A COMPARATIVE STUDY OF EMPLOYMENT DISCRIMINATION IN SOUTH AFRICA AND CANADA

by

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SUMMARY

South Africa and Canada have emerged from a history fraught of inequalities, which were characterised by segregationist practices. Such inequalities have served as an epitome of discrimination taking place in the society and the workplace in both countries. Both South Africa and Canada had their discrimination affecting black peoples (Africans, Indians and Coloureds) and Aboriginal peoples (Indians, Inuits or Métis) respectively, women and people with disabilities. In both countries discrimination has polarised society. It is against this backdrop that both countries have attempted to eliminate unfair discrimination through the promulgation of relevant legislation that seeks to, inter alia, provide the regulatory framework in respect of employment discrimination.

With the foregoing in mind, the purpose of this work is the provision of a selection of comparable aspects of employment discrimination in Canada and South Africa. This selection comprises discrimination on the basis of race, gender, sex, pregnancy, age and HIV/AIDS. The study uses, as its departure point, both countries’ constitutional framework to elicit the extent to which protection against unfair discrimination is extended to the workforce.

Apart from looking at the constitutional provisions towards the elimination of unfair discrimination, reference is made to specific employment statutory provisions in order to provide a comprehensive and explicit picture of how workplace discrimination in both countries is regulated.

The study focuses on substantive law from both countries about the above-mentioned aspects of discrimination. This is informed by the very nature and scope of the study because any concentration on procedural and evidentiary aspects of discrimination could lead to failure to achieve the objectives of the study.

It also looks at specific Canadian and South African case law, judgments of the courts and jurisprudence in the field of employment discrimination in order that the reader is presented with a clearer picture of recent developments in addressing workplace inequalities.
The concluding remarks are drawn from a variety of approaches used by authorities in the field of labour law in dealing with employment discrimination and issues for further research are highlighted.
CHAPTER 1
INTRODUCTION

1.1 INTRODUCTION

This treatise provides a comparative study of employment discrimination in South Africa and Canada. This study does not claim to be profoundly archetypal in the field of employment discrimination, but it rather seeks to render an input that will contribute to the jurisprudence of South African labour law.

The comparison in employment equity between South Africa and Canada is significant. This is against the background that the Canadian model on the subject has been useful to shape both the transitional and post-apartheid non-discriminatory South Africa. For example, the South African Employment Equity Act 55 of 1998 (hereinafter referred to as the EEA) and other related legislation are testament to the foregoing assertion. The EEA was adapted from the Canadian Employment Equity Act of 1995, in so far as drafters and legislators of the EEA in South Africa extensively used both the Canadian Constitution and human rights legislation as an imprint to facilitate the finalisation of South African employment equity law. It is consequently submitted that the extensive and optimal use of case law, relevant legislation and legal literature applicable in both countries will assist the study to meet its objectives.

This chapter covers the following subtopics:

- Objectives of the study
- Structure of the study

1.2 THE OBJECTIVE OF THE STUDY

The aim of the treatise is to advocate that in South Africa there exists fair/unfair employment discrimination. Likewise, the Canadian literature research indicates that employment discrimination does exist, which suggests that employment discrimination scenarios between the two countries could be comparable.
To date, the case law (in both countries) bears testimony to the effect that labour courts and other dispute resolution structures have done significantly well in matters pertaining to ensuring a curb on unfair employment discrimination. Such competency has necessitated the decrease of numerous cases in this field.

1.3 THE STRUCTURE OF THE STUDY

This study has six chapters. Chapter 2 provides a discussion to the legislative framework of employment discrimination in South Africa and Canada. Chapter 3 presents a descriptive model of the nature, scope and developments in employment discrimination for both countries. Chapter 4 discusses aspects of employment discrimination derived from legislation. The random selection of these aspects includes unfair discrimination on the grounds of race, ethnicity, gender, sex, pregnancy, and HIV status. Chapter 5 discusses remedies to employment discrimination through the provision of insights into dispute resolution mechanisms processes in the two countries. Chapter 6 offers concluding remarks.

It is submitted that this study will show that on selected aspects of employment discrimination a comparison between both South Africa and Canada can be made.
CHAPTER 2

LEGISLATIVE FRAMEWORK OF EMPLOYMENT DISCRIMINATION

2.1 INTRODUCTION

The aftermath of the apartheid regime in South Africa has yielded and revealed a phenomenon characterised by a democratic civil society. This phenomenon has inter alia embraced the spirit of human rights. It has manifested itself in such a way that it has been deemed necessary to create legislation congruent to the non-discriminatory dispensation. At the core of the foregoing has been the government’s realisation to accept a Constitution of the country to epitomise the environment that has undergone socio-economic and political change. In South Africa, one has witnessed the establishment of the Bill of Rights, which protects citizens from its rights infringement. Furthermore, workplace laws began to translate what the Constitution and the Bill of Rights propound in terms of inter alia denouncing unfair employment discrimination. On the workplace front, South Africa’s parliament promulgated the Employment Equity Act 55 of 1998, the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000, and amended all legislation relevant to the prohibition of employment discrimination.

The Canadian discrimination scenario is not too different from South Africa. To be specific, in employment circles, there has been discrimination against “minority” groups and women, which has raised both social and political concerns. Likewise, in 1982, the Human Rights statutes were introduced across Canada in an attempt to ensure equal employment opportunities and practices. With the Canadian Constitution that was amended to introduce equality rights, there also emerged the Canadian Charter of Rights and Freedoms that introduces the equality clause in order to strengthen the culture of non-discriminatory society and workplace. These innovations have necessitated the promulgation of Canadian Human Rights Act and Employment Equity Act of 1995 to ensure that unjustified workplace discrimination is prohibited.

The purpose of this chapter is to provide a discussion on the legal framework in respect to employment discrimination both in South Africa and Canada. It includes the background, the
interpretation of courts, embodiments of the Acts governing employment discrimination, etc. Therefore, the chapter traces the historical, recent and current legislation dealing with employment discrimination in both countries. It is significant to consider such legislation because it constitutes the cornerstone in regulating employment practices on discrimination. It renders *inter alia* Constitutions with their rights clauses, equity and labour legislation. Finally, there is also an exploration to both countries’ compliance into International Labour Organisation (ILO) Conventions 111 on Discrimination in Respect to Employment and Occupation.

### 2.2 GENERAL BACKGROUND

South Africa and Canada significantly share a history of oppression in the hands of British imperialists. This eventuality has brought about the scenario whereby the Constitutions of both countries became imprints of the colonialists from the United Kingdom. For example, the South Africa’s Constitution, prior to 1994, has had elements of British uncodified constitutional framework. Likewise, the Canadian constitutional law was originally enacted by the Parliament of the United Kingdom and was known as the British North-American Act.\(^1\) With all the constitutional negotiations that took place in South Africa, a democratic dispensation was set up with the valiant implementation of the interim Constitution, which existed until 1996.

The Canadian Constitutional Act of 1867\(^2\) established Canadian federalism. The federal states comprise of ten provinces\(^3\) and three territories\(^4\) which are situated in the northern part of Canada. However, in 1982, the above-mentioned Constitution was “patriated” through legislation to the Canadian Parliament. This process was conducted at the behest of its parliament. This suggests that the Canadian constitutional framework has undergone one significant metamorphosis of reinforcing autonomy to provinces whilst the federal government exists. That is why the familiar reference to Canadian Constitution is the one that refers to Canadian Constitutional Act of 1982.

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4. Yukon, the Northwest Territories and Nunavut.
As propounded in the interim Constitution, South Africa geographically consists of a national parliament and nine provinces.\(^5\) Though, South Africa consists of provincial legislature; constitutional matters and passing of legislation take place in the national parliament.

South Africa also shares an important characteristic with Canada: ethnic diversity. The former consists of a large number of black peoples (African, Indians and Coloured) and whites. For the purpose of eliminating discriminatory practices, blacks coupled with women and people with disabilities, are being called designated groups.\(^6\) In Canada, designated groups — *groupes désignés*,\(^7\) commonly known — consists of women, Aboriginal peoples (Indians, *Inuit* or *Métis*), persons with disabilities and members of visible minorities (persons other than Aboriginal peoples, who are non-Caucasian in race or non-white in colour).

Therefore, designated groups from both countries have been subjected to discrimination, be it fair and unfair. The legislature has, respectively, promulgated laws that seek to ensure that the above-mentioned groups, not only live in societies that demonstrate hostility through undesirable differentiation, but are protected and their fundamental human rights are not being infringed.

### 2.2.1 JUDICIARY AND DISPUTE RESOLUTION MECHANISMS INSTITUTIONS

In this paper dispute resolutions mechanisms for discrimination cases in both countries will also be discussed. As a preamble to that discussion, it is rather pertinent to briefly explain a subtle account on both the South African and Canadian nature of dispute resolution processes and functioning of the judiciary. Labour legislation and human rights legislation in Canada are under provincial jurisdiction, except approximately ten percent of the workforce that is under the federal jurisdiction in such areas as the federal public sector, federal crown corporations, and federally regulated industries such as banking and inter-provincial transportations and communications.\(^8\)

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\(^5\) Eastern Cape, Free State, Gauteng, Kwazulu Natal, Limpopo, Mpumalanga, North West, Northern Cape and Western Cape.


\(^7\) S 3 of the Canadian Employment Equity Act 1995.

The Constitution and other related legislation in these countries set forth structures to generally deal with civil claims arising from a number of issues. These issues may include, but are not limited to, those that pertain to employment discrimination. Outside courts of law in Canada, cases involving inequality that may translate to discrimination are dealt with through the Human Rights Commission. The Commission establishes specific Tribunals that are based in each province to deal with individual civil rights issues like unfair discriminations. The inequality disputes that are not resolved through tribunals are directed to provincially based Supreme Courts for appeal and/or review. If a dispute has not been finalised or resolved in the Supreme Court, it may thereafter be referred on appeal to the Federal Court of Appeal.

The South African scene substitutes the Canadian model of tribunals with statutory structures like the Commission for Conciliation, Mediation and Arbitration, bargaining councils and private arbitration. The Labour Court and Labour Appeal Court, generally, adjudicate over unfair discrimination disputes. Cases that have immense constitutional implications are from time to time referred straight to the Constitutional Court.

2.3 CONSTITUTIONALISATION OF DISCRIMINATION

Both the South African and Canadian Constitutions denounce unfair discrimination of any form. Both constitutions achieve the foregoing through practical recognition of equality clauses. For instance, in the first Constitutional Court case of Brink v Kitshof NO, O’Reagan J, had to grapple with the equality clause as it was still based on the interim Constitution. Whereas, in Canada, the first case to deal with equality as espoused in the Constitution was Andrews v Law Society of British Columbia, as per McIntyre, J. Both cases have made significant contribution in portending legislative challenges in the regulation of equality.

Jurisprudence, case law and labour law literature review, both in South Africa and Canada, abundantly reveal that the Constitutions in both countries enjoy supreme status. This

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9 Act 108 of 1996.
11 1996 (4) SA 197 (CC).
supremacy has managed to effectively replace the notion of parliamentary sovereignty. The eventuality has been significant because, in South Africa, for example, the apartheid dispensation could easily manipulate the system through the infringement of human rights. Therefore, parliamentary sovereignty shows its pertinence when it also safeguards the elimination of discriminatory practices in both countries.

The South African Constitution promulgates certain fundamental rights in its chapter on the Bill of Rights. In South Africa, judges of the Constitutional Court have endorsed the overarching importance of the Constitution as it enshrines the Bill of Rights. In the case of *Investigating Directorate: Serious Economic Offences and others v Hyundai Motor Distributors (Pty) Ltd and Others: In re: Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others*, the judgment as per Langa DPJ, quoted section 39(2) of the Constitution and argued:

“... that all statutes must be interpreted through the prism of the Bill of Rights. All lawmaking authority must be exercised in accordance with the Constitution. The Constitution is located in a history, which involves a transition from a society based on division, injustice and exclusion from the democratic process to one, which respects the dignity of all citizens, and includes all in the process of governance. As such, the process of interpreting the Constitution must recognise the context in which we find ourselves and the Constitution’s goal of a society based on democratic values, social justice and fundamental human rights. This spirit of transition and transformation characterises the constitutional enterprise as a whole”.

The above-mentioned view is, inter alia, supported by Ackerman CJ in *De Lange v Smuts NO* when he argued as follows:

“... no more than give expression to a sound principle of constitutional interpretation recognised by other open and democratic societies based on human dignity, equality and freedom such as, for example, the United States of America, Canada and Germany, whose constitutions like our 1996 Constitution, contain no express provision to such effect. In my view, the same interpretative approach should be adopted under 1996 Constitution.”

