission on Human Rights of 1950. The protection of basic rights were introduced as a means of eliminatory unfair competition.The Treaty of Amsterdam formally recognises the respect for fundamental human rights provisions:

> (i) The Treaty of Amsterdam proclaims that the Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States.

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achieve a certain result while leaving them discretion as to how to achieve the result. The details of how they are to be implemented are left to member states.

(ii) more effective action is to be taken to combat not only discrimination based on nationality but also discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation; (Article 13)

The Court has power to decide on matters whether the institutions have failed to respect human rights and fundamental freedoms. The free movement of persons within the EC further produces free movement of workers.

3.3 Free Movement Policy

Free movement policy is regulated with four type of freedom and one of those is the free movement of persons between the Member States that is one of the basic aims of the EU. It is not possible to achieve a single market without the mobility of the working population. The SEA is one of the greatest achievements of the EU and the barriers between member states have gradually been eliminated. As a result the standards of living and quality of life has risen. All border control within the EU territory on goods has been abolished together with customs control on people. Actions have been taken for the freedom of movement of persons and also to improve the worker's movement. Service qualifications obtained in one EU country are recognised in all other EU countries. The ability of EU citizens to travel and work virtually unhindered within the EU is intended to increase the economic competitiveness and efficiency of the Union, and provide valuable opportunities for European workers.

From the beginning the EEC Treaty states in Article 3 that it seeks 'for the purposes ...as provided by this Treaty '.....the abolition, as between Member States of obstacles to the free movement of ...persons'[68]. In the EEC Treaty a person's free movement was primarily regarded to be for economic purposes, and about the right to enter and reside for the same purposes in any other Member State. Article 3 provided a freedom of movement for persons, but of course not a general right for all people; to qualify the individual has to be a national of a Member State, and engaged in an economic activity as a worker[69], as a self employed person[70] or as the provider of services[71]. A persons going to another country to work as a worker should be under the control or supervision of an employer; a self-employed person must establish himself in another Member State in a self-employed capacity and has to attain a standard degree of performance. These rights can be derogated from on the grounds of public policy, public security and public health[72].

A series of important secondary measures have been adopted to ease the free movement of workers. Once a person is established as a worker, his various rights are protected by three principal secondary measures:

1.Rights of Entry and Residence- Directive 68/360,

2.Free Movement of Workers- Regulation 1612/68

[68] Article 3 (c) of the EC Treaty.

[69] EEC Treaty Article 48(1) 'The free movement of workers shall be ensured within the Community..'. (relevant Article 48-51).

[70] Articles 52-58 of the EEC Treaty.

[71] Art 59-66 of The EEC Treaty.

[72] EC Treaty (as amended by TEU and Treaty of Amsterdam) Article 39(3) 'It shall include the right, subject to limitations justified by reasons of public order, public safety and public health'.

3.The Right to Remain in the Host Member State- Regulation 1251/70.

The Regulation 1612/68 entitles all nationals of a Member State to take up and engage in gainful employment in the territory of another Member State in conformity with the relevant regulations applicable to national workers. A worker in the territory of another Member State is entitled to the same priority as the nationals of that Member State as regards access to available employment, and to the same assistance as that afforded by the host Member State's employment offices to their own nationals seeking employment. The Regulation ensures equal treatment by prohibiting any discrimination of workers who are nationals of a Member State, within the territory of another Member State as regards working and employment conditions (in particular dismissal and remuneration) because of their nationality, origin or religion.

The Schengen Agreements[73] were designed to promote free movement, that is, with regard to border checking, visas and other formalities. The free movement right was used in two main notions from the Schengen Agreement. First of all, that every citizen of the EU is entitled to travel freely within the Member States of the EU, and no special formalities are required for that. The fundamental right extends to members of the EU citizen's family and applies regardless of their situation or the reason for travel or residence. Secondly, the abolition of internal control to ensure the right of free movement. The Schengen Agreement was the first agreement to abolish control of people on the internal borders of the signatory states.

[73] Originally signed by the Benelux Countries, France and Germany. In 1990 Italy, Portugal, Spain and Greece acceded to the Convention, Austria in 1995 and Finland in 1996.

The Charter of Fundamental Rights of the EU also enshrines the right of every citizen of the EU to move and reside freely within the territory of the Member States. Since the foundation of EC free movement of a person is guaranteed by Community law as one of the fundamental freedoms for EU citizen. For workers this freedom also existed in the provisions of the TEU. Article 39 entails:

> '-the right to look for a job in another Member State;
>
> -the right to work in another Member State;
>
> -the right to reside there for that purpose;
>
> -the right to remain there;
>
> -the right to equal treatment in respect of access to employment, working conditions and all other advantages which could help to facilitate the worker's integration in the host Member State.'

This Article applies to the migrant workers who leave their country of origin and go to other Member States for economic activity. In order to achieve a common market with a labour standard focused on employment protection the EC emphasises the free movement of workers. This freedom has been established, clarified and developed over years through the case law of the European Court of Justice. The ECJ does not deal only the contractual employment relationships, and can refuse to accept a Member State's definitions of worker or employee. In *R v Immigration Appeal Tribunal*[74] the Court extended the definition of worker beyond the definition of employee, to cover the person

[74] ex parte Antonissen, Case C 292/89.

who engaged in an economic activity without a contratual relationship. We are now going to explore the employer, employee relationship in the EU context.

3.4 Employment Relationship in EU Law

In the EU the concept of labour law[75], the freedom of workers starts from the employment relationship that is characterised as a contract of employment and adopts the criterion of supervision by the employer to the employees. The employer's control, the time frame, workplace, and the manner in which, the work is to be done are the essential elements that characterise their relationship[76].

The TEU (as amended by the Treaty of Amsterdam) does not define the term 'employee' or 'worker' but the performance or work done by the worker must fall under an economic activity within the meaning of Article 2 of the TEU. The Court insists that all the Member States should frame the definition of worker in broad terms that ensures uniformity of interpretation[77].

In *Lawrie- Blum*[78] that a Court said the 'worker' has to be defined in accordance with objective criteria that distinguish the employment relationship by reference to the rights and duties of the persons concerned. The essential feature of an employment relationship

[75] There are other aspects of labour law but in this writing freedom of services is relevent topic.

[76] See Van Jaarsveld: Van Eck Principles of Labour Law (2002) 2[ed at 25]

[77] *Unger v Bestuur* [1964] ECR 1977 Case 75/63.

[78] Case 66/85 [1986] ECR 2121 Paras 16-17.

is that 'for a certain period of time a person performs services for and under the direction of another person in return for which he receives remuneration'.

Initially, the law affected those workers who adopted a contract of employment[79]. The Council Directive 91/533/EEC of 14 October 1991, dealing with an employer's obligation to inform employees of the conditions applicable to the contract or employment relationship, is decisive. The Council Directive[80] describes its scope as follows:

'This Directive shall apply to every paid employer having a contract or employment relationship defined by the law in force in a Member State and/or governed by the law in force in a Member State'[81].

(There are other categories of employment relationship, but in this thesis the contractual employment relationship is relevant). In the Directive there is a distinction between contractual and other employment relationships but the significance of the Directive is that, by implication, it also includes those categories of workers who have no contractual employment relationship. By including both categories of workers, those who fall within, as well as those who fall without, the definition of 'employee', the need arises to find some other criteria that constitute an employment relationship. First of all, the worker

[79] European Industrial Relations Dictionary: European Foundation for the Improvement of living and working condition: Contract of employment (www.eurofound.europa.eu) (accessed on October 2008).

[80] Council Directive 91/533/EEC of 14 October 1991 on an employer's obligation to inform employees of the conditions applicable to the contract or employment relationship.

[81] Art 1 of the Directive (Fn 80 above).

must be paid (Art 141(2) of the EC Treaty (and in Equal Pay Directive[82]) in respect of his employment; secondly there are certain essential terms that must be included in an employment contract (Art 2(1)(2) of Directive 91/533); and thirdly the casual and/or specific nature of workers are also included in the scope of the Directive, if they are not excluded by justified objective considerations (Art 1 (2)(b)).

Obviously, in the employment relationship an employee should protected by law if he falls within the legal definition of the term 'employee'. It has already been indicated that the Treaty does not define the term 'worker' but the secondary sources and the decisions of the Court provide criteria to enable us to define a person as a worker or employee. Directive 2001/23 defines an employee as follows-

> 'employee' shall mean any person who, in the Member State concerned, is protected as an employee under national employment law. (Art 2(d)).

This Directive (2001/23) also referred to rights and obligations 'arising from a contact of employment or from an employment relationship' (Art 3 (1)).

Council Directive 2002/14, establishing a framework for informing employees and consulting with them in the EC, defines employee as-

> 'any person who in the Member State concerned is protected as an employee under national employment law and in accordance with national practice'.

[82] The Equal Pay Directive 75/117.

EU legislation leaves the definition of an employee to the Member States, but in the case of the free movement policy the European Court of Justice (ECJ) defers to the national definition in other labour regulations context. Thus, in the result the employees are protected in EC law within the Member States depending on their national definition of 'employee'.

From the beginning the Rome Treaty provided for freedom of movement of goods, gradually the SEA introduced the concept of an internal market and therefore the free movement of people as well a person who is engaged in an economic activity as a worker, so that the ECJ also required a broad definition of a worker who engaged in an economic activity in order to secure the Internal Market objective. To secure the free movement of workers for achieving an internal market within the Community the ECJ decided that the term 'worker' was a Community concept. The Member States have an oppurtunity to adopt and modify the concept of 'migrant worker', but the problem arises that the term 'worker' and 'employee' are used in the different Directives of the EC without defining these terms. The ambiguity remains about the exact meaning of 'employee' and 'worker'in the EC Directives.

The European Member States have worked together for more than 50 years to achieve a high standard of employment, social security, economic and social cohesion and

solidarity, and quality of life. For all of the above purposes they need to ensure freedom, security and justice. Discrimination can damage these objectives and undermine the achievements in society and the labour force, also.

For this reason, to prevent discrimination, the EC enacted two Directives in 2000: the Racial Equality Directive[83] (to prevent discrimination against anyone on the grounds of race and ethnic origin), and the Employment Framework Directive[84] (to prevent discrimination against anyone on the grounds of religion or belief, disability, age or sexual orientation). These Directives set out principles that ensure a level of legal protection against discrimination.

Article 39 (2) of the TEU lies down that the freedom of movement of workers should entail the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and condition of work and employment. Article 12 of the TEU expresses that the free movement of persons is based on the principle of non-discrimination on the ground of nationality. It reads as follows-

> 'Within the scope of application of this Treaty, and without prejudice of any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited.'

TEU expressly prohibits discrimination to promote right to equality.

[83] 2000/43/EC.

[84] 2000/78/EC.

