

# University of the Western Cape

## Faculty of Law

**The extent to which the South African law governing racial discrimination protects employees: a comparison between South Africa and Canada**

**MINI-THESIS SUBMITTED IN PARTIAL FULFILMENT OF THE REQUIREMENTS FOR THE  
DEGREE M.PHIL: LABOUR LAW**

**IN THE DEPARTMENT OF MERCANTILE AND LABOUR LAW**

**UNIVERSITY OF THE WESTERN CAPE**



**Name:** Gladwin Zuma

**Student number:** 3413815

**Degree:** Mphil Labour Law

**Department:** Mercantile & Labour Law

**Supervisor:** Dr J van de Rheede

## **ACKNOWLEDGEMENTS**

Glory be to God, the Almighty. For being my source of infinite comfort.

To my wife, Hannah and my kids (Anniki, Nannie & Angie), your words of encouragement throughout the journey of this research are met with great appreciation. Thank you.

To my supervisor, Dr Jeannine van de Rhee. Thank you for your well informed guidance and support, I am eternally grateful. May the good Lord continue to bless you.

Jabu Z Jabu.



## DECLARATION

I, Gladwin Zuma, declare that 'The extent to which the South African law governing racial discrimination protects employees: a comparison between South Africa and Canada' is my own work, that it has not been submitted for any degree or examination in any other university, and that all the sources I have used or quoted have been indicated and acknowledged by complete references.

Signed:



Gladwin Zuma  
November 2021.



Supervisor: Dr J. Van de Rheede.

## **ABBREVIATIONS**

ILO Convention 111	International Labour Organisation Convention (No.111) concerning Discrimination in Respect of Employment and Occupation 1958
EEA	Employment Equity Act 55 of 1998
EEA1995	Canadian Employment Equity Act 1995.
EAP	Economically active population
FCP	Federal Contractors Program
LEEP	Legislated Employment Equity Programme
PEPUDA	Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000



## Table of Contents

ABSTRACT.....	8
CHAPTER 1.....	9
INTRODUCTION.....	9
1.1 BACKGROUND.....	9
1.2. PROBLEM STATEMENT.....	10
1.3. RESEARCH QUESTION.....	11
1.4. AIMS OF THE RESEARCH.....	11
1.5. LITERATURE REVIEW.....	13
1.6. SIGNIFICANCE OF THE RESEARCH.....	15
1.7 RESEARCH METHODOLOGY.....	15
1.8. CHAPTER OUTLINE.....	16
CHAPTER 2.....	18
THE LAWS GOVERNING RACIAL DISCRIMINATION IN SOUTH AFRICA.....	18
2.1 INTRODUCTION.....	18
2.2 THE EMPLOYMENT EQUITY ACT 55 OF 1998.....	20
2.2.1 UNFAIR DISCRIMINATION.....	21
2.2.1.1 Discrimination.....	22
2.2.1.1.1 Direct Discrimination.....	23
2.2.1.1.2 Indirect Discrimination.....	26
2.2.1.2 Unfairness.....	27
2.2.1.3 Equal Pay for work of equal value.....	29
2.2.1.4 RELIEF AND REMEDIES AVAILABLE TO EMPLOYEES.....	36
2.2.2 STATUTORY DEFENCES.....	37
2.2.2.1 An Inherent Requirement of a Job.....	37
2.2.2.2 Affirmative Action.....	39
2.2.2.2.1 Affirmative action: an obligation.....	40
2.2.2.2.1.1 Measures to identify and eliminate employment barriers.....	41
2.2.2.2.1.2 Furthering of diversity in the workplace based on equal dignity and respect of all people.....	41
2.2.2.2.1.3 Making reasonable accommodation for people from designated groups.....	43
2.2.2.2.1.4 Ensuring equitable representation of suitably qualified people from designated groups at all occupational levels in the workforce.....	44

2.2.2.2.1.5	Retaining and developing people from designated groups .....	45
2.2.2.2.2	Procedural obligations .....	46
2.2.2.2.2.1	Consultation with the employees .....	46
2.2.2.2.2.2	Conducting an analysis .....	48
2.2.2.2.2.3	Preparing an employment equity plan .....	50
2.2.2.2.2.4	Reporting to the Director-General .....	52
2.2.2.2.3	Affirmative action: a defence .....	53
2.3	CONCLUSION.....	54
CHAPTER 3.....		56
THE CANADAN LAWS GOVERNING RACIAL DISCRIMINATION .....		56
3.1	INTRODUCTION.....	56
3.2	UNFAIR DISCRIMINATION .....	60
3.2.1	DISCRIMINATION .....	60
3.2.1.1	DIRECT DISCRIMINATION .....	61
3.2.1.2	INDIRECT DISCRIMINATION .....	62
3.2.2	UNFAIRNESS .....	64
3.2.3	EQUAL PAY FOR WORK OF EQUAL VALUE.....	64
3.2.4	RELIEF AND REMEDIES.....	67
3.2.5	STATUTORY DEFENCES .....	68
3.2.5.1	BONA FIDE OCCUPATIONAL REQUIREMENT .....	69
3.2.5.2	AFFIRMATIVE ACTION .....	70
3.2.5.2.1	Affirmative action: an obligation.....	72
3.2.5.2.1.1	Identifying and eliminating employment barriers .....	72
3.2.5.2.1.2	Instituting positive policies and practices and making reasonable accommodation.....	73
3.2.5.2.2	PROCEDURAL OBLIGATIONS.....	74
3.2.5.2.2.1	Collect information and conduct an analysis.....	74
3.2.5.2.2.2	Conduct a review.....	75
3.2.5.2.2.3	Employment Equity Plan.....	75
3.2.5.2.2.4	Report.....	76
3.2.5.2.3	Affirmative action: a defence .....	77
3.3	CONCLUSION.....	78
CHAPTER 4.....		79
CONCLUSION AND RECOMMENDATIONS .....		79

<b>4.1 INTRODUCTION</b> .....	79
<b>4.2 UNFAIR DISCRIMINATION</b> .....	79
<b>4.3 AFFIRMATIVE ACTION</b> .....	81
<b>BIBLIOGRAPHY</b> .....	85



## **ABSTRACT**

During apartheid the lives of black South Africans were dominated by unfair discrimination on the ground of race. The creation of a new deracialised South Africa began with the dismantling of the legislation that existed during apartheid that promoted racial segregation and the promulgation of the Constitution. Section 9 of the Constitution promotes equality and prohibits unfair discrimination. The Employment Equity Act 55 of 1998 was enacted to give effect to section 9 (2) and 9 (4) of the Constitution. In terms of section 6 (1) of the EEA 'no person may unfairly discriminate against an employee on various grounds which includes the ground of race'. While legislative measures contained in the EEA have been enacted to address racial discrimination in the workplace, research shows that some employees are still subjected to racial discrimination. Research also shows that the pace of transformation in the workplace has been slow.<sup>1</sup> This is the case despite legislation being in place to promote equal opportunity for all.

This study contains an analysis of the South African law governing racial discrimination. The South African law governing racial discrimination will be compared to the legislative framework governing racial discrimination in Canada. This will be done to determine the extent to which the South African legislative framework protects black employees against racial discrimination and to determine whether the provisions governing racial discrimination in South Africa should be amended and/or supplemented. This will be done by examining case law, the provisions contained in statutes and journal articles.

### **Key Words**

Affirmative Action, Black People, Canada, Constitution of the Republic of South Africa, Designated employers, Employment Equity Act 55 of 1998, People from Designated groups, Racial Discrimination, South Africa, Transformation

---

<sup>1</sup> Department of Labour *Commission for Employment Equity Annual Report (2018 – 2019)* 10

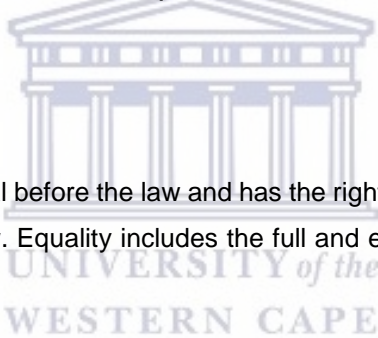


# CHAPTER 1

## INTRODUCTION

### 1.1 BACKGROUND

South African history is characterised by racial segregation, which excluded black people from mainstream economical participation.<sup>2</sup> During apartheid, black people were marginalised and the rights of black people were not recognised.<sup>3</sup> With the collapse of the apartheid government and the birth of a democratic South Africa, the Constitution was promulgated to recognise and protect the rights of every citizen in South Africa.<sup>4</sup> The Constitution is the supreme law of the country.<sup>5</sup> Section 9 of the Constitution reads:

- 
- '1. Everyone is equal before the law and has the right to equal protection and the benefit of the law. Equality includes the full and equal enjoyment of all rights and freedoms.
  2. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, 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.

---

<sup>2</sup> Currie I and De Waal J *The Bill Of Rights Handbook* 6<sup>th</sup> ed, 211.

<sup>3</sup> Currie I and De Waal J *The Bill Of Rights Handbook* 6<sup>th</sup> ed, 211.

<sup>4</sup> Constitution of the Republic of South Africa, 1996. (hereafter the Constitution)

<sup>5</sup> Section 2 of the Constitution.

5. Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair'.<sup>6</sup>

Statutes were enacted to outlaw unfair racial discrimination and to remove the inequalities created by apartheid. The Employment Equity Act 55 of 1998 (EEA) was enacted to give effect to section 9 of the Constitution.<sup>7</sup> The purpose of the EEA is to achieve equity in the workplace by

- (a) promoting equal opportunity and fair treatment in employment through the elimination of unfair discrimination; and
- (b) implementing affirmative action measures to redress the disadvantages in employment experienced by designated groups, in order to ensure their equitable representation in all occupational levels in the workforce.<sup>8</sup>

The EEA takes the various forms of oppression that took place during apartheid into consideration, where black people, women and people with disabilities (people from designated groups) were discriminated against unfairly by making certain provisions of the EEA applicable to people from designated groups only.<sup>9</sup>

## 1.2. **PROBLEM STATEMENT**

Equality in the workplace continues to be a subject of contestation.<sup>10</sup> Employers have the legal obligation to ensure that the laws that are meant to protect employees from racial discrimination in the workplace are implemented and adhered to.<sup>11</sup> Research shows that black employees are still subjected to racial discrimination despite the fact that racial discrimination is prohibited by the Constitution and the EEA.<sup>12</sup> Research also shows that there is non-compliance on the part of some employers in

---

<sup>6</sup> Section 9 of the Constitution.

<sup>7</sup> Section 9(2) of the Constitution.

<sup>8</sup> Section 2 of the EEA.

<sup>9</sup> Department of Labour *Commission for Employment Equity Annual Report (2018 -2019)* 10.

<sup>10</sup> Department of Labour *Commission for Employment Equity Annual Report (2018 -2019)* 3.

<sup>11</sup> Section 5 of the EEA.

<sup>12</sup> Ruiters G, 'Non-Racialism: The New Form of Racial Inequality in a Neo-Apartheid South Africa' *Journal of Asian and African Studies* (2021) Vol. 56(4) 889–904.

implementing some of the provisions contained in the EEA.<sup>13</sup> The Commission for Employment Equity reports that there is an underrepresentation of black people in the management structures of businesses in South Africa.<sup>14</sup> The 2019 Employment Equity report highlighted the fact that the pace of transformation in the workplace has been slow.<sup>15</sup>

### **1.3. RESEARCH QUESTION**

This study answers the main research question: To what extent does South African law protect black employees against racial discrimination? This study answers the sub-questions below:

- When comparing the South African legal framework governing racial discrimination with the Canadian legal framework governing racial discrimination, is there anything that South African can learn from the Canadian legislative framework to protect black South African employees against racial discrimination?
- Should the South African provisions governing racial discrimination of employees be amended and/or supplemented and if so, in which ways?

### **1.4. AIMS OF THE RESEARCH**

Section 9 (2) of the Constitution provides that legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken while section 9(4) of the Constitution makes provision for national legislation to be enacted to prevent or prohibit unfair discrimination. The Employment Equity Act 55 of 1998 (EEA) and the Promotion of Equality and Prevention of Unfair Discrimination 4 of 2000 Act was enacted to give effect to section 9 of the Constitution.<sup>16</sup> The Promotion of Equality and Prevention of Unfair Discrimination 4 of 2000 (PEPUDA) applies to persons who are not protected by the

---

<sup>13</sup> Department of Labour *Commission for Employment Equity Annual Report (2018 -2019)* 11.

<sup>14</sup> Department of Labour *Commission for Employment Equity Annual Report (2019 -2020)* 20.

<sup>15</sup> Department of Labour *Commission for Employment Equity Annual Report (2017 -2018)* 3.

<sup>16</sup> Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000.

EEA.<sup>17</sup> The EEA is limited to workplace discrimination only.<sup>18</sup> Since this research focuses on racial discrimination of black employees in the workplace, this study contains a discussion on the provisions contained in the EEA only.

While gender and disability discrimination is still prevalent in the workplace, this study will focus on racial discrimination only. Racial discrimination was selected given the history of racial segregation in South Africa where people were denied equal working opportunities in certain levels in the workplace based on the colour of their skin.<sup>19</sup> Racial prejudices are still prevalent in the workplace despite the collapse of apartheid.<sup>20</sup> The main objective of the thesis is to establish the extent to which the laws governing racial discrimination protects black employees.

This study contains a discussion on the current legislative framework that aims to protect the South African employees from racial discrimination in the workplace. The research contains a selected comparison which focuses on the legal framework governing racial discrimination in Canada. Canada was selected because research shows that racial discrimination in the workplace has been a persistent theme in Canada's history as well as in present times.<sup>21</sup> The occurrence of actions that amount to racial discrimination such as is the case in South Africa and in Canada's workplace inhibits Canada and South Africa's ability to move forward as well as to achieve unification of people from all race groups within the respective countries.<sup>22</sup> Similar to South Africa, statutes have been promulgated in Canada such as the Employment Equity Act 1995 as a means to address racial discrimination in the workplace.<sup>23</sup> As a result of Canada having legislative measures in place to address racial discrimination in the workplace, Canada was selected as the jurisdiction to which the laws in South Africa governing racial discrimination will be compared to. Due to the Canadian

---

<sup>17</sup> Section 5(3) Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000.

<sup>18</sup> Section 4 (1) of the Employment Equity Act 1998.

<sup>19</sup> Wizarat. T, '*Apartheid and Racial Discrimination in South Africa*' (1980) 33, Pakistan Institute of International Affairs.

<sup>20</sup> Wizarat. T, '*Apartheid and Racial Discrimination in South Africa*' (1980) 33, Pakistan institute of International Affairs.

<sup>21</sup> <https://www.bartleby.com/essay/Racial-Discrimination-in-Canadas-Workplace-PKHS5JFAWUDA5> (Accessed 03 March 2021)

<sup>22</sup> <https://www.bartleby.com/essay/Racial-Discrimination-in-Canadas-Workplace-PKHS5JFAWUDA5> (Accessed 03 March 2021)

<sup>23</sup> Employment Equity Act 1995, c. 44

provinces being governed by its own legislation this research will focus not only on the statutes that apply to Canada as a whole, but also on the legislative provisions governing racial discrimination in one of the provinces in Canada, Ontario. Ontario was selected as it is the province that has enacted statutes to eliminate racial discrimination in the workplace and is a province in which important judgments have been handed down that can be used to determine how black employees are protected against racial discrimination. Should it be found that there are shortcomings of the South African legislative framework governing racial discrimination, this study will provide recommendations on the manners in which the existing legislation in South Africa that governs racial discrimination in the workplace can be amended and/or supplemented.

### **1.5. LITERATURE REVIEW**

Botha M conducted research on managing racism in the workplace.<sup>24</sup> The purpose of the study was to evaluate racism in the context of the workplace and to suggest ways in which employers may manage instances of racism.<sup>25</sup> He concluded that 'employers should address instances of racial discrimination and such instances should be viewed in a serious light since racist behaviour goes against not only values of dignity and equality, but is intended to humiliate and offend the target'.<sup>26</sup> This research differs from Botha's study in that it will not only provide a discussion on the manner in which racial discrimination can be managed in the workplace, but also contains an analysis of the laws governing racial discrimination to determine whether there are shortcomings of the legislation and if so, whether the said laws can be amended and/or to ensure that black people are protected from these instances.

Al-Waqfi and Jain conducted research on racial inequality in Canada. These authors provide a description of the theoretical perspectives of racial discrimination; examine the nature and trends in such discrimination cases and analyse selected legal cases on racial discrimination in Canada.<sup>27</sup> While Al-Waqfi and Jain provide valuable

---

<sup>24</sup> Botha M, 'Managing Racism in the Workplace' (2018) 671 Journal for Contemporary Roman Dutch Law 81.

<sup>25</sup> Botha M, 'Managing Racism in the Workplace' (2018) 671 Journal for Contemporary Roman Dutch Law 81.

<sup>26</sup> Botha M, 'Managing Racism in the Workplace' (2018) 671 Journal for Contemporary Roman Dutch Law 81.

<sup>27</sup> Al-Waqfi M & Jain HC 'Racial inequality in employment in Canada: Empirical analysis and emerging trends' (2008) 51 Canadian Public Administration 429.

information, this mini-thesis differs from the research conducted by Al-Waqfi and Jain, in that while it contains a discussion on the laws governing racial discrimination in Canada, it will also compare the legal framework governing racial discrimination in South African with the Canadian legal framework governing racial discrimination.

Ruiters highlights the challenges that South African courts and the Human Rights Commission have in dealing with cases relating to race and equality.<sup>28</sup> This study differs from the research of Ruiters as it will demonstrate the importance of the judiciary in implementing the legislative provisions which are meant to protect black employees from racial discrimination in the workplace.

Cénat, Saba and Rosy provide important information on the effects of daily experiences of racial discrimination and micro aggressions among black individuals in Canada.<sup>29</sup> The aforementioned authors are of the view that expressions of superiority of white cultural values and communication styles are also common themes of micro aggressions.<sup>30</sup> The study provides statistics to illustrate what the current position is in Canada and that a large number of people from black communities in Canada have been subjected to racial discrimination on a daily basis.<sup>31</sup> This mini-thesis differs from the research conducted by these authors in that it will not be limited to a discussion on the provisions governing racial discrimination in Canada, but will also examine the provisions governing affirmative action in Canada.

---

<sup>28</sup> Ruiters G, 'Non-Racialism: The New Form of Racial Inequality in a Neo-Apartheid South Africa' *Journal of Asian and African Studies* (2021) Vol. 56(4) 889–904

<sup>29</sup> Cénat J, Saba H, Rosy D et al 'Prevalence and Effects of Daily and Major Experiences of Racial Discrimination and Microaggressions among Black Individuals in Canada' 2021 *Journal of Interpersonal Violence* 1 – 29.

<sup>30</sup> Cénat J, Saba H, Rosy D et al 'Prevalence and Effects of Daily and Major Experiences of Racial Discrimination and Microaggressions among Black Individuals in Canada' 2021 *Journal of Interpersonal Violence* 1 – 29.

<sup>31</sup> Cénat J, Saba H, Rosy D et al 'Prevalence and Effects of Daily and Major Experiences of Racial Discrimination and Microaggressions among Black Individuals in Canada' 2021 *Journal of Interpersonal Violence* 1 – 29.

## **1.6. SIGNIFICANCE OF THE RESEARCH**

In South Africa, racial discrimination of black employees continues to be a challenging issue.<sup>32</sup> Despite the legislative framework in place to address the past imbalances, such as the EEA, which was formulated to give effect to and promote the Constitutional right to equality, black employees are still subjected to racial discrimination.<sup>33</sup> Research shows that in certain structures within workplaces, people from designated groups are underrepresented and where changes are taking place, the pace of transformation is slow.<sup>34</sup> This research will assist employers in making them aware of the role they play in eradicating racial discrimination in the workplace and will further assist employers in identifying the sources of racial discrimination in the workplace, be it a practice, procedure or an organisational culture. This study will also assist employers in addressing matters that relate to unfair racial discrimination in the workplace in order to create a working environment that is inclusive.

The study will also assist in informing employees of the legislative framework that governs racial discrimination in South Africa and how the legislative framework governing racial discrimination in Canada compares to that in South Africa. It will also outline how employees who are subjected to racial discrimination in the workplace can seek redress using the appropriate legislative remedies at their disposal.

## **1.7 RESEARCH METHODOLOGY**

This thesis adopts a desktop methodology which consists of a discussion on primary and secondary sources. Primary sources such as the Constitution, legislation and case law is utilised for the purposes of this research. The Constitution is discussed since it is the supreme law of the country.<sup>35</sup> Statutes that are enacted should be consistent with the provisions contained in the Constitution. Legislation that governs

---

<sup>32</sup> Department of Labour *Commission for Employment Equity Annual Report (2018 – 2019)* 50.

<sup>33</sup> Department of Labour *Commission for Employment Equity Annual Report (2018 – 2019)* 10.

<sup>34</sup> Department of Labour *Commission for Employment Equity Annual Report (2019 – 2020)* 60.

<sup>35</sup> Section 2 of the Constitution.

racial discrimination in South Africa and Canada is discussed due to the fact that statutes are enacted to give effect to the Constitution and due to the fact that statutes are enacted with the aim of regulating and providing protection. Court judgments are discussed and examined since an analysis of court judgments will assist in answering the research question as a result of courts being responsible for interpreting legislation. Court judgments also provide insight on the manners in which the provisions contained in legislation are applied by employers.

This research has been conducted by making use of secondary sources such as journal articles and academic books. The aforementioned sources are used to determine the views of the different scholars on the subject matter. Statistics obtained from the Commission for Employment Equity are used and are important to determine what the current situation is insofar as the representation of black employees in various occupational levels within the workplace is concerned and the progress that has been made as far as transformation is concerned.

## **1.8. CHAPTER OUTLINE**

Chapter one contains *inter alia* the aims of the research, the problem statement, the research question, the significance of the research and methodology.