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14 *Supra* at 1.
15 *Supra* at Chapter 2.
16 2001 (1) SA 545 (CC).
17 1998 (3) SA 785 (CC).
The Bill of Rights enshrines rights of all people in South Africa and affirms the democratic values of human dignity, equality and freedom. Therefore, the Bill of Rights and the Constitution apply to all law and bind the legislature, the executive, the judiciary, and all organs of state. This view is supported by Langa DPJ, from *Daniels v Campbell NO and Others*\(^{18}\) judgment:

> “The purport and objects of the Constitution find expression in section 1 which lays out the fundamental values which the Constitution is designed to achieve. The Constitution requires that judicial officers read legislation, where applicable, in ways that give effect to its fundamental values. Consistently with this, when the constitutionality of legislation is an issue, they are under a duty to examine the objects and the purport of an Act and to read the provisions of the legislation, so far as is possible, in conformity with the Constitution.”

The right to equality, like other related rights, is not immune from the limitation rights as espoused in the South African Constitution. In fact, both sections 7 and 36, respectively, provide for limitations and its degree. The extent of these limitations, in question, may even affect the right to equality. These limitations have been divided into two, namely, external and internal. To take one example, in for instance dealing with external limitations, in the *Grootboom* case\(^ {19}\) the court *a quo* introduced a two-pronged approach based on one hand, to fact that the applicant must demonstrate the existence of the infringement in respect of the duty to respect, protect, promote and fulfill the rights in the Bill of Rights on the other hand, that the respondent must show that though there was an infringement but, it was justifiable and that the right was legitimately restricted in accordance with the general limitation clause contained in section 36 of the Bill of Rights. Therefore, any infringement in respect to the right to equality must be measured against the provisions of section 36 of the Constitution.

The Canadian Charter of Rights and Freedoms,\(^ {20}\) which was effected in 1985, affords the Canadians a number of rights and freedoms equavalent to South Africa’s provision of human rights to its citizens. It forms part of the supreme law of Canada, applies to government action, binds both the federal and provincial powers, and has given the judiciary a broad supervisory jurisdiction over the purpose, content and impact of government’s action and

\(^{18}\) (2003) JOL 1119 (CC).
\(^{20}\) Schedule B of the Canadian Constitution Act, 1982 (79).
several remedies to address unjustified infringements. This view is further supported by the following assertion:

“Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.”

The foregoing highlights that the Charter protects certain rights and freedoms, subject to the Canadian government’s power to impose reasonable limits under section 1 or to expressly declare that certain infringements may operate, notwithstanding, the Charter under section 33. Furthermore, the above-mentioned assertion also means that section 1 acknowledges that certain limitations on rights and freedoms are both possible and proper.

Both South African Bill of Rights and Canadian Charter of Rights and Freedoms directly deal with discrimination through the enforcement of equality clause. All this must be viewed on the backcloth of being subjected to limitation clauses of sections 7 and 36 (South African Constitutional perspective) and sections 1 and 33 of Canadian Charter of Rights and Freedoms, respectively.

2.3.1 BILL OF RIGHTS AND THE CHARTER OF RIGHTS AND FREEDOMS

The purpose of the above-mentioned rights’ is to consolidate and facilitate emancipatory processes regarding unnecessary differentiation whether direct or indirect. There has been a mention that, in South Africa, the Bill of Rights reinforces the concept of equality. Whereas, equality rights in Canada are also significant as they are *inter alia* codified in its Charter. Section 9(1) of the Bill of Rights states:

> “everyone is equal before the law and has the right to equal protection and benefit of the law”.

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22 S 1 of the Canadian Charter of Rights and Freedoms.
23 S 9 of the Bill of Rights.
24 S 15 of the Canadian Charter of Rights and Freedoms.
Whereas, section 15(1) of the Canadian Charter categorically state:

“every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law...”.

It is these clauses that seek to ensure that equality to all citizens in both countries is brought to manifest in order to curb unpalatable discrimination.

The Bill of Rights and the Charter for Rights and Freedoms outwardly preclude unfair discrimination from any authorities operating in the ambit of the state.\(^{25}\) This preclusion is further extended to all socio-economic and political role players. These role players may not discriminate – unfairly – on the grounds of race, pregnancy, sex, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth. The seriousness of the foregoing prohibition manifests itself when one considers that both the Bill and the Charter go on to demand an enactment of national legislation aimed at preventing or prohibiting unfair discrimination.

It is in the light of the above that, one may only deduce that, for instance, the promulgation of the employment equity legislation\(^ {26}\) in this country was founded on the backdrop of section 9(4) of the Bill. However, it is worth noting that the only lea-way that the role players, which include but not limited to employers, is what is being embraced by section 5 of the Bill where it is stated that discrimination on one or more of the above mentioned grounds is unfair unless it is established that such discrimination is fair.

The Canadian Charter of Rights and Freedoms is not as exhaustive as the South African Bill of Rights when it concerns equality rights. There might be numerous reasons for that, but it is trite that discrimination in Canada has always been slightly different when compared to South Africa because, with the former, the process involved minorities and women yet, with the latter; apartheid was a phenomenon involving blacks and women on a large scale. Section 15(1) of the Charter lists grounds to which unfair discrimination is prohibited.\(^ {27}\) Furthermore,

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25 S 9(3) highlights that the state may not unfairly discriminate directly or indirectly against anyone on one or more grounds.  
27 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.
it seeks to promote those laws or programmes of the country that are geared towards ameliorating conditions not favourable to discourage unfair discrimination.  

Both two pieces of legislation, from two different countries, abhor unfair discrimination. They provide broad base categories or grounds to preclude unfair discrimination. It has however been mentioned that when compared to the Bill, the Charter is not extensive in its coverage of equality rights wherein protection for discrimination is enshrined. The Bill further embraces the notion that depicts an inextricable link between preponderance into equality and human dignity rights. This is so because the existence of measures to curb unfair discrimination, yield a sense of a demonstration of the respect for all citizens. Finally, both the Bill and the Charter embody the necessity for the existence of national legislation, in both countries, to ensure the regulation of discrimination that is unfair.

2.3.2 SPECIFIC HUMAN RIGHTS LEGISLATION PROMOTING ANTI DISCRIMINATION

The Canadian Human Rights Act is an offspring of the Charter of Rights and Freedoms. Section 7 of the Act is specific about discrimination that takes place in employment. However, exceptions are given on practices based on *bona fide* occupational requirements, especially if those practices are reasonable as they are prescribed by guidelines, issued by the Canadian Human Rights Commission. In South Africa one does not normally refer to *bona fide* occupational requirements but inherent requirements of the job.

The purpose of the Canadian Human Rights Act is to ensure that all individuals should have an opportunity equal with other individuals to make for themselves the lives that they are able and wish to have their needs accommodated without being hindered from doing so by discriminatory practices based on race, national or ethnic origin, colour, religion, age, sex, sexual orientation, marital status, family status, disability or conviction for an offence for which a pardon has been granted. Therefore, it is its section 40 that enables individuals or

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28 S 15(2) of the Charter.
29 S 10 of the Bill of Rights.
31 S 15 of the Act.
32 S 26 of the Canadian Human Rights Act facilitates the establishment of the Commission.
33 S 2 of the Canadian Human Rights Act.
groups of individuals to file a complaint to the Commission for adjudication if there is an alleged discrimination.

To ensure the adjudication of disputes brought to the Commission, section 48(1) establishes the Canadian Human Rights Tribunal that conducts its proceedings informally and expeditiously.

The South African Human Rights Commission Act 54 of 1994 is the counterpart of the Canadian Human Rights Act of 1985, as amended. Notwithstanding this assertion, section 181(1) of the South African Constitution establishes and sets forth governing principles for state institutions supporting constitutional democracy. Amongst these institutions in the Human Rights Commission, they are independent, and subject only to Constitution and law, and they must be impartial and exercise their powers and perform their functions without fear, favour or prejudice.

The key objectives of the Commission are to develop an awareness of human rights among the people of South Africa, make recommendations to organs of state in order to enhance the implementation of human rights, undertake studies and report to Parliament on matters relating to human rights; and investigate complaints of violations of human rights and to seek appropriate redress. Section 7(1) gives the Commission powers, duties and functions assigned to it by section 116 of the Constitution. The latter ranges from the investigation and reporting on observance of human rights, taking steps to secure appropriate redress where human rights have been violated, carry out research and educating the public regarding human rights philosophy.

It seems therefore that both South Africa and Canada embrace a deep-seated culture of human rights as promulgated in their law. Indisputably, this embracement filters down and is at the heart of the workplace. The Canadian model, in terms of its legislation, seems to be different than South Africa in that its Human Rights Commissions go step further that South Africa’s one by allowing the adjudication in individual or group disputes. The South African Human

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34 Supra at 9.
35 S 115(1) of supra at 9.
36 S 181(2) supra at 9.
37 S 184(1).
38 S 184(2).
Rights Commission only, in terms of section 8 of its Act, mediate, conciliate or negotiate settlement with parties. However, it is worth noting that both countries’ advanced dispute resolution mechanisms are relatively different.

2.3.3 EMPLOYMENT EQUITY LAWS

In both countries there are two statutory enactments regulating employment discrimination.\(^{39}\) In both countries the legislation was founded against the background of both the Bill of Rights – section 9 - and the Charter of Rights and Freedoms – section 15 - respectively. Section 5 of the South African employment equity legislation begins by placing a positive obligation on all employers’ to “promote equal opportunity in the workplace by eliminating unfair discrimination in any employment policy or practice”.\(^{40}\) This view is genuinely supported by Basson et al when they further cite the provisions of section 2 which:

“requires employers to implement affirmative action measures to redress the disadvantages in employment experienced by designated groups, in order to ensure their equitable representation in all occupational categories and levels in the workplace”.\(^{41}\)

Therefore, from section 5 to 11, the Act deals with elimination of unfair discrimination and from section 12 to 33, attention is given to affirmative action measures.

In Canada, employment equity legislation exists in three jurisdictions. To this effect, Weiner argues, in line with section 4 of the Act that, in the federal jurisdiction, the Employment Equity Act of 1986 applies only to federal crown corporations and federally regulated industries yet, for the public sector; the federal government follows a non-legislated route by having committed itself to employment equity.\(^{42}\) The purpose of Canadian 1995 Employment Equity Act is to achieve equality in the workplace and to correct conditions of disadvantages experienced by women, aboriginal peoples, persons with disabilities and members of visible minorities.\(^{43}\) Raskin\(^{44}\) argues that at federal level, the employment equity programme differs

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\(^{39}\) Supra at 27.
\(^{43}\) S 2 of the Act.
from many of the other measures being used throughout the world, in that it groups together four designated groups – women, Aboriginal people, persons with disabilities and visible minorities – into one comprehensive measure.\(^{45}\) These target groups were identified during the Abella Commission as particularly subject to systemic discrimination.\(^{46}\) Section 5(a) states as follows:

\[\text{“every employer shall implement employment equity by identifying and eliminating employment barriers against persons in designated groups that result from the employer’s employment systems, policies and practices that are not authorised by law”} \]

Furthermore, the employer has a duty to institute such positive policies and practices and making such reasonable accommodations 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.\(^{47}\) However, in a quest to implement the above, section 6 highlights those employers who should not consequently suffer undue hardship.

Nieuweboer contends that for the purposes of implementing employment equity, every employer shall collect information and conduct an analysis of his workplace, in order to determine the degree of the under-representation of persons in designated groups in each occupational group in that workforce and conduct a review in order to identify employment barriers.\(^{48}\) In Canada, section 9(2) requires employees to identify themselves as belonging to the designated groups. It is therefore section 10 that obligates the employer to prepare an employment equity plan outlining measures to be taken to address equity disparities.

\(^{45}\) Nyandwi and Wadasinghe Employment Equity in Canada and Beyond: An International Perspective Part I: Comparison of Legislation (March 2001) - a study prepared for the 2001 review of the Employment Equity Act surveys the legislation adopted the same six countries, 7.


\(^{47}\) S 5(b).