3.5 Right to Equal Teatment

EU has a long history of prohibiting discrimination of sex in the employment context, especially through the Equal Pay Directive 75/117 and the Equal Treatment Directive 76/207. Discrimination is prohibited specially on the grounds of nationality because migrant workers are engaged in an economic activity in another country and in that situation freedom of nationality is most important. The TEU tries to ensure that migrant workers get the same treatment as national workers. Article 12 of the TEU provides that any discrimination based on nationality is prohibited. The Treaty of Amsterdam states the provision of non-discrimination in stronger terms, adding two new provisions to the EC Treaty. 'Article 12 of the EC Treaty was interpreted and emphasised by the Court in the *Data-Delect*[85] case. It said that the principle of non-discrimination means that

> 'there must be perfect equality of treatment in Member States of persons in a situation governed by Community law and nationals of the Member States in question.'

Therefore, in the *Perfili*[86] case it was confirmed that migrants would enjoy better social conditions in some Member States, where nationals benefit from higher social standards, than in others. The Court also added that, in prohibiting discrimination on the grounds of nationality, Articles 12, 43 and 49 were not concerned with disparities in treatment arising from differences between the laws in the Member States, so long as they affected

[85] Case C 43/95 *Data- Delect v MSL Dynamics* [1996] ECR I-4661.

[86] Case C-177/94 criminal proceeding against *Gianfranco Perfili*, civil party: *Lloyd's of London* [1996]ECR 1-161.

all persons subject to them in accordance with objective criteria and without regard to nationality'[87].

In respect of access to employment, working conditions and all other advantages which could help to facilitate the worker's integration in the host Member State the right to equal treatment is one of the fundamental principles that is guranteed by theTEU (as amended Amsterdam Treaty). Equal treatment in the workplace means that all workers are treated equally irrespective of their personal position and will not be discriminated against on the basis of race, sex, disability, nationality and religion.

In 2000 on 27 November the Council Directive 2000/78 established a general framework to ensure equal treatment for all in employment and occupation without regard to a person's religion or belief, disability, age or sexual orientation. This Directive gives protection for access to employment and self-employed activities, including selection criteria, recruitment conditions, working condition, etc. Free movement of workers (Art 39 of the EC Treaty) refers to the opportunity of workers free access into an employment relationship. Access to employment is also important for achieving a high level of employment according to Article 2 of the EC Treaty (as amended by TEU) and the prohibition of discrimination on numerous grounds.

On December 2000 at Nice the EC proclaimed The Charter of Fundamental Rights of the European Union (the Charter)[88] relating to dignity, liberty, equality, solidarity, citizenship

[87]See Catherine Barnard EC Employment Law 2nd Ed (2000) (Oxford University Press) at p-121.

and justice. The Charter is applicable to all Member States and ensures the fundamental rights in the area of employment and industrial relations. It makes a significant contribution to civil, political, social and economic rights and a reflection to the international sources of labour rights. Article 15 of the Charter states the freedom to choose an occupation and the right to engage in work-

> '(1) Everyone has the right to engage in work, and to pursue a freely chosen or accepted occupation.'

The right to equal treatment refers to free access to employment without any kind of unfair discrimination. One of the main focuses of this mini-thesis is to explore the meanings of discrimination in international instrument and national legislation and different types of discriminations are going to discuss next.

3.6 Discrimination in EU Provision

Discriminatory treatment or action could either directly or indirectly affect a person. In the TEU both direct and indirect discrimination are prohibited in Articles 39, 43 and 49. Article 13 complements Article 12 of the EC Treaty, which prohibits discrimination on

[88] In it's Preamble the Charter states-'The peoples of Europe, in creating an ever closer union among them, are resolved to share a peaceful future based on common values'.This is a document containing human rights provisions, 'solemnly proclaimed' by the European Parliament, the Council of the European Union, and the European Commission, on 7 December 2000. An updated version of the Charter was proclaimed on 12 December 2007 in Strasbourg, ahead of the signing of the Treaty of Lisbon, which makes the Charter Legally binding on all countries of the EU except Poland and the United Kingdom (by virtue of Article 1(8) of the Lisbon Treaty).

the grounds of nationality. The new Article enables the Council to take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.

In Regulation 1612/68[89] Article 3 (1) states that national law will not apply where, 'though applicable irrespective of nationality, their exclusive or principal aim or effect is to keep nationals of other Member States away from employment offered'.

The Directive 2000/78 also prohibits five types of discrimination:

(i) Direct discrimination (Art 2 .2(a))

(ii) Indirect discrimination (Art 2.2(b))

(iii) Instruction to discriminate(Art 2.4)

(iv) Victimisation (Art 11)

(v) Harassment (Art 2.3)

These five types of discrimination are defines according to the Directive 2000/78 in detail below.

3.6.1 Direct discrimination

Race Directive 2000/43 is one the most important Directive that ensure equal treatment measure going well beyond the sphere of employment. Article 2 (2) (a) of Directive 2000/43 and 2000/78 provides that direct discrimination 'shall be taken to occur where

[89] Regulation 1612/68 of EEC of the Council on free movement for workers within the Community (1968) OJ L257/2.

one person is treated less favourably than another is has been or would be treated in a comparable situation…'

3.6.2 Indirect discrimination

Article 2 (2) (b) of the Race Directive and directive 2000/78 says indirect discrimination means that 'where an apparently neutral provision, criteria, or practice would put persons ……..at a particular disadvantage compared with other persons, unless that provision, criteria or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary'.Such a provision would be considerer in case of religion or belief, age, disability or sexual orientation.

3.6.3 Instruction to discriminate

According to Article 2(4) of revised Directive 76/207 and 2000/78, 'An instruction to discriminate against persons on grounds referred to in Article 1 (including religion or belief, sexual oriention) shall be deemed to be discrimination within the meaning of this Directive'. Equivalent provisions can be found in the Article 13 Directives[90] and Article 2 (2) (b) of the Consolidated Directive.

[90] Article 2(4) of Dirs. 2000/43 and 2000/78.

3.6.4 Victimisation

Section 11 of the Directive 2000/78 introduces victimization as ' Member States shall introduce into their national legal systems such measures as are necessary to protect employees against dismissal or other adverse treatment by the employer as a reaction to a complaint within the undertaking or to any legal proceedings aimed at enforcing compliance with the principle of equal treatment.'

3.6.5 Harassment

The Equal Treatment Directive recognises harassment as a form of discrimination, Article 2(2) defines harassment as the situation 'where unwanted conduct related to the sex of a person occurs with the purpose or effect of violating the dignity of a person, and of creating an intimidating, hostile, degrading, humiliating or offensive environment'. This provision brought a wider range to prohibit discrimination because some acts cannot be treated as a form of discrimination but that can hamper a persons' dignity.

Any kind of discrimination is prohibited on listed grounds (not exhaustive) according to the Directive. Article 12 of the Directive states that

> 'any direct or indirect discrimination based on religion or belief, disability, age or sexual orientation as regards the areas covered by this Directive should be prohibited throughout the Community...'

Article 11 of the Directive provides that

> 'discrimination based on religion or belief, disability, age or sexual orientation may undermine the achievement of the objectives of the EC Treaty, in particular the attainment of a high level of employment and social protection, raising the standard of living and the equality of life, economic and social cohesion and solidarity, and the free movement of persons.'

A Member State should require positive action measures to ensure a procedure that a person, who is aggrieved because of non-application of the principle of equality, can enforce the right that he is entitled to under the Directive. These types of discrimination listed in the Directive should protect by EU Member States.

Article 141 of the EC Treaty prohibits discrimination based on sex,[91] which is covered by Article 2 of the Equal Treatment Directive of 9 February 1976 and revised by Council Directive 2002/73/EC. This Directive defines the principle of equal treatment for women and men as regards access to employment, vocational training and promotion, and working conditions as meaning

> 'that there shall be no discrimination whatsoever on grounds of sex either directly or indirectly by reference in particular to marital or family status'.

Member States of the EC should also ensure the procedure for the enforcement of the obligation under the Directive that any aggrieved person can pursue himself or herself if

[91] There are a number of joint Directive for Equal Treatment.

the equal treatment principle is not applied to them. Article 21 of the Charter of the EU prohibits discrimination on a number of grounds

> 'Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age, or sexual orientation shall be prohibited.'

The concept of discrimination and the grounds not to discriminate against is widely interpreted and clarified by the ECJ, and has been used in various Directives that will be discussed briefly in the next chapter.

3.7 Conclusion

In this chapter the historical development and building of the EU was discussed. Emphasis was placed on the development of a internal market and the principle of free movement of capital, goods, persons and services. Within the policy of free movement of persons, the workers' freedom of movement developed. In this context emphasis was placed on the workers' freedom, their rights and obligations, equal treatment, and the right not to be discriminated against on the basis of any of the prohibited grounds. The Member States bind themselves by Treaties and the institutions of the EC adopt secondary measures [Regulations and Directives] to achieve the objectives arising from these Treaties.

Chapter 2 and 3 examined the content of the employment relationship in both South Africa and the EU. Now we turn to Chapter 4 to the analysis of what will be regarded as constituting discrimination on the ground of religion. The enquiry will focus inter alia on the notion of 'religion', the determination of fair and unfair discrimination, and the specific rights and duties of the employee and employer with regard to this particular form of discrimination.

Chapter 4 Discrimination on the Ground of Religion

4.1 Definition of Religion

In this chapter the main focus is discrimination is on the ground of religion. The term 'religion' is difficult to define. There are many interpretations of what defines a religion but not one that can be said to be the most accurate. Religion can regulate a person's thinking and working, and guide their way of life. It is a strong belief in, and a relation to, the Creator, and imposes duties determined by the Creator. At the same time we should keep in mind that all religions are not theistic. However, there is no short cut, no specific or single way to define religion and attempts to define religion for all contexts are much more complex. Therefore, this chapter will firstly explore the etymology of the concept of religion.

4.1.1 Etymology

The English word "*religion*" is derived from the Middle English "*religioun*" which came from the Old French "*religion.*" It may have been originally derived from the Latin word

"*religo*" which means "*good faith*," "*ritual*," and other similar meanings. Or it may have come from the Latin "*religãre*" which means "*to tie fast*." [92]

Religion has a strong moral and social impact. According to Cicero[93] 'religio' is derived from 'relegere', to're-read', and indicates something that is passed on along chains of tradition. On the other hand, Lactantius[94] traces religion to religere, 'to bind fast', that means that religion places a strong emphasis on community, which is ironic given the tendency in the modern world that religion is something private and personal.