The second chapter consists of a discussion on the South African legislative provisions governing racial discrimination of employees. It contains a discussion on the meanings of discrimination, unfairness and defences that may be raised by employers where employees institute racial discrimination claims against the employer. The remedies that are available to employees who experience unfair discrimination is also discussed. This chapter also contains a discussion and an examination of the provisions governing affirmative action.

Chapter three contains a discussion on the legislative framework governing racial discrimination of employees in Canada. This is done in order to compare the laws governing racial discrimination in Canada with the laws governing racial discrimination in South Africa. This chapter determines whether South Africa can learn from the 8



Canadian laws that aim to eliminate and prohibit racial discrimination of black employees.

The final chapter, chapter four, consists of the conclusion which outlines the extent to which the South African legislation governing racial discrimination protects black employees. It also provides recommendations on whether the South African legislative framework should be amended and/or supplemented and if so, in which ways.



## CHAPTER 2

### THE LAWS GOVERNING RACIAL DISCRIMINATION IN SOUTH AFRICA

#### 2.1 INTRODUCTION

During apartheid, discrimination against workers on grounds such as race and gender was not only permitted; but was legally enforced.<sup>36</sup> Section 9 of the Constitution promotes equality by means of legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination.<sup>37</sup> In the matter between *Van Heerden v Minister of Finance*, the Constitutional Court stated that

‘Our supreme law says more about equality than do comparable constitutions. Like other constitutions, it confers the right to equal protection and benefit of the law and the right to non-discrimination. But it also imposes a positive duty on all organs of state to protect and promote the achievement of equality — a duty which binds the judiciary too.’<sup>38</sup>

An enquiry was created by the Constitutional Court in *Harksen v Lane* to determine whether the constitutional right to equality has been violated. The stages of the enquiry of this test have been set out by the Constitutional Court as follows:

- (a) Does the provision differentiate between people or categories of people? If so, does the differentiation bear a rational connection to a legitimate government purpose? If it does not then there is a violation of section 9 (1). Even if it does bear a rational connection, it might nevertheless amount to discrimination.
- (b) Does the differentiation amount to unfair discrimination? This requires a two-stage analysis:
  - (i) Firstly, does the differentiation amount to “discrimination”? If it is on a specified ground, then discrimination will have been established. If it is not on a specified ground, then whether or not there is discrimination will depend upon whether, objectively, the ground is based on attributes and characteristics which have the

---

<sup>36</sup> Du Toit D 'Protection against unfair discrimination in the workplace: Are the courts getting it right?' (2007)LDD 1.

<sup>37</sup> The Constitution.

<sup>38</sup> *Minister of Finance v Van Heerden* (2004) 25 ILJ 1593 (CC) para 31.

potential to impair the fundamental human dignity of persons as human beings or to affect them adversely in a comparably serious manner.

- (ii) If the differentiation amounts to “discrimination”, does it amount to “unfair discrimination”? If it has been found to have been on a specified ground, then unfairness will be presumed. If on an unspecified ground, unfairness will have to be established by the complainant. The test of unfairness focuses primarily on the impact of the discrimination on the complainant and others in his or her situation. If, at the end of this stage of the enquiry, the differentiation is found not to be unfair, then there will be no violation.
- (c) If the discrimination is found to be unfair then a determination will have to be made as to whether the provision can be justified under the limitations clause'.<sup>39</sup>

The EEA was promulgated to give effect to the Constitutional right to equality, to eliminate unfair discrimination in the workplace and to implement the affirmative action measures.<sup>40</sup> For this reason the EEA, and not the Constitution, should be relied on by employees who raise unfair discrimination claims against their employers.<sup>41</sup> The aforementioned test applies in determining whether a statute is constitutional in terms of the equality clause and is not used to determine whether an employer has discriminated unfairly against an employee.<sup>42</sup> A statute giving effect to a basic right is not limited to providing the minimum required by the Constitution. On the contrary, nothing prevents the legislature from giving more generous protection.<sup>43</sup>

The purpose of this chapter is to determine the extent to which the legislative framework that governs racial discrimination protects black employees in South Africa. This chapter consists of a discussion on discrimination, unfairness and the remedies available to employees who are successful with unfair discrimination claims. This chapter also contains a discussion on the legislative framework governing affirmative action.

---

<sup>39</sup> *Harksen v Lane* No 1998 (1) SA 300 (CC) para 53.

<sup>40</sup> Section 2 of the EEA.

<sup>41</sup> Du Toit D 'Protection against unfair discrimination in the workplace: Are the courts getting it right?' (2007)*LDD* 1.

<sup>42</sup> Du Toit D 'The evolution of the concept of 'unfair discrimination' in South African Labour Law' (2006) 27 *ILJ*1312.

<sup>43</sup> Du Toit D 'The evolution of the concept of 'unfair discrimination' in South African Labour Law' (2006) 27 *ILJ*1312.

## 2.2 THE EMPLOYMENT EQUITY ACT 55 OF 1998

The EEA was promulgated in 1998 and was amended in 2004 and in 2013. Chapter 2 of the EEA, which governs the provisions governing the elimination and the prohibition of unfair discrimination in the workplace applies to all employers and to all employees.<sup>44</sup> Chapter 3 of the EEA which contains the provisions governing affirmative action applies to people from designated groups and to designated employers.<sup>45</sup> People from designated groups are black people, women and people with disabilities who-

- '(a) are citizens of the Republic of South Africa by birth or descent; or
- (b) became citizens of the Republic of South Africa by naturalisation-
  - (i) before 27 April 1994; or
  - (ii) after 26 April 1994 and who would have been entitled to acquire citizenship by naturalisation prior to that date but who were precluded by apartheid policies.<sup>46</sup>

'Black people' consist of Africans, Coloureds and Indians.<sup>47</sup> According to the EEA, a 'designated employer' is defined as:

- '(a) a person who employs 50 or more employees;
- (b) a person who employs fewer than 50 employees but has a total annual turn-over that is equal to or above the applicable annual turn-over of a small business in terms of the Schedule 4 of this Act;
- (c) a municipality, as referred to in Chapter 7 of the Constitution;
- (d) an organ of state as defined in section 239 of the Constitution, but excluding the National Defence Force, the National Intelligence Agency and the South African Secret Service; and
- (e) an employer bound by collective agreement in terms of section 23 or 31 of the Labour Relations Act, which appoints it as a designated employer in terms of this Act, to the extent provided for in the agreement.<sup>48</sup>

---

<sup>44</sup> Section 4 of the EEA.

<sup>45</sup> Section 4 of the EEA.

<sup>46</sup> Section 1 of the EEA.

<sup>47</sup> Section 1 of the EEA.

<sup>48</sup> Section 1 of the EEA.

## 2.2.1 UNFAIR DISCRIMINATION

Chapter 2 of the EEA is an integral part of the EEA since it deals with the elimination and prohibition of unfair discrimination. Section 5 of the EEA states that ‘every employer must take steps to promote equal opportunity in the work place by eliminating unfair discrimination in any employment policy or practice’.<sup>49</sup> Section 6(1) of the EEA states that

‘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, birth or on any other arbitrary ground.’<sup>50</sup>

Section 6(1) of the EEA outlines the listed grounds in respect of which unfair discrimination against the employees is prohibited.<sup>51</sup> The prohibition of discrimination on any other ‘arbitrary ground’ was inserted into section 6(1) of the EEA in 2013.<sup>52</sup> The purpose of this insertion was to broaden the scope of protection against discrimination to include grounds which, even if they are not necessarily ‘analogous’ to specified grounds, are nevertheless ‘arbitrary’.<sup>53</sup>

The prohibition against unfair discrimination applies to all employees and employers (whether designated or otherwise).<sup>54</sup> Black employees are protected by virtue of the promulgation of section 5 of the EEA, since it places a positive duty on all employers to promote equal opportunity by eliminating unfair discrimination.<sup>55</sup> Section 6 of the EEA protects black employees since race is one of the listed grounds in terms of which unfair discrimination is prohibited both on a direct and an indirect basis.<sup>56</sup> The

---

<sup>49</sup> Section 5 of the EEA.

<sup>50</sup> Section 6 (1) of the EEA.

<sup>51</sup> Section 6(1) of the EEA.

<sup>52</sup> Employment Equity Act 47 of 2013.

<sup>53</sup> Du Toit D & Potgieter M *Unfair Discrimination in the workplace* (2014) 25;

Arbitrary means “capricious”; its introduction broadens “the scope of the prohibition of discrimination from grounds that undermine human dignity to include grounds that are merely irrational” and, in so doing, “places an additional remedy at workers’ disposal which may further encourage employers to pay serious attention to workplace practices and procedures” Garbers C & Le Roux P, *Employment Discrimination Law into the Future 2018 (2) StellLR 257*.

<sup>54</sup> Section 4 of the EEA.

<sup>55</sup> Section 5 of the EEA.

<sup>56</sup> Section 6 (1) of the EEA.

presence of unfair discrimination is determined by way of a two-stage enquiry. The first stage entails determining the presence of discrimination, while the second stage consists of an enquiry to determine the presence of unfairness. The meanings of discrimination and unfairness are discussed below.

### **2.2.1.1 Discrimination**

The word 'discrimination' denotes differentiation between groups or individuals, which in turn suggests a comparison between groups or individuals.<sup>57</sup> In the ordinary sense, discrimination occurs when people are denied the rights and privileges afforded to others.<sup>58</sup> The provisions governing unfair discrimination in the EEA should be interpreted in compliance with the Constitution and with the International Labour Organisation (ILO) Convention 111 of 1958 on Discrimination in Employment and Occupation (ILO Convention 111).<sup>59</sup> The ILO Convention 111 defines 'discrimination' as:

- ' (a) including 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.'<sup>60</sup>

While unfair discrimination is prohibited by the Constitution and the EEA, neither the Constitution nor the EEA provides a definition of discrimination. However, since the EEA should be interpreted in compliance with the Convention, the term 'discrimination' should for the purposes of the EEA be given the same meaning as the ILO Convention

---

<sup>57</sup> Kruger R, 'Equality and unfair discrimination: Refining the Harksen test. *South African Law Journal*. 488

<sup>57</sup> Du Toit D 'Protection against unfair discrimination in the workplace: Are the courts getting it right?' (2007)LDD 1.

<sup>58</sup> Grogan J, *Workplace Law*, 2014, 107.

<sup>58</sup> Section 3 (a) of the EEA.

<sup>59</sup> ILO, Discrimination (Employment and Occupation) Convention, C111, 25 June 1958, C111.

<sup>60</sup> Article 1 ILO Convention 111.

111.<sup>61</sup> Direct and indirect forms of discrimination, which are both prohibited by the EEA, are discussed below.

### **2.2.1.1.1 Direct Discrimination**

Direct discrimination occurs 'when adverse action is taken against people precisely because they possess one of the characteristics listed in section 6 (of the EEA), or comparable attributes'.<sup>62</sup> In ascertaining the presence of discrimination, the intention of the perpetrator is irrelevant.<sup>63</sup> The intention or motive of the employer may however be relevant to the remedy which the court may impose.<sup>64</sup> The most important factor is the effect which the differential treatment has on the individual or group.<sup>65</sup>

In *Louw v Golden Arrow Bus Services (Pty) Ltd*, the applicant Mr. Louw, a coloured male (black) who was working as the buyer alleged that he was earning less as compared to his counterpart Mr. Beneke, a white male employee, appointed as a buyer at a higher salary.<sup>66</sup> Mr. Louw referred the matter to the Labour Court on the ground that the difference in salaries constituted direct discrimination.<sup>67</sup> The Labour Court held that 'the mere existence of disparate treatment of people of, for example, different races is not discrimination on the ground of race unless the difference in race is the reason for the disparate treatment'.<sup>68</sup> The Labour Court concluded that 'the applicant did not succeed in demonstrating that the two jobs, on an objective evaluation, are jobs of equal value'.<sup>69</sup> The application based on direct unfair discrimination was dismissed.<sup>70</sup>

In *Woolworths (Pty Ltd v Whitehead*, Ms. Whitehead was aggrieved by the fact that she was not appointed to the position of Human Resources: Information and Technology Generalist, as advertised by the company.<sup>71</sup> Dr. Young was the successful

---

<sup>61</sup> Article 1 ILO Convention 111.

<sup>62</sup> Grogan J *Workplace Law* 12 ed (2010) 87.

<sup>63</sup> *Louw v Golden Arrow Bus Services (Pty) Ltd* (2000) 21 ILJ 188 (LC) para 10.

<sup>64</sup> *Louw v Golden Arrow Bus Services (Pty) Ltd* (2000) 21 ILJ 188 (LC) para 10.

<sup>65</sup> Grogan J *Workplace Law* 12 ed (2010) 87.

<sup>66</sup> *Louw v Golden Arrow Bus Services (Pty) Ltd* (2000) 21 ILJ188 (LC).

<sup>67</sup> *Louw v Golden Arrow Bus Services (Pty) Ltd* (2000) 21 ILJ188 (LC).

<sup>68</sup> *Louw v Golden Arrow Bus Services (Pty) Ltd* (2000) 21 ILJ188 (LC) para 26.

<sup>69</sup> *Louw v Golden Arrow Bus Services (Pty) Ltd* (2000) 21 ILJ188 (LC) para 106.

<sup>70</sup> *Louw v Golden Arrow Bus Services (Pty) Ltd* (2000) 21 ILJ188 (LC).

<sup>71</sup> *Woolworths (Pty Ltd v Whitehead* 2000 (6) BLLR 640 (LAC) para 2.

candidate.<sup>72</sup> Ms. Whitehead instituted legal action against the company in the Labour Court, alleging direct discrimination on the grounds of sex.<sup>73</sup> She stated that she was not appointed to the position because she was pregnant at the time.<sup>74</sup> The Labour Court held that ‘the respondent could not show that her pregnancy was the sole reason that she was not appointed to the position’.<sup>75</sup> The Labour Court concluded that she was not appointed based on the fact that there was another candidate, who in terms of knowledge and skills was a far better candidate.<sup>76</sup>

In *Nehawu obo Mofokeng v Charlotte Theron Children’s Home*, the employer had enforced a policy that excluded black women from supervising white children.<sup>77</sup> Three black women being the applicants in the matter, worked as cleaners for the respondent and lost their employment due to retrenchment.<sup>78</sup> The matter was referred to the CCMA and remained unresolved. After a period which exceeded three months, owing to various reasons from the applicants it was referred to the Labour Court on the grounds of unfair discrimination based on race.<sup>79</sup> The Labour Court did not grant condonation and also assessed that the claim of the respondents would be unsuccessful.<sup>80</sup> The union referred the matter to the Labour Court of Appeal. The Labour Court of Appeal upheld the appeal stating that ‘the dispute was of exceptional nature’.<sup>81</sup> The Supreme Court of Appeal held that merit of the case warranted condonation.

In *Harmse v City of Cape Town*, the applicant, a black male applied for three posts as advertised by the respondent and he was not shortlisted for any of the posts.<sup>82</sup> The job advert indicated that it will comply with provisions of the EEA.<sup>83</sup> Two white males were appointed instead. He referred the disputes to the Labour Court, citing unfair

---

<sup>72</sup> *Woolworths (Pty Ltd v Whitehead)* 2000 (6) BLLR 640 (LAC) para 18(a).

<sup>73</sup> *Woolworths (Pty Ltd v Whitehead)* 2000 (6) BLLR 640 (LAC) para 19.

<sup>74</sup> *Woolworths (Pty Ltd v Whitehead)* 2000 (6) BLLR 640 (LAC) 9.

<sup>75</sup> *Woolworths (Pty Ltd v Whitehead)* 2000 (6) BLLR 640 (LAC).

<sup>76</sup> *Woolworths (Pty Ltd v Whitehead)* 2000 (6) BLLR 640 (LAC).

<sup>77</sup> *Nehawu obo Mofokeng v Charlotte Theron Children’s Home* 2004 BLLR 979 (LAC) para 24.

<sup>78</sup> *Nehawu obo Mofokeng v Charlotte Theron Children’s Home* 2004 BLLR 979 (LAC) para 1.

<sup>79</sup> *Nehawu obo Mofokeng v Charlotte Theron Children’s Home* 2004 BLLR 979 (LAC) para 5.

<sup>80</sup> *Nehawu obo Mofokeng v Charlotte Theron Children’s Home* 2004 BLLR 979 (LAC) para 10.

<sup>81</sup> *Nehawu obo Mofokeng v Charlotte Theron Children’s Home* 2004 BLLR 979 (LAC) para 26.

<sup>82</sup> *Harmse v City of Cape Town* (2003) 24 ILJ 1130 (LC).

<sup>83</sup> *Harmse v City of Cape Town* (2003) 24 ILJ 1130 (LC) para 14.5.



discrimination on the grounds of race amongst other things.<sup>84</sup> The Labour Court stated that 'the respondent's objection that the applicant has failed to disclose a cause of action based on race discrimination falls to be dismissed'.<sup>85</sup> The court held that the applicant was discriminated against unfairly on the ground of race.<sup>86</sup>

In *Mahlanyana v Cadbury (Pty) Ltd (2000)*, Ms. Mahlanyana, a black woman had applied for the position of factory accountant.<sup>87</sup> Her application was unsuccessful.<sup>88</sup> Her manager then recommended that she accept a position as an assistant factory accountant, as she was not qualified for the position at the time and needed further training, to which she declined the offer.<sup>89</sup> Ms. Mahlanyana claimed that the failure to appoint her for the position as factory accountant was based on racial discrimination as two of her white colleagues were appointed for the post.<sup>90</sup> The employer stated that 'her application was unsuccessful, specifically because of her lack of adequate experience which was an advertised prerequisite for the position'.<sup>91</sup> The Labour Court concluded that Ms. Mahlanyana had not been subjected to any form of racial discrimination.<sup>92</sup> The Labour Court established that her race was not a contributing factor in her non-appointment to the position.

The case law illustrates that employees should connect the disparate treatment to the protected ground in order to be successful with their claims.

The meaning of direct discrimination protects black employees from unfair racial discrimination in the workplace. Black employees are also protected as a result of the fact that the intention of the employer is irrelevant in determining whether an employer has unfairly discriminated against an employee on a direct basis.

---

<sup>84</sup> *Harmse v City of Cape Town (2003) 24 ILJ 1130 (LC) para 2.*

<sup>85</sup> *Harmse v City of Cape Town (2003) 24 ILJ 1130 (LC) para 18.*

<sup>86</sup> *Harmse v City of Cape Town (2003) 24 ILJ 1130 para 19.*

<sup>87</sup> *Mahlanyana v Cadbury (Pty) Ltd (2000) 21 ILJ 2274 (LC).*

<sup>88</sup> *Mahlanyana v Cadbury (Pty) Ltd (2000) 21 ILJ 2274 (LC).*

<sup>89</sup> *Mahlanyana v Cadbury (Pty) Ltd (2000) 21 ILJ 2274 (LC) para 14.*

<sup>90</sup> *Mahlanyana v Cadbury (Pty) Ltd (2000) 21 ILJ 2274 (LC).*

<sup>91</sup> *Mahlanyana v Cadbury (Pty) Ltd (2000) 21 ILJ 2274 (LC) para 13.*

<sup>92</sup> *Mahlanyana v Cadbury (Pty) Ltd (2000) 21 ILJ 2274 (LC) para 21.*

### 2.2.1.1.2 Indirect Discrimination

Indirect discrimination in employment occurs when an employer utilises 'an employment practice that is facially neutral but disproportionately affects members of disadvantaged groups, and which cannot be adequately justified'.<sup>93</sup> Deciding on a plain prohibition of 'indirect discrimination', the development of the meaning and proof of indirect discrimination has been placed squarely in the hands of the courts.<sup>94</sup> It is not necessary for the applicant in such a claim to show that the employer acted intentionally when discriminating against the employee.<sup>95</sup> A complainant in an indirect discrimination claim, in principle, must be in a position to show that the seemingly neutral policy or practice has a *disproportionate impact* on a protected group.<sup>96</sup>

In *Leonard Dingler Employee Executive Council and Others v Leonard Dingler (Pty) Ltd & Others*, the dispute was based on the fact that the employer had two separate funds one for black people and the other for white people, however these funds as per the employer catered for weekly paid employees and monthly paid employees.<sup>97</sup> The majority of black employees were weekly paid employees.<sup>98</sup> The employer contributions were also different since with the monthly paid employees the employer contributed 10% to the Staff Benefit Fund and only 5% for the weekly paid employees.<sup>99</sup> While the employer had established a policy for the weekly paid and monthly paid policy, it was clear that the effects of this policy were detrimental to the weekly paid staff who were black people.<sup>100</sup> The Labour Court held the employees were unfairly discriminated.<sup>101</sup>

---

<sup>93</sup> Dupper O, 'Proving Indirect Discrimination in Employment: A South African View', *Industrial Law Journal* (2000) 21 ILJ 747.

<sup>94</sup> Dupper O, 'Proving Indirect Discrimination in Employment: A South African View', *Industrial Law Journal* (2000) 21 ILJ 747.

<sup>95</sup> Dupper O & Garbers C *Essential Employment Discrimination Law* (2014) 36.

<sup>96</sup> Dupper O & Garbers C *Essential Employment Discrimination Law* (2014) 46.

<sup>97</sup> *Leonard Dingler Employee Representative Council & others v Leonard Dingler (Pty) Ltd & others* 1997 (11) BLLR 1438 (LC).

<sup>98</sup> *Leonard Dingler Employee Representative Council & others v Leonard Dingler (Pty) Ltd & others* 1997 (11) BLLR 1438 (LC) 1440.

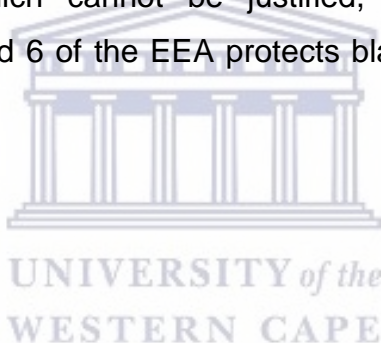
<sup>99</sup> *Leonard Dingler Employee Representative Council & others v Leonard Dingler (Pty) Ltd & others* 1997 (11) BLLR 1438 (LC) 1441.