\(^{48}\) Nieuweboer Anti-discrimination legislation in the USA, Canada and the Netherlands http: www.international.metropolis.net/events/rotterdam, papers/20_Nieuweboer.htm.
2.3.4 LABOUR RELATIONS LEGISLATION

2.3.4.1 LABOUR RELATIONS ACT 66 OF 1996

The first part of the residual unfair labour practice definition\(^{49}\) which dealt with unfair discrimination in the Labour Relations Act has been repealed and replaced by section 6 of the Employment Equity Act, which prohibits unfair discrimination on both listed and unlisted grounds. However, McGregor states that under item 2(2)(b), an employer might still adopt or implement employment policies and practices designed to achieve the adequate protection and advancement of persons disadvantaged by unfair discrimination.\(^{50}\)

2.3.4.2 PROMOTION OF EQUALITY AND PREVENTION OF UNFAIR DISCRIMINATION\(^{51}\)

PEPUDA, as the Act is commonly known, is aimed at promoting equality and prevent unfair discrimination in all spheres of society. Significantly, the Act begins to protect those who fall outside of the Employment Equity Act definition of an employee like independent contractors.

2.4 INTERNATIONAL LABOUR ORGANISATION (ILO)

The ILO is a United Nations specialised agencies whose purpose is to promote social justice and international recognised human and labour rights. Currently, both South Africa and Canada are amongst 175 nations affiliated as member states of the ILO. Member states have ratified conventions and recommendations through the formulation of international labour standards. Quite importantly, member nations are encouraged to ratify Conventions and have an obligation to put the Conventions before their Parliament for consideration.

South Africa and Canada have, respectively, ratified Conventions related to prohibition of unfair discrimination. Canada ratified Discrimination (Elimination of discrimination in respect of Employment and Occupation) Convention, 1958 (No. 111). South Africa ratified

\(^{49}\) Item 2(1)(a) of the Labour Relations Act 66 of 1995. This provision defined residual unfair labour practices to include unfair discrimination between an employer and an employee.


\(^{51}\) Act 4 of 2000.
its Convention of this nature in 1997. Convention 100 was ratified by Canada in 1972, thereby giving effect to the principle of equal pay for work of equal value thus precluding any sort of discrimination on the basis of remuneration. As far as the Equal Remuneration Convention is concerned, South Africa ratified its own in the year 2000. The importance of these steps ensures the international community about the commitment of member states to extirpate all forms of discrimination.

2.5 CONCLUSION

Both South Africa and Canada legislative frameworks regulating the prohibition of discrimination are comparable. This has been evidenced by contextual similarities on Constitutions, employment equity legislation and compliance with International Labour Organisation (ILO) standards. The above-mentioned comparability becomes crucial when one considers aspects of jurisprudential benchmarking to elicit an understanding of how courts in both countries have endeavoured to deal with discrimination cases. However, it is also pertinent to realise - in terms of employment discrimination - the manner in which the latter has natured, scoped and developed in both countries and this is the subject of the next chapter.
CHAPTER 3
NATURE, SCOPE AND DEVELOPMENTS OF EMPLOYMENT DISCRIMINATION

3.1 INTRODUCTION

Workplace discrimination in South Africa and Canada has manifested itself in different ways. Both countries’ legislatures have established parameters for one to understand the nature and scope of discrimination. For instance, literature review reveals that both countries recognise direct and indirect discrimination. Insights have also been given to highlight what constitutes both fair and unfair discrimination.

In Canada, employment discrimination may be justified on the basis of *Bona Fide Occupational Qualification* (BFOQ)/*Bona Fide Occupational Requirements* (BFOR). The popular term comparable to BFOR in South African labour relations law is *Inherent Requirements of the Job* (IRJ). Throughout this chapter, these terms will be explored to show how they have been used in both countries to justify discrimination on the side of employers.

Employment discrimination law in Canada and South Africa has steadily expanded the scope of what are considered prohibited grounds for discrimination. In both countries employment discrimination has been scrutinised, explained and expanded during the last few years by human rights tribunals and courts.

This chapter considers direct and indirect employment discrimination, as well as fair and unfair employment discrimination, in Canada and South Africa. Furthermore, it explores the employment discrimination laws of both countries, and the applicable court judgments. The chapter commences by addressing definitional issues.

3.2 DEFINITIONAL ISSUES

There has been a major debate on the manner in which discrimination is defined. The Constitutional Court of South Africa has, on a number of occasions, considered the concept of
discrimination. Discrimination means an act of treating a person or a group differently than others. This definition simply suggests that one would tend to baselessly differentiate between two human beings or things on arbitrary grounds. Basson et al contend that when one tries to attach a meaning to the word “discrimination”, one always thinks of “differentiation”. However, in *Prinsloo v Van der Linde*, it was held that “discrimination” means “treating persons differently in a way which impairs their fundamental dignity as human beings”. From these viewpoints, it seems that differentiating between employees might not be problematic but what counts most is the reasons attached to the act.

Some proponents in this field argue that, by discriminating, one is showing favour, prejudice or bias for or against a person on any arbitrary grounds. For example, the foregoing has been supported by scrutiny into discriminating on the basis of race, gender, sex, disability, pregnancy, marital status, family responsibility, ethnic or social origin, colour, sexual orientation, age, religion, HIV status, conscience, belief, political opinion, culture, language and birth by the employer. According to Du Toit:

> “Discrimination must involve an element of prejudice but, rather, defines ‘prejudice’ as encompassing not only a derogation from existing rights but …”

It would seem that discrimination, particularly in the South African context, was also reinforced by the apartheid system that *inter alia* promoted discriminatory practices on the basis of race, which was heavily critisised by the international community.

In Canada, discrimination is broadly defended in the context of human rights where it is stated that it is an exclusion, restriction of protected characteristics; the result of which is the

52 Association of Professional Teachers & another v Minister of Education & others (1995) 16 ILJ 1048 (IC); Brink v Kitshoff NO 1996 (6) BCLR 609 (CC); Fraser v The Children’s Court, Pretoria North & Others 1997 (2) SA 261 (CC); President of the Republic of South Africa v Hugo 1997 (4) SA 1 (CC); 1997 (6) BCLR 153 708 (CC); Prinsloo v Van der Linde infra (n 4); Harksen v Lane NO infra (n 14); Larbi-Odam & Others v MEC for Education (North-West Province) & Another 1997 (12) BCLR 1655 (CC).


57 Du Toit *When Does Affirmative Action in Favour of Certain Employees Become Unfair Discrimination Against Others?* Paper presented at the Conference on Equality: Theory and Practice in South Africa and Elsewhere, hosted by the Faculty of Law, University of Cape Town, the Law, Race and Gender Research Unit and the Institute of Development and Labour Law.
prevention or impairment of the exercise of human rights and freedoms guaranteed in human rights legislation.\(^{58}\) However, in Canada the most authoritative definition of discrimination is found in the judgment of *Andrews v Law Society of British Columbia*. McIntyre, J held as follows:

“Discrimination may be described as a distribution whether intentional or not but based on grounds relating to personal characteristics of the individual or group, which has the effect of imposing burdens, obligations, or disadvantages on such individual(s) or group(s) not imposed upon others, or which withholds or limits access to opportunities, benefits, and advantages available to other members of the society.”\(^{59}\)

A distinction based on personal characteristics attributed to an individual solely on the basis of association with a group will rarely escape the charge of discrimination, while those based on an individual’s merits and capacities will rarely be so classed.\(^{60}\) In *Carson v Air Canada*,\(^{61}\) the Review Tribunal argued that fundamental to the concept of discrimination is the existence of a preference or distinction based on an individual’s characteristics, but not related to an individual merit.\(^{62}\)

Human rights statutes in Canada have only briefly defined the term “discrimination”, except for the Manitoba Human Rights Code which exhaustively defines the term as follows:

“‘Discrimination’ means:

(a) differential treatment of an individual on the basis of the individual’s actual or presumed membership in or association with some class or group of persons, rather than on the basis of personal merit; or

(b) differential treatment of an individual or group on the basis of any characteristic referred to in subsection 2; or

(c) differential treatment of an individual or group on the basis of the individual or group’s actual or presumed association with another individual or group whose identity or membership is determined by any characteristic referred to in subsection (2); or

\(^{60}\) Supra at note 8.
\(^{62}\) Supra at note 10.
Finally, it seems that there is a diametrical difference between the manner in which the South African and Canadian notions of discrimination are viewed. Both perspectives suggest that discrimination is normative with its intrinsic component of differentiation between one person and another on either arbitrary or listed grounds, which has an effect of one person being treated less favourably than another. Clearly, section 6(1) of the Employment Equity legislation provides the list with regard to discrimination. Both the Canadian and South African laws do not preclude employees from challenging discrimination by employers on unlisted grounds. But, there is a test for the foregoing, namely, that the grounds must objectively be based on attributes and characteristics which have the potential to impair the fundamental human dignity of persons as human beings or to affect them adversely in a comparably serious manner. One now turns into considering direct and indirect discrimination.

### 3.3 DIRECT AND INDIRECT DISCRIMINATION

The Employment Equity Act seeks to prohibit both direct and indirect discrimination. Direct discrimination usually takes place when the employer draws a distinction between employees on one or more arbitrary grounds, such as sex, marital status, HIV status, family responsibility, race, and other prohibited grounds for discrimination.

Aggarwal states that the Canadian notion of direct discrimination is that it occurs where an employer adopts a practice or rule that, on the face of it, discriminates on a prohibited ground, for example precluding Catholics, women, or Blacks from employment. The Supreme

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63 S 9(1) of the Code.
64 Act 55 of 1998.
65 Harksen v Lane NO 1998 (1) SA 300 (CC).
66 Supra at note 8.
67 See Association of Professional Teachers & Another v Minister of Education & Other (1995) 16 ILJ 1048 (IC).
68 In Hoffman v SA Airways (2000) 21 ILJ (CC) the court held that it was unfair discrimination to preclude an HIV positive cabin crew attendant employment on the basis of his medical status.
69 Aggarwal Sex Discrimination in Canada (1994) 20.
Court of Canada, in Central Alberta Dairy Pool v Alberta\textsuperscript{70} defined direct discrimination as follows:

“The essence of direct discrimination in employment is the making of a rule that generalises about a person’s ability to perform a job based on membership in a group sharing a common personal attribute like sex, age, religion, etc. The ideal human rights legislation is that each person be accorded equal treatment as an individual taking into account those attributes. Thus, justification of a rule manifesting a group of stereotypes depends on the validity of the generalisation and/or the impossibility of making individualised assessments.”\textsuperscript{71}

It must be stated that both in South Africa and Canada inherent requirements of the job and \textit{bona fide} occupational requirements principles have respectively been used as a defence to allegations of direct discrimination.

Du Toit \textit{et al} argue that an employer may be guilty of indirect discrimination if the use of an apparently neutral criterion has a significant adverse impact on a particular group and the criterion is not sufficiently relevant to workplace needs to justify that impact.\textsuperscript{72} Jammy, AJ agreed with this explanation in \textit{Lagardien v University of Cape Town}.\textsuperscript{73} It is therefore clear that indirect discrimination occurs when an employer applies a criterion that is, on the face of it, neutral to all employees or prospective employees. The application of this criterion has the effect of discriminating between certain groups of employees or potential employees. For instance, the requirement that a prison guard comply with certain physical attributes, such as height and weight, may be indirectly discriminatory against women – even though the employer may try to rely on the defence that these discriminatory requirements are related to the inherent requirements of the job.\textsuperscript{74} Adverse effects discrimination utilises the defence of the duty on the side of the employer to accommodate the specific needs of individuals or groups but all this must not constitute undue hardship to the employer. However, in the United States, the use of indirect discrimination (the use of neutral criteria with a disproportionate impact on a protected groups) was outlawed.\textsuperscript{75} The differentiation between

\textsuperscript{70} (Alta.1990) 12 C.H.R.R D/417.
\textsuperscript{71} Supra at D/477 (para. 46).
\textsuperscript{72} Infra at note 57.
\textsuperscript{73} (2000) 21 ILJ 2469 (LC).
monthly paid workers – the majority being white - and weekly paid employees – who happened to be black – was found to be direct discrimination.\textsuperscript{76}

In Canada, courts have also been confronted with the situation of having to decide on whether or not indirect or adverse effects discrimination has taken place. In \textit{Eldridge v A-G of British Columbia},\textsuperscript{77} Lamer, CJ held that the differentiation in the provision of medical services to citizens that were deaf constituted indirect discrimination and was in contradiction to the spirit of the Canadian Charter of Rights and Freedoms.\textsuperscript{78} Furthermore, the Canadian Courts have rejected challenges to the exception in human rights legislation that permit mandatory retirement. The \textit{McKinney v University of Guelph} case challenged the provision of the Ontario Human Rights Code that prevented complaints about discrimination over the age of 65; the Supreme Court held that this was age discrimination and it needed to be abhorred.\textsuperscript{79} In \textit{Bhindar v Canadian National Railway}, the Supreme Court held that the broad aim and purpose of the Act covering adverse effect discrimination was violated by an employment rule that required all employees to wear hard-hats for safety reasons; this rule discriminated against \textit{Sikh} employees whose religious principles forbade any head-covering but a turban.\textsuperscript{80}

It is consequently submitted that both direct and indirect discrimination are prohibited in South Africa and Canada.