Definitions of religion almost invariably contain some defect. These include:

- Some exclude beliefs and practices that many people passionately defend as religious. For example, the definition might include belief in a God or Goddess or combination of Gods and Goddesses who are responsible for the creation of the universe and for its continuing operation. This excludes such non-theistic religions as Buddhism and many forms of religious Satanism, which have no such belief.
- Some definitions equate '*religion*' with '*Christianity*', and thus define two out of every three humans in the world as non-religious.

[92] Definition of the word 'Religion' (None are totally satisfying)by Religious Information Comparison of Religions (Religious Tolerance.Org).
http://www.religioustolerance.org/rel_defn.htm (accessed on November 2008).

[93] Marcus Tullius Cicero(3 January 106 BC-7 December 43 BC) was a Roman statesman, lawyer, political theorist,philosopher, and Roman Constitutionalist.

[94] Lucius Caelius FirmianusLactantius was an early Christian authur (ca 240-ca320).

- Some define 'religion' in terms of 'the sacred' and/or 'the spiritual' and thus require the creation of two more definitions'[95].

The etymology of the term of religion contents difficulty. Many attempts focus too narrowly; recognising a few aspects of religion and excludeing those religion that do not fit well. The attempt to find out the definition of the term 'religion' is followed by the various dictionary definitions. Few of those are mentioned to find out the definition of the 'religion'.

4.1.2 Dictionary Definitions:

Dictionaries have made many attempts to define the word *religion*:

[1] '...no single definition will suffice to encompass the varied sets of traditions, practices, and ideas which constitute different religions.' [96]

[2] 'Human recognition of superhuman controlling power and especially of a personal God entitled to obedience'[97]

[3] 'a cause, principle, or system of beliefs held to with ardor and faith.'[98]

[95]Definition of the word 'Religion' (Fn 93 above).

[96] Barns & Noble (Cambridge) Encyclopedia (1990):

[97] The Concise Oxford Dictionary (1990):

[98] Merriam-Webster's Online Dictionary.

[4] 'any specific system of belief and worship, often involving a code of ethics and a philosophy.'[99]

This definition would exclude religions that do not engage in worship. It implies that there are two important components to religion:

- One's belief and worship in a deity or deities
- One's ethical behaviour towards other persons

This dual nature of religion is expressed clearly in the Christian Scriptures (New Testament) in Matthew 22:36-39:

'Teacher, what is the great commandment in the law? Jesus said unto him, Thou shalt love the Lord thy God with all thy Heart, and with all thy soul, and with all thy mind. This is the first and great commandment. And the second is like unto it, Thou shalt love thy neighbour as thyself'

[5] 'An organised system of belief that generally seeks to understand purpose, meaning, goals, and methods of spiritual things. These spiritual things can be God, people in relation to God, salvation, after life, purpose of life, order of the cosmos, etc.'[100]

Besides the dictionary definitions a list of definitions of religion has been assembled from various authors and theologians. A few definitions from them are listed below.

[99] Webster's New Dictionary (Third College Edition).

[100] The Christian Apologetics & Research Ministry (CARM) (Dictionary).

4.1.3 Definitions by Authors:

Kile Jones –

> 'It is apparent that religion can be seen as a theological, philosophical, anthropological, sociological, and psychological phenomenon of human kind. To limit religion to only one of these categories is to miss its multifaceted nature and lose out on the complete definition'[101]

Paul Connelly defines religion as-

> 'Religion originates in an attempt to represent and order beliefs, feelings, imaginings and actions that arise in response to direct experience of the sacred and the spiritual. As this attempt expands in its formulation and elaboration, it becomes a process that creates meaning for itself on a sustaining basis, in terms of both its originating experiences and its own continuing responses.'[102]

Within the frame of this thesis an overview of the right to religion in terms of legal text is also important. In that point firstly the international instruments referring to the right to religion will be dealt with, followed by the national definitions.

4.1.4 International Instruments

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[101] Kile Jones Essay on defining religion. (PhD student at the University of Glasgow, Scotland). www.kilejones.com (accessed November 2008).

[102] Paul Connelly in Definition of Religion and Related Terms (1996) (www.darc.org) (accessed November 2008).

Religion is commonly, but not always, associated with traditional majority, minority or new religious beliefs in a transcendent deity or deities. In human rights discourse, however, the use of the term usually also includes support for the right to hold non-religious beliefs. In 1993 the United Nation Human Rights Committee, an independent body of 18 experts selected through a UN process, described religion or belief as 'theistic, non-theistic and atheistic beliefs, as well as the right not to profess any religion or belief'.

Religions, and other beliefs, bring hope and consolation to billions of people, and hold great potential for peace and reconciliation. They have also, however, been the source of tension and conflict. These complexities, and the difficulty of defining 'religion' and 'belief,' are illustrated by the still developing history of the protection of freedom of religion or belief in the context of international human rights.[103]

Though it is difficult to define religion, most national legislation (for example, the SA Constitution) protects freedom of religion to give to effect the international obligations binding upon the relevant states by the international instruments signed by them. International law does not define the term 'religion' for example Universal Declaration on Human Rights of 1948; ICCPR of 1966, most national Constitutions also include

[103] University of Minnesota Human Rights Centre Human Rights Library, Study Guide: Freedom of Religion or Belief (2003). http://www1.umn.edu. (accessed on November 2008).

clauses on freedom of religion without defining 'religion' for example the SA Constitution and the Constitution for the United States of America (USA Constitution).

4.1.5 Constitutional Court Definition

According to the SA Constitutional Court 'religious beliefs, are not truths that can be publicly demonstrated'. They are 'neither confirmable nor [deniable] by public evidence' and therefore, 'the use of common standards of reason cannot help reasonable people to converge on the truths in the area of religion'[104].

It is clear from the above discussion that there is no single, unique or specific definition of the term 'religion'. It can be advantageous of allowing the courts to interpret 'religion' in a way that follows and promotes the purpose of the legislation. The Court should not concern with the legitimacy of a particular belief or creed, only to protect person or group of persons from arbitrary or discriminatory treatment based on their religion or belief.

The right to religious freedom includes right not to be discriminated against on that basis. Discrimination can be promoting a negative impact to achieve equality; it can be fair or unfair and even can be justified by the law, though law forbids it. Therefore, it is important to explore the concept of discrimination and discuss detail below.

4.2 Discrimination

[104] *Christian Education South Africa v Minister of Education* 2000 (10) BCLR 1051 (CC) at para 17.

The word 'discrimination' generally means 'to treat unequally'. It comes from the Latin 'discriminare', which means to 'distinguish between'[105]. In a legal sense it is defined and explained in different ways. However, discrimination is more than distinction or differentiation; it is action based on favour resulting in unfair treatment of people.The right to equality provides the right not to treat unequally, that means, not to discriminate against. The concept of equality discussed below.

4.2.1. Employment Equality

As it was briefly mention in chapter two, equality is usually distinguished from formal equality and substantive equality. Formal equality leads to the traditional notion of similarity of treatment, and is established by the opportunity to compete equally on the basis of personal talents. ECJ in *Kalanke*[106] the equality of opportunity was strongly argued by the Advocate General, that

> 'the positive action in favour of women should be limited to measures designed to achieve equality of opportunity, that is putting people in a position to attain equal results by creating conditions of equality as between members of the two sexes as regards starting points. [para 9]
>
> Only those conditions that cause inequalities at the starting points need to be removed. [para 12]'

[105] From Wikipedia, the free encyclopedia.
(http://en.wikipedia.org/wiki/Discrimination) (accessed November 2008).

[106] *Kalanke v Freie Hansestadt Bremen Case* C-450/93 [1996] 1 CMLR 175 (ECJ).

In Kalanke case the Advocate General excluding the affirmative action measures and limited only to the achievement of equality.The women are previously disadvantaged group and to promote them in a advanced group it is necessary to take affirmative steps or measures to achieve substantive form of equality.

In the event of deep-rooted structural disadvantage, this formal equality approach is not appreciated[107]. In *Harksen v Lane NO*[108] case the court has therefore required that the investigation into the fairness of discrimination should be directed primarily at the experience of the victim of discrimination. Thus, the concept of substantive equality becomes an important relation factor in employment equity.

Substantive equality is indicated of a choice in favour of the substantive approach. In *City Council of Pretoria*[109] the Constitutional Court of South Africa said

> 'section 8 [of the interim Constitution] is premised on the recognition that the ideal of equality will not be achieved if the consequences of those inequalities and disparities caused by discriminatory laws and practices in the past are not recognised and dealt with.'

In *National Coalition for Gay*[110] the Court said

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[107] Harmse case (1997) (11) BCLR 1 (2003) (LC).

[108] 489 (CC) at par 1510 E.

[109] *City Council of Pretoria v Walker* (1998) 3 BCLR 257 (CC) at para 46.

[110] *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000 1 BCLR 39 (CC) at para 62.

'substantive equality is envisaged when section 9(2) unequivocally asserts that equality includes "the full and equal enjoyment of all rights and freedoms".'

Sachs J remarked that one of the great gains achieved by following a situation-sensitive human rights approach is that the analysis focuses not on abstract categories, but on the lives as lived and the injuries experienced by different groups in soceity.

In *President of RSA v Hugo*[111] Goldstone J emphasised 'the need to develop a concept of unfair discrimination which recognises that although a freedom is the goal, that goal cannot be achieved by insisting upon identical treatment in all circumstances'.

He also added that 'Each case, therefore, will require a careful and thorough understanding of the impact of the discriminatory action upon the particular people concerned to determine whether its overall impact is one which furthers the constitutional goal of equality or not. A classification which is unfair in one context may not necessarily be unfair in a different context'[112].

From the case law discussed above it can determined that the prohibition of unfair discrimination may imply differentiated treatment of employees and workseekers in order to achieve substantive equality among them. In *Leonard Dingler Employee Representative Council v Leonard Dingler (Pty) Ltd*[113] Seady AJ held that

'the prohibition of unfair discrimination ...sorts permissible discrimination from impermissible discrimination. By this mechanism the legislation recognises that

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[111] *President of RSA v Hugo*(1997) 6 BCLR 708 at 729 F-G.

[112] at 729 G-H.

[113] (1998) 19 ILJ 285 (LC) at 294 I- J.

discriminatory measures are not always unfair. What is less clear is where to draw the line between permissible and impermissible discrimination. The notion of permissible discrimination is in keeping with a substantive, rather than formal, approach to equality that permeats the Constitution…'

This is an indication that differential treatment does not always result in unfair discrimination. Same approach in *Germishuys v Upington Municipality*[114], the court stated that

'any employer which chooses one candidate amongst a group of several for a position of employment, of necessity "discriminates" against the unsuccessful candidates. Discrimination in the context implies preferring one party above another. More properly, it would be correct to say that the employer "differentiated" rather than "discriminated". '

In terms of section 9(3) of the Constitution a two-stage analysis laid down the determination as to whether differentiation amounts to unfair discrimination, in *Harksen v Lane No*[115] Goldstone J held that:

'Firstly, the question arises whether differentiation amounts to 'discrimination' and, if it does, whether, secondly, it amounts to 'unfair discrimination'. It is as well to keep these two stages of the enquiry separate. That there can be instances of discrimination which do not amount to unfair discrimination is evident from the fact that even in cases of discrimination on the grounds specified in section

[114] *Germishuys v Upington Municipality* (2001) 3 BLLR 345 (LC) (at par 81).