<sup>100</sup> *Leonard Dingler Employee Representative Council & others v Leonard Dingler (Pty) Ltd & others* 1997 (11) BLLR 1438 (LC) 1446.

<sup>101</sup> *Leonard Dingler Employee Representative Council & others v Leonard Dingler (Pty) Ltd & others* 1997 (11) BLLR 1438 (LC) 1454.

In *Adriaanse v Swartklip Products*, the employer had used a standard 8 qualification as a minimum requirement for the advertised position.<sup>102</sup> The applicant, who had been employed on a fixed term contract for a while, referred the matter to the CCMA after she was not appointed to the position.<sup>103</sup> The commissioner held that 'the failure to appoint the applicant amounted to indirect discrimination, as the employer could not show that the standard eight qualification requirement was sufficiently relevant to the workplace needs'.<sup>104</sup>

The aforementioned case law demonstrates that the legislature protects employees from indirect discrimination in the workplace. The meaning of indirect discrimination protects black employees, because even in circumstances where employers make use of policies or practices that are neutral on the face of it, but have a disproportionate effect on black people which cannot be justified, it will amount to indirect discrimination. Sections 5 and 6 of the EEA protects black employees from indirect racial discrimination.



### **2.2.1.2 Unfairness**

In circumstances where discrimination is proved to be present, the presence of unfairness should be determined. The burden of proof is governed by section 11 of the EEA. Section 11 of the EEA states that

- (1) If unfair discrimination is alleged on a ground listed in section 6(1), the employer against whom the allegation is made must prove, on a balance of probabilities, that such discrimination-
  - (a) did not take place as alleged; or
  - (b) is rational and not unfair, or is otherwise justifiable
- (2) If unfair discrimination is alleged on an arbitrary ground, the complainant must prove, on a balance of probabilities, that -
  - (a) the conduct complained of is not rational;

---

<sup>102</sup> *Adriaanse v Swartklip Products* [1999] 6 BALR 649 (CCMA).

<sup>103</sup> *Adriaanse v Swartklip Products* [1999] 6 BALR 649 (CCMA).

<sup>104</sup> *Adriaanse v Swartklip Products* [1999] 6 BALR 649 (CCMA).

- (b) the conduct complained of amounts to discrimination; and
- (c) the discrimination is unfair.<sup>105</sup>

In terms of section 11 of the EEA, where discrimination is alleged on listed grounds such as on the ground of race, the burden of proof is on the employer. In the event of discrimination being alleged on a listed ground, unfairness is presumed. However, in circumstances where discrimination is alleged on arbitrary grounds, the burden is on the employee.<sup>106</sup> With the discrimination being alleged on arbitrary grounds, the unfairness of discrimination is not presumed.<sup>107</sup>

In *Biggar v City Of Johannesburg*, a black male employee referred a dispute to the Labour Court citing discrimination on the ground of race.<sup>108</sup> The employer did not lead evidence to dismiss the claim of the applicant.<sup>109</sup> The Labour Court stated that ‘the burden was upon the respondent to prove the fairness of the discrimination, it was incumbent upon it to ensure that all the necessary material and evidence is before the court in order to enable it to make a finding of fairness, but it failed’.<sup>110</sup> The Labour Court concluded that the applicant was unfairly discriminated against.<sup>111</sup>

Section 11 of the EEA protects black employees from racial people from discrimination, since the employer is required to prove that the alleged discrimination either did not occur, or that it is rational and not unfair or is otherwise justifiable.

---

<sup>105</sup> Section 11 of the EEA.

<sup>106</sup> Section 11 of the EEA.

<sup>107</sup> Du Toit D & Potgieter M *Unfair Discrimination in the workplace* (2014) 25.

<sup>108</sup> *Biggar v City of Johannesburg (Emergency Management Services)* (JS232/09) [2016] ZALCJHB 559; (2017) 38 ILJ 1806 (LC); [2017] 8 BLLR 783 (LC) para 35.2.

<sup>109</sup> *Biggar v City of Johannesburg (Emergency Management Services)* (JS232/09) [2016] ZALCJHB 559; (2017) 38 ILJ 1806 (LC); [2017] 8 BLLR 783 (LC) para 40.

<sup>110</sup> *Biggar v City of Johannesburg (Emergency Management Services)* (JS232/09) [2016] ZALCJHB 559; (2017) 38 ILJ 1806 (LC); [2017] 8 BLLR 783 (LC) para 48.

<sup>111</sup> *Biggar v City of Johannesburg (Emergency Management Services)* (JS232/09) [2016] ZALCJHB 559; (2017) 38 ILJ 1806 (LC); [2017] 8 BLLR 783 (LC) para 48.

### 2.2.1.3 Equal Pay for work of equal value

It is generally accepted as axiomatic that persons doing equal work should receive equal pay.<sup>112</sup> However, research shows that there are often discrepancies between the remuneration paid between men and women, between people from different races and for other reasons.<sup>113</sup> However, a mere differentiation in pay between employees who do similar work or work of equal value does not mean, in itself, that an act of unfair discrimination has been perpetrated. In terms of the EEA, 'a difference in terms and conditions of employment between employees of the same employer performing the same or substantially the same work or work of equal value that is directly or indirectly based on any one or more of the grounds listed in section 6(1), is unfair discrimination.'<sup>114</sup>

In *Mutale v LorcomTwenty Two CC*, a black female employee, referred the matter to the Labour Court following her dismissal by the respondent.<sup>115</sup> The applicant discovered that the employer was willing to pay black prospective employees a fixed amount of money while the white employees would be paid based on their negotiated salary for the same job.<sup>116</sup> The applicant contended that the employer unfairly discriminated against her on the grounds of race when the employer computed her salary.<sup>117</sup> The employer was unsuccessful in defending this claim since the Labour Court held that the actions of the employer unfairly discriminated against the employee.<sup>118</sup>

The Employment Equity Regulations (Regulations) were promulgated in terms of section 55 of the EEA which came into effect on 1 August 2014.<sup>119</sup> The Regulations provide the meaning of work of equal value which states that the work performed by an employee:

---

<sup>112</sup> Dupper O & Garbers C *Essential Employment Discrimination Law (2014)* 138.

<sup>113</sup> Dupper O & Garbers C *Essential Employment Discrimination Law (2014)* 138.

<sup>114</sup> Section 6(4) of the EEA.

<sup>115</sup> *Mutale v LorcomTwenty Two CC* (2009) 30 ILJ 634 (LC).

<sup>116</sup> *Mutale v LorcomTwenty Two CC* (2009) 30 ILJ 634 (LC). Para 16.

<sup>117</sup> *Mutale v LorcomTwenty Two CC* (2009) 30 ILJ 634 (LC). Para 40.

<sup>118</sup> *Mutale v LorcomTwenty Two CC* (2009) 30 ILJ 634 (LC). Pg 21.

<sup>119</sup> Section 55 (1) of the EEA.

- '(1) is the same as the work of another employee of the same employer, if their work is identical or interchangeable;
- (2) is substantially the same as the work of another employee employed by that employer, if the work performed by the employees is sufficiently similar that they can reasonably be considered to be performing the same job, even if their work is not identical or interchangeable;
- (3) is of the same value as the work of another employee of the same employer in a different job, if their respective occupations are accorded the same value in accordance with regulations 5 to 7.<sup>120</sup>

Clause 3 of the Regulations, which deals with the elimination of unfair discrimination, states that:

- '(1) An employer must, in order to eliminate unfair discrimination, take steps to eliminate differences in terms and conditions of employment, including remuneration of employees who perform work of equal value if those differences are directly or indirectly based on a listed ground or any arbitrary ground that is prohibited by section 6(1) of the Act.
- (2) Without limiting sub-regulation (1), an employer must ensure that employees are not paid different remuneration for work of equal value based on race, gender or disability.<sup>121</sup>

The Code of Good Practice on equal pay for work of equal value (Code on equal pay) which was published by the Minister of Labour in terms of section 54(1)(a) of the EEA is meant to guide both the employer and the employee on the application of the principle of 'equal pay for work of equal value' in the workplace.<sup>122</sup> The Code on equal pay applies to all employers and employees covered by the EEA with the primary objective which is to 'promote the elimination of unfair discrimination in respect of pay /remuneration by applying the principle of equal pay /remuneration for work of equal value'.<sup>123</sup> The Code on equal pay further aims to 'encourage employers to manage their pay /remuneration policies, practices and proper consultation processes within a sound governance framework in order to drive and maximise on the principle of equal pay /remuneration for work of equal value that is fair, free from unfair discrimination

<sup>120</sup> Clause 4 of the Employment Equity Regulations (the Regulations) GN R595 GG37873 of 1 August 2014.

<sup>121</sup> Clause 3 of the Employment Equity Regulations (the Regulations) GN R595 GG 37873 of 1 August 2014. 22

<sup>122</sup> *Code of Good Practice on Equal Pay/Remuneration for Work of Equal Value* (the Code). GN 448 in GG 38837 of 1 June 2015.

<sup>123</sup> *Code of Good Practice on Equal Pay/Remuneration for Work of Equal Value* (the Code). GN 448 in GG 38837 of 1 June 2015. Para 1.1.

and consistently applied'.<sup>124</sup> The meaning of 'remuneration' is outlined in the Code on equal pay. Remuneration includes 'any payment in money or in kind, or both, made or owing to any person in return for working for another person, including the State'.<sup>125</sup>

Clause 5 of the Regulations established the methodology for assessing whether a difference in remuneration of employees who are performing work of equal value amounts to unfair discrimination. In terms of clause 5 of the Regulations:

- '(1) it must first be established
  - (a) whether the work concerned is of equal value in accordance with regulation 6; and
  - (b) whether there is a difference in terms and conditions of employment, including remuneration.
- (2) it must then be established whether any difference in terms of sub-regulation (1) (b) constitutes unfair discrimination, applying the provisions of section 11 of the Act.'<sup>126</sup>

Clause 6 of the Regulations which deals with the assessment of whether the work is of equal value reads:

- '(1) In considering whether work is of equal value, the relevant jobs must be objectively assessed taking into account the following criteria:
  - (a) the responsibility demanded of the work, including responsibility for people, finances and material;
  - (b) the skills, qualifications, including prior learning and experience required to perform the work whether formal or informal;
  - (c) physical, mental and emotional effort required to perform the work, and
  - (d) to the extent that it is relevant, the conditions under which work is performed, including physical environment, psychological conditions, time when and geographical location where work is performed.'

The employer is required to consider the aforementioned criteria to evaluate the value of the work which will include the responsibility demanded of the work which may

---

<sup>124</sup> *Code of Good Practice on Equal Pay/Remuneration for Work of Equal Value* (the Code). GN 448 in GG 38837 of 1 June 2015. Para 1.3.

<sup>125</sup> *Code of Good Practice on Equal Pay/Remuneration for Work of Equal Value* (the Code). GN 448 in GG 38837 of 1 June 2015 para 2.4.

<sup>126</sup> Clause 5 of Employment Equity Regulations (the Regulations) GN R595 GG37873 of 1 August 2014.

<sup>127</sup> Clause 6(1) of the Employment Equity Regulations (the Regulations) GN R595 GG 37873 of 1 August 2014.

include the employees' responsibility for people, finances and material.<sup>128</sup> The employer must also consider the skills, qualifications, including prior learning and experience required to perform the work, whether formal or informal.<sup>129</sup> These must be relevant to the task at hand. The physical, mental and emotional effort required to perform the work is also critical in the evaluation.<sup>130</sup> The last factor which should be considered is the assessment of working conditions which may include an assessment of the physical environment, psychological conditions, time when and geographic location where the work is performed.<sup>131</sup>

In *Mangena v Fila South Africa (Pty) Ltd*, the applicant contended that the respondent paid Ms. McMullin more than Mr. Shabalala (the applicant) for the work of equal value.<sup>132</sup> The applicant claimed that this amounted to discrimination based on race.<sup>133</sup> The Labour Court stated that 'a claimant in an equal pay claim must identify a comparator, and establish that the work done by the chosen comparator is the same or similar work and on a listed or analogous ground'.<sup>134</sup> The employer argued that Mr. Shabalala performed mechanical tasks with insignificant administrative duties while Ms McMullin performed non-mechanical work which required decision-making process.<sup>135</sup> The Labour Court held that 'the applicant failed to establish, even on a *prima facie* basis, that Shabalala and McMullin performed the same or similar work'.<sup>136</sup>

In *Ntai & Others v South African Breweries Ltd*, the applicants (Black) who were training officers alleged that they were earning less as compared to their white counterparts and that constituted unfair racial discrimination.<sup>137</sup> The matter was referred to the Labour Court.<sup>138</sup> The Labour Court held that

---

<sup>128</sup> *Code of Good Practice on Equal Pay/Remuneration for Work of Equal Value* (the Code). GN 448 in GG 38837 of 1 June 2015 para 5.4.1.

<sup>129</sup> *Code of Good Practice on Equal Pay/Remuneration for Work of Equal Value* (the Code). GN 448 in GG 38837 of 1 June 2015 para 5.4.2.

<sup>130</sup> *Code of Good Practice on Equal Pay/Remuneration for Work of Equal Value* (the Code). GN 448 in GG 38837 of 1 June 2015 para 5.4.3.

<sup>131</sup> *Code of Good Practice on Equal Pay/Remuneration for Work of Equal Value* (the Code). GN 448 in GG 38837 of 1 June 2015 para 5.4.4.

<sup>132</sup> *Mangena v Fila South Africa (Pty) Ltd* 2009 12 BLLR 1224 (LC) para 2.

<sup>133</sup> *Mangena v Fila South Africa (Pty) Ltd* 2009 12 BLLR 1224 (LC) para 2.

<sup>134</sup> *Mangena v Fila South Africa (Pty) Ltd* 2009 12 BLLR 1224 (LC) para 6.

<sup>135</sup> *Mangena v Fila South Africa (Pty) Ltd* 2009 12 BLLR 1224 (LC) para 13.

<sup>136</sup> *Mangena v Fila South Africa (Pty) Ltd* 2009 12 BLLR 1224 (LC) para 14.

<sup>137</sup> *Ntai & Others v South African Breweries Ltd* 2001 (2) BLLR 186 (LC)

<sup>138</sup> *Ntai & Others v South African Breweries Ltd* 2001 (2) BLLR 186 (LC) para 6.



'If an employer pays employees unequally on the basis of their race, this would clearly constitute a discrimination on the grounds of race. However, it also means that a mere differentiation in pay between employees who do similar work or work of equal value does not mean, in itself, that an act of discrimination is being perpetrated. It is only when such differentiation is based on or linked to an unacceptable ground that it becomes discrimination within its pejorative meaning.'<sup>139</sup>

The application based on unfair discrimination was dismissed.<sup>140</sup>

In *Duma v Minister of Correctional Services & Others*, Ms. Duma was promoted to Manager: Legal Services in 2006 (Salary level 08).<sup>141</sup> In 2007, the Department of Correctional Services advertised vacancies for the post of Manager: Legal Services, these posts were later amended to Assistant Director (Salary Level 09).<sup>142</sup> Ms. Duma took the matter to Labour Court, contending that her salary should have been determined at Salary Level 09 since she was doing the same work as the other managers on other provinces and that this amounted to unfair discrimination on the grounds of geographical location.<sup>143</sup> The employer denied the allegations.<sup>144</sup> The Labour Court concluded that the applicant had proven that the discrimination was unfair.<sup>145</sup> The employer took the matter to the Labour Court of Appeal, contending that while Legal Services Managers in the Department would perform the same work, the volume of work differs from region to region.<sup>146</sup> The decision of the Labour Court was set aside.<sup>147</sup> The Labour Appeal Court concluded it cannot be confirmed as a fact that the differentiation was purely based on the geographic location.<sup>148</sup>

---

<sup>139</sup> *Ntai & Others v South African Breweries Ltd* 2001 (2) BLLR 186 (LC) para

<sup>140</sup> *Ntai & Others v South African Breweries Ltd* 2001 (2) BLLR 186 (LC) 18

<sup>141</sup> *Duma v Minister of Correctional Services and Others* (C604/2012) [2016] ZALCCT 6; (2016) 37 *ILJ* 1135 (LC); [2016] 6 BLLR 601 (LC) para 6.

<sup>142</sup> *Duma v Minister of Correctional Services and Others* (C604/2012) [2016] ZALCCT 6; (2016) 37 *ILJ* 1135 (LC); [2016] 6 BLLR 601 (LC) para 7.

<sup>143</sup> *Duma v Minister of Correctional Services and Others* (C604/2012) [2016] ZALCCT 6; (2016) 37 *ILJ* 1135 (LC); [2016] 6 BLLR 601 (LC) para 18.

<sup>144</sup> *Duma v Minister of Correctional Services and Others* (C604/2012) [2016] ZALCCT 6; (2016) 37 *ILJ* 1135 (LC); [2016] 6 BLLR 601 (LC) para 23.

<sup>145</sup> *Duma v Minister of Correctional Services and Others* (C604/2012) [2016] ZALCCT 6; (2016) 37 *ILJ* 1135 (LC); [2016] 6 BLLR 601 (LC) para 25.

<sup>146</sup> *Minister of Correctional Services and Others v Duma* (CA10/2016) [2017] ZALAC 78; para 17.

<sup>147</sup> *Minister of Correctional Services and Others v Duma* (CA10/2016) [2017] ZALAC 78; pg 13.

<sup>148</sup> *Minister of Correctional Services and Others v Duma* (CA10/2016) [2017] ZALAC 78; para 25.

Clause 7 of the Regulations outlines the factors that justifies a difference in terms and conditions of employment and states that:

'if employees perform work that is of equal value, a difference in terms and conditions of employment, including remuneration, is not unfair discrimination if the difference is fair and rational and is based on any one or a combination of the following grounds:

- a) the individuals' respective seniority and length of service;
- b) the individuals' respective qualifications, ability, competence or potential above the minimum acceptable levels required for the performance of the job;
- c) the individuals' respective performance, quantity or quality of work, provided that the employees are equally subject to the employer's performance evaluation system, that the performance evaluation system is consistently applied.<sup>149</sup>

When examining whether the requirement to apply pay/remuneration equity in the workplace is being complied with, the following three key issues should be considered: First it should be determined whether the jobs that are being compared are the same, substantially the same or of equal value in terms of an objective evaluation.<sup>150</sup> Secondly, it should be determined whether there is a difference in the terms and conditions of employment, including pay /remuneration, of the employees in the jobs that are being compared.<sup>151</sup> Finally, in circumstances where there are differences in the terms and conditions, it should be established whether such differences are justified on fair and rational grounds<sup>152</sup> However, differences in terms and conditions of employment, including pay/remuneration, of employees of the same employer may not necessarily constitute unfair discrimination where the complainant and the comparator do not perform the same, similar or work of equal value.<sup>153</sup>

---

<sup>149</sup> Clause 7 (1) of the Employment Equity Regulations (the Regulations) GN R595 GG 37873 of 1 August 2014.

<sup>150</sup> *Code of Good Practice on Equal Pay/Remuneration for Work of Equal Value* (the Code). GN 448 in GG 38837 of 1 June 2015 para 4.4.1.

<sup>151</sup> *Code of Good Practice on Equal Pay/Remuneration for Work of Equal Value* (the Code). GN 448 in GG 38837 of 1 June 2015 para 4.4.2.

<sup>152</sup> *Code of Good Practice on Equal Pay/Remuneration for Work of Equal Value* (the Code). GN 448 in GG 38837 of 1 June 2015 para 4.4.3.

<sup>153</sup> *Code of Good Practice on Equal Pay/Remuneration for Work of Equal Value* (the Code). GN 448 in GG 38837 of 1 June 2015 para 4.5.

In *Pioneer Foods (Pty) Ltd v Workers Against Regression and Others*, the employer paid new drivers for a period of two years, 20% less as compared to the drivers with a length of service exceeding the two-year period.<sup>154</sup> The Labour Court stated that ‘a differentiation on the basis of “being newer employees” is not an unlisted arbitrary ground of discrimination; and a practice of paying newer employees at a lower rate for a two year period is in any event neither irrational nor unfair’.<sup>155</sup> The Labour Court held that differentiation is based on a justifiable policy.<sup>156</sup>

Black employees are protected as a result of the enactment of section 6(4) of the EEA since it states that a difference in terms and conditions of employees who perform work of equal value amounts to unfair discrimination if the difference is based on grounds such as race. Black employees are also protected by the Regulations since it provides a meaning of the phrase ‘work of equal value’, places an obligation on employers to eliminate differences in remuneration of employees who perform work of equal value where such differences are based directly or indirectly on grounds such as race. The Regulations also list factors that should be taken into consideration in determining whether work is of equal value. In addition, the Regulations provide the methodology in assessing whether a difference in remuneration paid to employees who perform work of equal value amounts to unfair discrimination. However, the Regulations permit differences in remuneration and confirms that where the difference is fair and rational and is based on the factors listed in clause 6 of the Regulations it will not amount to unfair discrimination.

The law above indicates that where there are differences in salaries between black and white employees who are performing work of equal value, such differences should be removed where race is the reason for the difference in remuneration, unless a legitimate reason to justify such a difference exists.

---

<sup>154</sup> *Pioneer Foods (Pty) Ltd v Workers Against Regression (WAR) & others* (C687/15) [2016] ZALCCT 14; [2016] 9 BLLR 942 (LC); (2016) 37 ILJ 2872 (LC).

<sup>155</sup> *Pioneer Foods (Pty) Ltd v Workers Against Regression (WAR) and Others* (C687/15) [2016] ZALCCT 14; [2016] 9 BLLR 942 (LC); (2016) 37 ILJ 2872 (LC) para 32.

<sup>156</sup> *Pioneer Foods (Pty) Ltd v Workers Against Regression (WAR) and Others* (C687/15) [2016] ZALCCT 14; [2016] 9 BLLR 942 (LC); (2016) 37 ILJ 2872 (LC) para 57.