\subsection*{3.4 FAIR DISCRIMINATION}

The above discussion bears testimony to the fact that discrimination in employment exists but there is another revelation that, within the ambit of law, discrimination may take place as long as employers would have a just cause for it: an employer has a duty to prove before the court or relevant tribunal that it is justified to discriminate against the employee(s). This burden of proof may be so huge as to dissuade the employer from its intention to discriminate.

Both South African and Canadian legislation allows the following grounds for fair discrimination, \textit{inter alia}:

\begin{itemize}
\item \textsuperscript{76} \textit{Infra} at note 69.
\item \textsuperscript{77} (1997) Can SC.
\item \textsuperscript{78} (1997) 3 BHRC at 137-138.
\item \textsuperscript{79} http://canada.justice.gc.ca/chra/en/frp-c18.html.
\item \textsuperscript{80} \textit{Supra} at note 28.
\end{itemize}
discrimination on the basis of affirmative action;
- inherent requirements of a particular job discrimination.

### 3.4.1 AFFIRMATIVE ACTION DISCRIMINATION

The following discussion does not intend to be exhaustive on affirmative action discrimination. The scope of this document does not permit extensive treatment of the topic. Interestingly, whilst this chapter is being drafted courts in both Canada and South African are increasingly making judgments on affirmative action discrimination.

Section 13(1) of the Employment Equity Act states that every designated employer must, in order to achieve employment equity, implement affirmative action measures for people from the designated groups in terms of this Act.\[^{81}\] Seemingly, the spirit of the Act is to render legal any affirmative action measures to promote employment equity on the basis of fairness for designated groups.\[^{82}\] Affirmative action therefore aims at achieving equality at work without lowering standards and without unduly limiting the prospects of existing employees, for example by getting rid of discrimination in company policies, procedures and practices.\[^{83}\] This measure is taken to strike the balance between race and gender gaps and proper representatives in the workplace. This seeks to ensure that the groups from previously disadvantaged spheres are fairly represented in the workplace of a particular employer.

The first affirmative action case of *George v Liberty Life Association of Africa Ltd*\[^{84}\] was not too stringent in determining ground rules for the implementation of affirmative action. In *casu*, it was myopically maintained that for the purposes of affirmative action, an employer might even decide to dismiss the other employee to allow an affirmative action candidate to be employed. The foregoing is contrary to the motive for introducing affirmative action. In *Public Servants Association v Minister of Justice* case,\[^{85}\] the High Court categorically found it absurd for an employer to apply random or haphazard affirmative action measures. It stated that the measures must be designed to achieve an intended purpose in a rational and adequate

\[^{81}\] *Supra* at note 4.
\[^{82}\] Designated groups are defined by the Act as those employees who have been victims of past inequalities. These groups are blacks, women and disabled persons.
\[^{83}\] *Supra* at note 3.
\[^{84}\] (1996) 17 *ILJ* 571.
\[^{85}\] (1997) 18 *ILJ* 241 (T).
manner. The Labour Court in *PSA v Minister of Correctional Services* postulated that affirmative action measures must help to achieve equality, disadvantaged groups should have access to adequate protection and advancement and such groups must be beneficiaries of the non-discriminatory (post apartheid) era.

Other distinguishable landmark cases concerning unfair discrimination in the context of the implementation of equal employment and affirmative action measures that expanded the Labour Court jurisprudence in the sphere of South Africa’s labour law were *Walters v Transitional Local Council of Port Elizabeth and another* and *Independent Municipal and Allied Workers Union v Greater Louis Trichardt Transitional Local Council*. The Labour Court in both cases emphasised the importance of employers being able to develop affirmative action programmes in order to rely on affirmative action in justifying affirmative appointments. In all this, the same Labour Court has firmly endorsed the notion that employers cannot justify dismissing an employee to pave way for an applicant that comes from disadvantaged group.

One of the important features of most of the Canadian Human Rights statutes is their provision of special programmes known as affirmative action programmes. These programmes are legalised by section 15(2) of the Charter. They are introduced to address the effects of pre and post employment barriers on race, ancestry, colour, place of origin, national of ethnic origin, nationality or citizenship, towards minority groups and women. Therefore, affirmative action programmes are aimed at correcting the consequences of past and continuing discrimination. It is section 16 of the Canadian Human Rights Act that legalises affirmative action.

Voluntary affirmative action programmes are legal in ten Canadian jurisdictions; this involves nine Canadian provinces and the Federal level. The most prominent implementation of the above-mentioned programmes over the past decade has been in Ontario, Saskatchewan, Nova

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87 (1997) 18 ILJ (LC).
88 (2000) 21 ILJ 2723 (LC)
89 (2000) 21 ILJ 1119 (LC)
93 *Supra* at note 39.
Scotia, Montreal, Alberta, British Columbia, New Brunswick, Quebec and Manitoba. Through voluntary affirmative action programmes, cabinet in provinces approves its implementation but there is no serious legal obligation for employers.

Also, in Canada, there are mandatory affirmative action or contract compliance programmes. These programmes require private contractors to show through statistics how they are doing in terms of affirmative action as a condition of doing business with Canadian Government agencies. Jain argues that this commitment involves the setting of goals and timetables for minority employment in job categories where such minorities have been under-utilised in proportion to their representation in the labour force. Therefore, if these contractors fail to comply with the above-mentioned requirement the contracts end up being rejected, not renewed or cancelled.

**3.4.1.1 RECENT JURISPRUDENTIAL DEVELOPMENTS IN AFFIRMATIVE ACTION MEASURES**

Recent judgments in the field of affirmative action discrimination have confirmed that section 6 of the Employment Equity Act provides that it is not unfair discrimination to take affirmative action measures consistent with the purpose of the Act. This requires that designated employers adopt and implement affirmative action measures. In *Coetzer and others v Minister of Safety and Security and another*, Landman, J had to order the respondent, SAPS, to promote applicants who happened to be white males to the rank of captain. Although courts are reluctant to interfere with policies and procedures of the employer, in this case the court’s reasoning was that the respondent failed to produce the affirmative action plan that would justify discrimination and this failure had the potential of scuppering the respondent’s constitutional imperative of efficiency. In *Harmse v City of Cape Town* the applicant had a dispute with his employer on the basis that he was not short listed for any of the three posts advertised, and contended that this constituted unfair discrimination on the basis of affirmative action. Waglay, J found that the foregoing was true because the employer failed to or implement an employment equity plan thus, rendering it incapable to defend its discrimination.

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94 Supra at note 19.
3.4.2 DISCRIMINATION BASED ON INHERENT REQUIREMENTS OF A JOB AND BONA FIDE OCCUPATIONAL REQUIREMENTS

Section 6(2)(b) of the EEA allows employers to discriminate on the basis of inherent requirements of the job. An inherent requirement exists where the nature of a job requires that a person must have a specific arbitrary characteristic. The word “inherent” suggests that possession of particular personal characteristics (for example, being male or female, speaking particular language, or being free of a disability) must be necessary for effectively carrying out the duties attached to a particular position.

Literature as well as case law reveals that employers use discrimination based on inherent requirements of the job quite often. For instance, in responding to a charge of discrimination an employer may want to argue that the discrimination is justified by the inherent requirement of the job. The nature of the job and requisite qualifications may justify the argument on the inherent requirements of the job. If such requirements can be shown, discrimination will be fair. For example, a person with extremely poor eyesight – and it can be proven – cannot be employed as an aircraft pilot.

In South Africa, prior to the promulgation of the equity legislation, the Labour Relations Act allowed the use of the principle of “inherent job requirement”. In the case of Collins v Volkskas Bank, before the Industrial Court, the court a quo had imported the already heavily condemned test for inherent requirements of the job that was used in the American case of Griggs v Duke Power Company. The Griggs case held that the employer’s commercial interests could be held to be an inherent job requirement. The problem with this test is that it elevates commercial profitability above the discriminatory impact of the practice.
on employees. It is against this background that South African courts have rejected the
interpretation that permits business operational requirements as defences to discrimination
charges.

The EEA in South Africa does not indicate which test must be used to determine whether an
inherent requirement exists, the courts\(^{107}\) seem to have endorsed the following criteria that the
inherent requirement must:

- be a permanent feature of the job;
- be integral to the job – that is, cannot be changed without materially altering the job
  itself; and
- be essential to getting the job done.\(^ {108}\)

The above mentioned test seems slightly opposed to the reasoning of Landman, J in the
*Kadiaka v Amalgamated Beverage Industries*,\(^ {109}\) where he contended that the refusal of
the employer to appoint a job seeker from the opposition was justified on *bona fide*
commercial or operational reasons.

When referring to the inherent requirements of the job, the Canadian labour law refers to *bona
fide* occupational qualification (BFOQ)\(^ {110}\) or *bona fide* occupational requirements (BFOR).
These concepts are normally used interchangeably. The *bona fide* occupational requirement
is an exception to the rule in Canada protecting employees against discrimination on
prohibited grounds, including sex.\(^ {111}\) The Canadian Human Rights Act states as follows:

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\(^{107}\) *Supra* at note 13.

\(^{108}\) *Infra* at note 19 page 572.

\(^{109}\) (1999) 20 *ILJ* 373 (LC).

\(^{110}\) This term is also popular in the American law though employers are precluded from using it on the basis
of race.

\(^{111}\) *Supra* at note 15 in 239.
“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 …”^112

Significantly, in Canada, for any practice based on a *bona fide* occupational requirement or for any practice which is excused by a *bona fide* justification, it must be established that accommodation of the needs of an individual or a class of individual affected would impose undue hardship on the person who would have to accommodate those needs, considering health, safety and cost.\(^{113}\) This further emphasises the fact that, in order for employers to justify the use of the *bona fide* occupational requirements, they need to prove that the converse will impose undue hardship. De Villiers states that the test for a BFOR was recently reformulated expressly to accommodate criticism that the approach as defence to discrimination failed to address systemic issues adequately.\(^{114}\)

Like the inherent requirements of the job, the employer is allowed to utilise the *bona fide* occupational qualification or requirement to discrimination only with regard to the specific job. For instance, an employer may not be deemed to have discriminated against an employee if it is a reasonable requirement of the job. In *Ontario Human Rights Commission and others v The Borough of Etobicoke*,\(^ {115}\) the court had to consider whether a policy imposing a mandatory retirement age of 60 years on firefighters was indeed a *bona fide* occupational requirement or whether or not it constituted unlawful discrimination on the basis of age.\(^ {116}\) The Court found that the compulsory retirement provision was a *bona fide* occupational requirement. However, in *Martin v Canadian Forces*, the Federal Court of Appeal upheld a decision of a Tribunal that found the mandatory retirement policy of the Canadian Forces was as not a *bona fide* occupational requirement.\(^ {117}\)

In the landmark case of *British Columbia (Public Service Relations Commission) v*

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\(^{112}\) S 15(1)(a).


\(^{116}\) Cohen “Justifiable Discrimination – Time to Set the Parameters” (2000) 12 SA Merc LJ.

\(^{117}\) *Supra* at note 26.
BCGEU, commonly known as the *Meiorin* case, the Canadian Supreme Court, per McLachin, J, established a new three-part test for employers in order to successfully defend discrimination as a *bona fide* occupational requirement. The employer must show that, on the balance of probabilities:

- the standard as set was rationally connected to the performance of the job;
- it had adopted the standard in an honest and good faith belief that it was necessary to the fulfillment of that legitimate work-related purpose, and
- the standard was reasonably necessary to the accomplishment of that purpose – *ie* that it was impossible to accommodate individual employees sharing the claimants characteristics without imposing undue hardship upon the employer.\(^\text{120}\)

The *Merion* case was followed by the *British Columbia (Superintendent of Motor Vehicles) v British Columbia (Council of Human Rights)*\(^\text{121}\) where the Supreme Court categorically stated that in all cases an employer bears a burden of accommodating individuals to a point just short of undue hardship. This undue hardship, if raised as a defence, must be apparent and pass any constitutional challenge.