[115] Fn 101 above at 1508 A-D.

8(2), which by virtue of section 8(4) are presumed to constitute unfair discrimination, it is possible to rebut the presumption and establish that the discrimination is not unfair.

Section 8 (2) contemplates two categories of discrimination. The first is differentiation on one (or more) of the fourteen grounds specified in the sub-section. The second is differentiation on a ground not specified in sub-section (2) but analogous to such ground.'

In *Prinsloo v Van der Linde*[116] the second form of discrimination was defined as follows:

'The second form is constituted by unfair discrimination on grounds, which are not specified in the sub-section. In regard to this second form there is no presumption in favour of fairness...Given the history of this country we are of the view that 'discrimination' has acquired a particular pejorative meaning relating to the unequal treatment of people based on attributes and characteristics attaching to them..... [U]nfair discrimination when used in this second form in section 8(2), in the context of section 8 as a whole, principally means treating persons differently in a way which impairs their fundamental dignity as a human beings, who are inherently equal in dignity...Where discrimination results in treating persons differently in a way which impairs their fundamental dignity as human beings, it will clearly be a breach of section 8(2). Other forms of differentiation, which in some other way affect persons adversely in a comparably serious manner may well constitute a breach of section 8(2) as well.'

[116] (1997) 6 BCLR 759 (CC) at 772F- 774C.

Differentiation does not constitute a violation of section 9(1) of the Constitution; it may amount to unfair discrimination for the purposes of section 9(3) and 9(4) of the Constitution[117]. In *Prinsloo* case the Court distinguished between two kinds of differentiation:

> 'The idea of differentiation (to employ a neutral descriptive term) seems to lie at the heart of equality jurisprudence in general and of the section 8 right or rights in particular. Taking as comprehensive a view as possible of the way equality is treated in section 8, we would suggest that it deals with differentiation in basically two ways: differentiation which does not involve unfair discrimination and differentiation which does involve unfair discrimination.'

From these cases it should be clear that differentiated treatment can amount to discrimination or mere differentiation. A discriminatory action can be fair or unfair and unfair discrimination could be on the prohibited grounds specified by relevant legislation that is not justified by law if not otherwise mentioned. However, if the differentiation, is based on any of the grounds specified in section 9(3) of the Constitution or impairs the dignity or in some other invidious way adversely affect the complainant in a comparably serious manner, it has to meet, apart from the rationality requirements, also the stricter demands of fairness under section 9(3) of the Constitution[118].

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[117] *Prinsloo v Van der Linde* (1997) 6 BCLR 759 (CC) at 772B and *Harksen v Lane No*1997 (11) BCLR 1489 (CC) at 1507 I.

[118] *National Coalition for Gay and Lesbian Equality v Minister of Justice* (1998) 6 BCLR 726 at 745C.

In *Harksen*[119] it was laid down that an unspecified ground could constitute 'discrimination' if it is based on attributes or characteristics, which have the potential to impair the fundamental dignity of persons as human beings, or to affect them adversely in a comparably serious manner. PEPUDA defines prohibited grounds of discrimination as the listed grounds and any other ground where discrimination based on that other ground (1) causes or perpetuates systematic disadvantage; (2) undermines human dignity; or (3) adversely affect the equal enjoyment of a person's rights and freedoms in a serious manner that is comparable to discrimination based on a listed ground[120].

Section 9(5) of the Constitution applies in the case of discrimination based on a specified ground; which provide listed grounds in sub-section (3) is unfair unless it is established that discrimination is fair. No such presumption in favour of unfairness applies to discrimination based on unspecified grounds.

There is discrimination which can be either fair or unfair, on the grounds of specified or unspecified and could constitute direct or indirect discrimination. To explore all these kind of discrimination it is important to know the legal definition of discrimination in the international instrument and the definition of national legislation that follows the provision of international instrument to give effect to the relevent state's international obligations.

[119] (1997) 11 BCLR 1489 (CC) at 1508 G-H.

[120] Section 1 (xxii) of PEPUDA.

4.2.2 Definition of discrimination-

4.2.2.1 International Instruments

Various legal instruments defined discrimination. In the employment context 'discrimination' in South Africa must be defined, interpreted in compliance with ILO Convention 111 Concerning Discrimination in Respect of Employment and Occupation (section 3(d) of EEA) which defines discrimination in Article 1 as follows:

> '1. For the purpose of this Convention the term 'discrimination' includes:
>
> (a) Any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin, which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation;
>
> (b) Such other distinction, exclusion or preference which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation as may be determined by the Member concerned after consultation with representative employers' and workers' organisations, where such exist, and with other appropriate bodies.'

4.2.2.2 EU Provisions

Directive 2000/78/EC of 27 November 2000 establishes a general framework for equal treatment in employment and occupation, whereas Article 1 of the Directive states that its purpose is to lay down a general framework for combating discrimination on the grounds of religion or belief, disability, age or sexual orientation as regards employment and

occupation, with a view to putting into effect in the Member States the principle of equal treatment.

Article 2 describe the concept of discrimination-

'1. For the purposes of this Directive, the 'principle of equal treatment' shall mean that there shall be no direct or indirect discrimination whatsoever on any of the grounds referred to in Article 1'.

2. For the purposes of paragraph 1:

'(a) direct discrimination shall be taken to occur where one person is treated less favourably than another is, has been or would be treated in a comparable situation, on any of the grounds referred to in Article 1;

(b) indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would put persons having a particular religion or belief, a particular disability, a particular age, or a particular sexual orientation at a particular disadvantage compared with other persons unless:

(i) that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.

3. Harassment shall be deemed to be a form of discrimination within the meaning of paragraph 1, when unwanted conduct related to any of the grounds referred to in Article 1 takes place with the purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or

offensive environment. In this context, the concept of harassment may be defined in accordance with the national laws and practice of the Member States'.

According to the provision of Directive 2000/78 there are several kinds of discrimination that can arise in the employment context, few examples are given below. As for example: direct discrimination can arise when an employer decides to dismiss an employee simply because he declared that he belongs to a particular religion. Refusal of time off work for religious holidays to Muslim or Hindu employees may be discriminatory on the grounds of religion[121].

Indirect discrimination as regards dress code in working environments is a neutral rule that applied to everyone, without distinction however, that can indirectly discriminate against some religious groups. For example: the employees of a company have a dress code, i.e. to wear a particular cap with the colour of the company. This could disadvantage Muslim woman who wears a headscarf. Indirect discrimination will not be unlawful if it can be justified[122].

[121] Vickers, Religion and Belief Discrimination in Employment. The EU Law, Report for the European Commission, January 2007, Part .V, available at: http://ec.europa.eu/employment_social/fundamental_rights/pdf/legnet/07relbel_en.pdf (accessed November 2008).

[122] Fn 121 above

Instruction to discriminate can occur, for example, if an employer instructs an employee to do something that would amount to religious discrimination.

Victimisation takes place when a person is treated less favourably for having made a complaint about religious discrimination, or having supported another person in their complaint procedure.

Harassment, for example, occurs when a worker, especially if he or she holds a supervisory function, intimidates or humiliates an employee in front of other colleagues.

4.2.2.3 South African Provisions

The Employment Equity Act of 1998 (EEA), like the EC Directive, ILO Convention 111 and the SA Constitution, prohibits both indirect and direct discrimination[123]. The EEA provides that an employer's conduct falls within the terms of the definition of discrimination, if it is based on a prohibited ground. Religion is one of the directly prohibited grounds not to be discriminated on. According to the EEA 'harassment' on a prohibited ground is also treated as a form of discrimination (section 6(3)).

---

[123] Section 6(1) of the EEA.

Section 1 of the PEPUDA defines 'discrimination', 'equality', 'harassment', and 'Prohibit grounds'. According to section 1 -

> 'discrimination' means any act or omission, including a policy, law, rule, practice, condition or situation which directly or indirectly-
>
> (a) imposes burdens, obligations or disadvantage on; or
>
> (b) withholds benefits, opportunities or advantages from,
>
> any person on one or more of the prohibited grounds;
>
> 'equality' includes the full and equal enjoyment of rights and freedoms as contemplated in the Constitution and includes *de jure* and *de facto* equality and also equality in terms of outcomes;
>
> 'harassment' means unwanted conduct which is persistent or serious and demeans, humiliates or creates a hostile or intimidating environment or is calculated to induce submission by actual or threatened adverse consequences...
>
> 'Prohibited grounds' are-
>
> (a) race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth; or ....'

Above mentioned definitions and provisions are legislative provisions. Religious freedom implies the right not to be discriminated against on the basis of religion. On the one hand, the prohibition of discrimination means formal equality, viz that everyone is treated alike. However, on the other hand, substantive equality extends the differential fundamental needs to everyone. The nature of different religions requires that the different practice of

the group of that religion is respected, for example, the Muslim needs to take a break two times during the day to make their Salah. As mentioned, the Constitution in section 9(2) recognises substantive equality, the full and equal enjoyment of all rights and freedoms.

To prove discrimination one has to establish that the treatment is less favourable treatment, and that it is based, directly or indirectly, on a prohibited ground. The SA Constitution[124] allows fair discrimination on certain listed grounds[125]. It is important to know what kind of action taken by the employer constitutes religious discrimination and is that religious discrimination can be fair if it will be for the operational requirement of a job or any other legitimate ground permitted by the legislation. What kind of actions or treatment by employer to the employee may be constitute religious discrimination that will discuss next.

4.3 Religious Discrimination

Employers are not allowed to take any action regarding employment (e.g. hiring, firing, awarding benefits) that constitutes discrimination on the basis of religion. It is difficult for employees to prove that the employer's differentiated treatment is really on the ground of religion.

[124] Section 9 (5) of the Constitution.

[125] Section 9 (3) of the Constitution.

4.3.1 International Position-

The international instruments protect freedom of religion, and therefore the right not to discriminate against on the ground of religion. The States bind themselves by signing these instruments and shall take effective measures to prevent and eliminate unfair discrimination. Two fundamental rights ensure the respect of religion in Europe: (i) right to religious freedom, and (ii) right to freedom from religious discrimination[126].

(i)The right to religious freedom is contained, for instance, in The Universal Declaration of Human Rights, signed in 1948. Article 18 states:

> 'Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have a religion or whatever belief of his [her] choice.'