#### 2.2.1.4 RELIEF AND REMEDIES AVAILABLE TO EMPLOYEES

Employees who are aggrieved by unfair discrimination in the workplace may refer the dispute to the Commission for Conciliation, Mediation and Arbitration (CCMA).<sup>157</sup> A commissioner of the CCMA may, in any arbitration proceedings in terms of this EEA, make any appropriate arbitration award that gives effect to a provision of the EEA.<sup>158</sup> The CCMA may make an order compelling the employer either to pay compensation to the employee, or to make payment of damages to the affected employee and/or order the employer to take steps to prevent the same unfair discrimination or a similar practice occurring in the future in respect of other employees.<sup>159</sup>

Unless the EEA provides otherwise, the Labour Court has exclusive jurisdiction to determine any dispute with the interpretation or application of the EEA.<sup>160</sup> If the Labour Court decides that an employee has been unfairly discriminated against, the Court may make any appropriate order that is just and equitable in the circumstance, including –

- (a) payment of compensation by the employer to that employee;
- (b) payment of damages by the employer to that employee;
- (c) an order directing the employer to take steps to prevent the same unfair discrimination or a similar practice occurring in the future in respect of other employees;
- (d) an order directing an employer, other than a designated employer, to comply with Chapter III as if it were a designated employer;
- (e) an order directing the removal of the employer's name from the register referred to in section 41; or
- (f) the publication of the Court's order.<sup>161</sup>

It is trite that the concept of 'damages' would also include "general damages" which is not necessarily proven damages and /or patrimonial loss that exists in a specified and readily determinable amount.<sup>162</sup> In the case of discrimination claims in terms of the

---

<sup>157</sup> Section 15 of the EEA.

<sup>158</sup> Section 48 of the EEA.

<sup>159</sup> Section 48 (2) of the EEA.

<sup>160</sup> Section 49 of the EEA.

<sup>161</sup> Section 50 (2) of the EEA.

<sup>162</sup> *Makau v Department of Education Limpopo Province (JS 879/2012)* [2013] ZALCJHB 222 para 50.

EEA, it is proper and competent for the Labour Court to award general damages.<sup>163</sup> The remedies that are available to employees are not limited to those listed above. The broad sweep of the term 'any appropriate order that is just and equitable in the circumstances' allows the applicant to claim and the court to grant any remedy which is appropriate to address the consequences of the act of unfair discrimination that has been perpetrated or to prevent repetition.<sup>164</sup> The remedies discussed above provide protection to black employees who are subjected to racial discrimination.<sup>165</sup>

## **2.2.2 STATUTORY DEFENCES**

There are defences which an employer may raise in response to a claim of discrimination. In terms of section 6(2) of the EEA where an employer implements affirmative action measures that are consistent with the EEA or distinguishes or prefers or excludes a person based on an inherent requirement of the job, this will not amount to unfair discrimination. The aforementioned defences are discussed below.

### **2.2.2.1 An Inherent Requirement of a Job**

According to the ILO an 'inherent requirement of a job' has been interpreted to mean 'something as a permanent attribute or quality; forming an element, especially an essential element, of something'.<sup>166</sup> The phrase stems from the ILO Convention 111.<sup>167</sup> In terms of the ILO Convention 111

'any distinction, exclusion or preference in respect of a particular job based on the inherent requirements thereof shall not be deemed to be discrimination.'<sup>168</sup>

An inherent requirement of a job therefore means 'a requirement that does not merely offer an advantage but one without which it would be impossible for that job to be performed'.<sup>169</sup>

---

<sup>163</sup> *Makau v Department of Education Limpopo Province (JS 879/2012) [2013] ZALCJHB 222 para 50.*

<sup>164</sup> Du Toit D & Potgieter M *Unfair Discrimination in the workplace* (2014) 139

<sup>165</sup> Section 51 of the EEA.

<sup>166</sup> Dupper O & Garbers C *Essential Employment Discrimination Law (2014)* 89.

<sup>167</sup> Dupper O & Garbers C *Essential Employment Discrimination Law (2014)* 70.

<sup>168</sup> Article 1(2) of Convention 111.

<sup>169</sup> Du Toit D & Potgieter M, *Unfair Discrimination in the Workplace* (2014) 89.

In *Dlamini v Green Four Security*, the security guards (applicants) who belonged to the Baptised Nazareth church, were dismissed after refusing to shave their beards. They referred the matter to the Labour Court, claiming unfair discrimination on the grounds of religion.<sup>170</sup> The Labour Court had to establish whether the clean-shaven rule was an inherent requirement of the job.<sup>171</sup> The Labour Court stated that ‘the applicants failed to prove the no shaving rule to be an essential tenet of the Nazareth faith and failed to prove that they were discriminated against on the grounds of religious beliefs’.<sup>172</sup> The Labour Court held that ‘the clean-shaven rule is an inherent requirement of the job’.<sup>173</sup>

In *Hoffman v SAA*, the applicant was denied employment as a cabin assistant on the grounds that he tested positive for Human Immunodeficiency Virus (HIV).<sup>174</sup> The employment practice of the employer excluded prospective employees that tested positive for HIV.<sup>175</sup> The employer successfully defended the claim in the Labour Court, aggrieved by this decision, Mr Hoffman referred the matter to the Constitutional Court.<sup>176</sup> The employer asserted that ‘the exclusion was based on safety, medical and operational grounds’.<sup>177</sup> The Constitutional Court stated that

‘the fact that some people who are HIV positive may, under certain circumstances, be unsuitable for employment as cabin attendants does not justify the exclusion from employment as cabin attendants of all people who are living with HIV.’<sup>178</sup>

The Constitutional Court dismissed the finding of the High Court ‘that HIV negative status is an inherent requirement “at least for the moment” for a cabin attendant’.<sup>179</sup> The Constitutional Court held that the employer unfairly discriminated against the applicant.<sup>180</sup>

---

<sup>170</sup> *Dlamini v Green Four Security* 2006 11 BLLR 1074 (LC).

<sup>171</sup> *Dlamini v Green Four Security* 2006 11 BLLR 1074 (LC) para 9.

<sup>172</sup> *Dlamini v Green Four Security* 2006 11 BLLR 1074 (LC) para 27.

<sup>173</sup> *Dlamini v Green Four Security* 2006 11 BLLR 1074 (LC).

<sup>174</sup> *Hoffmann v South African Airways* 2001 (1) SA 1 (CC).

<sup>175</sup> *Hoffmann v South African Airways* 2001 (1) SA 1 (CC) para 7.

<sup>176</sup> *Hoffmann v South African Airways* 2001 (1) SA 1 (CC).

<sup>177</sup> *Hoffmann v South African Airways* 2001 (1) SA 1 (CC) para 7.

<sup>178</sup> *Hoffmann v South African Airways* 2001 (1) SA 1 (CC) para 36.

<sup>179</sup> *Hoffmann v South African Airways* 2001 (1) SA 1 (CC) para 39.

<sup>180</sup> *Hoffmann v South African Airways* 2001 (1) SA 1 (CC) para 40.

In *Independent Municipal and Allied Workers Union v City of Cape Town*, Mr. Murdoch applied for the position of a fire fighter and was not appointed based on the fact that he was diabetic and insulin dependent.<sup>181</sup> Mr. Murdoch took the matter to the Labour Court, citing unfair discrimination on an arbitrary ground.<sup>182</sup> The employer argued that the decision not to appoint Mr. Murdoch was premised on the occupational requirements of the job which were not only risky to him but to other people around him as well.<sup>183</sup> The Labour Court concluded that the employer unfairly discriminated against the employee as it generalised his condition instead of assessing his medical condition as an individual.<sup>184</sup>

The case law above illustrates that each and every case is unique and it has to be assessed on its own merits.

Inherent requirements are those which cannot be removed from the job without dramatically altering the nature of the job. Where the stated requirements for a job do not meet the above test, the exclusion of persons from that job on the basis of those stated requirements would amount to unfair discrimination.<sup>185</sup> A defence based on the inherent requirement of job is relatively straightforward. In essence it amounts to no more than showing a requirement which is essential for the performance of the job and which the unsuccessful applicants lacks.<sup>186</sup>

### **2.2.2.2 Affirmative Action**

Formal Equality is based on the premise that 'individuals should be treated equally, on the basis of their own merit, rather than on attributes based on irrelevant characteristics such as race, colour, gender, caste or other analogous status'.<sup>187</sup> However, experience has demonstrated that inequalities persist despite the

---

<sup>181</sup> *Independent Municipal and Allied Workers Union v City of Cape Town* (2005) 26 ILJ 1404 (LC).

<sup>182</sup> *Independent Municipal and Allied Workers Union v City of Cape Town* (2005) 26 ILJ 1404 (LC) para 2.

<sup>183</sup> *Independent Municipal and Allied Workers Union v City of Cape Town* (2005) 26 ILJ 1404 (LC) para 11.

<sup>184</sup> *Independent Municipal and Allied Workers Union v City of Cape Town* (2005) 26 ILJ 1404 (LC) para 111.

<sup>185</sup> Rycroft, A, Inherent requirements of the job, (2015) 900 *Indus.L.J.* (Juta) 36(4).

<sup>186</sup> Du Toit D & Potgieter M, *Unfair Discrimination in the Workplace* (2014) 88.

<sup>187</sup> Dupper O & Garbers C *Equality in the Workplace, Reflections from South Africa and Beyond* (2009) 19. 31

introduction of formal equality.<sup>188</sup> Substantive equality is 'an asymmetric principle rather than the abstract individual of formal equality, its aim is to break the cycle of disadvantage associated with status or outgroups'.<sup>189</sup> As a result of South Africa's legacy of workplace discrimination and its aim to correct the imbalances of the past, it has adopted a substantive notion of equality.

Affirmative action measures are defined as 'measures intended to ensure that suitably qualified employees from the designated groups have equal employment opportunity and are equitably represented in all occupational categories and levels of the workforce'.<sup>190</sup> Affirmative action may constitute a defence and an obligation. While this discussion appears under the heading 'statutory defences', affirmative action which amounts to an obligation will be discussed first which will be followed by a discussion on affirmative action that may be raised as a defence.

#### **2.2.2.2.1 Affirmative action: an obligation**

Designated employers are obligated to implement affirmative action measures for designated groups to achieve employment equity.<sup>191</sup> These measures must include:

- (a) measures to identify and eliminate employment barriers, including unfair discrimination, which adversely affect people from designated groups;
- (b) measures designed to further diversity in the work-place based on equal dignity and respect of all people;
- (c) making reasonable accommodation for people from designated groups in order to ensure that they enjoy equal opportunities and are equitably represented in the workforce of a designated employer;
- (d) subject to subsection (3), measures to-
  - (i) ensure the equitable representation of suitably qualified people from designated groups in all occupational levels in the workforce; and
  - (ii) retain *and* develop people from designated groups and to implement appropriate training measures, including measures in terms of an Act of Parliament providing for skills development'.

---

<sup>188</sup> Dupper O & Garbers C *Equality in the Workplace, Reflections from South Africa and Beyond* (2009) 19.

<sup>189</sup> Dupper O & Garbers C *Equality in the Workplace, Reflections from South Africa and Beyond* (2009) 19.

<sup>190</sup> Section 15 of the EEA.

<sup>191</sup> Section 13(1) of the EEA.



#### **2.2.2.2.1.1 Measures to identify and eliminate employment barriers**

A designated employer is compelled to assess employment policies, procedures and practices in order to identify any barriers that directly or indirectly impede one or more people from designated groups.<sup>192</sup>

Booyesen conducted research on the barriers to employment equity implementation and retention of blacks in management in South Africa.<sup>193</sup> The employees who were interviewed by Booyesen and who provided feedback on their workplace identified the following factors to be barriers to the implementation of employment equity; insufficient focus, coordination and integration of existing implementation processes, lack of shared understanding of and communication about employment equity issues; lack of leadership commitment; inconsistencies in the implementation of employment equity without any consequence as well as white fears around employment equity.<sup>194</sup>

It is through the consultation with the employees that the employer will be able to identify these barriers.<sup>195</sup> Critical to achieving this is ensuring that there is proper consultation between the designated employer and the employees. Black employees are protected as a result of this affirmative action measure and will benefit since the EEA makes it compulsory for designated employers to identify and remove employment barriers that may exist in the workplace.

#### **2.2.2.2.1.2 Furthering of diversity in the workplace based on equal dignity and respect of all people**

Diversity refers to the co-existence of employees from various socio-cultural backgrounds within the workplace.<sup>196</sup> Diversity includes factors such as race, gender,

---

<sup>192</sup> Provision 6.1.3.3 Code of Good Practice: Preparation, Implementation and Monitoring of Employment Equity Plans GNR424 in GG40817 of 12 May 2017.

<sup>193</sup> Booyesen L 'Barriers to employment equity implementation and retention of blacks in management in South Africa, (2007) 31 *South African Journal of Labour Relations*.

<sup>194</sup> Booyesen L 'Barriers to Employment equity implementation and retention of Blacks in management in South Africa' (2007) 31 *South African Journal of Labour Relations* 57.

<sup>195</sup> Section 16 (1) of the EEA.

<sup>196</sup> Ongori H & Agola J Critical Review of literature on Workforce Diversity, *African Journal of Business Management* pp. 072-076, July 2007.

age, colour, physical ability and ethnicity.<sup>197</sup> While research shows that many organisations have embraced diversity, others still consider it merely an issue of compliance with legal requirements.<sup>198</sup> The objective here is not only to further diversity in a numerical sense by having more employees from designated groups.<sup>199</sup> The purpose of this measure is also to promote diversity 'in a qualitative sense by fully integrating employees from designated groups, or to put it differently, to make the workplace genuinely accommodative of persons from different backgrounds'.<sup>200</sup>

A study conducted by Harold and Kumar with regard to diversity indicates that workforce diversity management leads to job satisfaction and job performance.<sup>201</sup> The study highlighted that most of the employees who formed the subject matter of the research are positive and that they can cope with diversity while a few of the employees are willing to adjust.<sup>202</sup> The study concluded that successfully managing diversity can lead to more committed, better satisfied, better performing employees and potentially better financial performance for an organisation.<sup>203</sup> Based on the study that was conducted by Booysen, the employees who were interviewed, mentioned the following as inhibiting factors:

- A lack of cultural sensitivity where new recruits are expected to assimilate into the current organisational culture.<sup>204</sup>
- A lack of cultural awareness programmes and of an organisational culture that values diversity.<sup>205</sup>
- A white male dominant organisational culture that continues to exclude black recruits (formally or informally through exclusionary network practices).<sup>206</sup>

---

<sup>197</sup> Ongori H & Agola J Critical Review of literature on Workforce Diversity, *African Journal of Business Management* pp. 072-076, July 2007.

<sup>198</sup> Ongori H & Agola J Critical Review of literature on Workforce Diversity, *African Journal of Business Management* pp. 072-076, July 2007.

<sup>199</sup> Ongori H & Agola J Critical Review of literature on Workforce Diversity, *African Journal of Business Management* pp. 072-076, July 2007.

<sup>200</sup> Du Toit D & Potgieter M *Unfair Discrimination in the Workplace* (2014) 158.

<sup>201</sup> Harold A & Kumar V 'Managing Workplace Diversity: Issues and Challenges' 2012.

<sup>202</sup> Harold A & Kumar V 'Managing Workplace Diversity: Issues and Challenges' 2012.

<sup>203</sup> Harold A & Kumar V 'Managing Workplace Diversity: Issues and Challenges' 2012.

<sup>204</sup> Booysen L 'Barriers to Employment equity implementation and retention of Blacks in management in South Africa' (2007) 31 *South African Journal of Labour Relations*.

<sup>205</sup> Booysen L 'Barriers to Employment equity implementation and retention of Blacks in management in South Africa' (2007) 31 *South African Journal of Labour Relations*.

<sup>206</sup> Booysen L 'Barriers to Employment equity implementation and retention of Blacks in management in South Africa' (2007) 31 *South African Journal of Labour Relations*.

The inhibiting factors mentioned above may be experienced by black employees in a number of places of employment and it is for this reason that the existence of this affirmative action measure is beneficial. Black employees are protected by this measure since a designated employer is required to promote diversity and inclusiveness in the workplace, by fully integrating employees from the designated groups. Employees that are employed by employers who do not fall within the meaning of a 'designated employer' are vulnerable since this protection is not extended to such employees. For this reason it is recommended that the meaning of 'designated employer' be amended to include more employers within its scope than what is included at present.

#### **2.2.2.2.1.3 Making reasonable accommodation for people from designated groups**

Section 1 of the EEA states that 'reasonable accommodation' means 'any modification or adjustment to a job or to the working environment that will enable a person from a designated group to have access to participate or advance in employment'.<sup>207</sup> In certain circumstances, the refusal to make reasonable accommodation of an employee's needs and circumstances, where this can be done without undue hardship to the employer may constitute unfair discrimination.<sup>208</sup> The duty of reasonable accommodation on the part of employers may be easy for some employers to comply with, particularly where it is possible for the employer to make alterations to the working environment, or it could be difficult for employers to comply with, such as in cases where making such accommodation will result in financial hardship for the employer.<sup>209</sup>

While this measure is often associated with disability, its scope extends beyond that.<sup>210</sup> Religious and cultural needs of designated employees may also have to be

---

<sup>207</sup> Section 1 of the EEA.

<sup>208</sup> Item 5.2.2 Code of Good Practice on the Integration of Employment Equity into Human Resource Policies and Practices GN 1358 of 4 August 2005.

<sup>209</sup> Bernard R REASONABLE ACCOMMODATION IN THE WORKPLACE: TO BE OR NOT TO BE? (2014) 17 *PELJ* 3781.

<sup>210</sup> Du Toit D & Potgieter M, *Unfair Discrimination in the Workplace* (2014) 160.

accommodated. It is apparent that in the employment equity legislation, reasonable accommodation is not geared solely for people with disabilities but is equally applicable to those employees or applicants from other designated groups.<sup>211</sup> The designated employer is compelled to provide reasonable accommodation for people from the designated groups. The scope of the meaning of designated employers should be extended to include even more employers than what it does at present so that their employees can enjoy the same protection. Black employees in the workplace are protected by this measure since the EEA requires these employers to make reasonable accommodation for such employees.

#### **2.2.2.2.1.4 Ensuring equitable representation of suitably qualified people from designated groups at all occupational levels in the workforce**

While equitable representation does relate to numbers, it does relate to more than numbers.<sup>212</sup> Bringing about equitable representation means the development of employees who were the victims of unfair discrimination in the past to overcome those barriers and realise their full potential.<sup>213</sup> Section 20(3) of the EEA contains the meaning of 'suitably qualified' and states that a person may be suitably qualified for a job 'as a result of any one of, or any combination of that person's formal qualifications, prior learning, relevant experience or capacity to acquire, within a reasonable time, the ability to do the job'.<sup>214</sup>

The primary purpose of this measure is not to overlook people from the designated groups based on experience where they possess the necessary qualifications, skills or knowledge required to perform the job at hand. Suitably qualified black employees are protected by this measure and should not be overlooked for positions since the EEA requires that the capacity to acquire the ability to do the job within a reasonable period should be taken into consideration when appointing or promoting a member from the designated group.<sup>215</sup> This then implies that a lack of experience cannot solely

---

<sup>211</sup> Dupper O & Garbers C *Essential Employment Discrimination Law (2014)* 175.

<sup>212</sup> Du Toit D & Potgieter M, *Unfair Discrimination in the Workplace (2014)* 161.

<sup>213</sup> Du Toit D & Potgieter M, *Unfair Discrimination in the Workplace (2014)* 161.

<sup>214</sup> Section 20(3) of the EEA.

<sup>215</sup> Section 20(3) (d) of the EEA.

be used to justify excluding black people. This measure does not provide protection to employees who are not employed by a designated employer. The scope of the meaning of designated employers should thus be extended to include even more employers than what it does at present so that their employees can enjoy the same protection.

#### **2.2.2.2.1.5 Retaining and developing people from designated groups**

The working environment is a vital factor that affects the motivation of employees from designated groups and has an effect on an employee's decision to remain within an organisation.<sup>216</sup> A study that was conducted by Shakeel on employee retention highlighted amongst other things that job satisfaction and training is important when it comes to employee retention.<sup>217</sup> Training is a tool for retaining employees and its impact on the revenue which is made by a place of employment can be positive.<sup>218</sup> Research shows that certain challenges exist when it comes to the retention, training and development of black employees in some workplaces. Research conducted by Booysen revealed that 'black people are perceived as tokens and not fully integrated into companies because of little delegation of real responsibility or decision-making authority, owing to persistent stereotypes'.<sup>219</sup> In certain cases black employees are not systematically developed and trained and there is no effective talent management.<sup>220</sup> Retaining members from the designated groups must be given preference by designated employers which may at times imply overlooking white males in order to reach the employment equity targets.

It has also been revealed that there is a lack of black mentors and role models'.<sup>221</sup> It is within this framework that development and training are important factors, as the

---

<sup>216</sup> Du Toit D & Potgieter M, *Unfair Discrimination in the Workplace* (2014) 163.

<sup>217</sup> Shakeel N 'Factors Influencing Employee Retention: An Integrated Perspective' (2015) 6 *Journal of Resources Development and Management*.

<sup>218</sup> Shakeel N 'Factors Influencing Employee Retention: An Integrated Perspective' (2015) 6 *Journal of Resources Development and Management*.

<sup>219</sup> Booysen L 'Barriers to Employment equity implementation and retention of Blacks in management in South Africa (2007) 31 *South African Journal of Labour Relations*.

<sup>220</sup> Booysen L 'Barriers to Employment equity implementation and retention of Blacks in management in South Africa (2007) 31 *South African Journal of Labour Relations*.

<sup>221</sup> Booysen L 'Barriers to Employment equity implementation and retention of Blacks in management in South Africa (2007) 31 *South African Journal of Labour Relations*.

vast majority of skilful people, those who the organisation are most eager to attract will prefer an environment where they are able to grow within the place of employment.<sup>222</sup> Development can take place by means of knowledge acquisition through training programmes that the designated employer can establish in the workplace.