It seems that in both South Africa and Canada, concepts of inherent requirement of the job and *bona fide* occupational qualification/requirement might not constitute discrimination if it is to be found reasonable. In both countries this basically provides a limited right to discriminate. In *Whitehead v Woolworths*,\(^\text{122}\) the employer argued that it was justified to discriminate against a pregnant woman due to the fact that it was an inherent requirement of the job that the employee should serve an uninterrupted period of at least twelve months. However, the Labour Court adopted a view that

> “an inherent requirement implies that the job must have an indispensable attribute that relates, in an inescapable way, to the performance of the job required” \(^\text{123}\)

\(^{118}\) 176 DLR (4th) 1, 35 C.H.R.R D/257; (1999) 3 SCR 3 (SC).

\(^{119}\) This is the name of a Canadian female firefighter who complained of discrimination.


\(^{122}\) (1999) *ILJ* 2133 (LC).

The contrary was to be found by the Labour Appeal Court judgment as per Zondo AJP (as he was then) and Willis JA – with the exception of Conradie JA who dissented by arguing that Whitehead was precluded employment due to her pregnancy - concurred in overturning the decision of the Labour Court and agreed that there was no unfair discrimination. The Labour Appeal Court was heavily criticised for its narrow view on this matter.

The Canadian employment discrimination law has yet developed the new concept that is inextricably linked to *bona fide* occupational requirements, namely, universality of service principle. This principle was endorsed by the Federal Court of Appeal in a trilogy of cases involving prominent Canadian organisations. Further reaffirmation of the principle as linkable with BFOR was seen in the case of *Canada (Attorney General) v Hebert et al.* All the of the foregoing necessitated the enhancement of the relationship between the duty to accommodate – which is one of the hallmarks of BFOR – and the universality of service and this was reflected in the 1998 amendments to the Canadian Human Rights Act’s provision on exclusions to discrimination.

### 3.5 UNFAIR DISCRIMINATION

In its Chapter II, the Employment Equity Act prohibits unfair discrimination in much the same way, as does the Labour Relations Act. Generally, the laws of South Africa and Canada proscribe unfair discrimination. Unfair discrimination happens when differentiation is based on immutable personal characteristics, and where differentiation is made arbitrarily and without any justification.

Gerbers contends that with regard to the burden of proof for discrimination, courts have played a significant role in shaping the discrimination law of South Africa. He draws in

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128 66 of 1995, as amended.
129 *Supra* at note 35.
both Canadian\textsuperscript{131} and the United States\textsuperscript{132} authority that shaped evidentiary requirements in discrimination cases for South Africa. Therefore, even in South African employment law, it is not enough merely to allege unfair discrimination without substantial evidentiary proof. The Constitutional Court in the \textit{Harksen} case ruled that allegations must pass the following test:

\begin{quote}
“First, 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 potential to impair the fundamental human dignity of persons as human beings or to affect them adversely in a comparatively serious manner.”\textsuperscript{133}
\end{quote}

In light of the above, Garbers argues that the Constitutional Court in \textit{Harksen’s} case set the following parameters in order for one to satisfy the requirements for unfair discrimination:

\begin{enumerate}
\item The applicant must be an employee. South African law defines “employee” in various ways.\textsuperscript{134}
\item The applicant must be able to show that the matter was conciliated and, by implication, that a “reasonable attempt to resolve the dispute” had been made prior to referral for conciliation. In this regard, the Constitutional Court wanted the applicant to satisfy the Court that some dispute resolution processes had been followed. This is aimed at preventing employees from rushing directly to courts without the employer having any knowledge of the dispute, thereby unnecessarily flooding the already overloaded judicial system.
\end{enumerate}

\textsuperscript{131} Vizkelety \textit{Proving Discrimination in Canada} (1987).
\textsuperscript{133} Harksen at para. 53.
3. There must be discrimination, whether direct or indirect.

4. The discrimination must be unfair. Gerbers argues that differentiation in itself is not enough to prove a *prima facie* case for discrimination. The further enquiry would be necessary to establish the differentiation being based or linked to unacceptable reasons. Surely, the unacceptable reasons may be derived from the Constitution and the Employment Equity Act. If there is a link found between differentiation and listed grounds then, one may argue that discrimination ensued. Now, the further enquiry will be to establish whether or not was the discrimination fair or unfair. The Employment Equity Act only provides two defences in this regard, namely, affirmative action measures and inherent requirement of the job, as previously argued. However, in *Leonard Dingler Employee Representative Council v Leonard Dingler (Pty) Ltd*, in an endeavour to accept the defence different from the above two, it was contended:

>“Discrimination is unfair if it is reprehensible in terms of the society’s prevailing norms. Whether or not society will tolerate the discrimination depends on what the object is of the discrimination and the means used to achieve it. The object must be legitimate and the means proportional and rational.”

This case bears testimony to the fact that an employer may be able to justify discrimination other than on the basis of either affirmative action or inherent requirements of the job.

5. The discrimination must be caused by an employment policy or practice as defined. This requirement poses a major challenge for a job applicant who is facing indirect discrimination because it is this discrimination that may be difficult to identify, perhaps to convince the Labour Court of its existence. The requirement of this nature – the discrimination must be caused by and employment policy is subjective in the circumstances. Dupper argues that if one is compelled to use words like “policy” and

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135 *Supra* at note 59.
136 *Supra* at note 57.
137 *Supra* at note 34.
139 *Supra* at note 59, 143.
“practice”, already one is clouding issues because both the latter and the former require a broad approach in terms of analysis.\textsuperscript{140}

6. Liability of the employer. This may not be problematic on the basis that in most cases the notion of vicarious liability, especially in cases of harassment – which is a form of discrimination in terms the Act.\textsuperscript{141} For any act of discrimination, the employer is held liable if it is found that either the employee or any other party in the context of employment is in breach.

In South Africa, there is another school of thought that has advanced the argument that if discrimination can be justified on the basis of inherent requirements of the job, it would not be inappropriate to advance other justifications on the basis of operational requirements. According to Vettori, if operational requirements are acceptable reason for dismissal, there is no reason why such requirement cannot be used for refusing a job applicant employment.\textsuperscript{142} This judicial line of thinking has been borrowed from retrenchment scenario whereby a dismissal because the latter can be justified as based on operational requirements.

3.6 CONCLUSION

The purpose of this chapter was to advocate a comparison on how both South African and Canadian authorities have viewed discrimination, whether direct or indirect and fair or unfair. On the exploration of the definition of discrimination, it was discovered that the manner in which Canadian legislation and courts have viewed the concept is not different from the South African legislative framework. However, the chapter went into strides in an attempt to trace how discrimination has unfolded in both countries thus concluding that the concept of discrimination in both countries is comparable.

\textsuperscript{141} S 6(3) of the Employment Equity Act 55 of 1998.
\textsuperscript{142} (2000) 2 (33) \textit{DJ}. 
CHAPTER 4
ASPECTS OF EMPLOYMENT DISCRIMINATION

4.1 INTRODUCTION

Over the past decade, in South Africa, various laws have been passed in an attempt to ensure sound employee-employer relations. South African labour law jurisprudence has shown that the courts have permitted employers to apply discrimination, but only if it can be justified as fair.

Whilst, on one hand, fair discrimination has been justified on the basis of affirmative action and inherent requirements of the job, on the other hand what has been a matter of much litigation has been unfair discrimination – with its exhaustive burden of proof – which has been held as impermissible and viewed as inconsistent with the norms and values of democratic countries, such as South Africa and Canada.

In Canada, the most significant development in employment law during the last six decades has been the passage of human rights statutes, both in the country’s federal and provincial jurisdictions. Human rights statutes prohibit discrimination, specifically in employment, on a variety of prohibited grounds that will be discussed in this chapter. But, as previously contended, the Canadian model of affirmative action and bona fide occupational requirement measures has also served as justifiable grounds for discrimination.

Both South Africa and Canada have approved certain types of employment discrimination, which are sanctioned by both countries’ Constitutions, Human Rights laws and employment equity legislation.

This chapter scrutinises a selection of aspects of employment discrimination that are prohibited. This selection includes discrimination on the basis of race, age, pregnancy, gender, HIV/AIDS status and marital status. Space does not permit an examination of all the grounds of discrimination listed in the relevant legislation of both countries. Furthermore, an analysis of aspects of discrimination as expounded on in this chapter is also justified because, it is submitted that literature review and court decisions in both countries have paid attention
to these aspects. This chapter contains also an analysis of case law pertaining the above-mentioned selection of aspects of employment discrimination from both countries.

4.2 DISCRIMINATION ON THE BASIS OF RACE, COLOUR, NATIONALITY, ETHNICITY AND NATIONAL ORIGIN

A plethora of racial discrimination incidents has caused socio-political debates to mushroom in an unfolding history of both South African and Canadian labour relations law. Racial discrimination is particularly widely reported on in both South Africa and Canada, and one has the impression that race discrimination has been challenged more vociferously to date than any other area. In Europe, the Race Relations Act of 1976 forbids racial discrimination, which is defined on the basis of colour, race, nationality, ethnic or national origins. For example, in Mandla v Dowell Lee - which is one of the earlier European cases that sought to challenge racial discrimination – the House of Lords found that the applicant who was of Sikh descent was discriminated against on the basis of ethnicity when he was refused entrance to a private school unless he gave up wearing his turban and had his hair cut. Likewise in Canada, the Supreme Court in Bhinder v Canadian National Railway held that an employment rule that required all employees to wear hard-hats for safety reasons discriminated against Sikh employees whose religious principles forbade any head-covering but a turban. The court a quo expressed the view that the Canadian Human Rights Act prohibited not just acts of direct discrimination where individuals were expressly excluded from employment or services because of personal characteristics connected with the listed grounds (race, sex, sexual orientation, pregnancy, HIV/AIDS etc.) of discrimination, but also that the Act prohibited conditions of employment and accessibility to services which did not expressly single out a group of employees on their personal characteristics.

The Canadian Courts have supported some Tribunal decisions where it was found that a prima facie race or ethnicity discriminatory practice has taken place. This was initially evidenced in the Ottawa Board of Education and Others case that took place in 1996. This

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144 S 3(1).
146 (1985) Can.SC.
148 Supra.
149 Unreported Divisional Court of Ottawa, a case involving a certain Mr. Wong.
is significant because this case was one of the first cases decided after the Canadian Employment Equity Act was promulgated. In this case, Mr. Wong was discriminated against and harassed on the basis of race, ethnic origin, and age. He was a teacher – of Chinese ancestry - for over two decades at Ottawa Technical High School. The Department of Education rationalisation process selected him for possible retrenchment. Factors taken into consideration for the selection were seniority, age, the male-female ratio, teaching experience, specialisation and availability for extra-curricular activities. The Ottawa Board of Inquiry found that Mr. Wong was unfairly discriminated against on the basis of his race, ethnic origin and age.

The respondent challenged the Ottawa Board of Inquiry decision in the Divisional Court on the grounds that the board’s finding with respect to constructive and direct discrimination on the basis of race, ethnic origin and age was improper. In November 1996, the Divisional Court dismissed the respondent’s case with costs. The court a quo in upholding the decision of the Board of Inquiry held that although the evidence before the Board purely consisted of circumstantial evidence, there was sufficient evidence to support the Board’s finding of direct discrimination.

The Leonard Dingler case\textsuperscript{150} was one of the first racial discrimination cases that the South African Labour Court had to determine. The challenge was based on unfair discrimination but the employer’s behaviour was found to constitute racial discrimination. It differentiated between monthly paid workers who happened to be white and black weekly paid employees, in relation to the Staff Benefit Fund. Seady AJ found that the respondent employer could not justify this racial discrimination because what became crucial was not whether or not has there been direct or indirect discrimination but the deciding factor was the effect of the employer’s policies on employees’ dignity.

The first successful human rights case of systemic racial discrimination in Canada, which included an effective employment equity remedy, was \textit{National Capital Alliance on Race Relations (NCARR) v Health and Welfare Canada}.\textsuperscript{151} In this case the respondent was the Government of Canada (Federal Public Service), which was accused of failing to remove barriers in order to promote employment accessibility for Canadian’s visible minorities to top

\textsuperscript{150} \textit{Leonard Dingler Employee Representative Council v Leonard Dingler (Pty) Ltd} (1998) 19 \textit{ILJ} 858 (LC).

managerial position, the so-called glass ceiling phenomenon. This happened contrary to public statements made by the Federal Public Service in which it regularly affirmed its commitment to equal opportunity and multiculturalism. The Court found in favour of the applicant – NCARR.