The International Covenant on Civil and Political Rights (ICCPR), of 16 December 1966 in Article 18 declares:

> '(1) Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.

[126] See: ENAR, Combating Religious and Ethnic Discrimination in Employment. From the EU and International Perspective, 2004, available at. http://www.enareu.org/en/publication/reports/discrim_employ_04_en.pdf (accessed on November 2008)

(2) No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.'

The European Convention on Human Rights and Fundamental Freedoms (ECHR), signed in Rome in 1950 in Article 9 declares the same right for everyone:

'9(1) Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in worship, teaching, practice and observance.

(2) Freedom to manifest one's religion or belief shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others'.

The UN Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief[127] (1981 UN Declaration) contains eight Articles, four of which (Articles 1, 2, 3 and 4) define important rights in this context. This Declaration does not constitute a legally binding text, but it is the basis of a number of actions, for example, the work of the UN Special Reporter on Freedom of Religion or Belief. The reports of the Special Reporter have noted numerous cases of intolerance,

[127]The UN Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief of 1981

discrimination and violation of religious freedom in some states. Article 1 of the UN Declaration 1981states:

> '(1) Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have a religion or whatever belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practices and teaching.
>
> (2) No one shall be subject to coercion which would impair his freedom to have a religion or belief of his choice.'

The Charter of Fundamental Rights of the European Union, was signed in 2000 but not yet included in the Treaties and, therefore, not yet legally binding (article 10). Political future of the Charter is currently uncertain. However, the European Court of Justice is likely to use its provisions as an interpretation aid when applying Community Law.

(ii) The prohibition of discrimination on grounds of religion is provided for in a number of International Instruments: Article 2 of the ICCPR states:

> '1. Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other.
>
> (2) Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in

accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant'.

Article 26 provides that the law shall prohibit any discrimination, on the ground, among others, of religion. It also contains the duty to guarantee effective and equal protection against discrimination, requiring the States Parties to effectively act to realise conditions of equality. Article 26 states:

'All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as ... religion'.

UN Declaration 1981 provides in Article 2

'1. No one shall be subject to discrimination by any State, institution, group of persons, or person on the grounds of religion or other belief.

2. For the purposes of the present Declaration, the expression 'intolerance and discrimination based on religion or belief' means any distinction, exclusion, restriction or preference based on religion or belief and having as its purpose or as its effect nullification or impairment of the recognition, enjoyment or exercise of human rights and fundamental freedoms on an equal basis.'

UN Declaration continue in Article 3

'Discrimination between human being on the grounds of religion or belief constitutes an affront to human dignity and a disavowal of the principles of the Charter of the United Nations, and shall be condemned as a violation of the human rights and fundamental freedoms proclaimed in the Universal Declaration of Human Rights and enunciated in detail in the International Covenants on Human Rights, and as an obstacle to friendly and peaceful relations between nations.'

4.3.1.1 Limitation Clause

Article 18 of the ICCPR and Article 9 of the ECHR protect freedom of religion, but subject the manifestation of religion or belief to such limitations that are 'prescribed by law' and are necessary in the interest of public safety to protect public order, health or morals, or to protect the fundamental rights and freedoms of others. Article 18 (3) of the ICCPR reads as follows;

'Freedom to manifest one's religions or belief may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals of the fundamental rights and freedoms of others.'

The General Comments[128] to Article 18 of the ICCPR said that these limitations are to be strictly interpreted, such that only the listed restrictions are allowed. Limitations must be

[128] Human Rights Committee, General Comment No 22: The Right to Freedom of Thought, Conscience and Religion (Art 18) at number 8.
[available at http://www.unhchr.ch/tbs/doc.nsf]

'directly related and proportionate to the specific need on which they are predicated', and 'may not be imposed for discriminatory purposes or applied in a discriminatory manner'.

Article 39 (3) of the TEU authorises derogations from the fundamental principles of free movement of workers on three grounds: public policy, public security and public health; and Article 55 contain the same derogations for freedom of services. All derogations to a fundamental freedom of the Community must be interpreted strictly so that their scope cannot be determined unilaterally by each Member State, without being subject to control by the Community institutions[129], and must be read subject to the general principles of law, including fundamental human rights. The court said in *ERT V DEP*[130] that the application of the derogations in Article 55 must be appraised in the light of the general principle of freedom of expression in Article 10 of the European Convention on Human Rights[131]. Member States do, however, retain a certain amount of discretion, within the limits of the EC Treaty, to determine what constitutes public policy in the light of their national needs.[132]

[129] Barnard C. EC Employment Law 2ed (2000) at 180.

[130] Case C-260/89 (1991) ECR I-2925.

[131] Barnard C.(fn 121) (fn 422 at page 181).

[132] *Adoui and Cornuaille v Belgian State* [1982] ECR 1665, para 8.

4.3.2 EU position-

Religious discrimination is a problem that is increasing in the European employment context because of migrant workers coming from different cultures and religious backgrounds. Europe is facing a more varied religious landscape with its increasing diversity, than ever before. According to the Eurobarometer Report on Discrimination[133], a survey issued in January 2007, 44% of Europeans feel that discrimination on grounds of religion or belief is currently widespread in Europe and 64% perceive racial discrimination as a largely common problem. Third country nationals, particularly undocumented migrants and asylum seekers, the Jewish community and the Muslim community, are all particularly vulnerable to racial and religious discrimination[134].

People belonging to religious minorities, especially migrants, also have disproportionately lower incomes and higher rates of unemployment[135]. There is an increasing level of harassment and discrimination against minority group in the workplace. For example a Muslim woman who wears a headscarf can be particularly vulnerable to harassment and discrimination in the workplace. This is unfair treatment on

[133] The Eurobarometer Report is available at: http://ec.europa.eu/employment_social/eyeq/uploaded_files/documents/Eurobarometer_report_en_2007.pdf (accessed on 2 November 2008).

[134] ENAR Shadow Report 2005, p. 32, available at: http://www.enar-eu.org/en/publication/shadow_reports/europe2005_low_EN.pdf (accessed on 2 November 2008).

[135] See Migrants, Minorities and Employment. Exclusion, Discrimination and Anti-discrimination in 15 Member States of the European Union, EUMC, 2003, available at: http://eumc.eu.int/eumc/material/pub/comparativestudy/CS-Employment-en.pdf; (accessed on November 2008)

the basis of both gender and religion. Discrimination on grounds of religion or belief could also refer to differences in the treatment of a person in the enjoyment of her/his fundamental right to freedom of religion or belief. For example:

(a) An employer decides not to employ a job applicant because, although he has the skills required for the job, he/she is a Hindu or Muslim. This is discrimination on grounds of religion or belief.

(b) Employees in a workplace are ridiculed or even physically attacked by reason of their faith. This constitutes religious harassment.

There are a number of European Instruments that ensure religious freedom and prohibit discrimination on that basis. Article 14 of the European Convention on Human Rights and Fundamental Freedoms[136] (1950) prohibits discrimination on the basis of religion in relation to matters that come within the ambit of Convention rights. Article 14 provides:

> 'The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.'

[136] Not all EU Member States have ratified this convention, but it has been in force since 1 April (2005). Article 6 of the Treaty on European Union makes a reference to the ECHR, stating that 'the Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms'. Therefore the interpretation of rights given by the European Court is relevant for the protection of religious freedom and for the key concepts used in addressing religious discrimination, both in the Member States and at EU level.

Protocol 12 to the Convention[137], signed in 2000, created an independent right not to be discriminated against and impose a duty on public authorities not to discriminate. Article 1 of Protocol 12 to the ECHR:

> '1. The enjoyment of any right set forth by law shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.'

Article 21 of the Charter of Fundamental Rights of the European Union[138] contains a wide prohibition of discrimination:

> '1. Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited.
>
> 2. Within the scope of application of the Treaty establishing the European Community and of the Treaty on European Union, and without prejudice to the special provisions of those Treaties, any discrimination on grounds of nationality shall be prohibited.'

[137] Out of 27 Member States of EU only the Netherlands, Luxembourg, Cyprus, Finland and Romania have ratified the Protocol on July 2007.

[138] The Charter of Fundamental Rights of the European Union in article 52.3 states that when the rights contained in the Charter correspond to rights guaranteed by the ECHR, 'the meaning and scope of those rights shall be the same as those laid down by the said Convention'. Although not binding, the Charter makes an explicit reference to the interpretation of the rights given by the ECHR instruments.

In addition to this, the Charter further ensures the principle of equality before the law (Article 20) and respect for cultural, religious and linguistic diversity throughout the EU (Article 22). The signatories of international or European instruments have a duty to prohibit discrimination in their national legislation and to make this prohibition effective and respected by every citizen in the State. The EU now has specific provisions on religious discrimination, in Directive 2000/78.

The EU Directive 97/80/EC[139] (applicable to Article 141 of the EC Treaty and the Equality Directives) states that the applicant (employee) need only establish facts from which discrimination may be presumed. The burden then passes to the respondent (employer) who must prove that there has been no discrimination. The presence of such legal instruments in the international and European frameworks means that the signatories of each covenant have the duty to prohibit discrimination in their domestic legislation and to make this prohibition effective and respected by everyone in the State.

4.3.3 SA position

Section 6(1) of the EEA provides 'no person may unfairly discriminate, directly or indirectly, against an employee...on one or more grounds...race, sex, religion...'.

[139] 'The aim of this Directive shall be to ensure that the measures taken by the Member States to implement the principle of equal treatment are made more effective, in order to enable all persons who consider themselves wronged because the principle of equal treatment has not been applied to them to have their rights asserted by judicial process after possible recourse to other competent bodies' (Article 1 of the Directive). This Directive deals with the burden of proof in case of discrimination on the basis of sex, which is equally applicable to other forms of discrimination.

Section 11 of the EEA provides that 'whenever unfair discrimination is alleged in terms of this Act, the employer against whom the allegation is made must establish that it is fair'.

The South African courts have applied these principles in a number of important cases where religious discrimination relating to employment was alleged. The *Prince case*[140] illustrates the approach of the Constitutional Court in dealing with a statutory provision that allegedly discriminates on the ground of religion. Prince, a law graduate, had been refused permission to enter the legal profession because he had been convicted for possession of cannabis. Prince proved that he was a member of the Rastafarian religion and that the use of cannabis was an integral part of the religion. He also argued that the general prohibition on the use of cannabis was unconstitutional because drug abuse could be combated without banning the use of cannabis for religious reasons.

The Court said that the prohibition of the use of cannabis in section 4(b) of the Drug and Drug Trafficking Act 1992 has a serious impact on the rights of Rastafarians to practise their religion, since it forces them to choose between following their religious convictions or obeying the law.[141] The purpose of the Drugs and Drug Trafficking Act to control the use of dependence-producing substances is an important objective to consider when deciding whether it justifiably limits the right to freedom of religion of members of the Rastafarian religion[142]. It was decided that the prohibition of the use of cannabis

[140] *Prince v President of the Law Society of the Cape of Good Hope & Others*, 2002(3) BCLR 231 (CC)

[141] *Prince Case (*Fn 132*)* at 991B.