In terms of the EEA, designated employers are required to comply with certain procedural obligations. The procedural obligations are discussed below.<sup>223</sup>

#### **2.2.2.2.2 Procedural obligations**

Section 13(2) of the EEA states that a designated employer is required to consult with its employees as required by section 16; conduct an analysis as required by section 19; prepare an employment equity plan as required by section 20 and report to the Director-General<sup>224</sup> These duties are discussed below.

##### **2.2.2.2.2.1 Consultation with the employees**

A designated employer is required to take reasonable steps to consult with a representative trade union representing members at the workplace and its employees or representatives nominated by them.<sup>225</sup> In the absence of a trade union the employer should consult with its employees or representatives nominated by them.<sup>226</sup> The objective of this consultation process is to discuss matters concerning the analysis which should be conducted by the designated employer,<sup>227</sup> the preparation and implementation of the employment equity plan <sup>228</sup> and the report that should be submitted to the Director General of the Department of Labour.<sup>229</sup> The employees or their nominated representatives with whom an employer consults must reflect the

---

<sup>222</sup> Du Toit D & Potgieter M, *Unfair Discrimination in the Workplace* (2014) 163.

<sup>223</sup> Provision 1(b) Code of Good Practice: Preparation, Implementation and Monitoring of Employment Equity Plans GNR424 in GG40817 of 12 May 2017.

<sup>224</sup> Section 13 (2) of the EEA.

<sup>225</sup> Section 16 (1) (a) of the EEA.

<sup>226</sup> Section 16 (1) (b) of the EEA.

<sup>227</sup> Section 17 (a) of the EEA.

<sup>228</sup> Section 17 (b) of the EEA.

<sup>229</sup> Section 17(c) of the EEA.

interests of employees from across all occupational levels of the employer's workforce; employees from designated groups; and employees who do not form part of people from designated groups.<sup>230</sup>

The consultation should include

- '(a) Reasonable opportunity for employee representatives to meet with the employer to consult on the conducting of an analysis, the development of a plan and the submitting of reports to the Department of Labour.
- (b) The opportunity for both employer and employee representatives to provide feedback to their respective constituencies.
- (c) The request, receipt and consideration of relevant information.'
- (d) The allocation of adequate time for each of the steps to be completed.'<sup>231</sup>

The disclosure of relevant information by designated employers is vital when it comes to ensuring that the consultation is successful. The information which should be disclosed by the employer includes:

- '(a) the extent to which suitably qualified people from and amongst the different designated groups are equitably represented within each occupational level in that employer's workforce in relation to the demographic profile of the national and regional (provincial) economically active population.
- (b) steps taken by a designated employer to train suitably qualified people from the designated groups.
- (c) steps to be taken by a designated employer to recruit and promote persons from the designated groups to implement its EE Plan.
- (d) the extent to which the designated employer has made progress in eliminating employment barriers that adversely affect people from designated groups.
- (e) steps taken by an employer to appoint and retain suitably qualified people from the designated groups.
- (f) steps taken by the designated employer to provide reasonable accommodation for suitably qualified people from the designated groups'<sup>232</sup>

---

<sup>230</sup> Section 16(2) of the EEA.

<sup>231</sup> Provision 6.1.2.6 of the Code of Good Practice: Preparation, Implementation and Monitoring of Employment Equity Plans *GN R424 in GG 40817 of 12 May 2017.*

<sup>232</sup> Provision 6.1.2.9 of the Code of Good Practice: Preparation, Implementation and Monitoring of Employment Equity Plans *GNR424 in GG40817 of 12 May 2017.*

Black employees are protected by this procedural obligation since this obligation provides employees with the opportunity to address matters relating to the policies and procedures which have an effect on employment equity as well as any matters relating to racial discrimination in the workplace. Employees who are employed by employers who do not fall within the meaning of designated employers are deprived of this protection. The success of employment equity depends largely on the efficacy of the consultation process.<sup>233</sup> Employers, employees and trade unions must be willing to play a constructive role in the consultation process.<sup>234</sup> Regular and meaningful consultations will contribute to a joint commitment to workplace transformation.<sup>235</sup>

#### **2.2.2.2.2 Conducting an analysis**

Section 19 of the EEA, which governs the designated employer's duty to conduct an analysis states that

- (1) A designated employer must collect information and conduct an analysis, as prescribed, of its employment policies, practices, procedures and the working environment, in order to identify employment barriers which adversely affect people from designated groups.
- (2) An analysis conducted in terms of subsection (1) must include a profile, as prescribed, of the designated employer's workforce within each occupational level in order to determine the degree of underrepresentation of people from designated groups in various occupational levels in that employer's workforce.<sup>236</sup>

It is necessary to distinguish between practices on the one-hand and 'employment practices', 'policies' and 'procedures' on the other-hand.<sup>237</sup> Policies and procedures are formal documents often drawn up by lawyers or human resource specialists.<sup>238</sup> Practices refer to the way that things are done and being undocumented, lend themselves to subjective interpretations of being discriminatory.<sup>239</sup> The review should

---

<sup>233</sup> Item 5.3.14. of Code of *Good Practice on the Integration of Employment Equity into Human Resource Policies and Practices GN 1358 in GG 27866 of 4 August 2005.*

<sup>234</sup> Item 5.3.14. of Code of *Good Practice on the Integration of Employment Equity into Human Resource Policies and Practices GN 1358 in GG 27866 of 4 August 2005.*

<sup>235</sup> Item 5.3.14. of Code of *Good Practice on the Integration of Employment Equity into Human Resource Policies and Practices GN 1358 in GG 27866 of 4 August 2005.*

<sup>236</sup> Section 19 of the EEA.

<sup>237</sup> Du Toit D & Potgieter M *Unfair Discrimination in the workplace* (2014) 153.

<sup>238</sup> Du Toit D & Potgieter M *Unfair Discrimination in the workplace* (2014) 153.

<sup>239</sup> Du Toit D & Potgieter M *Unfair Discrimination in the workplace* (2014) 153.



include a critical examination of all established policies, practices, procedures and the working environment to identify barriers that affect people from the designated groups.<sup>240</sup> The employer should conduct an analysis of the workforce profile in order to distinguish between people from designated and non-designated groups.<sup>241</sup> The under-representation or over-representation of a particular group, whether designated or non-designated, must be captured in the analysis and used to inform and prioritize strategies in the employment equity plan to address the under-representation.<sup>242</sup>

The purpose of the analysis is –

- (a) to determine the extent of under-representation of employees i.e. both permanent and temporary workers from the designated groups in the different occupational levels of the employer's workforce in terms of race, gender and disability.
- (b) to assess all employment policies, practices, procedures and the working environment so as to-
  - identify any barriers that may contribute to the underrepresentation or under-utilisation of employees from the designated groups;
  - identify any barriers or factors that may contribute to the lack of affirmation of diversity in the workplace;
  - identify other employment conditions that may adversely affect designated groups; and
  - identify practices or factors that positively promote employment equity and diversity in the workplace including reasonable accommodation.<sup>243</sup>

If the workplace profile indicates that black people are underrepresented, the next step is to identify the reasons for such underrepresentation.<sup>244</sup> Testing existing policies and practices against the benchmark of unfair discrimination is the clearest way of identifying the practices and policies that discriminate or could discriminate unfairly and therefore should be corrected.<sup>245</sup>

---

<sup>240</sup> Provision 6.1.3.3 of the Code of Good Practice: Preparation, Implementation and Monitoring of Employment Equity Plans GNR424 in GG40817 of 12 May 2017.

<sup>241</sup> Provision 6.1.3.2(a) of the Code of Good Practice: Preparation, Implementation and Monitoring of Employment Equity Plans GNR424 in GG40817 of 12 May 2017.

<sup>242</sup> Provision 6.1.3.2(e) of the Code of Good Practice: Preparation, Implementation and Monitoring of Employment Equity Plans GNR424 in GG40817 of 12 May 2017.

<sup>243</sup> Provision 6.1.3.1 of the Code of Good Practice: Preparation, Implementation and Monitoring of Employment Equity Plans GNR424 in GG40817 of 12 May 2017.

<sup>244</sup> Du Toit D, Godfrey S & Cooper C *Labour Relations Law A Comprehensive Guide* 6ed (2015) 746.

<sup>245</sup> Du Toit D & Potgieter M *Unfair Discrimination in the workplace* (2014) 152.

Black employees are protected as a result of this procedural obligation since the EEA requires the employer to conduct an analysis into the employment policies, practices, procedures and the working environment to identify barriers which adversely affect people from designated groups and the said analysis should include a profile to determine the degree of underrepresentation of people from designated groups. Black employees who are employed by an employer who do not fall within the meaning of a designated employer may be disadvantaged by the lack of protection which such a situation may cause. Since the obligation to conduct an analysis does not provide protection to all black employees it is recommended that the meaning of 'designated employer' be extended.

#### **2.2.2.2.3 Preparing an employment equity plan**

A designated employer is required to 'prepare and implement an employment equity plan which will achieve reasonable progress towards employment equity in that employer's workforce'.<sup>246</sup> In developing the employment equity plan, the employer should consult and attempt to reach consensus on 'the development of the employment equity plan by considering the analysis that was conducted by the employer, the national and provincial Economically Active Population (EAP), the determination of the duration of the employment equity plan as well as the determination of the annual objectives of the employment equity plan'.<sup>247</sup> The employer should formulate corrective measures, which should include goals and targets as well as the establishment of time frames within which such goals and targets will be achieved.<sup>248</sup> This should be followed by the identification and allocation of resources for the implementation of the employment equity plan as well as the communication of the employment equity plan to the workforce.<sup>249</sup>

---

<sup>246</sup> Section 20 (1) of the EEA.

<sup>247</sup> Provision 7 of the Code of Good Practice: Preparation, Implementation and Monitoring of Employment Equity Plans GN R424 in GG40817 of 12 May 2017.

<sup>248</sup> Provision 7 of the Code of Good Practice: Preparation, Implementation and Monitoring of Employment Equity Plans GN R424 in GG40817 of 12 May 2017.

<sup>249</sup> Provision 7 of the Code of Good Practice: Preparation, Implementation and Monitoring of Employment Equity Plans GN R424 in GG40817 of 12 May 2017.

The analysis report must be used to prioritise the targeted designated groups in accordance with their representation.<sup>250</sup> The analysis report should be used to determine and inform the affirmative action measures, including strategies, which would be included in the employment equity plan as a response to the barriers that were identified in the policies, procedures and practices.<sup>251</sup>

An employment equity plan should contain the objectives to be achieved for each year of the plan,<sup>252</sup> and the affirmative action measures which the designated employer intends to implement.<sup>253</sup> Where underrepresentation of people from designated groups has been identified in the analysis, the numerical goals to achieve equitable representation of suitably qualified people from designated groups within each occupational level in the workforce, the timetable within which this is to be achieved, and the strategies intended to achieve those goals should be specified in the employment equity plan.<sup>254</sup> The employment equity plan should also include the timetable for each year of the plan for the achievement of goals and objectives other than numerical goals;<sup>255</sup> the duration of the plan, the procedures that will be used to monitor and evaluate the implementation of the plan and whether reasonable progress is being made towards implementing employment equity.<sup>256</sup> Lastly, the plan should also consist of the internal procedures to resolve any dispute with regard to the interpretation or implementation of the plan;<sup>257</sup> the persons in the workforce responsible for monitoring and implementing the plan;<sup>258</sup> and any other prescribed matter.<sup>259</sup> As a result of the aforementioned one of the cornerstones of the regulation of affirmative action is the employment equity plan. It reflects a designated employer's employment-equity implementation programme. It also reflects the critical link between the current workforce profile and possible barriers in employment policies

---

<sup>250</sup> Provision 7.1.1 of the Code of Good Practice: Preparation, Implementation and Monitoring of Employment Equity Plans.

<sup>251</sup> Provision 7.1.2 of the Code of Good Practice: Preparation, Implementation and Monitoring of Employment Equity Plans.

<sup>252</sup> Section 20(2) (a) of the EEA.

<sup>253</sup> Section 20(2) (b) of the EEA.

<sup>254</sup> Section 20(2) (c) of the EEA.

<sup>255</sup> Section 20(2) (d) of the EEA.

<sup>256</sup> Section 20(2)(f) of the EEA.

<sup>257</sup> Section 20(2)(g) of the EEA.

<sup>258</sup> Section 20(2)(h) of the EEA.

<sup>259</sup> Section 20(2)(i) of the EEA.

and procedures, and the implementation of remedial measures to achieve employment equity in the workplace.<sup>260</sup>

Black employees are protected as a result of this procedural duty, since the employment equity plan is informed by the analysis which was conducted by the designated employer and includes the barriers that were identified and the manners in which these barriers will be eliminated. Black employees working for the employers who do not fall within the meaning of a designated employer may be vulnerable. The scope of the meaning of designated employers should be extended to include more employers than what it does at present so that their employees can enjoy the same protection.

#### **2.2.2.2.4 Reporting to the Director-General**

A designated employer is required to submit a report to the Director-General once every year, on the first working day of October or on such other date as may be prescribed.<sup>261</sup> The chief executive officer of the designated employer is required to sign the report, after ensuring that the report contains the prescribed information.<sup>262</sup> An employer that is unable to submit a report to the Director-General by the first working day of October should notify the Director-General in writing before the last working day of August in the same year and provide reasons for its inability to do so.<sup>263</sup> The Director-General may apply to the Labour Court to impose a fine in circumstances relating to the designated employer's failure to submit a report,<sup>264</sup> or to notify and provide reasons to the Director-General,<sup>265</sup> or where the designated employer has notified the Director-General with falsified or invalid reasons.<sup>266</sup> The employer should consult with its employees or employee representatives and union representatives through established forum(s) prior to submitting the employment equity report to the Department of Labour.<sup>267</sup> The employment equity report should be used as a

---

<sup>260</sup> Deane T 'The Regulation of Affirmative Action in the Employment Equity Act 55 of 1998'.

<sup>261</sup> Section 21(1) of the EEA.

<sup>262</sup> Section 21(4) of the EEA.

<sup>263</sup> Section 21(4) of the EEA.

<sup>264</sup> Section 21(4) (a) of the EEA.

<sup>265</sup> Section 21(4) (b) of the EEA.

<sup>266</sup> Section 21 (4) (c) of the EEA.

<sup>267</sup> Provision 8(b) of the Code of Good Practice: Preparation, Implementation and Monitoring of Employment Equity Plans GN R424 in GG 40817 of 12 May 2017.

monitoring and evaluation tool to inform future implementation strategies and the preparation of successive plans.<sup>268</sup> Black employees are protected as a result of this procedural duty since the Director-General will as a result of this duty be in a position to monitor and assess compliance or failure thereof.

In the event of an extension of the scope of the meaning of ‘designated employers’, this procedural duty would apply to more employers than what it is at present. The lack of monitoring the progress of employment equity in circumstances where black employees are employed by an employer who is not a designated employer may be a challenge for such employees. It is thus necessary for such employees to obtain the protection which this procedural obligation affords similar to those employed by designated employers.

Affirmative action constituting a defence is discussed below.

#### **2.2.2.2.3 Affirmative action: a defence**

Similar to an employer being entitled to raise an inherent requirement of the job as a defence, an employer may also raise affirmative action as a defence.

In *Reynhardt v University of South Africa*, the employee was unsuccessful in his application for a position of Dean in the faculty of science. Instead, a coloured male was appointed to the post.<sup>269</sup> He took the matter to the Labour Court.<sup>270</sup> The employer raised affirmative action as a defence.<sup>271</sup> It was however established by the Labour Court that the employment equity targets were reached.<sup>272</sup> The Labour Court held that the applicant was unfairly discriminated against on the basis of his race when he was not appointed as Dean of the Faculty of Science for the second term.<sup>273</sup> The University

---

<sup>268</sup> Provision 8(c) of the Code of Good Practice: Preparation, Implementation and Monitoring of Employment Equity Plans GN R424 in GG 40817 of 12May 2017.

<sup>269</sup> *Reynhardt v University of South Africa* 2008 (29) ILJ 725 (LC).

<sup>270</sup> *Reynhardt v University of South Africa* 2008 (29) ILJ 725 (LC) para 1.

<sup>271</sup> *Reynhardt v University of South Africa* 2008 (29) ILJ 725 (LC) para 7.

<sup>272</sup> *Reynhardt v University of South Africa* 2008 (29) ILJ 725 (LC) para 111.

<sup>273</sup> *Reynhardt v University of South Africa* 2008 (29) ILJ 725 (LC) para 146.

appealed the decision and the Labour Appeal Court upheld the decision of the Labour Court.<sup>274</sup>

In *Alexandre v Department of Health*, the applicant, a white male had applied for the post of Director: Engineering and Technical Support.<sup>275</sup> He was unsuccessful with the application and a coloured male was appointed to the position instead.<sup>276</sup> Citing unfair discrimination on the grounds of race for the failure of him being appointed, he referred the matter to the Labour Court.<sup>277</sup> The employer raised affirmative action as a defence.<sup>278</sup> The Labour Court held that in terms of the employment equity targets as presented by the employer, the white male category based on the target was significantly exceeded, whereas same was not the case in respect of coloured males.<sup>279</sup> The Labour Court dismissed his application as a consequence.<sup>280</sup>

### 2.3 **CONCLUSION**

The purpose of this chapter is to determine the extent to which the legislative framework governing racial discrimination protects black employees. This chapter shows that the provisions contained in the EEA play an important role in addressing and protecting black employees from racial discrimination in South African workplaces.

Sections 5 and 6 of the EEA protect black employees against racial discrimination. Black employees are not only protected as a result of the meanings of direct and indirect discrimination, but are also protected as a result of the laws governing equal pay for work of equal value. Should the employee allege racial discrimination, whether directly or indirectly, the burden of proof rests on the employer to prove that the discrimination either did not take place as was alleged, or that 'it is rational and not

---

<sup>274</sup> *UNISA v REYNHARDT* [2010] 12 BLLR 1272 (LAC).

<sup>275</sup> *Alexandre v Provincial Administration of the Western Cape Department of Health* (2005) 26 ILJ 765 (LC).

<sup>276</sup> *Alexandre v Provincial Administration of the Western Cape Department of Health* (2005) 26 ILJ 765 (LC).

<sup>277</sup> *Alexandre v Provincial Administration of the Western Cape Department of Health* (2005) 26 ILJ 765 (LC).

<sup>278</sup> *Alexandre v Provincial Administration of the Western Cape Department of Health* (2005) 26 ILJ 765 (LC) para 7.

<sup>279</sup> *Alexandre v Provincial Administration of the Western Cape Department of Health* (2005) 26 ILJ 765 (LC).

<sup>280</sup> *Alexandre v Provincial Administration of the Western Cape Department of Health* (2005) 26 ILJ 765 (LC) para 46.

unfair, or otherwise justifiable'. Employees that are subjected to racial discrimination in the workplace are at liberty to approach the CCMA and/or the Labour Court for relief. The remedies which are provided in terms of the EEA protect black employees from racial discrimination in the workplace. Since the CCMA and the Labour Court is empowered to award a number of remedies, the remedies that are available act as a deterrent to discourage employers from discriminating against black employees unfairly.

Designated employers are required to identify and eliminate employment barriers, to promote further diversity in the workplace, to make reasonable accommodation for people from designated groups, to ensure equitable representation of people from designated groups and to retain and develop people from the designated groups. The affirmative action measures which designated employers are required to implement protect black employees. Black employees are further protected by procedural obligations which compels every designated employer to consult with its employees, to conduct an analysis, the draft and implement an employment equity report and to report to the Director-General of the Department of Labour.

It is recommended that the scope of the meaning of designated employers be extended to include more employers than what it does at present so that their employees can enjoy the same protection that is provided to employees who are currently employed by employers who fall within that meaning. The chapter that follows contains a discussion on the legislative framework governing racial discrimination in Canada.

## CHAPTER 3

### THE CANADAN LAWS GOVERNING RACIAL DISCRIMINATION

#### 3.1 INTRODUCTION

Chapter 2 contains a discussion on the extent to which the South African legislative framework governing racial discrimination in South Africa protects the black employees. Chapter 2 shows that black employees are not only protected as a result of sections 5 and 6 of the EEA, but also as a result of the meanings of direct discrimination, indirect discrimination and the determination of the presence of unfairness. Black employees in South Africa are also protected as a result of the remedies that are available to employees who are successful with racial discrimination claims. The provisions governing affirmative action also protect black employees who are employed by designated employers. In chapter 2 the recommendation is made that the scope of the meaning of a 'designated employer' be extended to include more employers so that more employees can be protected by the laws governing affirmative action. This chapter contains a discussion on the laws governing racial discrimination in the Canadian workplace.

UNIVERSITY of the  
WESTERN CAPE

Canada and South Africa have parliamentary democracies and have adopted policies that involve government intervention for the purposes of the prevention and elimination of unfair discrimination against racial groups, women, and persons with disabilities.<sup>281</sup> Canada is a federal state, as such, the responsibility for lawmaking is shared among one federal, ten provincial and three territorial governments.<sup>282</sup> Similar to South Africa, the Canadian Constitution makes provision for equality rights.<sup>283</sup> Canada has also ratified with the ILO Convention 111. The Constitution Act, 1982 of Canada consists of two main parts: the Canadian Charter of Rights and Freedoms and the rights of

---

<sup>281</sup> Harish C, Frank H & Christa L. 'Employment equity in Canada and South Africa: a comparative review'. *The International Journal of Human Resource Management* (2012), 23:1, 1-17, DOI.

<sup>282</sup> Marleau R & Monpetit C, House of Commons Procedure and Practice (2000 ed)

<sup>283</sup> Section 15 Canadian Charter Rights and Freedoms, Part 1 of the Constitution Act, 1982.