Disgruntled employees have, since the promulgation of both the LRA and the EEA, challenged non-appointment or non-promotion on the basis of affirmative action. Averments in several court or tribunal proceedings have alleged racial discrimination. In the Van Vuuren case, the applicant challenged the appointment of a black candidate notwithstanding the interviewing panel’s recommendation that she (the applicant) was best suited for the job. The Labour Appeal Court held that the Department of Correctional Services was not arbitrary in its appointment and conduct by making the unfair labour practice charge untenable. This was against the background that the Commissioner of Correctional Services was required to balance disparities created by past inequalities through redress. Similarly, in Abbot v Bargaining Council for the Motor Industry the applicant for the job felt that he was unfairly discriminated against on the basis of his race and trade union affiliation yet the respondent used affirmative action policy as its defence.

Both the Louis Trichardt Local Council and McInnes cases were classified by applicants as racial discrimination yet the respondents raised the defence of affirmative action policy in terms of Schedule 7, item 2(2)(b). However, the Labour Court in both cases opined that the employer could not use race as a justification for appointment if the affirmative action policy or programme does not stipulate demographical disparities and how representation will be achieved. In the Auf der Heyde case, the respondent successfully justified its appointment of two black candidates on the basis of merit, suitability and competence. This underscored the challenge to racial discrimination because its (the respondent’s) affirmative action policy was well formulated to establish requisite criteria based on suitability for the job. In the same vein, the Labour Appeal Court disagreed with the Labour Court’s decision that Mr. Auf der

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156 Independent Municipal and Allied Workers Union v Greater Louis Trichardt Transitional Local Council (2000) 21 ILJ 1119 (LC).
158 Auf der Heyde v University of Cape Town (2000) 21 ILJ 1758 (LC).
159 University of Cape Town v Auf der Heyde (2001) 12 BLLR 1316 (LAC).
Heyde’s termination of employment with the appellant was procedurally unfair. However, the emphasis of the Labour Appeal Court was that:

“a person relying on claim of unfair discrimination must prove causal connection between act or omission complained of and prejudicial consequence”\textsuperscript{160}

4.3 AGE DISCRIMINATION

The United States uses as the Federal Age Discrimination in Employment Act of 1967 and the Older Workers Benefit Act of 1990 to regulate age discrimination. In the United Kingdom, the government has adopted a voluntary Code of Practice on age diversity, and is now considering how to legislate against age discrimination in the workplace. In Finland the prohibition of age discrimination is entrenched in the country’s new Constitution Act of 2000 and Contract of Employment Act of 2001. This demonstrates that other countries, besides South Africa and Canada, also take age discrimination quite seriously.

Age discrimination, if it cannot be justified, constitutes unfair discrimination in South Africa and Canada. Both section 6(1) of the EEA and the Canadian Human Rights Act\textsuperscript{161} list age as one of the prohibited grounds for discrimination. This discrimination could either be premised on prohibition of child labour\textsuperscript{162} and/or forcing “old workers” to retire before the statutory stipulated age.\textsuperscript{163} The scope of protection against age discrimination in both countries is premised in all aspects of employment, namely, recruitment, training, transfers, promotion, dismissal, lay-offs, compensation, overtime, hours of work, holidays, benefits, shift work, evaluation and discipline.\textsuperscript{164} However, courts in South Africa and Canada have permitted age discrimination only on the basis of the inherent requirement of the job or a bona fide occupational requirement\textsuperscript{165}. In Swart v Mr Video (Pty) Ltd\textsuperscript{166} the respondent argued that it could not appoint a job seeker because her supervisor was young; the court rejected this

\textsuperscript{160}Supra.
\textsuperscript{161}R.S, 1985, c. H-6, s. 2; 1996, c.14, s.1; 1998, c. 9, s.9.
\textsuperscript{162}Both the South African and Canadian Constitutions prohibit employment of children under the age of 15. This is further strengthened by the fact that these countries have rectified ILO Conventions on Minimum Age for Admission to Employment Convention 138 of 1973.
\textsuperscript{164}Joseph Rowntree Foundation Information Sheet July 2001.
\textsuperscript{165}See the decision on Large v City of Stratford infra.
\textsuperscript{166}(1997) 2 BLLR 249 (CCMA).
argument as unfair discrimination. The *Baadjies’s case*\textsuperscript{167} is one of the cases bearing testimony to the fact that failure of the employer to demonstrate that age discrimination is justified on the basis of the inherent requirements of the job can result in a finding of unfair differentiation.

The judiciary has also recently endorsed the fact that employers cannot rely on discriminatory collective agreements in a quest to perpetuate age differentiation. In *SACTWU and others v Rubin Sportswear*,\textsuperscript{168} the applicants had been employed by a company whose business was purchased by the respondent. Subsequently, the respondent reached an agreement with the union that the old company’s employees would be employed on the same terms. The applicants, aged between 60 and 63, were told that the normal retirement age for employees in the new establishment (Rubin Sportswear) was 60 years, and that this retirement age\textsuperscript{169} would apply to them with immediate effect. This led the respondent to offer applicants one year fixed term contracts after which their services were going to be terminated. The applicants declined this offer and the respondent dismissed them on the basis that they had reached the normal retirement age.

The applicants claimed that their dismissals were automatically unfair\textsuperscript{170} because the company had discriminated against them on the basis of age. The respondent defended its decision using the Rules of the Provident Fund to which the applicants were members. The Labour Court was not persuaded by the respondent’s argument and found that the employer had misconstrued the provision of the LRA\textsuperscript{171}, which refers to “normal retirement age”. The Court *a quo* stated that the LRA’s intention in using the phrase “normal retirement age” is not to dictate the age at which the employer may require the employees to retire, but the age at which the employees may retire if they so wish. The court found that the applicants had been automatically unfairly dismissed because the respondent’s decision to enforce a retirement age of 60 years was unfairly imposed upon them without consultation. Compensation was therefore awarded to the applicants.

\textsuperscript{167} Supra.

\textsuperscript{168} (2003) 5 BLLR 505 (LC).

\textsuperscript{169} Also see *Christie v Stingray Accessory Manufacturers CC* (2003) 3 BALR 275 (CCMA).

\textsuperscript{170} The applicants used as justification for their dismissal section 187(2) (b) of the Labour Relations Act 66 of 1995, as amended. For further commentary, also see Bosch “Section 187(2)(b) and the Dismissal of Older Workers – Is the LRA Nuanced Enough?” (2003) 24 *ILJ* 1283.

\textsuperscript{171} S 187(2)(b) of the LRA states that “a dismissal based on age is fair if the employer has reached the normal or agreed retirement age for persons employed in that capacity”.

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In Rubenstein v Price’s Daelite (Pty) Ltd\footnote{172} the notion that employers can force employees to retire on reaching a certain age was upheld; the Labour Court, per Jammy AJ, found no unfair age discrimination in a case where the respondent dismissed the applicant because she was 70 years old. The Labour Court held that there was no way that the applicant could use section 187(2)(b) of the LRA to challenge the dismissal.

The circumstances of the above-mentioned cases are identical to those of the Canadian landmark case involving Large v Stratford (City).\footnote{173} In casu, the applicant, a police officer, argued that his mandatory retirement at age 60, which was provided for in a collective agreement, violated the Ontario Human Rights Code.\footnote{174} The Board of Inquiry agreed with him, as did both the Divisional Court and the Court of Appeal. However, the Supreme Court of Canada reversed the decision of the lower courts and found that the mandatory retirement policy of the employer was justifiable as a \textit{bona fide} occupational requirement.

The Labour Court has also supported employers who terminate employees’ contracts at an agreed age. In Schmahmann v Concept Communications Natal (Pty) Ltd\footnote{175} Landman AJ (as he was then) stipulated that if the employer requires an employee to retire on attaining a requisite/agreed/normal age the termination is by the effluxion of time rather than by dismissal. This view was supported by Zondo AJ (as he was then) in Schweitzer’s case,\footnote{176} who further argued that even if a termination of employment because the employee has reached the age of retirement, was found to be a dismissal in terms of section 187(2)(b), that dismissal will be \textit{ipso facto} fair.

In all Canadian jurisdictions, age discrimination is prohibited only per the requirements of human rights legislation. However, the prohibition in terms of the requisite age for employment and retirement threshold vary federally, provincially and territorially.\footnote{177}

\footnote{172} (2002) 5 BLLR 472 (LC).
\footnote{174} R.S.O. 1980, c 340, s. 4 (6).
\footnote{175} (1997) 8 BLLR 1092 (LC).
\footnote{176} Schweitzer v Waco Distributors (a division of Voltex) (Pty) Ltd (1998) 10 BLLR 1050 (LC).
\footnote{177} For example, British Columbia 19-65, Alberta +18, Saskatchewan 18-64, Ontario18-65, Newfoundland 19-65, etc.
The Zurich Insurance Co v Ontario (Human Rights Commission) case\textsuperscript{178} is seen as one of the Canadian landmark cases on age, sex and family status discrimination. In this case the majority of the Supreme Court of Canada found that Zurich Insurance did not discriminate against Michael Bates contrary to the Ontario Human Rights Code by charging him higher premiums for automobile insurance because of, \textit{inter alia}, his age. Significantly, the Court \textit{a quo} held that charging higher automobile insurance premiums to young, unmarried, male drivers is \textit{prima facie} discriminatory and contravenes the Ontario Human Rights Code. However, Sopinka J argued that the issue in this appeal was whether or not that discrimination is permitted by section 21 of the Code\textsuperscript{179} and that the test in section 21 is whether or not a discriminatory practice is based on sound and accepted insurance practices, and also whether there is no practical alternative. It was against this background that the majority judgment held that the insurance premiums were based on sound and accepted insurance practices thus, making the discrimination on the basis of age, sex and family status fair.

Both McLachlin and L’Heureux-Dube JJ dissented, arguing that whilst the discriminatory classification scheme was imposed in good faith, there was no casual connection established between being young, single and male, and having a higher risk of motor accidents. Both judges found that a mere statistical correlation is not satisfactory enough because it accepts the very stereotyping that is deemed unacceptable by human rights legislation. Furthermore, Zurich Insurance, in their view, failed to prove that there was no practical alternative to using discriminatory criteria as the basis for rate classification. Also, the failure of the insurer to bear the burden of showing that no reasonable alternative exists, and through its own failure to collect the required data meant that it failed to meet the burden of proof required. In the judges’ opinion, the appeal would have been allowed.

In another matter unrelated to employment discrimination, the Canadian Board of Inquiry found that Ms. Velenosi\textsuperscript{180} was subjected to age discrimination when the landlord on grounds that only elderly people could become tenants denied her accommodation. The respondent challenged the decision in the Divisional Court, which reversed the finding of the Board of Inquiry and held that there was insufficient evidence to conclude that accommodation was

\textsuperscript{179} S 21 of the Ontario Human Rights Code states that the prohibitions against discrimination are not infringed where a contract of automobile insurance differentiates on “reasonable and \textit{bona fide}” grounds about age, sex, marital status, family status or handicap.
\textsuperscript{180} \textit{Velenosi v Dominion Management and Others} (1997) (unreported).
refused on the basis of age. On appeal, the Court of Appeal upheld the decision of the Board of Inquiry and found that the prohibited ground for discrimination need not to be the only reason for the action taken by the respondent as long as it forms one of the reasons. Furthermore, the Court rejected the majority opinion of the Divisional Court that the consequences of a finding of direct discrimination should factor into how rigorously the evidence is to be weighed at a hearing.\textsuperscript{181}

In \textit{Law v Canada (Minister of Employment and Immigration)},\textsuperscript{182} the Federal Court of Appeal as \textit{per} Lamer CJ, held that the denial of survivor’s benefits under Canadian Pension Plan (CPP) to Nancy Law did not violate section 15(1) of the Canadian Charter of Rights and Freedoms on the basis of age. The appellant, a 30-year-old woman without dependent children or disability applied for a grant through CPP which gradually reduces the survivor’s pension for able-bodied surviving spouses without dependent children who are older than 35, thereby favouring people of 34 and younger. After all the appeals made by the appellant, in its finding, the Federal Court of Appeal concurred with the Pensions Appeals Board that even if, constitutionally, the Canada Pension Plan infringed section 15(1) of the Charter by discriminating on the basis of age, this infringement is justifiable in a free and democratic society under section 1 (limitation clause) of the Charter.\textsuperscript{183}

\section*{4.4 DISCRIMINATION ON THE BASIS OF HIV/AIDS}

Section 6(1) of the EEA, in terms of its prohibition of unfair discrimination, includes HIV status as one of its listed grounds. However, it is ironical that neither item 2(1)(a)\textsuperscript{184} nor section 9(3) of the South African Constitution refer to HIV status as a listed ground. The Americans with Disability Act (ADA)\textsuperscript{185} describes HIV/AIDS status as a disability. This notion of regarding the above-mentioned status as disability was confirmed in \textit{Bradgon v Abbott},\textsuperscript{186} where the US Supreme Court addressed the issue of asymptomatic HIV infection (that is a person living with HIV but who has no symptoms of HIV) as a disability under ADA. This case is significant as the first case in which the US Supreme Court addressed issues pertaining to the AIDS epidemic. Several United States courts have held that HIV is a

\begin{thebibliography}{9}
\item Supra.
\item (1999) 1 S.C.R. 497.
\item http://www.canlii.org/ca/cas/scc/1999/1999scc17.html.
\item Schedule 7 of the LRA 66 of 1995, as amended.
\item (1990) USC 12102-12213.
\item (1998) 118 S.Ci.2196.
\end{thebibliography}
disability under the Americans with Disability Act. Likewise in Australia, HIV/AIDS is regarded, in its Federal law, which is the Disability Discrimination Act of 1992, as a disability. Even in the United Kingdom, the approach is such that HIV/AIDS is seen as disability in terms of UK Disability Discrimination Act of 1995. The implications of treating HIV/AIDS as disability are far-reaching. This approach helps to reinforce the same stereotypes and stigma the prohibition against HIV status is being endeavoured to achieve.