[142] *Prince case* (fn 132) at 986 E-F.

undoubtedly interferes with the practice by Rastafarians of their religion. However, having regard to the extent to which the eradication of the use of cannabis is in keeping with international standards, the nature and extent of the limitation is not unreasonable[143].

It was submitted on behalf of the applicant that the violation of the applicant's rights to freedom of religion and equality could have been avoided by a limited exemption permitting adherents of the Rastafarian religion to possess and use cannabis for purposes of bona fide religious observance. The Court rejected this contention.

Nine judges hearing the matter, four Judges were prepared to uphold the appeal. Applying the test of proportionality (section 36 (1) of the Constitution), they found that the general prohibition on the use of cannabis had the effect of treating all members of the Rastafarian faith as criminals, thereby violating their rights to dignity and religious freedom. They also found that it was possible to differentiate between the use of cannabis for religious purposes, and for other purposes, and, therefore, concluded that the general prohibition on the use of cannabis was unconstitutional.

The other five judges disagreed with them. They gave the opinion that Rastafarian is a religion and that the prohibition on the use of cannabis limited the religious freedom of members of that faith. Given the nature of the international drug trade and South Africa's international obligation to combat that trade, it was found that a general exemption to allow the possession of drugs for religious purposes would undermine the State's ability

[143] at 986G.

to enforce its drug legislation[144]. The limitation, therefore, was justifiable, and the appeal was rejected.

In this case the religious purpose and the general purpose of the use of cannabis are treated differently. The judgement ensures the dignity of the religious practice. However, the judges were able to reject the appeal on a different ground, viz. that the use of cannabis violated the State's international obligations. The Court was not, therefore, dealing with a case of religious discrimination. The majority opinion of the five judges was to the effect that religious purposes should be protected but that at the same time 'cannabis' is one kind of drug, and that the use thereof cannot be supported. Though the judges said they limited the religious freedom of the members of the Rastafarian faith, it was very difficult to ensure that the use of that particular drug would not be abused. For this reasons it is the State's responsibility to establish a general law and order for all, though it may be an extra duty for police or other relevant force.

The *FAWU case*[145] also involved alleged religious discrimination by an employer. A number of Muslim employees were dismissed for refusing to work on Eid Day, a Muslim religious holiday. In terms of a collective agreement employees were entitled only to official public holidays. Although the employees offered to work overtime so that production would not be lost, the employer did not agree. The employees then failed to report for work on that day and, after disciplinary proceedings, they were dismissed. In the Labour Court they claimed that their dismissals were automatically unfair or,

[144] at 989 A-B.

[145] *FAWU & others v Rainbow Chicken Farms* (2000) 1 BLLR 70 (LC).

alternatively, that their conduct did not warrant dismissals. The employees also alleged that they had been unfairly discriminated against on the basis of their religion.

The Labour Court had to answer the question of whether the employer's refusal to allow a group of Muslim butchers a day off to celebrate Eid constituted a discriminatory practice. Contrary to an agreement between the butchers' union and the employer that the butchers would work half-shifts on Eid, they collectively informed the company that they were not prepared to do so.

The Court dismissed the claim of religious discrimination since the decision to dismiss was not only because they were followers of the Muslim faith or they had to practise their faith on a particular day. It was held that to refuse to allow employees to celebrate religious holidays constitutes unfair discrimination only if the employer permits some to do it and not others, and providing that the granting of such permission would not result in a disruption of work. The Court also found that it was operationally justified to require all workers to work on religious holidays that were not official public holidays. In this case the employees are 'Muslims' and they slaughter chicken in the'halal' (slaughter in the name of Allah) way; this is the genuine operational requirement of that job. However, it found that an employer is not entitled to dismiss an employee for unauthorised absence where he has no prior offences. Although the conduct of the employees had been indicative of insubordination, they had not stayed away from work for a frivolous reason, but had acted on principle. The Court, however, warned that employers of employees of

minority religious persuasions should negotiate a compromise which allows workers time off on religious days. They were, therefore, reinstated.

To ensure religious freedom an employer should accommodate the religious practice, and grant their workers time off for big religious festivals. The employer could handle this situation very easily: the employees can work overtime before Eid, and on that particular day they can take time off. Only the Christian religious festivals are public holidays. There are other religions, e.g. Hindu, where festivals are not recognised as public holidays because they may be minor groups in a country, and it is not possible for a government to declare all religious holidays as public holidays. It is an employer's duty to accommodate the religious practices of his employees who belong to a different religious belief.

4.4 The Employee's Protection against Unfair Discrimination

Employees are protected by national legislation to give effect to their constitutional right against discrimination. The labour law provisions are the first step for an employee in an employment context. However, in a non-employment context, for example, for an ex-employee or a formal employee, the PEPUDA or the common law can be applied. The Constitutional Court is the last recourse to enforce the right not to be discriminated against on the basis of religion.

4.4.1. The Constitutional Court

The Constitution is the original source to prevent unfair discrimination in the employment context. However, the CC directly deals only with the most exceptional matters[146] because legislation is the primary source to give effect to that constitutional right. In the case of Minister *of Health and Another v New Clicks SA (Pty) Ltd and Others*[147] the CC explained:

> 'Where, as here, the Constitution requires Parliament to enact legislation to give effect to the constitutional rights guaranteed in the Constitution, and Parliament enacts such legislation, it will ordinarily be impermissible for a litigant to found a cause of action directly on the Constitution without alleging that the statute in question is deficient in the remedies that it provides. Legislation enacted by Parliament to give effect to a constitutional right ought not to be ignored. And where a litigant founds a cause of action on such legislation, it is equally impermissible for a court to bypass the legislation and to decide the matter on the

[146] *S v Zuma and Others* 1995 (4) BCLR 401 (CC) at par 11; and see rule 18 of the Rules of the Constitutional Court (GNR.1675 of 31 October 2003).

[147] 2006 (1) BCLR 1 (CC) at par 437, dealing with the relationship between the right to administrative justice, contained in s 33 of the Constitution.

basis of the constitutional provision that is being given effect to by the legislation in question.'[148]

Where it is a question of law, fairness of law, or interpretation of rights, that arises, then the CC deals with that matter. The 'fairness' or 'unfairness' of discrimination, existence of unfairness, and the justification of unfairness are also within its jurisdiction. In various cases the CC has established a few criteria to determine the 'unfairness'-

- the position of the complainant and whether he or she is a member of a group which has suffered discrimination and patterns of disadvantage in the past;[149]
- the nature of the power in terms of which the discrimination was carried out;[150] and
- the extent to which the discrimination impairs the rights and interest of the complainant and his or her group and amounts to an invasion of dignity.[151]

All factors must be relevant to deciding the unfairness or fairness of the discrimination measure.[152] It was also held in the case of *President of the Republic of South Africa v Hugo* –

[148] It follows that fundamental rights are enforced primarily by the High Court (in terms of section 169 of the Constitution) or, in labour matters, also by the Labour Court (in terms of section 157(2), Labour Relations Act 66 of 1995 ('the LRA')).

[149] *President of the RSA v Hugo* 1997 (6) BCLR 708 (CC at pars 43, 112; *Harksen v Lane NO* 1997 (11) BCLR 1489 (CC) at par 52;

[150] *President of the Republic of South Africa* at par 43; *Harksen* at par 52.

[151] *Harksen* at par 52.

'Each case, therefore, will require a careful and thorough understanding of the impact of the discriminatory action upon the particular people concerned to determine whether its overall impact is one which furthers the constitutional goal of equality or not. A classification which is unfair in one context may not necessarily be unfair in a different context.'

Section 36 of the Constitution makes provision to justify the unfairness. For all of these reasons the aggrieved person may not directly access the CC without an exceptional matter, their primary source to establish the right from the EEA.

4.4.2 In Labour Law

The Constitution is the original source of the right not to be discriminated against unfairly and legislation is the primary source to enforce that right. The legislation gives protection against discrimination on the basis of religion, and gives effect to the constitutional right by scrutinising the actions taken by an employer in respect of their employees. The EEA is the primary source dealing with the violations of this right, and is concerned with regulating employer conduct in the limited and specific context of the employment relationship. The EEA has no provision to determine the 'unfairness' of discrimination in terms of section 36 of the Constitution. The employer's conduct to the employees is decided on the basis of the fact of each case by EEA. To determine an employer's

[152] *Harksen* at 1511.

conduct as 'unfair discrimination', it should be decided first whether it is a case of 'differentiation' or 'discrimination'. In determining the unfairness the labour court has followed the test laid down by the CC in *Harksen v Lane NO*[153].

Differentiation on a prohibited ground is clearly separated from discrimination. The labour court deals only with 'unfair discrimination'; the 'fairness' or 'unfairness' is not a matter to be decided by this court. However, if there is no discriminatory conduct found, then it is not necessary to prove it unfair or fair.[154] On violation of the employee's right not to be unfairly discriminated against on the ground of religion, the employee has direct access to the labour court in terms of the EEA. If there arises any matter that is not covered by the EEA, then that person (may be an ex-employee) has access to a remedy in terms of the PEPUDA.

4.4.3 PEPUDA

PEPUDA was born with the principles of equality, fairness, equity, justice, human dignity, freedom, and many other caring and compassionate attitudes. To give effect to section 9, read with item 23 (1) of schedule 6, of the Constitution, PEPUDA aimed to

[153]1998 1 SA 300 (CC).

[154]In *Woolworths (Pty) Ltd v Whitehead* [2000] 6 BLLR 640 (LAC) at 655 the controversial views of Willis JA were *obiter* in that the majority of the court found that no discrimination had been proved, thus making it unnecessary to rule on the question of 'fairness'.

prevent and prohibit unfair discrimination and harassment, to promote equality, and eliminate unfair discrimination.

PEPUDA is entitled to enact legislation required by section 9 of the Constitution; to give effect to the letter and spirit of the Constitution, in particular, the equal enjoyment of all rights and freedoms by every person and the promotion of equality; to provide for procedures for the determination of circumstances under which discrimination is unfair; and to set out measures to advance persons disadvantaged by unfair discrimination (section 2). The provisions of this Act must be interpreted to give effect to the constitutional right to promote equality through legislative and other measures designed to protect or advance persons disadvantaged by past and present unfair discrimination (section 3). Section 6 provides for a general prohibition of unfair discrimination; 'neither the State nor any person may unfairly discriminate against any person'. Section 11 prohibit harassment as a form of discrimination; 'no person may subject any person to harassment'.