Aboriginal peoples in Canada.<sup>284</sup> In terms of Section 15 of the Canadian Charter of Rights and Freedoms (Charter):

- '(1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.
- (2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability'.<sup>285</sup>

In terms of section 15 of the Charter, the government may also promote equality by enacting laws or creating programmes that aim to improve the conditions of people who have been disadvantaged because of the personal characteristics listed above.<sup>286</sup>

In order to determine if there has been violation of section 15 of the Charter, the following three questions that should be asked:

- '1. Does the government action or legislation create a distinction based on an enumerated or analogous ground?
2. If yes, is the government action or legislation part of an ameliorative program aimed at improving situations for disadvantaged group? The court will have to establish that the following conditions are met:
  - (a) There is a correlation between the program and the disadvantage experienced by the particular group.
  - (b) The purpose of the program is genuine.
  - (C) The distinction generally serves or advances the goal of the ameliorative program.If these conditions are met, there is no violation of section 15. If not the analysis continues to the third question,
3. Does the distinction create a disadvantage by perpetuating prejudice or stereotyping?'<sup>287</sup>

The aforementioned shows that a test is used in Canada to determine whether there has been a violation of the equality clause, similar to the way in which the test created

---

<sup>284</sup> Constitution Act 1982.

<sup>285</sup> Section 15 Canadian Charter of Rights and Freedoms 1982.

<sup>286</sup> Section 15 Canadian Charter of Rights and Freedoms 1982.

<sup>287</sup> Quebec (Attorney General v A, 2013 SCC 5 para 186.

in *Harksen v Lane* is used to determine whether there has been a violation of the South African constitutional right to equality. The Canadian Human Rights Act 1985 is a federal law that contains provisions governing discrimination. Section 7 of the Canadian Human Rights Act provides that it is a discriminatory practice, directly or indirectly,

- (a) to refuse to employ or continue to employ any individual, or
- (b) in the course of employment, to differentiate adversely in relation to an employee, on a prohibited ground of discrimination.'

Employment equity in Canada officially came into effect with the promulgation of the Employment Equity Act (EEA 1995). The EEA 1995 seeks to 'achieve fairness in the workplace by removing systemic barriers and overcoming the discrimination that has kept four traditionally disadvantaged groups from being employed or promoted'.<sup>288</sup> The purpose of the EEA 1995 is:

'to achieve equality in the workplace so that no person shall be denied employment opportunities or benefits for reasons unrelated to ability and, in the fulfilment of that goal, to correct the conditions of disadvantage in employment experienced by women, aboriginal peoples, persons with disabilities and members of visible minorities by giving effect to the principle that employment equity means more than treating persons in the same way but also requires special measures and the accommodation of differences'.<sup>289</sup>

Section 4(1) of the EEA 1995 provides that the Act applies to:

'private sector employers; the portions of the public service of Canada set out in Part I of Schedule I to the Public Service Staff Relations Act; the portions of the public service of Canada set out in Part II of Schedule I to the Public Service Staff Relations Act that employ one hundred or more employees; and such other portion of the public sector employing one hundred or more employees, including the Canadian Forces and the Royal Canadian Mounted Police, as may be specified by order of the Governor in Council on the recommendation of the Treasury Board, in consultation with the minister responsible for the specified portion'.<sup>290</sup>

---

<sup>288</sup>Ng\* E & Burke R, A Comparison of the Legislated Employment Equity Program, Federal Contractors Program, and Financial Post 500 Firms. *Canadian Journal of Administrative Sciences*.

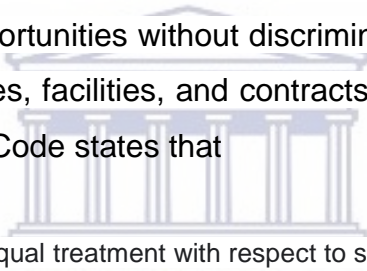
<sup>289</sup> Section 2 Employment Equity Act S.C. 1995, c 44.

<sup>290</sup> Section 4 Employment Equity Act of S.C. 1995, c 44.

In terms of the EEA 1995 'designated groups' means 'women, aboriginal peoples (First Nations, Inuit and Metis), persons with disabilities and members of visible minorities'. Members of visible minorities consists of 'persons, other than aboriginal peoples, who are non-Caucasian in race or non-white in colour'.<sup>291</sup>

In terms of section 3 of the EEA 1995 a 'private sector employer' is defined as 'any person who employs one hundred or more employees on or in connection with federal work, undertaking or business and includes any corporation established to perform any function or duty on behalf of the government of Canada that employs hundred or more employees'. This definition excludes a person who employs employees on or in connection with work, undertaking or business of a local or private nature in Yukon, the Northwest territories or Nunavut or a departmental corporation'<sup>292</sup>

The Ontario Human Rights Code is a provincial law that gives everybody in the province equal rights and opportunities without discrimination in specific social areas such as jobs, housing, services, facilities, and contracts or agreements.<sup>293</sup> Section 1 of the Ontario Human Rights Code states that



'every person has a right to equal treatment with respect to services, goods and facilities, without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, gender identity, gender expression, age, marital status, family status or disability'.<sup>294</sup>

The objective of this chapter is to determine how the Canadian legislative framework governing racial discrimination compares to that in South Africa. This chapter consists of a discussion on discrimination, unfairness and the remedies that are available to employees who are successful with unfair discrimination claims. This chapter also contains a discussion on the laws governing affirmative action. This is done in order to determine whether South Africa can learn from the legislative measures that exist in Canada.

---

<sup>291</sup> Section 3 Employment Equity Act of S.C. 1995, c 44.

<sup>292</sup> Section 3 Employment Equity Act of S.C. 1995, c 44.

<sup>293</sup> Human Rights Code, RSO 1990, c H-19.

<sup>294</sup> Section 1 of the Human Rights Code, RSO 1990, c H-19.

## 3.2 UNFAIR DISCRIMINATION

The meanings of 'discrimination' and 'unfairness' are discussed below.

### 3.2.1 DISCRIMINATION

All jurisdictions (all ten provinces) have human rights statutes that prohibit and attempt to eliminate employment discrimination on numerous prohibited grounds such as race, national/ethnic origin, colour, religion, age, sex, marital status, disability, sexual and sexual orientation.<sup>295</sup> Discrimination includes making stereotypical assumptions about attributes of individuals, not assessing their merits and capacities properly, denying them benefits, and excluding them from participation in various activities.<sup>296</sup> In *Andrews v Law Society* the Court held 'that discrimination is a distinction which, whether intentional or not but based on grounds relating to personal characteristics of the individual or group, has an effect which imposes disadvantages not imposed upon others or which withholds or limit access to advantages available to other members of society'.<sup>297</sup> Section 5(1) of the Ontario Human Rights Code provides that

'every person has a right to equal treatment with respect to employment without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, gender identity, gender expression, age, record of offences, marital status, family status or disability'.<sup>298</sup>

In South Africa, the meaning of 'discrimination' is the same as it is in the ILO Convention 111.<sup>299</sup> The meaning of discrimination in Canada is similar to what it is in South Africa. Similar to South Africa, in Canada discrimination may be direct or indirect.<sup>300</sup> In Canada, direct discrimination is also referred to as 'explicit

---

<sup>295</sup> Thomas, A. and Jain, H. (2004). 'Employment equity in Canada and South Africa: progress and propositions'. *The International Journal of Human Resource Management*, 15(1).

<sup>296</sup> Ontario Human Rights Commission 1962.

<sup>297</sup> *Andrew v Law Society of British Columbia* [1989] 1SCR 143; 1989.

<sup>298</sup> Section 5(1) of the Ontario Human Rights Code.

<sup>299</sup> See para 2.2.1.1 above.

<sup>300</sup> Yu A 'Direct Discrimination and Indirect Discrimination: a distinction with a difference' 2019 9(2) *Western Journal of Legal Studies* 2.

discrimination' and indirect discrimination is also referred to as 'adverse effect discrimination'.<sup>301</sup> Direct and indirect discrimination is discussed below.

### 3.2.1.1 DIRECT DISCRIMINATION

Direct discrimination in employment is discrimination resulting from a standard that is facially discriminatory on a prohibited ground.<sup>302</sup> It is when certain benefits are withheld from others based on a prohibited ground that are available to others without a legitimate or *bona fide* reason.<sup>303</sup> Direct discrimination occurs in this connection, where an employer adopts a practice or rule which on its face discriminates on a prohibited ground.<sup>304</sup> The intention of the employer is irrelevant in determining whether direct discrimination is present.<sup>305</sup>

In *Brooks v Canada Safeway Ltd*, the employer's insurance fund provided weekly benefits for loss of pay due to sickness or accident.<sup>306</sup> It however, excluded pregnant women for seventeen weeks from benefiting from the fund.<sup>307</sup> The applicant referred the matter to the Supreme Court on appeal, following the decision of the Court of Appeal, which find in favour of the employer (respondent).<sup>308</sup> The employee cited discrimination on the grounds of sex and family status.<sup>309</sup> The Supreme Court stated that 'once an employer decides to provide an employee benefit package, exclusion from such scheme must not be made in a discriminatory fashion. Selective compensation of this nature would clearly amount to sex discrimination'.<sup>310</sup> The Supreme Court held that the plan unfairly discriminated against the applicant on the grounds of sex.<sup>311</sup>

---

<sup>301</sup> Yu A 'Direct Discrimination and Indirect Discrimination: a distinction with a difference' 2019 9(2) *Western Journal of Legal Studies* 2.

<sup>302</sup> Yu A 'Direct Discrimination and Indirect Discrimination: a distinction with a difference' 2019 9(2) *Western Journal of Legal Studies* 2.

<sup>303</sup> Ontario Human Rights Commission 1962.

<sup>304</sup> *Ont. Human Rights Comm. v. Simpsons-Sears*, 1985 *CanLII* 18 (SCC), [1985] 2 SCR 536.

<sup>305</sup> Yu A 'Direct Discrimination and Indirect Discrimination: a distinction with a difference' 2019 9(2) *Western Journal of Legal Studies* 2.

<sup>306</sup> *Brooks v. Canada Safeway Ltd.*, 1989 *CanLII* 96 (SCC), [1989] 1 S.C.R. 1219.

<sup>307</sup> *Brooks v. Canada Safeway Ltd.*, 1989 *CanLII* 96 (SCC), [1989] 1 S.C.R. 1219. 1240.

<sup>308</sup> *Brooks v. Canada Safeway Ltd.*, 1989 *CanLII* 96 (SCC), [1989] 1 S.C.R. 1219. 1220.

<sup>309</sup> *Brooks v. Canada Safeway Ltd.*, 1989 *CanLII* 96 (SCC), [1989] 1 S.C.R. 1219. 1223.

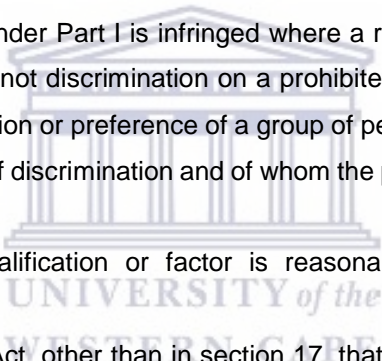
<sup>310</sup> *Brooks v. Canada Safeway Ltd.*, 1989 *CanLII* 96 (SCC), [1989] 1 S.C.R. 1219.1240. 52

<sup>311</sup> *Brooks v. Canada Safeway Ltd.*, 1989 *CanLII* 96 (SCC), [1989] 1 S.C.R. 1219. 1250.

In South Africa, direct discrimination is where 'adverse action is taken against a person precisely because the person possesses an attribute contained in section 6 of the EEA or a comparable attribute'.<sup>312</sup> Canada and South Africa have adopted a similar meaning of direct discrimination and in both jurisdictions the intention of the employer is irrelevant. Black employees in Canada are thus protected as a result of the meaning of direct discrimination in the same way as black employees are in South Africa.

### 3.2.1.2 INDIRECT DISCRIMINATION

Indirect discrimination or 'adverse effect discrimination' is where a standard that is neutral on the face of it impacts a group adversely on a prohibited ground.<sup>313</sup> Section 11(1) of the Ontario Human Right Code states that

- 
- (1) A right of a person under Part I is infringed where a requirement, qualification or factor exists that is not discrimination on a prohibited ground but that results in the exclusion, restriction or preference of a group of persons who are identified by a prohibited ground of discrimination and of whom the person is a member, except where,
    - (a) the requirement, qualification or factor is reasonable and *bona fide* in the circumstances; or
    - (b) it is declared in this Act, other than in section 17, that to discriminate because of such ground is not an infringement of a right. R.S.O. 1990, c. H.19, s. 11 (1).<sup>314</sup>

In the case of indirect discrimination, the intention of the employer is irrelevant. What matters is the impact that the differentiation has on a particular person or a group of people.<sup>315</sup>

In *Ontario (Human Rights Commission) v Simpsons-Sears Ltd*, the employee (complainant) after becoming a member of the Seventh Day Adventist church could

---

312 See para 2.2.1.1.1 above.

313 Yu A 'Direct Discrimination and Indirect Discrimination: a distinction with a difference' 2019 9(2) *Western Journal of Legal Studies* 2.

314 Section 11 (1) Human Rights Code, RSO 1990, c H-19.

315 Yu A 'Direct Discrimination and Indirect Discrimination: a distinction with a difference' 2019 9(2) *Western Journal of Legal Studies* 2. 53

no longer work on Friday evening and on Saturday as her religion commanded that she must observe the Sabbath.<sup>316</sup> The employer (respondent) could not agree to this request and offered her a part-time position which the appellant accepted.<sup>317</sup> The matter was referred by the complainant to the Divisional Court and the Court of Appeal on the grounds of discrimination based on creed, which both dismissed the complaint, and subsequently, it was referred to the Supreme Court of Appeal.<sup>318</sup> In defining indirect discrimination, the Supreme Court stated that

'It arises where an employer for genuine business reasons adopts a rule or standard which is on its face neutral, and which will apply equally to all employees, but which has a discriminatory effect upon a prohibited ground on one employee or group of employees in that it imposes, because of some special characteristic of the employee or group, obligations, penalties, or restrictive conditions not imposed on other members of the work force'.<sup>319</sup>

The Supreme Court expressed that 'an intent to discriminate was not required as an element of discrimination'.<sup>320</sup> The Supreme Court held that the employer indirectly discriminated against the employee on the grounds of religion.<sup>321</sup>

In South Africa, a distinction is made between direct and indirect discrimination, which is the case in Canada as well. In South Africa, indirect discrimination occurs when an employer makes use of a policy that is neutral on the face of it, however has a disproportionate effect on a disadvantaged group without it being justifiable.<sup>322</sup> This meaning is similar to what it is in Canada. In assessing the presence of indirect discrimination, the intention of the perpetrator is irrelevant in both jurisdictions. The meanings of indirect discrimination in Canada protects black employees in the same way as in South Africa.

---

<sup>316</sup> Ont. Human Rights Comm. v. Simpsons-Sears, 1985 CanLII 18 (SCC), [1985] 2 SCR 536.

<sup>317</sup> Ont. Human Rights Comm. v. Simpsons-Sears, 1985 CanLII 18 (SCC), [1985] 2 SCR 536. Para 7.

<sup>318</sup> Ont. Human Rights Comm. v. Simpsons-Sears, 1985 CanLII 18 (SCC), [1985] 2 SCR 536.

<sup>319</sup> Ont. Human Rights Comm. v. Simpsons-Sears, 1985 CanLII 18 (SCC), [1985] 2 SCR 536. Para 18

<sup>320</sup> Ont. Human Rights Comm. v. Simpsons-Sears, 1985 CanLII 18 (SCC), [1985] 2 SCR 536.

<sup>321</sup> Ont. Human Rights Comm. v. Simpsons-Sears, 1985 CanLII 18 (SCC), [1985] 2 SCR 536.

<sup>322</sup> See para 2.2.1.1.2 above.

### **3.2.2 UNFAIRNESS**

Discrimination is unfair when the differentiation is based on immutable personal characteristics, and where differentiation is made arbitrarily and without any justification.<sup>323</sup> An applicant in the case of alleged discrimination bears the burden of proof, to prove a *prima facie* case, after which the burden shifts to the employer to prove that the discrimination is justifiable.<sup>324</sup> This is also the situation in South Africa when racial discrimination is alleged, in which case the burden of proof is on the employer.<sup>325</sup> For this reason, as far as the burden of proof is concerned black employees in South Africa are protected in the same way as in Canada.

### **3.2.3 EQUAL PAY FOR WORK OF EQUAL VALUE**

Section 11 of the Canadian Human Rights Act regulates equal wages, the assessment of work of equal value separate establishments, different wages based on prescribed reasonable factor and including the reduction of wages. In terms of the said section 'it is a discriminatory practice for an employer to establish or maintain differences in wages between male and female employees employed in the same establishment who are performing work of equal value'.<sup>326</sup> In assessing the value of work performed by employees employed in the same establishment, the criterion to be applied is the composite of the skill, effort and responsibility required in the performance of the work and the conditions under which the work is performed.<sup>327</sup> Separate establishments are 'established or maintained by an employer solely or principally for the purpose of establishing or maintaining differences in wages between male and female employees shall be deemed for the purposes of this section to be the same establishment'.<sup>328</sup>

---

<sup>323</sup> *Canada (Attorney General) v Irvine* 2003 F.C.T 660.

<sup>324</sup> *Law v Canada (Minister of Employment and Immigration)*, [1999] 1 SCR 497. 76-83.

<sup>325</sup> See para 2.2.1.2 above.

<sup>326</sup> Section 11(1) of the Canadian Human Rights Act RCS 1985.

<sup>327</sup> Section 11(2) of the Canadian Human Rights Act RCS 1985. 55

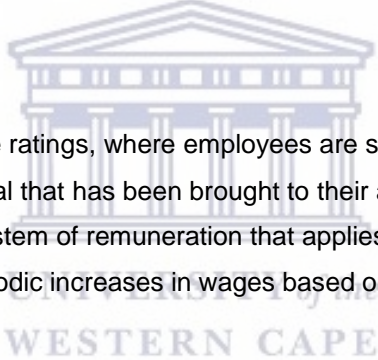
<sup>328</sup> Section 11(3) of the Canadian Human Rights Act RCS 1985.



It is not a discriminatory practice to pay male and female employees different wages 'if the difference is based on a factor prescribed by guidelines, issued by the Canadian Human Rights Commission to be a reasonable factor that justifies the difference'.<sup>329</sup> The Canadian Human Rights Act sets out the factors to justify different wages for work of equal value.<sup>330</sup> Section 9 which deals with the method of assessing the value of work, states that

'where an employer relies on a system in assessing the value of work performed by employees employed in the same establishment, that system shall be used in the investigation of any complaint alleging a difference in wages, if that system operates without any sexual bias; is capable of measuring the relative value of work of all jobs in the establishment; and assesses the skill, effort and responsibility and the working conditions determined in accordance with sections 3 to 8.'<sup>331</sup>

In terms of section 16 of the Human Rights Act which guides the reasonable factors in difference in wages between male and female performing work of equal value, the difference is justified by

- 
- (a) different performance ratings, where employees are subject to a formal system of performance appraisal that has been brought to their attention;
  - (b) seniority, where a system of remuneration that applies to the employees provides that they receive periodic increases in wages based on their length of service with the employer;
  - (c) a re-evaluation and downgrading of the position of an employee, where the wages of that employee are temporarily fixed, or the increases in the wages of that employee are temporarily curtailed, until the wages appropriate to the downgraded position are equivalent to or higher than the wages of that employee;
  - (d) a rehabilitation assignment, where an employer pays to an employee wages that are higher than justified by the value of the work performed by that employee during recuperation of limited duration from an injury or illness;
  - (e) a demotion procedure, where the employer, without decreasing the employee's wages, reassigns an employee to a position at a lower level as a result of the unsatisfactory work performance of the employee caused by factors beyond the employee's control, such as the increasing complexity of the job or the impaired

---

<sup>329</sup> Section 11(4) of the Canadian Human Rights Act RCS 1985.

<sup>330</sup> The Canadian Human Rights Act RCS 1985.

<sup>331</sup> *Equal Wages Guidelines, 1986.*

health or partial disability of the employee, or as a result of an internal labour force surplus that necessitates the reassignment.<sup>332</sup>

The Pay Equity Act S.C 2018 (Pay Equity Act) was enacted in 2018, with the purpose of

‘achieving pay equity through proactive means by redressing the systemic gender-based discrimination in the compensation practices and systems of employers that is experienced by employees who occupy positions in predominantly female job classes so that they receive equal compensation for work of equal value, while taking into account the diverse needs of employers, and then to maintain pay equity through proactive means’.<sup>333</sup>

The Pay Equity Act requires federally regulated employers, with an average of 10 or more employees, to take a proactive approach to correct gender wage gaps within their organisation.<sup>334</sup> Employers are compelled to establish a pay equity plan<sup>335</sup> and must identify job classes,<sup>336</sup> determine the value of work performed by the job class,<sup>337</sup> identify the total compensation for each job class.<sup>338</sup> The employer must also compare the total compensation of the predominantly female job classes with the compensation of the predominantly male job classes, using the ‘equal average,’ ‘equal line,’ or another method approved by the Commissioner and then identify the wage gaps for predominantly female job classes.<sup>339</sup> The Pay Equity Regulations (the Regulations) came into effect in June 2021. The purpose of the Regulations is to support the implementation of the Pay Equity Act, in ensuring that, on average, women and men in federally regulated public and private sector workplaces receive equal pay for work of equal value.<sup>340</sup>

The aforementioned discussion shows that in Canada the law governing equal pay for work of equal value focuses on the inequalities between the wages of males and females only. This is not the case in South Africa. In South Africa, paying different

---

<sup>332</sup> Section 16 of the Human Rights Act.

<sup>333</sup> Pay Equity Act S.C. 2018, c. 27, s. 416.

<sup>334</sup> Section 6 of the Pay Equity Act S.C. 2018, c. 27, s. 416.

<sup>335</sup> Section 13 of the Pay Equity Act S.C. 2018, c. 27, s. 416.

<sup>336</sup> Section 35 of the Pay Equity Act S.C. 2018, c. 27, s. 416.

<sup>337</sup> Section 41 (1) of the Pay Equity Act S.C. 2018, c. 27, s. 416.

<sup>338</sup> Section 44(1) of the Pay Equity Act S.C. 2018, c. 27, s. 416.

<sup>339</sup> Section 47 of the Pay Equity Act S.C. 2018, c. 27, s. 416.