The Canadian Human Rights Act and the provincial and territorial human rights codes protect people living with HIV/AIDS against unfair discrimination. Also, the Charter of Rights and Freedoms covers HIV/AIDS status as a listed ground of prohibited unfair discrimination. In Canada, HIV status is considered as a disability under the terms of human rights legislation in each and every jurisdiction of the country. The treatment of HIV status as a disability by Canada poses a major challenge in terms of an ability of this part of the study to compare the two countries. But, notwithstanding the above, both the South African and Canadian Courts denounce discrimination on the grounds of HIV status. The two cases as discussed below bear testimony to this assertion.

The Constitutional Court, as per Ngcobo J in *Hoffman v South African Airways* found that the refusal by the employer to employ the cabin attendant – job applicant – solely on the ground of his HIV status, amounted to unfair discrimination. In denouncing SAA policy as constituting unfair discrimination against HIV positive persons, the Constitutional Court contended as follows:

> “People who are living with HIV constitute a minority. Society has responded to their plight with intense prejudice. They have been subjected to systematic disadvantage and discrimination. They have been stigmatised and marginalised. As the present case illustrates, they have been denied employment because of their HIV status without regard to their ability to perform the duties of the position from which they have been excluded. Society’s response to them has forced many of them not to reveal their HIV status for fear of prejudice. This, in turn, has deprived them of the help they would otherwise receive.”

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188 S 4 of the Act.
189 S 15.
191 At 2370-2371.
The same intolerance of unfair discrimination on the basis of HIV status is found in the Namibian case of *N v Minister of Defence*. In this case, the Court as per Levy AJ was called upon to determine whether or not the exclusion on the grounds of HIV status of a prospective applicant for enlistment in the Namibian Defence Force constituted unfair discrimination as contemplated in section 107 of the Labour Act. The Court held that for the respondent to conclude that an applicant who was HIV positive could not carry out duties was shortsighted. It held also that the Defence Force tests should be aimed at determining fitness of the soldiers but not HIV status *per se*. Therefore, in its findings, the Court held that the exclusion of the applicant from the military solely because he was found to be HIV positive constituted unfair discrimination and was in breach of section 107 of the Namibian Labour Act. What was also of concern to the Court was the fact that after enlistment - which surely is preceded by HIV testing – no further HIV tests were carried out on the members of the Defence Force.

The *Hoffman and N* cases’ circumstances could easily be matched or equated to the *Canadian Airline Flight Attendants Association v Pacific Western Airlines*. In this case the Arbitration Board ruled not only that there was no genuine risk of transmission of the HIV/AIDS virus by the flight attendant in the normal course of his duties, but also that the removal amounted to discrimination that was unfair and unconstitutional. The board further argued that the fear of other employees and customers was insufficient reason for removing the applicant from his duties and was not justified.

In all these cases, the courts were convinced that employers cannot reject job applicants on the basis of positive HIV status. If this happens, in the sight of the law, it will constitute unfair discrimination. Moreover, the employers are expected to adhere to the principles of the Code of Good Practice: Key Aspects of HIV/AIDS and Employment. The Code was intended to be a guide to both employers and employees on how to manage the impact of HIV/AIDS in the workplace. The EEA prescribes that when interpreting the Act relevant codes must be taken into account. According to Turro the Code assists in creating

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193 Act No 6 of 1992 (Namibia).
195 The code was published by the Minister of Labour in terms of the powers vested in him by section 54(1) of the EEA.
196 GN R1298 in GG21815.
197 *Supra.*
awareness of the disease and eradicating stereotypes and discrimination in the workplace by charging employers with adopting policies and dealing with the issue in a responsible and direct manner.

4.4.1 TESTING FOR HIV\(^{198}\)

Section 7(2) read with section 50(4) of EEA precludes blanket HIV testing by employers unless the Labour Court has sanctioned such testing as justifiable. According to Du Toit \( et al\),\(^{199}\) the Labour Court may make any order it considers appropriate, including the imposition of conditions relating to the provision of counseling, the maintenance of confidentiality, the period for which testing is authorised, and the category or categories of jobs or employees in respect of which the authorisation applies.\(^{200}\) However, there has been immense debate and controversy around the interpretation of section 7(2), which prohibits HIV testing in the workplace. This prohibition is aimed at assisting employees to keep their HIV status confidential. An employer might conduct HIV tests to its employees and finally dismiss those that are HIV positive.

The Labour Court per Landman J in Joy Mining\(^ {201}\) established conditions for approved HIV testing, as summarised by Du Toit \( et al\):

\begin{quote}
“\textit{The testing had to be voluntary and anonymous; testing had to be conducted with the consent of the employees and could not be required as a condition of employment; promotion and/or other benefits; the samples had to be received and processed by a particular company; the applicant and its management could not be involved in the testing apart from participating as employees themselves; the applicant could not discriminate against HIV-positive employees should it become aware of their status; the purpose of testing was only to discover the percentage of HIV-positive employees in order to enable the company to plan to plan an effective HIV/AIDS strategy, no prejudicial}\n\end{quote}

\(^{198}\) Also see \textit{India MX v XY High Court of Bombay} 1997(unreported): regarding pre-employment HIV testing which is prohibited; \textit{X v Y \\& Others} (1988) 2 All ER 648 (Queen’s Bench Division, UK): regarding rights to privacy (unreported). \textit{Bragdon v Abbot} 118 S.Ct2196, 66 U.S.L.Wk 4601 (1998): regarding discrimination on the grounds of disability; Costa Rican and Venezuela Supreme Court (unreported): regarding rights to access to anti-retroviral treatment; \textit{C v Minister of Correctional Services TPD, South Africa} (unreported): regarding HIV testing of a prisoner without informed consent; European Court of Human Rights, \textit{D v The United Kingdom} (146/1996/767/964) (unreported): regarding the deportation of an alien drug courier to a country with no access to medical treatment.

\(^{199}\) Du Toit \( et al\) \textit{Labour Relations Law} (2003) 584.\(^{200}\)

\(^{200}\) S 50(4).

\(^{201}\) \textit{Joy Mining, a division of Harnischfeger (SA) (Pty) Ltd v National Union of Mineworkers of SA and Others} (2002) 23 ILJ 391 (LC).
inference could be drawn from a refusal to submit to testing; the applicant could not be aware of which employees had undergone such testing; and the curt order, together with a notice that any employee could decline to take the test without being subject to any prejudice, should be displayed.\textsuperscript{202}

The above mentioned strict measures to disallow employers from abusing HIV testing system has recently emerged in \textit{Irvin & Johnson Ltd v Trawler and Line Fishing Union and others}\textsuperscript{203} case. Rogers AJ argued that there was some difficulty in the interpretation of section 7(2) of the EEA in that both employers and employees would want the intervention of the Labour Court in terms of warranting HIV testing only if the process was not going to be voluntary and anonymous. Therefore, it is submitted that this case settles the whole debate surrounding the legality of voluntary counseling with elements of anonymity.

In the recent case of \textit{PFG Building Glass (Pty) Ltd v CEPPWAWU and others}\textsuperscript{204} the Labour Court disagreed with \textit{Irvin & Johnson} approach of firstly, determining justifiability in terms of section 7(2) to the extent that it had been held that justifiability was to be determined on the basis of what was equitable in the circumstances. This Court felt that the starting point in determining the legality of HIV testing was section 36 of the Constitution and the need to balance constitutional rights and all other rights. Secondly, the \textit{Irvin & Johnson} approach had flaws – in the Court’s approach – as far as anonymous testing is concerned. This is against the background that in the \textit{Irvin & Johnson} case, Rogers AJ held that anonymous testing fell outside the ambit of section 7 of the EEA. The Court \textit{a quo} concluded that \textit{Irvin & Johnson} judgment is not a convincing example and granted an order to the effect that anonymous and voluntary testing falls within the ambit of section 7 and the employer could conduct it.

HIV testing in most Canadian provinces and territories falls with the ambit of medical testing. Most Commissions have held that medical examinations carried out for employment purposes should focus on verifying whether or not an individual is able to perform the essential duties of a particular job. In Ontario, for an example, the Employment Commission\textsuperscript{205} indicates that:

\begin{itemize}
\item \textsuperscript{202} \textit{Supra}.
\item \textsuperscript{203} (2003) 24 \textit{ILJ} 565 (LC).
\item \textsuperscript{204} (2003) 5 \textit{BLLR} 475 (LC).
\item \textsuperscript{205} It has a Policy on Employment-Related Medical Testing.
\end{itemize}
(i) Employment-related medical examination or inquiries, conducted as part of the applicant screening process are prohibited under subsection 23(2) of the Ontario Code;

(ii) Any employment-related medical examination or inquiries are to be limited to determining the individual’s ability to perform the essential duties of the job;

(iii) Medical examinations, if determined to be necessary to assess an individual’s ability to perform the essential duties of a job should only be undertaken after a conditional offer of employment has been made, preferably in writing;

(iv) If the applicant or employee requires accommodation in order to enable him or her to perform essential duties of the job, the employer is required to provide such accommodation unless to so would cause undue hardship.\(^{206}\)

Like South Africa, the Canadian approach to HIV status testing is quite stringent. Employers cannot test employees with the aim of dismissing them, or applicants with the aim of rejecting them because of their HIV status \(\textit{per se}\). In fact such actions would constitute automatically unfair dismissals or unfair discrimination.

4.5 DISCRIMINATION ON THE GROUNDS OF SEX, GENDER, PREGNANCY AND MARITAL STATUS

It makes both academic and jurisprudential sense to combine these grounds for discrimination because the Constitution, LRA and EEA\(^{207}\) find this combination to be listed grounds for unfair discrimination. This line of thinking is even supported by Turro when she states that the reason for combining these grounds for the purpose of discussion and analysis is that very often, certain facts may give rise to allegations of discrimination on any one or a combination of the above grounds.\(^{208}\)

Sex and gender discrimination have been topical in the South African labour relations law. In \textit{Association of Professional Teachers and another v Minister of Education and others},\(^{209}\) the


\(^{207}\) The repealed Item 2(1)(a) of Schedule 7, the provisions of which appear in s 6 of the EEA.

\(^{208}\) \textit{Supra.}

\(^{209}\) (1995) 16 \textit{ILJ} 1048 (IC).
Industrial Court had to decide on the issue of fringe benefits. The Minister of Education refused to grant housing benefits to married teachers on the basis that it was assumed that their spouses would take care of housing subsidies. Therefore, the Court found that the exclusion of married women from a homeowner allowance scheme directly discriminates against a class of women on the basis of their sex, coupled with their marital status.\textsuperscript{210}

The same Industrial Court was found to have been unshaken and uncontroversial in \textit{Collins v Volkskas Bank (Westonaria Branch), a division of Absa Bank Ltd}\textsuperscript{211} case where it was held that the dismissal of a female employee on account of her pregnancy was a form of sex discrimination. The Labour Court was called upon to determine whether there had been an automatically unfair dismissal in terms of section 187(e) of the LRA.\textsuperscript{212} Ms Botha was employed by the respondent as a receptionist. Soon thereafter she informed her employer that she was pregnant. The employer was not impressed about such tidings and ordered Botha to become a sales representative and she declined. She was dismissed. The Court \textit{a quo} seemed dissuaded by the respondent’s argument that it could not tolerate having a pregnant women as receptionist, the same women that would at some stage take a long maternity leave. This experience is similar to \textit{Sheridan case}\textsuperscript{213} where the applicant was dismissed as the waitress because she was pregnant. The Labour Court found that the dismissal was automatically unfair and ordered payment of substantial compensation. The Board of Inquiry, in Canada had similar circumstances in the \textit{Solange Lavender case}\textsuperscript{214} In this case, the applicant, a waitress, was dismissed because in one occasion she had vaginal bleeding whilst at work and was rushed to hospital, stayed for five days and when she came back and told the respondent that she was pregnant and she was consequently dismissed. The dismissal was found to be unfair.