Any person who alleges unfair discrimination may proceed under this Act if they have no access in terms of EEA, because in terms of section 5(3) of the Act it does not 'apply to any person to whom and to the extent to which the EEA, applies'.

PEPUDA According to section 20(1) proceedings under this Act may be instituted by any person acting in their own interest; or on behalf of another person who cannot act in their own name; or any person acting as a member, or in the interests, of a group or class of

persons; any person acting in the public interest; and any association acting in the interests of its members.

The presiding officer should take into account criteria, such as the following, to determine whether the matter should be heard in the equality court or any other alternative forum (section 20 (3)(a)) in order to deal more appropriately with the matter in terms of that alternative forum's powers and functions:

Section 20 (4)(a) The personal circumstances of the parties and particularly the complainant;

(b) the physical accessibility of any contemplated alternative forum;

(c) the needs and wishes of the parties and particularly the complainant;

(d) the nature of the intended proceedings and whether the outcome of the proceedings could facilitate the development of judicial precedent and jurisprudence in this area of the law;

(e) the views of the appropriate functionary at any contemplate alternative forum.

PEPUDA provides a general responsibility to promote equality to the States and to all persons[155] and duty to the State to promote equality with the assistance of the relevant

[155] section 24 (1) and (2) of PEPUDA.

constitutional institutions develop awareness of fundamental rights in order to promote a climate of understanding, mutual respect and equality[156]take measures to develop and implement programmes in order to promote equality[157]; where necessary or appropriate-develop action plans to address any unfair discrimination, hate speech or harassment[158] and enact further legislation that seeks to promote equality and to establish a legislative framework in line with the objectives of this Act[159].

There is protection for employee's not to be discriminated against on any grounds; on the other hand the employer's also have option to justify his action does not discriminatory or the discrimination is not on the prohibited ground or there is a reason to discriminate justified by law. It is most important to know when an employer can take a defence that his action is justified though that is a discriminatory treatment.

4.5 Employer's Defence

Most of the time the employer adopts the defence that the unequal treatment is based on the inherent requirements of a job, lack of experience, or some other ground that is permitted by the law.

The LRA and as well as EEA provide a defence clause for the employer, viz; that to distinguish, exclude, or prefer any person on the basis of an inherent requirements of a

[156] section 25 (a) of PEPUDA.

[157] section 25 (b).

[158] section 25 (c)(i).

[159] section 25(c)(ii).

job is not unfair discrimination[160]. LRA provides that a dismissal will be regarded as automatically unfair if the reason for dismissal is that the employer unfairly discriminated against an employee. However, the employer should be able to prove that the discrimination is the result of an inherent job requirement the act will be regarded as fair[161].

A similar defence is also provided for EU. The Equal Treatment Directive[162] of the EC states in Article 4:

> '(1) Member States may provide that a difference of treatment which is based on a characteristic related to any of the grounds referred to in Article 1 shall not constitute discrimination where, by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out, such a characteristic constitutes a genuine and determining occupational requirement, provided that the objective is legitimate and the requirement is proportionate.
>
> 2. Member States may maintain national legislation in force at the date of adoption of this Directive or provide for future legislation incorporating national practices existing at the date of adoption of this Directive pursuant to which, in the case of occupational activities within churches and other public or private organisations the ethos of which is based on religion or belief, a difference of treatment based on a person's religion or belief shall not constitute discrimination where, by reason of the nature of these activities or of the context in which they are carried out, a person's

[160] section 6 (2) (a) of the EEA.

[161] Section 187 (1) (f) of the LRA.

[162] Council Directive 2000/78/EC of 27 November 2000.

religion or belief constitute a genuine, legitimate and justified occupational requirement, having regard to the organisation's ethos. This difference of treatment shall be implemented taking account of Member States' constitutional provisions and principles, as well as the general principles of Community law, and should not justify discrimination on another ground'.

The EEA and EU Directive both follow the provision of the ILO Convention, in terms of Article 1(2) – distinction, exclusions or preferences based on the inherent requirements of a particular job are not discrimination within the meaning of the Convention.

4.5.1 Inherent Requirements of a Job

The term 'inherent job requirement' has been clarified by international instruments and also by the courts. EEA provides in section 6(2) (b) that it is not unfair to 'distinguish, exclude or prefer any person on the basis of an inherent requirement of a job, but does not define the term. Legislature left it to the labour court to define the term on the basis of the fact of each case. 'Inherent' implies a job requirement that is part of the 'essential features or defining characteristics' of the position in question. John Grogan define 'the word 'inherent' suggests that the possession of a particular personal charecteristic must be necessary for effectively carring out the duties attached to a particular position[163] In *Whitehead v Woolworths (Pty) Ltd*[164] the Labour Court dealt with the question whether uninterrupted job continuity was an inherent requirement for the position. Waglay J held that an inherent requirement implies an 'indispensable attribute' of the job, which must

[163] John Grogan Workplace Law (2007) 9ed at 295

[164] *Whitehead v Woolworths (pty) Ltd* [1999] 8 BLLR 862 (LC).

'relate in an inescapable way to the performing of the job required'. The Labour Court add that The main reason was simply that she would not be able to work for the full period when her services would be urgently required. The result of this requirement may have been discriminatory towards Ms Whitehead. But the reason was not arbitrary. Woolworths was essentially relying on operational reasons to support its case.

This judgement was revised on appeal, Conradie JA held that the company had concocted the version about a better candidate, and had in reality decided not to offer Ms Whitehead the position because she was pregnant[165].

In Hoffman v South African Airways[166], the SAA contended that Mr Hoffman was incapable of performing the work of a flight attendant because he was HIV positive. The High Court agreed. However, the Constitutional Court held on appeal that the argument that the economic needs of the enterprise were important, the court held that the constitutional right of HIV-positive people to be protected against 'stigmatisation and prejudice' was of greater social value. The SAA was ordered to take Mr Hoffmann into service.

A similar decision can be found by the Labour Court in Independent Municiple & Allied Workers Union & another v City of Cape Town[167] that the blanket ban was not justified by the risk, and that the ban accordingly offended the dignity of diabetics and their right to follow their chosen calling. The municipality was ordered to employ Murdoch as a fireman it he passed the remaining tests.

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[165] *Whitehead v Woolworths (pty) Ltd* (2000) 21 ILJ 571 (LAC)

[166] *Hoffman v South African Airways* (2000) 21 ILJ 2357 (CC)

[167] *Independent Municiple & Allied Workers Union & another v City of Cape Town* (2005) 26 ILJ 1404 (LC)

The Hoffman and City of Cape Town judgments make it clear that the courts will apply the 'inherent requirements of the job' test strictly. It is unlikely that the Labour Appeal Court's Whitehead judgment will remain authority in the light of Hoffman[168].

An inherent requirement is one that if not met an applicant would simply not qualify for the post. If the job can be performed without the requirement, it cannot be said that it is inherent[169]. Most jurisdictions apply some variation of a necessity test for example, religion, sex or national origin qualify as bona fide occupational qualifications that are reasonably necessary for the normal operation of a particular business or enterprise. Not only by the employment contract but also by reference to the function that the employee performs, it should be clear that the requirement is inherent for that position. A discriminatory requirement cannot be considered a necessary prerequisite for a job, if there is a non-discriminatory or less-discriminatory alternative that will be available. The employer's defence of 'inherent job requirements' is critically and specifically analysed by a court to establish whether the requirements are reasonably necessary for the normal operation of a particular business or enterprise. From the reported judgements of South African cases it is apparent that the Court critically and systematically interprets 'the inherent requirements of a job'. The following indications emerge from the reported judgments:

- In *Collins v Volkskas*[170] it was decided that business necessity must be dictated by operational requirements.

[168] John Grogan (fn 163) at 298

[169] *Whitehead* case at para 34-35.

[170] *Collins v Volkskas Bank (Westonaria Branch), a division of Absa Bank Ltd* (1994) 12 BLLR 73 (IC)..

- In *Woolworths v Whitehead*[171] the court said that without that particular requirement the employer would be unable to continue the job. Non-compliance with such requirement must result in more than mere inconvenience or limited disruption to the employer.
- In *Lagadien v University of Cape Town*[172], inherent requirements should be clear evidence from its existence.

In *Dlamini & others v Green Four Security*[173] the Labour Court held that the applicants had not been discriminated on the ground of religion because he could neither prove that the prohibition against beard-trimming was a central tenet of their religion (Nazarene) nor that they suffer some significance penance if they broke the rule. The requiring to be clean shaved was equally applied to all employees.

In this case the court emphasized on the workplace rule on the basis of inherent requirement of a job. It was mentioned that ' the more serious the impact of the workplace rule on the freedom of religion, the more persuasive or compelling the justification must be. Ultimately, the question is one degree to be assessed in the concrete legislative and social setting of the measure. [para 38]

To make an analysis on this judgement it can be said that in a democratic, secular country like South Africa different religion or belief co-exist and the freedom of religion should not be hampered or limited in that place where employer have a scope to accommodate or proportionate religious belief or practice.

[171] at para 34-35.

[172] (2001) 1 BLLR 76 (LC).

[173] (2006) 11 BLLR 1074 (LC)

In *Strydom v Nederduitse Gereformeerde Gemeente Moreleta Park*[174] it was held that the right to equality of the complainant had to be balanced against the freedom of religion of the church.

However, there are several criteria to determine that the inherent requirements of a job provision are not used unfairly by the employer, but may provide a strong and sufficient scope for justifying discrimination in the workplace. It can otherwise be hamper the constitutional guarantee of human dignity and equal treatment. Discrimination in general may be necessitated by the requirements of a job; a court must take into account that in certain instances religion may not be a genuine bona fide operational qualification for a particular job.

Section 14 (3) (e)-(h) of PEPUDA lists a few criteria to determine fairness in general. These criteria should be used in determining whether a *prima facie* discriminatory act by an employer can be justified with reference to the inherent requirements of a job:

> '(f) whether the discrimination has a legitimate purpose;
>
> (g) whether and to what extent the discrimination achieves its purpose;
>
> (h) whether there are less restrictive and less disadvantageous means to achieve the purpose;
>
> (i) whether and to what extent the respondent has taken such steps as being reasonable in the circumstances to—
>
> (i) address the disadvantage which arises from or is related to one or more of the prohibited grounds; or
>
> (ii) accommodate diversity.'

[174] 2008 JOL 22361 (T)

Article 4 Directive 2000/78/EC provides that genuine operational requirements of a job do not create any direct discrimination. This is the only defence for an employer in case of unfair discrimination. There are other exceptions that can be justified in case of indirect discrimination. The Directive contains two genuine occupational requirement exceptions: 4(1) a narrower general exception for all employers;

4(2) a broader exception for organisations with a religious ethos.