<sup>340</sup> Pay Equity Act S.C. 2018, c. 27, s. 416.

wages to the employees of the same employer that are performing the same or substantially the same work based on race is unfair discrimination unless a justification is present.<sup>341</sup> Black employees in South Africa are more protected by the law governing equal pay for work of equal value in comparison to Canada. The emphasis in South Africa is premised on a number of prohibited grounds that include race while the emphasis in Canada is only on gender-based wage discrimination.

### **3.2.4 RELIEF AND REMEDIES**

The Tribunal is the body which has the authority to mediate and arbitrate over employment related matters including unfair discrimination in the workplace.<sup>342</sup> Section 29 (1) of the EEA 1995 states that 'a Tribunal may in the same manner and to the same extent as a superior court of record, summon and enforce the attendance of witnesses and compel them to give oral and written evidence on oath and to produce such documents and things as the Tribunal considers necessary for a full review'.<sup>343</sup> An order of a Tribunal is final and, except for judicial review under the Federal Court Act R.C.S 1985, is not subject to appeal or review by any court.<sup>344</sup>

If at the conclusion of the inquiry the member or panel finds that the complaint is substantiated, the member or panel may make an order against the person found to be engaging or to have engaged in the discriminatory practice.<sup>345</sup> The order may include any one of a number of terms that the member or panel considers appropriate.<sup>346</sup> The order may include one that the person involved should refrain from committing the discriminatory practice and that such person should take measures, in consultation with the Commission on the general purposes of the measures, to redress the practice or to prevent the same or a similar practice from occurring in future.<sup>347</sup> The measures may include the adoption of a special program, plan or arrangement<sup>348</sup> or making an application for approval and implementing a plan.<sup>349</sup> The person may be

---

<sup>341</sup> See para 2.2.1.3 above.

<sup>342</sup> Section 28(1) of the EEA 1995. c.44.

<sup>343</sup> Section 29(1) of the EEA 1995. c.44.

<sup>344</sup> Section 30(3) of the EEA 1995. c.44.

<sup>345</sup> Section 53 (2) of the Human Rights Act RCS 1985.

<sup>346</sup> Section 53 (2) of the Human Rights Act RCS 1985.

<sup>347</sup> Section 53(2) (a) of the Human Rights Act RCS 1985.

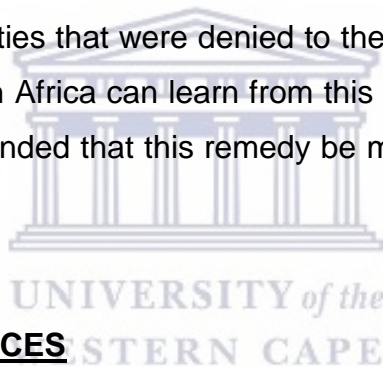
<sup>348</sup> Section 53 (2) (a) (1) of the Human Rights Act RCS 1985.

<sup>349</sup> Section 53 (2) (a) (2) of the Human Rights Act RCS 1985.

ordered to 'make available to the victim of the discriminatory practice, on the first reasonable occasion, the rights, opportunities or privileges that are being or were denied the victim as a result of the practice'.<sup>350</sup> The person may also be ordered to -

'compensate the victim for any or all of the wages that the victim was deprived of and for any expenses incurred by the victim as a result of the discriminatory practice.<sup>351</sup> that the person compensate the victim for any or all additional costs of obtaining alternative goods, services, facilities or accommodation and for any expenses incurred by the victim as a result of the discriminatory practice<sup>352</sup> and that the person compensate the victim, by an amount not exceeding twenty thousand dollars, for any pain and suffering that the victim experienced as a result of the discriminatory practice'.<sup>353</sup>

The remedies that are available to employees who are successful with unfair discrimination claims are similar in both jurisdictions. However, in Canada unlike in South Africa an employer may be ordered to make available to the employee the rights, privileges or opportunities that were denied to the employee as a result of the discriminatory practice. South Africa can learn from this aspect of the law in Canada and as a result it is recommended that this remedy be made available to employees in South Africa as well.



### 3.2.5 STATUTORY DEFENCES

In Canada, certain defences may be raised by an employer. Section 15(1) of the Human Rights Act 1985 states that 'it is not a discriminatory practice if any refusal, exclusion, expulsion, suspension, limitation, specification or preference in relation to any employment is established by an employer to be based on a *bona fide* occupational requirement'.<sup>354</sup> In terms of section 16 (1) of the Human Rights Act 1985

'it is not a discriminatory practice for a person to adopt or carry out a special program, plan or arrangement designed to prevent disadvantages that are likely to be suffered by, or to eliminate or reduce disadvantages that are suffered by, any group of individuals when

<sup>350</sup> Section 53 (2) (b) of the Human Rights Act RCS 1985.

<sup>351</sup> Section 53 (2) (c) of the Human Rights Act RCS 1985.

<sup>352</sup> Section 53 (2) (d) of the Human Rights Act RCS 1985.

<sup>353</sup> Section 53 (2) (e) of the Human Rights Act RCS 1985.

<sup>354</sup> Section 15 (1) of the Human Rights Act RCS 1985.

those disadvantages would be based on or related to the prohibited grounds of discrimination, by improving opportunities respecting goods, services, facilities, accommodation or employment in relation to that group'.<sup>355</sup>

An employer may thus raise a *bona fide* occupational requirement and affirmative action as a defence. The aforementioned defences are discussed below.

### **3.2.5.1 Bona Fide Occupational Requirement**

In the case of a direct discrimination, the employer may establish that a standard is the '*bona fide* occupational requirement by showing that the standard was imposed honestly and in good faith, was not designed to undermine the objectives of the human rights legislation, that the standard is reasonably necessary to ensure the safe and efficient performance of the work and does not place an unreasonable burden on those whom it applies'.<sup>356</sup> In the South African context, *bona fide* occupational requirement would be an inherent requirement of a job. In adverse effect discrimination, the *bona fide* occupational requirement defence does not apply.<sup>357</sup> Once *prima facie* discrimination has been established, the employer should only show that there is rational connection between the job and the particular standard but also that the employer cannot further accommodate the claimant without incurring undue hardship.<sup>358</sup> If the employer cannot discharge this burden, then it has failed to establish a defence to the charge of discrimination. In such a case, the claimant would succeed.<sup>359</sup>

Similar to South Africa, employers are able to use the inherent requirement of a job as a defence to justify discrimination. Even if the matter amounts to discrimination, it will not be regarded as unfair discrimination, if the action of the employer is consistent with the purpose of the EEA. What is of critical importance is for the employers not to incur

---

<sup>355</sup> Section 1 (2) of the Human Rights Act RCS 1985.

<sup>356</sup> British Columbia (Public Service Employee Relations) v BCGSEU para 20.

<sup>357</sup> British Columbia (Public Service Employee Relations) v BCGSEU 22.

<sup>358</sup> British Columbia (Public Service Employee Relations) v BCGSEU para 22.

<sup>359</sup> British Columbia (Public Service Employee Relations) v BCGSEU para 22.

undue hardship based on a particular appointment of the employee. In South Africa this defence may be raised whether the discrimination is direct or indirect, however in Canada it may only be raised in the case of a claim of direct discrimination.

### **3.2.5.2 AFFIRMATIVE ACTION**

Similar to South Africa, Canadians have adopted the notion of substantive equality as opposed to formal equality.<sup>360</sup> The Charter guarantees the right to substantive equality.<sup>361</sup> Formal equality is therefore blind to structural inequality.<sup>362</sup> It ignores actual social and economic disparities between people and sets standards that appear to be neutral, but which, in truth, embody a set of particular needs and expectations that derive from socially privileged or dominant groups.<sup>363</sup> In *Quebec (Attorney General) v A* the court held that ‘the purpose of the equality provision is to eliminate the exclusionary barriers faced by individuals in the enumerated or analogous groups in gaining meaningful access to what is generally available’.<sup>364</sup> In the constitutional equality guarantee, the main aim was not to punish the discriminator, but rather to provide relief for the victims of discrimination.<sup>365</sup>

As indicated above, the EEA 1995 applies to a private sector employer, portions of the federal public administration and any other portion of the public sector that employs one hundred or more employees. This scope of the application of the EEA 1995 and the meaning of a private sector employer shows that the meaning of a ‘designated employer’ in South Africa may include more employers than what it does in Canada. This is because in South Africa a ‘designated employer’ includes an employer who employs 50 or more employees, while in Canada the EEA 1995 applies to employers who employ 100 or more employees and in Canada such an employer should be one who performs federal work or who performs a function or duty on behalf of the government as the meaning of ‘private sector employer’ indicates.

---

<sup>360</sup> *Andrews v Law Society of British Columbia* [1989] 1 SCR 143 (Supreme Court of Canada).

<sup>361</sup> *Andrews v Law Society of British Columbia* [1989] 1 SCR 143 (Supreme Court of Canada).

<sup>362</sup> De Vos P, ‘Equality for All’ 67.

<sup>363</sup> De Vos P, ‘Equality for All’ 67.

<sup>364</sup> *Quebec (Attorney General) v. A*, 2013 SCC 5 (CanLII), [2013] 1 SCR 61.

<sup>365</sup> *Ontario Human Rights Commission v Simpsons-Sears Ltd* [1985] 2 SCR 53 (Supreme Court of Canada) para 12.

There are two mandatory federal employment equity programs, namely the Legislated Employment Equity Program (LEEP) and the Federal Contractors Program (FCP).<sup>366</sup> The LEEP applies to federally regulated private sector, federally regulated Crown corporations and other federal organisations with 100 or more employees.<sup>367</sup> The FCP is a private voluntary mechanism, applied to non-federal organisations wishing to supply goods and services to the federal government. Although not federally regulated, employers wishing to provide services to the federal government are required to commit to employment equity before their bids will be accepted.<sup>368</sup> Private companies bidding on federal contracts worth \$200,000 or more, and having 100 or more employees, are also required to undertake employment equity initiatives in terms of the FCP.<sup>369</sup> In the case of non-compliance, the federal government can terminate the contract and place the contractor on the 'limited eligibility to bid list'. By being registered on this list, the contractor loses its ability to provide future bids for the federal contracts.<sup>370</sup> The classification is not permanent and the contractors can remedy the situation and demand a second audit by the authorities.<sup>371</sup> The organisation is required to conclude an agreement in terms of which it commits to developing an employment equity action plan. Violations of the terms of the agreement or of the programmes requirements can lead to the exclusion of the employer from bidding on future contracts.<sup>372</sup>

In Canada similar to South Africa, affirmative action acts as an obligation and a defence. Even though this discussion appears under the heading, statutory defences, affirmative action which acts as an obligation will be discussed first and will be followed by a discussion on affirmative action that may be raised as a defence.

---

<sup>366</sup> Ng\* E & Burke R, 'A Comparison of the Legislated Employment Equity Program, Federal Contractors Program, and Financial Post 500 Firms'. *Canadian Journal of Administrative Sciences*.

<sup>367</sup> Ng\* E & Burke R, 'A Comparison of the Legislated Employment Equity Program, Federal Contractors Program, and Financial Post 500 Firms'. *Canadian Journal of Administrative Sciences*.

<sup>368</sup> Ng\* E & Burke R, 'A Comparison of the Legislated Employment Equity Program, Federal Contractors Program, and Financial Post 500 Firms'. *Canadian Journal of Administrative Sciences*.

<sup>369</sup> Ng\* E & Burke R, 'A Comparison of the Legislated Employment Equity Program, Federal Contractors Program, and Financial Post 500 Firms'. *Canadian Journal of Administrative Sciences*.

<sup>370</sup> Ng\* E & Burke R, 'A Comparison of the Legislated Employment Equity Program, Federal Contractors Program, and Financial Post 500 Firms'. *Canadian Journal of Administrative Sciences*.

<sup>371</sup> Ng\* E & Burke R, 'A Comparison of the Legislated Employment Equity Program, Federal Contractors Program, and Financial Post 500 Firms'. *Canadian Journal of Administrative Sciences*

<sup>372</sup> Ng\* E & Burke R, 'A Comparison of the Legislated Employment Equity Program, Federal Contractors Program, and Financial Post 500 Firms'. *Canadian Journal of Administrative Sciences*.

### **3.2.5.2.1 Affirmative action: an obligation**

Section 5 of the EEA 1995 states that every employer shall implement employment equity by:

- '(a) identifying and eliminating employment barriers against persons in designated groups that result from the employer's employment systems, policies and practices that are not authorized by law; and
- (b) instituting such positive policies and practices and making such reasonable accommodations as will ensure that persons in designated groups achieve a degree of representation in each occupational group in the employer's workforce that reflects their representation in
  - (i) the Canadian workforce, or
  - (ii) those segments of the Canadian workforce that are identifiable by qualification, eligibility or geography and from which the employer may reasonably be expected to draw employees.'<sup>373</sup>

Section 6 of the EEA 1995 provides that, the obligation to implement employment equity does not require an employer to

'take a particular measure to implement employment equity where the taking of that measure would cause undue hardship to the employer; to hire or promote unqualified persons; with respect to the public sector, to hire or promote persons without basing the hiring or promotion on selection according to merit in cases; or to create new positions in its workforce'.<sup>374</sup>

The affirmative action measures which employers are required to implement in terms of section 5 of the EEA 1995 are discussed below.

#### **3.2.5.2.1.1 Identifying and eliminating employment barriers**

Instances of racial discrimination may constitute barriers preventing the hiring, retention or promotion of racial minorities.<sup>375</sup> These can include informal selection based on unnecessary qualifications (such as a requirement for an unreasonable

---

<sup>373</sup> Section 5 of the EEA 1995. c.44.

<sup>374</sup> Section 6 of the EEA of 1995. c.44.

<sup>375</sup> Helen B, Jeffrey G. Reitz and Nan Weiner 'Addressing Systemic Racial Discrimination in Employment' (2002) 28, *Canadian Public Policy* pp. 373-394.



number of years of experience), informal recruitment systems (through 'word of mouth' or networking where the networks do not extend to minority groups). It may also include selection committees consisting only of long term employees (few of whom happen to be members of minority groups).<sup>376</sup> Some of these practices may not have been discriminatory when first implemented, but become discriminatory with the changing racial composition of the labour force.<sup>377</sup>

### **3.2.5.2.1.2 Instituting positive policies and practices and making reasonable accommodation**

Employment equity policies are proactive requiring employers to examine the adequacy of representation of designated groups such as minorities in the workplace compared to the labour supply and to look into potential problem areas.<sup>378</sup> Where significant underrepresentation is determined, employers are required to examine employment systems for the possibility of underlying barriers.<sup>379</sup> In Canada, accommodation fails to be reasonable if and only if there is proof that it will cause undue hardship on the party who is required to accommodate.<sup>380</sup> This is also the situation in South Africa where an employer's failure to provide reasonable accommodation will only amount to unfair discrimination where reasonable accommodation could have been provided without the employer experiencing undue hardship.

The two forms of affirmative action measures discussed above are also implemented by designated employers in South Africa. In Canada 'designated groups' consist of Aboriginal people, women, persons with disabilities and members of visible minorities.

---

<sup>376</sup> Helen B, Jeffrey G. Reitz and Nan Weiner 'Addressing Systemic Racial Discrimination in Employment' (2002) 28, *Canadian Public Policy* pp. 373-394.

<sup>377</sup> Helen B, Jeffrey G. Reitz and Nan Weiner 'Addressing Systemic Racial Discrimination in Employment' (2002) 28, *Canadian Public Policy* pp. 373-394.

<sup>378</sup> Helen B, Jeffrey G. Reitz and Nan Weiner 'Addressing Systemic Racial Discrimination in Employment' (2002) 28, *Canadian Public Policy* pp. 373-394.

<sup>379</sup> Helen B, Jeffrey G. Reitz and Nan Weiner 'Addressing Systemic Racial Discrimination in Employment' (2002) 28, *Canadian Public Policy* pp. 373-394.

<sup>380</sup> Marte, L, Reasonable Accommodation: 'The New Concept from an Inclusive Constitutional Perspective' 14 *SUR - INT'L J. oN HUM Rts.* 85 (2011)

<sup>381</sup>Visible minorities consist of people other than Aboriginal peoples who are non-Caucasian or non-white.<sup>382</sup> Black employees therefore form part of 'designated groups' and are protected by the two forms of affirmative action measures which the relevant employers are required to implement as discussed above. In cases however where a black employee is employed by an employer to whom the EEA 1995 does not apply or who is not required to implement LEEP or FCP, such an employee will not be protected.

Similar to South Africa, in Canada it is not unfair discrimination to implement affirmative action measures and the employer can exclude any person on the basis of a *bona fide* occupational requirement. In both jurisdictions, affirmative action measures are meant to ensure the achievement of substantive equality.

### **3.2.5.2.2 PROCEDURAL OBLIGATIONS**

In Canada, similar to South Africa, there are procedural duties which an employer is required to comply with. The procedural obligations are discussed below.

#### **3.2.5.2.2.1 Collect information and conduct an analysis**

When implementing employment equity, every employer is required to collect information and conduct an analysis of the employer's workforce, in order to determine the degree of the underrepresentation of persons in designated groups in each occupational group in that workforce.<sup>383</sup> Information collected by an employer is confidential and should only be used for the purpose of implementing the employer's obligations: in terms of the EEA 1995. This procedural obligation is similar to the procedural obligation in South Africa governed by section 19(2) of the EEA in terms of which the analysis should include a profile of the employer's workforce within each level to determine the degree of underrepresentation of people from designated groups. In circumstances where a black employee is employed by an employer to

---

<sup>381</sup> See para 3.1 above.

<sup>382</sup> See para 3.1 above.

<sup>383</sup> Section 9 of the EEA of 1995.c.44.

whom the EEA 1995 applies or who is not required to implement either the LEEP or FCP, such an employee will be protected as a result of this procedural obligation.<sup>384</sup>

#### **3.2.5.2.2.2 Conduct a review**

The employer is also required to conduct a review of the employer's employment systems, policies and practices, in order to identify employment barriers against persons in designated groups that result from those systems, policies and practices.<sup>385</sup> Only those employees who identify themselves to an employer, or agree to be identified by an employer, as aboriginal peoples, members of visible minorities or persons with disabilities should be included as members of those designated groups for the purposes of implementing employment equity.<sup>386</sup> This procedural obligation is similar to the procedural obligation in South Africa governed by section 19(1) of the EEA in terms of which an employer is required to conduct an analysis of its employment policies, procedures, practices and the working environment to identify barriers that adversely affect people from designated groups. In circumstances where a black employee is employed by an employer to whom the EEA 1995 applies or who is required to implement either the LEEP or FCP, such an employee will be protected as a result of this procedural obligation.



#### **3.2.5.2.2.3 Employment Equity Plan**

The employer is required to prepare an employment equity plan that specifies the positive policies and practices that the employer intends to institute in the short term in respect of hiring, training, promotion and retention of persons in designated groups and in respect of which reasonable accommodation should be made for those persons.<sup>387</sup> Measures should also be included to correct the underrepresentation of those persons identified by the analysis,<sup>388</sup> to eliminate any employment barriers identified by the review,<sup>389</sup> and should set out a timetable with numerical goals for the hiring and promotion of persons in designated groups in order to increase their

<sup>384</sup> Section 9 (3) of the EEA of 1995. c.44.

<sup>385</sup> Section 9 of the EEA of 1995. c.44.

<sup>386</sup> Section 9 (2) of the EEA of 1995. c.44

<sup>387</sup> Section 10 (1) (a) of the EEA 1995. c.44.

<sup>388</sup> Section 10 (1) (a) of the EEA 1995. c.44.

<sup>389</sup> Section 10 (1) (b) of the EEA 1995. c.44.

representation in each occupational group in the workforce in which underrepresentation has been identified. The employment equity plan should also set out measures to be taken in each year to meet those goals<sup>390</sup> set out the employer's longer term goals for increasing the representation of persons in designated groups in the employer's workforce and the employer's strategy for achieving those goals.<sup>391</sup>

Employers in Canada are required to draft and implement an employment equity plan in the same way as designated employers are required to in South Africa. Similar to South Africa, where black employees are employed by employers who are required to comply with this procedural obligation, they are protected as a consequence.

#### **3.2.5.2.2.4 Report**

The private sector employers shall, on or before June 1 in each year, file with the Minister a report in respect of the immediately preceding calendar year containing prescribed information.<sup>392</sup> The report should include the 'industrial sector in which its employees are employed, the location of the employer and its employees,<sup>393</sup> the number of its employees and the number of those employees who are members of designated groups,<sup>394</sup> the occupational groups in which its employees are employed and the degree of representation of persons who are members of designated groups in each occupational group,<sup>395</sup> the salary ranges of its employees and the degree of representation of persons who are members of designated groups in each range and in each prescribed subdivision of the range<sup>396</sup> and the number of its employees hired, promoted and terminated and the degree of representation in those numbers of persons who are members of designated groups'.<sup>397</sup>

Employers in the LEEP program are compelled to submit employment equity reports to the Labour Program on an annual basis.<sup>398</sup> The report should contain information

---

<sup>390</sup> Section 10 (1) (d) of the EEA 1995. c.44.

<sup>391</sup> Section 10 (1) (e) of the EEA 1995. c.44.

<sup>392</sup> Section 18 of the EEA 1995. c.44.

<sup>393</sup> Section 18 of the EEA 1995. c.44.

<sup>394</sup> Section 18 (a) of the EEA 1995. c.44.

<sup>395</sup> Section 18 (b) of the EEA 1995. c.44.

<sup>396</sup> Section 18 (c) of the EEA 1995. c.44.

<sup>397</sup> Section 18 (d) of the EEA 1995. c.44.

<sup>398</sup> Ng\* E & Burke R 'A Comparison of the Legislated Employment Equity Program, Federal Contractors Program, and Financial Post 500 Firms'. *Canadian Journal of Administrative Sciences*.

with regard to the industrial sector, the employees' status (such as, permanent full-time, permanent part-time and temporary), the occupational groups, salary ranges and wage gaps, as well as information relating to hiring promotion and termination. The report should also highlight the employment equity activities that the employer has undertaken including the measures taken, results achieved following these activities, and consultations between the employer and employee representatives.<sup>399</sup> Similar to South Africa, employers are required to submit reports to the Director-General of the Department of Employment and Labour. Black employees are protected as the institution is mandated to monitor the implementation of the plan.

### **3.2.5.2.3 Affirmative action: a defence**

In *R v Kapp*, the federal government issued an exclusive communal fishing licence under a pilot sales program for three aboriginal bands to fish salmon for a 24-hour period and make profit.<sup>400</sup> The program excluded the non-aboriginal groups.<sup>401</sup> The non-aboriginal group protested the decision, they were arrested and subsequently the matter was before the court, they cited unfair discrimination, alleging the breach of the equality rights on the grounds of race.<sup>402</sup> The federal government argued that 'the purpose of the program under which the licence was issued was to regulate the fishery, and that it ameliorated the conditions of a disadvantaged group'.<sup>403</sup> The Supreme Court of Canada held that that an affirmative action program under the federal government's Aboriginal Fisheries Strategy did not violate section 15 Canadian Charter of Rights and Freedoms.<sup>404</sup>

---

<sup>399</sup> Ng\* E & Burke R 'A Comparison of the Legislated Employment Equity Program, Federal Contractors Program, and Financial Post 500 Firms'. *Canadian Journal of Administrative Sciences*

<sup>400</sup> *R. v. Kapp*, 2008 SCC 41 (CanLII), [2008] 2 SCR 483. Para 2.

<sup>401</sup> *R. v. Kapp*, 2008 SCC 41 (CanLII), [2008] 2 SCR 483. Para 2.

<sup>402</sup> *R. v. Kapp*, 2008 SCC 41 (CanLII), [2008] 2 SCR 483. Para 9.

<sup>403</sup> *R. v. Kapp*, 2008 SCC 41 (CanLII), [2008] 2 SCR 483. Para 29.

<sup>404</sup> *R. v. Kapp*, 2008 SCC 41 (CanLII), [2008] 2 SCR 483. Para 61.

### 3.3 CONCLUSION

In Canada and South Africa, employees are protected as a result of the laws governing racial discrimination. Statutes such as the EEA in South Africa and the Canadian Human Rights Act were enacted to achieve equality in the workplace by means of eliminating unfair discrimination.

The meaning of discrimination protects black employees in Canada and in South Africa. As a result of the meanings of direct and indirect discrimination being similar in Canada and South Africa, black employees in both jurisdictions are protected in the same way. As a result of the burden of proof in discrimination cases based on race in Canada being on the employee to merely prove a *prima facie* case and thereafter shifting to the employer to prove that such discrimination is justifiable shows that black employees are protected in South Africa and in Canada as far as the burden of proof is concerned.

The law governing equal pay for work of equal value provides more protection to black employees in South Africa than in Canada. This is because in Canada, the law relevant to this issue focuses exclusively on the inequalities in remuneration paid to males in comparison to females, while in South Africa the law is also concerned with racial disparities when it comes to paying employees for work of equal value. The remedies in both South Africa and Canada protect black employees, however South Africa can learn from the remedy in Canada in terms of which an employer may be ordered to provide the employee concerned with the rights, opportunities or privileges that was denied to the employee as a result of the discriminatory practice. This chapter thus recommends that the South African law governing racial discrimination be supplemented to include this remedy. The law governing affirmative action and the procedural obligations in Canada and South Africa protect black employees. It is important to note however that the obligations to implement affirmative action and to comply with the procedural obligations may fall on more employers in South Africa than in Canada as a result of the difference in the categories of employers to whom the law governing affirmative action applies.

## **CHAPTER 4**

### **CONCLUSION AND RECOMMENDATIONS**

#### **4.1 INTRODUCTION**

The primary aim of this thesis is to determine the extent to which the South African legislative provisions that governs racial discrimination protects black employees. An additional objective of this thesis is to determine whether the South African legislative framework should be amended and/or supplemented. For this reason, the laws governing racial discrimination in South Africa have been compared to that in Canada. Chapter 2 contains a discussion on the legislative provisions that governs racial discrimination in the workplace while chapter 3 contains a discussion on the laws that govern racial discrimination in Canada. In both jurisdictions, the Constitution is the supreme law which provides for equality and prohibits unfair discrimination. In terms of the right to equality in South Africa's Constitution, 'national legislation must be enacted to prevent and prohibit unfair discrimination'.<sup>405</sup> The EEA was enacted to give effect to the right to equality.<sup>406</sup> Canada's Constitution Act 1982 consists of two parts: the Canadian Charter of Rights and Freedoms and the rights of Aboriginal people in Canada.<sup>407</sup>

#### **4.2 UNFAIR DISCRIMINATION**

Section 5 of the EEA provides that the employers are compelled to take steps to promote equality in the workplace and eliminate unfair discrimination.<sup>408</sup> In terms of the EEA unfair discrimination is prohibited and the grounds in terms of which such discrimination is prohibited includes the ground of race.<sup>409</sup> The aforementioned provisions protect black employees from racial discrimination in the workplace since

---

<sup>405</sup> See para 1.1 above.

<sup>406</sup> See para 1.1 above.

<sup>407</sup> See para 3.1 above.

<sup>408</sup> See para 2.2.1 above.

<sup>409</sup> See para 2.2.1 above.

the EEA applies to all employers and employees. In Canada protection is also provided by the Canadian Human Rights Act 1985 in terms of which differentiating either directly or indirectly against an employee adversely on a prohibited ground amounts to a discriminatory practice.<sup>410</sup> As a result of race being a prohibited ground, black employees are protected by the Canadian Human Rights Act 1985.

The meanings of direct discrimination protect black employees in Canada and in South Africa. In South Africa direct discrimination is defined as a situation where 'adverse action is taken against people, because they possess a characteristic in section 6 of the EEA or a comparable attribute'.<sup>411</sup> In Canada direct discrimination exists where a standard facially discriminates on a prohibited ground.<sup>412</sup> The meanings of indirect discrimination are similar in both jurisdictions. In South Africa indirect discrimination is defined as 'a facially neutral standard or practice that adversely affects members of a disadvantaged group disproportionately, that cannot be justified'.<sup>413</sup> In Canada indirect discrimination is similarly defined as a 'standard that is facially neutral and adversely affects a group identifiable by a prohibited ground'.<sup>414</sup> Since race is a prohibited ground in Canada and South Africa, black employees are protected as a result of the meaning of indirect discrimination. Black employees are also protected as a result of the employer's intention being irrelevant in ascertaining whether direct and indirect discrimination exists. As far as unfairness is concerned, in South Africa the burden of proof is based on whether discrimination is alleged on a listed or on an arbitrary ground. Where an employee alleges to have been discriminated against on a listed ground such as race, the burden of proof is on the employer to prove either that the discrimination did not take place, or that it is rational and not unfair or otherwise justifiable.<sup>415</sup> In Canada, the complainant should prove a *prima facie* case of discrimination and once this is proven, the burden shifts to the employer to prove that the discrimination is justified.<sup>416</sup>

---

<sup>410</sup> See para 3.1 above.

<sup>411</sup> See para 2.2.1.1.1 above.

<sup>412</sup> See para 3.2.1.1 above.

<sup>413</sup> See para 2.2.1.1.2 above.

<sup>414</sup> See para 3.2.1.2 above.

<sup>415</sup> See para 2.2.1.2 above.

<sup>416</sup> See para 3.2.2 above.



The legislative provisions governing equal pay for work of equal value are similar in both jurisdictions and in assessing the value of equal work. In Canada, the key focus of the legislation is to protect women from systemic discrimination. In South Africa, 'a difference in terms and conditions of employment between employees of the same employer performing the same or substantially the same work or work of equal value that is directly or indirectly based on any one or more of the grounds listed in section 6(1), is unfair discrimination'.<sup>417</sup> The law in South Africa governing equal pay for work of equal value protects black employees from discrimination since race is one of the listed grounds. Black employees are also protected by the remedies that are available to employees in Canada and in South Africa. However as far as the remedies are concerned, it is recommended that South Africa's law be supplemented to include the remedy that is available to employees in Canada in terms of which employers may be directed to provide the employee concerned with the rights, opportunities or privileges that was denied to the employee as a result of the discriminatory practice.

The aforementioned remedy is available to employees in Canada which is not the case in South Africa, being the reason for the recommendation.

### **4.3 AFFIRMATIVE ACTION**

Due to the fact that substantive equality is relevant in both jurisdictions, it is not unfair discrimination to take affirmative action measures. In South Africa, the most important category of employers that fall within the meaning of a 'designated employer' is an employer who employs 50 or more employees'.<sup>418</sup>

In Canada, the EEA 1995 applies to private sector employers; the portions of the public service of Canada, to the Public Service Staff Relations Act that employ one hundred or more employees; and such other portion of the public sector employing one hundred or more employees, including the Canadian Forces and the Royal Canadian Mounted Police.<sup>419</sup> In Canada a "private sector employer" means any person who employs one hundred or more employees on or in connection with a federal work, undertaking or

---

<sup>417</sup> See para 2.2.1.3 of the EEA.

<sup>418</sup> Section 1 of the EEA.

<sup>419</sup> See para 3.1 above.

business that includes any corporation established to perform any function or duty on behalf of the Government of Canada that employs one hundred or more employees.

Since the meaning of a designated employer in South Africa includes employers who employ less employees than employers in Canada who are required to implement affirmative action, there may be more employers in South Africa who fall within the meaning of a 'designated employer'.

In South Africa affirmative action measures consist of measures to identify and eliminate employment barriers, to further diversity, to make reasonable accommodation, ensuring equitable representation of suitably qualified people as well as to train and develop the people from the designated groups.<sup>420</sup> In Canada affirmative action measures are measures to identify and eliminate employment barriers as well as to institute positive policies and practices and making reasonable accommodation.<sup>421</sup> The meaning of people from designated groups in Canada differs from South Africa. In Canada "designated groups" means women, aboriginal peoples, persons with disabilities and members of visible minorities whereas in South Africa,<sup>422</sup> "designated groups" consists of black people, women and people with disabilities. Black employees are thus protected as a result of the law governing affirmative action in both South Africa and Canada in circumstances where they are employed by employers who are required to implement affirmative action.

In South Africa and Canada, employers are required to comply with procedural obligations.<sup>423</sup> In South Africa, these obligations apply to designated employers. The employer is required to consult with the employees.<sup>424</sup> It is within the consultation process that the employees will be able to highlight racial discrimination issues that may exist in the workplace. Employers are required to conduct an analysis of existing policies and procedures as well as the working environment in order to identify the barriers that may affect the people from designated groups. Employers are also

---

<sup>420</sup> See para 2.2.2.2.1 above.

<sup>421</sup> See para 3.2.5.2.1 above.

<sup>422</sup> See para 3.1 above.

<sup>423</sup> See para 2.2.2.2.2 above.

<sup>424</sup> See para 2.2.2.2.2.1 above.

required to conduct an analysis of the workforce to determine the extent of the underrepresentation of the people from the designated groups.<sup>425</sup> In addition employers are required to prepare and implement an employment equity plan for the purposes of achieving reasonable progress towards employment equity objectives.<sup>426</sup> The plan must indicate the measures in which the employer will adopt to address the matters that were discussed in the consultation and analysis process and this plan will be reported to the relevant authorities or legislated institution. In South Africa the report will be submitted to the Director-General of the Department of Employment and Labour. Black employees in South Africa are therefore protected by the procedural obligations where they are employed by a designated employer. In Canada the procedural duties include the duty to collect information and conduct an analysis, as well as to conduct a review. It also includes the duties to prepare an employment equity plan and to submit a report. The procedural duties in Canada are thus similar to what they are in South Africa. Black employees in Canada who are employed by employers who are required to comply with the procedural obligations are also protected.

Despite the fact that chapter 3 shows that the employers who are required to implement affirmative action measures and comply with the procedural obligations in Canada may be less than what it is in South Africa due to the difference in the categories of employers to which these obligations apply in the respective jurisdictions, it is recommended that the scope of the meaning of a 'designated employer' in South Africa be extended. It is recommended that the EEA in South Africa be amended in such a way that the meaning of a 'designated employer' be extended so that more black employees in South Africa can be protected as a result of the law governing affirmative action than those that are at present.

This thesis has discussed the extent to which the law in South Africa protects black employees against racial discrimination and the ways in which the South African law should be amended and/supplemented.

---

<sup>425</sup> See para 2.2.2.2.2 above.

<sup>426</sup> See para 2.2.2.2.3 above.



UNIVERSITY *of the*  
WESTERN CAPE

## **BIBLIOGRAPHY**

### **Constitution**

The *Constitution Act, 1982*.

Constitution of the Republic of South Africa, 1996.

### **Legislation.**

Canadian Human Rights Charter 1982.

Canadian Employment Equity Act (EEA) 1995.

Employment Equity Act 55 of 1998.

Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000

### **Conventions**

ILO, Discrimination (Employment and Occupation) Convention, C111, 25 June 1958.

### **Case Law**

*Adriaanse v Swartklip Products* [1999] 6 BALR 649 (CCMA).

*Alexandre v Provincial Administration of the WC Department of Health* (2005) ZALC 57.

*Andrews v Law Society of British Columbia* [1989] 1 SCR 143 (Supreme Court of Canada)

*British Columbia (Public Service Employee Relations) v BCGSEU* (1999) 3 SCR 3 (Supreme Court of Canada).

*Canadian National Railway v Canada Co (Human Rights Commission)*, [1987] 1 SCR 1114.

*Dlamini v Green Four Security* [2006] 11 BLLR 1074 (LC)

*Director General of the Department of Labour v Comair Limited* (2009) ZALC 78.

*Dudley v City of Cape Town* (2004) 25 ILJ305 (LC).

77



*Duma v Minister of Correctional Services and Others* (C604/2012) [2016] ZALCCT 6; (2016) 37 ILJ 1135 (LC); [2016] 6 BLLR 601 (LC).

*Harksen v Lane* No 1998 (1) SA 300 (CC).

*Hoffmann v South African Airways* 2001 (1) SA 1 (CC).

*Independent Municipal and Allied Workers Union v City of Cape Town* (2005) 26 ILJ 1404 (LC).

*Lagadien v University of Cape Town* (2000) ZALC 107.

*Leonard Dingler Employee Representative Council & others v Leonard Dingler (Pty) Ltd & others* 1997 (11) BLLR 1438 (LC).

*Louw v Golden Arrow Bus Services (Pty) Ltd* (2000) 21 ILJ 188 (LC).

*Mahlanyana v Cadbury (Pty) Ltd* (2000) 21 ILJ 2274 (LC).

*Mangena v Fila South Africa (Pty) Ltd* 2009 12 BLLR 1224 (LC).

*Minister of Correctional Services and Others v Duma* (CA10/2016) [2017] ZALAC

*Minister of Finance v Van Heerden* (2004) 25 ILJ 1593 (CC).

*Ntai & Others v South African Breweries Ltd* 2001 (2) BLLR 186 (LC)

*Ontario Human Rights Commission v. Etobicoke*, 1982 CanLII 15 (SCC), [1982] 1 SCR 202.

*Ontario Human Rights Commission v Simpsons-Sears Ltd* [1985] 2 SCR 53 (Supreme Court of Canada)

*Pioneer Foods (Pty) Ltd v Workers Against Regression (WAR) and Others* (C687/15) [2016] ZALCCT 14; [2016] 9 BLLR 942 (LC); (2016) 37 ILJ 2872 (LC)

*PSA obo Tlowana v MEC of agriculture* ((2012) ZALCJHB 121

*Quebec (Attorney General) v. A*, 2013 SCC 5 (CanLII), [2013] 1 SCR 61

*R. v. Kapp*, 2008 SCC 41 (CanLII), [2008] 2 SCR 483

*Reynhardt v University of South Africa* 2008 (29) ILJ 725 (LC).

*Solidarity and Others v Department of Correctional Services and Others* 2016 (10) BCLR 1349 (CC)

*Solidarity obo Barnard v South African Police Service* (2010) 31 ILJ 742 (LC).

*UNISA v REYNHARDT* [2010] 12 BLLR 1272 (LAC).

*Willemse v Patelia NO and Others* (J1161/2004) [2006] ZALC 92; [2007] 2 BLLR 164 (LC) (19 October 2006)

*Woolworths (Pty) Ltd v Whitehead* 2000 (6) BLLR 640 (LAC).

## Journal Articles

- Agocs C & Burr C, Employment equity, affirmative action and managing diversity: assessing the differences. *International Journal of Manpower* 17,4/5.
- Al-Waqfi M & Jain HC Racial inequality in employment in Canada: Empirical analysis and emerging trends (2008) 429 - 453. *Canadian Public Administration*.
- Botha M, Managing Racism in the Workplace, 81 *THRHR* 671 (2018).
- Booyesen L 'Barriers to Employment equity implementation and retention of Blacks in management in South Africa' (2007) 21 *South Africa Journal of Labour Relations* 47 - 71.
- Cénat J, Saba H, Rosy D et al Prevalence and Effects of Daily and Major Experiences of Racial Discrimination and Microaggressions among Black Individuals in Canada (2021) *Journal of Interpersonal Violence* 1 – 29.
- Cooper C 'A Constitutional Reading of the Test for Unfair Discrimination in Labour Law' (2001) 2001 *Acta Juridica* 121.
- Cooper C 'The boundaries of equality in labour law' (2004) 25 *ILJ* 813 -852
- Deane T, The Regulation of Affirmative Action in the Employment Equity Act 55 of 1998.
- De Villiers C 'Addressing systemic sex discrimination: Employer defences to discrimination in Canada and South Africa' (2001) 2001 *Acta Juridica* 175.
- Du Toit D 'Protection against Unfair Discrimination: Cleaning up the Act?' (2014) 35 *ILJ* 2623.
- Du Toit D 'Protection against unfair discrimination in the workplace: are the courts getting it right?' (2007) *LDD* 1-15
- Du Toit D 'The Evolution of the Concept of 'Unfair Discrimination' in South African Labour Law' (2006) 27 *ILJ* 1311.
- Dupper O, *Proving Indirect Discrimination in Employment: A South African View*, *Industrial Law Journal*.
- Garbers, C. & Le Roux, P. 2018. Employment discrimination law into the future. *Stellenbosch Law Review*, 29(2):237-269.

Harish C, Frank H & Christa L. Employment equity in Canada and South Africa: a comparative review. *The International Journal of Human Resource Management* (2012), 23:1, 1-17, DOI

Harold A & Kumar V "Managing Workplace Diversity: Issues and Challenges 2012. Jane A, Employment Equity: How We Can Use It To Fight Workplace Racism, Canadian Race Relation Foundation. 1988.

Kruger R, Equality and unfair discrimination: Refining the Harksen test\*. *South African Law Journal*. 488

L Botha & A Kok 'An empirical study of the early cases in the pilot equality courts established in terms of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000' (2019) 19 *African Human Rights Law Journal* 317-336

Le Roux R 'Section 60 of the Employment Equity Act 1998: will a comparative approach shake this joker out of the pack?'

Ng\* E & Burke R, A Comparison of the Legislated Employment Equity Program, Federal Contractors Program, and Financial Post 500 Firms. *Canadian Journal of Administrative Sciences*.

Ongori H & Agola J Critical Review of literature on Workforce Diversity, *African Journal of Business Management* pp. 072-076, July 2007.

Ruiters G, Non-Racialism: The New Form of Racial Inequality in a Neo-Apartheid South Africa. *Journal of Asian and African Studies* 2021, Vol. 56(4) 889–904

Rob R, Equal Pay for Work of Equal Value, *Canadian Public Policy*, Vol. 13, No. 4 (Dec. 1987), pp. 445-461.

Samuel J & Tandon N, Engagement Strategy for a Racism-Free Workplace. *Cultural and Pedagogical Inquiry*, Fall 2020, 12(2), pp. 165-171.

Shakeel N Factors Influencing Employee Retention: An Integrated Perspective, *Journal of Resources Development and Management*. Vol.6, 2015.

Thomas A, Employment equity in South Africa, lessons from Global School, *International Journal of Manpower*, Vol 23 No3, 2002, pp 237-255.

Thomas, A. and Jain, H. (2004). Employment equity in Canada and South Africa: progress and propositions. *The International Journal of Human Resource Management*, 15(1).



Wizarat. T, Apartheid and Racial Discrimination in South Africa. 1980 (33), Pakistan Institute of Internal Affairs.

### **Books**

Bauman RW and Kahana T (eds) *The Least Examined Branch: The Role of Legislatures in the Constitutional State* (2006) Cambridge University Press Cambridge.

Collins H "Discrimination, Equality and Social Inclusion" (2003) 66 *The Modern Law Review* 16

Currie. I & De Waal J. "The Bill of Rights Handbook" 6ed (2013) South Africa Juta.  
Dupper. O & Garbers. C. "Equality in the Workplace, Reflections from South Africa and Beyond (2009) South Africa: Juta

Du Toit D & Potgieter M *Unfair Discrimination in the workplace* (2014) Cape Town: Juta.

Fenwick C, Kalula & Landau I "Labour Law: A Southern African Perspectives" (2005) ILO (*International Institute for Labour Studies*).

Grogan J *Workplace Law* 11ed (2014) Juta.

Malherbe. K & Sloth- Nielsen. J (eds) *Labour Law into the Future* (2012) South Africa: Juta.

Sowell. T. "Affirmative Action around the World: An Empirical Study" (2004) United States: Yale University Press.

## **Reports**

Department of Labour *Commission for Employment Equity Report* (2013-2014)

Department of Labour *Commission for Employment Equity Report* (2015 – 2016)

Department of Labour *Commission for Employment Equity Report* (2018 -2019)

Department of Labour *Commission of Employment Equity Report* (2019 – 2020)

## **Online Article.**

<http://www.workinfo.com/Articles/eecompliance.htm> (Accessed 20 May 2020).

<https://www.bartleby.com/essay/Racial-Discrimination-in-Canadas-Workplace-PKHS5JFAWUDA5>  
(Accessed 03 March 2021)





UNIVERSITY *of the*  
WESTERN CAPE