In the context of an employer's defence Article 4(1) is not controversial In religious discrimination this article enables religious freedom and other rights to be balanced against each other in the employment context. It only applies where there is a very clear connection between the work to be done and the characteristics required: it must be a genuine, bona fide occupational requirement. This exception should be proportionate in the particular case involved, and should be examined in each case very carefully. For example: in a Muslim Madrrassa a Muslim teacher should be required for teaching religious studies to the Muslim students, this is a genuine requirements; but a math or science teacher or a cleaner should not necessarily be a Muslim. Article 4(1) implies that religious discrimination is only be lawful in case of those employed in a religious service, whose job involves teaching or promoting religion, or is for religious observance.

A few cases can be found arising out of the Article 4 in the EU. In Denmark, the Church Humanitarian Organisation dismissed a young man from his job as a cleaner. The Church admitted that under the provisions of the Directive, such discrimination against a cleaner

would not be permitted[175]. There was no genuine occupational need for the cleaning job to be carried out by a member of the same religious group. The same view was adopted in Spain where the Constitutional Court annulled a dismissal of ward assistance from a private Catholic Hospital because the job was neutral in relation to the Organisation's ideology[176]. A different approach was seen in Germany where, it was held that numbers of the same religious group should perform all work in a religious organisation because it was part of the mission of that Church. Thus labour laws will need to be interpreted in a way that will not interfere with church autonomy. If members of staff violate duties of loyalty to the ethos of a religious school, it may be that dismissal will be allowed[177]. In Ireland, an exception to the non-discrimination rules applies to discrimination by teacher training institutions, in order to ensure the availability of teachers to maintain the religious ethos of primary schools[178]. The Netherlands provides a broader exception to the non-discrimination principle for private educational establishments, allowing discrimination where necessary for a religious ethos organisation to uphold its ethos[179].

In many cases, the question of whether there is a genuine occupational requirement of a job imposed by an employer will be determined by whether it is necessary and

[175] See Country Report Denmark, European Network of Legal Exparts in the non-discrimination field (Human European Consultancy, Migration Police Group (MPG) 2006).

[176] See Constitutional Court Decision, 12 June 1996, 106/1996.

[177] Vickers, Religion and Belief Discrimination in Employment. The EU Law, Report for the European Commission, January 2007, Part .V, available at:
http://ec.europa.eu/employment_social/fundamental_rights/pdf/legnet/07relbel_en.pdf
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[178] Section 12 (4) Employment Equity Act 1998-2004.

[179] Article 5(2) c General Equal Treatment Act.

proportionate to allow it. However, proportionality is not always easy to determine. For example, a doctor's practice could have a Hindu ethos and could require staff to share his faith. Being a Hindu is not directly related to the work of a doctor and does not need to be determining whether such requirement is lawful or not. It should be clear that a teacher at a religious school who teaches persons from particular religious groups must be from the same religious groups, but a cleaner at that school or a ward attendant or a doctor at a religious hospital need not belong to the same religious group that was the relevant institution.

In the EU Member States there is no agreed view on this matter. In the UK and Denmark this work is not religious in nature, and for this reason it should not be a genuine occupational requirement for the job. In Germany this view was opposed, because that work was a part of the mission of Church.

Chapter 5 CONCLUSION

Equality is a broad idea of justice that can promote equality in the employment context. The right to equality brought with it the right not to be discriminated against on any prohibited ground. In this mini-thesis there is a comparison between South African and EU Law in respect of discrimination on the ground of religion. Comparison with different labour law systems can be valuable, and the foreign law can be adopted if that law or provision is suitable for, and can be interpreted into a national labour relations system.

There are a number of international instruments that deal with the right to religious freedom and the right not to be discriminated against on the grounds of religion or belief. The mini-thesis deals with the problem area, which can arise in this context: how to define religion; what type of action could be treated as unfair discrimination on the basis of religion; and an employee's protection against the discrimination and an employer's defences to such a charge. An employer, who tries to establish that the alleged of discrimination is not based on religion, must show that his action is fair irrespective of religious considerations.

Chapter two discusses the South African constitutional provisions relating to equality that is extended by the contents of formal and substantive equality. The concept of the full development of substantive equality can remove deep-rooted inequality and injustice[180]. The Constitution respects international obligations, and ensures that national legislation is

[180] In *Harmse* case *(2003) LC* at para 45

enacted to protect the rights guaranteed by the Constitution. The EEA was born to promote equal opportunity and fair treatment in employment through the elimination of unfair discrimination and to take affirmative action measures. To promote equality, the State must prohibit unfair discrimination on a list of grounds that includes religion. In the employment relation the employer and the employee, or worker, are the two main parties, so that the definition of employee or worker is also relevant and important to ensure the employee's right not to be discriminated against on the basis of religion. There is a number of employment relationships for example contractual employee, independent contractor. The Court will give effect the true nature of the relationship between the employer and employee as determined by the evidence[181]. The term 'employee' or 'worker' is broadly defined and interpreted by the Court so that the employee can enjoy their rights not to discriminate against on any of the prohibited grounds.

Chapter three deal with the employment relation in the EU. The EU consists of 27 Member States. The basic aim of the EU is to create an internal market within the EU with a free movement policy. In between the EU Member States the free movement of persons, goods, capital and services are ensured. Citizens of one Member State may engage in economic activity in another Member State known as worker. ECJ deals with the contractual employment relationship as well as cover the person who engaged in an economic activity without a contract of employment. The free movement policy in the EU has created an increasing visibility of religious diversity accompanied by a rise in discrimination and prejudice against religious minorities. The EU has created a

[181] In *Gerber* case (2005) 9 BLLR 849 (LAC)

framework of legal instruments, policies and initiatives for combating religious discrimination and for promoting equality to ensure compliance with international obligations. It could be argued that the principles of equality and non-discrimination and respect for the right to freedom of thought, conscience and religion have not been fully implemented in all Member States. It is also recognised that legal instruments alone are not sufficient to grant a broad implementation of the principle of equality or to ensure that all people in the society share a commitment to this principle.

There are other difficulties with introducing protection against religious discrimination, and there are significant challenges to implementing and interpreting the religion and belief provisions of the SA and EU law.

First of all, there is the difficulty to define religion. International instruments as well as South Africa and EU laws protect the right to religious freedom without defining the term 'religion'. The purpose of the international instruments and the South Africa and EU laws and other means is to attain a level of equality by removing, and protecting against, unfair discrimination. The failure to define the key term may make it difficult to achieve this objective.

Secondly, the object of all the instruments is to improve the understanding of issues that cause unfair discrimination, to develop the capacity to tackle discrimination effectively, and to promote the values underlying the fight against discrimination. In the EU the

Member States cannot attain this entire objective in the same way. The 'inherent requirements of the job' is an important defence for the employer that can justify a discriminatory action. The inherent requirements of a job was also interpreted and implemented differently by each Member State of the EU.

The enquiry undertaken in the mini-thesis highlighted certain issues:

- The term 'discrimination' must be interpreted in compliance with the ILO Convention 111 (Art 1(1)) as 'any distinction, exclusion or preference ……..which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation'. The Constitutional Court can attempt to scrutinise discrimination on the basis of the ILO Convention definition, and also to determine whether the discrimination is unfair.

- Discrimination is prohibited on the grounds listed in the ILO Convention (e.g. race, colour, sex, religion, political opinion etc.) but this is not a exhaustive list; there are a number of grounds that are also prohibited by national law (e.g. age discrimination). In dealing with the matter of unfair discrimination, a court must also take into account all those grounds that are not mentioned in the ILO Convention.

- There is a distinction between discrimination and differentiation. The conduct of an employer may be fall outside of the definition of discrimination and can be a mere differentiation treatment.

- The term 'religion' has no unique definition. Religious freedom is ensured, and the right not to be discriminated against on the ground of religion is protected both internationally and nationally. However, it can be a great obstacle to have the definition undefined. There are many religions, and it is almost impossible to formulate a unique definition of 'religion' that will be broad enough to encompass all religions, and be acceptable to all religious groups or believers. The court should take extra care in dealing with the matter of religion in each case.

- Any appointment, dismissal, or preference should require that there be no discrimination on the grounds of religion. In the *FAWU*[182] case the employees complained that there was religious discrimination, but the dismissal was not on the grounds of religion, employer took disciplinary action based on the inherent requirements of the job.

- 'Inherent requirements of the job' is the defence against the allegation of direct discrimination on a prohibited ground for an employer. The SA approach is to find out whether the nature of the job truly needed the requirements. EU Member States have different views and different interpret actions of this defence.

[182] Fn 4above

- There are some kinds of job that require employees to have certain skills or qualifications to continue the work smoothly and safely. It should not be discrimination if a person does not get a job because of his/her non-qualification. The main thing is that for anti-discrimination legislation the employers are under an obligation to consider each applicant on his or her merits in the light of these inherent requirements rather than making judgements on the basis of arbitrary factors such as religion or belief.

In a workplace an employee can inform or notify his or her employer that there is a conflict between the requirements of the job and the religious practice. Then an employer has a duty to reasonably accommodate an employee or prospective employee's religious observance or practice. The employer has a duty to accommodate available facilities about dress code, break time, annual leave etc. to the employee. The employer may take necessary action to accommodate all facilities to promote religious belief or practice in the workplace. Employer may introduce a flexible arrival or departure time, flexible work breaks and employee can use lunchtime to make up time lost due to the observance of religious practice.

Reasonable accommodation should also include the right to an extended lunch break on Fridays so as to enable Muslim employees to attend the collective *Jumu'a* prayers, provided that the extra time spent in such a payer break is made up during the course of the week. Similarly, employees should be able to pray in their workplace provided that the time spent on such prayers is made up either at the beginning or at the end of the

workday and where possible this may require the provision of space for prayers. There should be flexibility in relation to commencement and finishing times as well as the opportunity to work reduced lunch hours where an employee is observing a fast.

In relation to job application forms and interviews the questions should not contain about availability for work that are asked in a manner that can reveals the applicants dignity or the question should not designed in a manner to reveal that religious requirements may conflicts with the work schedule or workplace routine. In case of religious holiday it should be managed as a matter of practice that the employer discuss with the employee that whether they wish to work over other public holidays in place of their own religious festivals in considering the safe and secure availability and access of the workplace, the ability to verify that work has been completed with financial viability. The employers can make a planning policy to respect religious practice without hampering their business.

It might be argued that it would be advantageous to have statutory definitions of both 'religion' and 'inherent requirements of the job'- in the same way that SA legislation has with regard to 'discrimination'. However, it is suggested that it would be extremely difficult, if at all possible, to achieve this, and that it would be more effective to leave the matter in the hands of the courts, as is presently the case. In that manner the specific circumstances of the matter before the court can be carefully investigated and determined with regard to the content of these notions.

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