In \textit{Solidarity obo AL McCabe v South African Institute for Medical Research},\textsuperscript{215} the Court found that a pregnant employee who was on fixed-term employment and was dismissed in terms of section 186(1)(b) of the LRA was unfairly discriminated against. The Court was satisfied that the applicant had reasonably held the expectation of renewal of her contract in a

\begin{itemize}
\item \textsuperscript{210} \textit{Supra.}
\item \textsuperscript{211} (1994) 12 BLLR 73 (IC).
\item \textsuperscript{212} Botha v SA Import Export International CC (1999) 20 ILJ 2580 (LC).
\item \textsuperscript{213} Sheridan v The Original Mary Anne’s at the Colony (Pty) Ltd (1999) 20 ILJ 2952.
\item \textsuperscript{214} Solange Lavender v Cochrane Station Inn Restaurant and Polizogopoulos (1998) OHRC Case Summaries.
\item \textsuperscript{215} (2003) 9 BLLR 927 (LC).
\end{itemize}
similar position and that failure to renew the contract on grounds of pregnancy jointly constituted unfair dismissal and discrimination.

It is also equally alarming that even lawyers who are deemed to be custodians of good legal practice can err and decide to indulge on discrimination on the basis of pregnancy. The case in question is that of Mashava\textsuperscript{216} who was employed – on probation – as a candidate attorney. She was accused by her employer of failing to disclose that she was pregnant. Therefore, Landman J had to decide whether or not the applicant’s dismissal was on the basis that she was deceitful by failure to disclose her pregnancy status or in essence this dismissal was due to her pregnancy. After considering all evidence before it, the Court found that the dismissal was based on her pregnancy and that the applicant was never deceitful because at the time of the dismissal she was not obliged to disclose her status of being pregnant.

The above-cited cases are also significant in that the Industrial Court was able to distinguish between the two terms namely sex and gender. It was held that “sex” refers to the biological differences between men and women whereas “gender” refers to the social and cultural evaluation hence, one may say that a person is a female or male according to his or her sex but men or women according to his or her gender.\textsuperscript{217} It is therefore submitted that sex, gender and pregnancy\textsuperscript{218} discrimination are sides of the same coin.\textsuperscript{219}

Commentators in the field of labour law contend that there should be two approaches to be adopted when dealing with sex discrimination. The first one is based on the notion that sex alone should not be a sufficient ground for differentiation. This translates from the equal treatment principle, which suggests that those who, apart from their sex, are alike should be treated alike. This debate led to the challenge of the equal treatment principle in the Canadian sex discrimination case of Andrews v The Law Society of Columbia.\textsuperscript{220} In this case, the applicant argued that social inequality is not about sameness or difference because men, for

\textsuperscript{216} Mashava v Cazyn & Woods Attorneys (2000) 21 ILJ 402 (LC).
\textsuperscript{217} Albertyn and Kentridge “Introducing the Right to Equality in the interim Constitution” (1994) SAJHR 149, 167.
\textsuperscript{218} The House of Lords has referred the case of Webb v EMO Air Cargo UK Ltd to European Court of Justice in an attempt to clear up the inconsistency between UK and EC Law regarding pregnancy and sex discrimination.
\textsuperscript{219} The European Court of Justice has held that it is direct sex discrimination to dismiss a women engaged on a six months fix term contract, when recruited, the employer knew she was pregnant and would only be able to work a relatively part of that fixed term period.
\textsuperscript{220} (1989) 1 S.C.R 143.
example, do not have to be the same as anyone to be entitled to their social position and men are just as different from women as women are from men without making them just as disadvantaged. It was further argued that women suffer from social subordination, systemic abuse and deprivation of social power, resources and respect, because they are women. On the basis of these arguments the Supreme Court of Canada found that there was sex discrimination that could not be justified.221

In South Africa, sex discrimination is also discrimination on the basis of pregnancy because it is only women that fall pregnant and they constitute opposite sex from their male counterparts.222 However, pregnancy was omitted from item 2(1)(a) of Schedule 7 to the LRA as a listed ground for discrimination. But, the relevance of this omission is moot because, lately, both the Constitution and the EEA directly or indirectly regard pregnancy as the listed ground for discrimination. Though, it is not the purpose of this section to traverse extensively on the case of Woolworths, perhaps it suffices to emphasise that the decision of the Labour Appeal Court triggered unprecedented anger by those who fill that the court a quo as per Zondo JP was not justified to hold that uninterrupted job continuity as a factor in deciding whether Beverley Whitehead could be appointed. It is therefore submitted that the minority judgment of Conradie J clearly captures the unfair discrimination against the applicant on the grounds of her pregnancy.

The Canadian Human Rights’s approach to “sex” “gender” discrimination is the encapsulation of discrimination on the basis of pregnancy. The Canadian Supreme Court’s ruling in Bliss v Canada (Attorney General)223 was condemned for finding that discrimination emanating from pregnancy is not discrimination on the basis of sex because the court myopically contended that, though pregnancy is characteristic to all women, but it is not all women that fall pregnant. This view was contrary to the South African Industrial Court’s Association of Professional Teachers v Minister of Education’s case interpretation of sex. The Bliss case was superseded by the case of Brooks v Canada Safeway Ltd224 wherein the Supreme Court of Canada, in a unanimous decision, ruled that Safeway’s employee disability plan discriminated

221 Supra.
222 In Woolworths (Pty) Ltd v Whitehead (2000) 6 BLLR 640 (LAC) at par 73 Willis JA accepted that “discrimination on the grounds of pregnancy is a form of discrimination on the basis of sex”.
223 (1979) 1 S.C.R 183.
against pregnant employees and that constituted discrimination because of sex within the meaning of section 6(1) of the 1974 Manitoba Human Rights Act.

There are two Canadian sex discrimination cases that further demonstrate how the Supreme Court have shown overruling powers over lower courts. In *Canadian National Railway Company v Canada (Human Rights Commission)* and *Action Travail des Femmes*, the Supreme Court of Canada overturned the decision made earlier on by the Canadian Federal Court of Appeal. The court a quo ruled that the Canadian Human Rights Tribunal which dealt with the matter on sex discrimination did not have authority to impose a hiring quota on Canadian National Railway Company for women – who were seeking employment in non-traditional blue collar jobs – to be employed. Another controversy erupted when the Supreme Court of Canada, in *Gould v Yukon Order of Pioneers* ruled that a refusal of female membership in a men’s organisation was not a discriminatory denial of services contrary to the Yukon Human Rights Act.

In Canadian pregnancy cases, the Tribunals have, for example, required employers to accommodate pregnant employees by transferring the employee from night shift to day shift where the employee’s health was affected. Furthermore, a significant area involving performance of the job and pregnancy is the requirement of uninterrupted job continuity raised by employers. It would seem that this requirement has an adverse effect on pregnant women and is one of the greatest areas of discrimination against women. Canadian Tribunal enquiries have been focused on whether the employer can accommodate the employee’s absence from work arising out of pregnancy and whether such accommodation would cause undue hardship. In balancing equality of opportunity with employer concerns in these cases, the tribunals have held that the costs of replacement labour and additional training have not been sufficient to constitute undue hardship.

As previously shown, the area of discrimination on the basis of sex, gender, marital status and pregnancy for both South Africa and Canada is comparable. The principles adopted by the

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courts bears testimony that there is an inextricable link to these aspects of discrimination. The Constitutions, Human Rights legislation and employment laws in both countries prohibit this form of discrimination. The only limitation, though, is that each case is judged on its own merits but, it would seem that consistency had to some extent prevail in the courts when these aspects were challenged.

4.6 CONCLUSION

Discrimination on the grounds of race, sex, gender, pregnancy, marital status and age have been fiercely challenged in South Africa and Canada. Literature review and case law assessment and analysis indicate that where judges and arbitrators have found that there existed unfair discrimination, they undoubtedly have ordered against employers who violate human rights and employment equity laws. It is therefore submitted that the above-mentioned selection of aspects of employment discrimination – as listed grounds in South Africa and Canada – have been found comparable.
CHAPTER 5
REMEDIES FOR EMPLOYMENT DISCRIMINATION

This chapter explains the remedies for unfair discrimination in respect of employment in South Africa and Canada. It deals with both the legislative framework and case law regulating dispute resolution mechanisms in order to offer victims of unfair discrimination proper recourse.\(^{230}\) The relevant legislation in both countries such as South Africa’s LRA, EEA, and Bill of Rights as well as the Canadian EEA, Charter for Rights and Freedoms, Human Rights Act, Human Rights Codes and also relevant case law will be scoured.

Section 10(2) of the EEA\(^ {231}\) allows any party to a dispute regarding alleged unfair discrimination in an employment policy or practice other than dismissal\(^ {232}\) to refer the dispute in writing to the CCMA or any recognised council within six months\(^ {233}\) after the act or omission. The party referring the dispute must satisfy the Commission that a copy of the referral has been served on the other party to the dispute; that it has made a reasonable attempt to resolve the dispute prior to the referral\(^ {234}\) and the CCMA must attempt to resolve the dispute through conciliation.\(^ {235}\) If the dispute has not been resolved after conciliation, the CCMA must issue a certificate indicating that the dispute has not been resolved. Then, the dispute can either be referred to arbitration (but only if parties consent to this), or to the Labour Court for adjudication. The primary reason for involving the Labour Court is that employment discrimination is important yet, it poses major litigatory difficulties. Finally, if parties consent to the CCMA arbitrating the alleged unfair discrimination dispute, the Commissioner would conduct the proceedings as jurisdictionally covered by section 141 of the LRA.\(^ {236}\)

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\(^{230}\) S 38 of the Constitution of the Republic of South Africa (Act 108 of 1996) confirms the right of access to a competent court where a right contained in the Bill of Rights has been infringed.

\(^{231}\) No. 55 of 1998.

\(^{232}\) If the alleged unfair discrimination took the form of a dismissal in terms of section 187(2)(b), it should be referred to the appropriate bargaining council or the CCMA where it has jurisdiction. Therefore the above mentioned dismissal would be dealt with in terms of Chapter VIII of the LRA. If it is just an allegedly automatically unfair dismissal, it must be referred to the CCMA within 90 days.

\(^{233}\) S 10(3) states that the CCMA may allow for late referrals if such lateness can be justified.

\(^{234}\) S 10(4) of the EEA.

\(^{235}\) S 10(5) supra. Even section 135[1-6(b)] of the LRA espouses on how conciliation should be conducted by the Commission.

\(^{236}\) S 141(1) sates that if a dispute remain unresolved after conciliation, the Commissioner must arbitrate the dispute as if a party to the dispute would otherwise be entitled to refer the dispute to the Labour Court for adjudication and, instead, all the parties agree to arbitration under the auspices of the CCMA.
Prior to embarking on conciliation, the Commissioner must establish and ascertain that the commission has jurisdiction to entertain the dispute. For instance, the dispute involving unfair discrimination and unfair labour practice which requires arbitration through section 186(2) of the LRA is confusing. This obfuscation became apparent in *SALSTAFF v Spoornet* case,\(^{237}\) where the applicant, a white woman, claimed that the company’s failure to consider her promotion to posts filled by black appointees was unfair labour practice. However, the arbitrator found that the real dispute was related to discrimination on the grounds of colour (race) and gender and therefore, fell outside his jurisdiction. Therefore, any council or the CCMA must decide whether it has jurisdiction to hear the dispute as it was rightly held in *SACCAWU v Speciality Stores (Pty) Ltd*.\(^{238}\) In *NUMSA v Driveline (Pty) Ltd*,\(^{239}\) the Labour Appeal Court re-emphasised that the forum for dispute proceedings is determined by what the employee alleges the dispute to be.

In Canada, section 28(1)\(^{240}\) facilitates the establishment of the Tribunal to mediate, conciliate and arbitrate over employment equity disputes arising from unfair discrimination.\(^{241}\) Section 29 of Canadian EEA accords the Tribunal powers to deal with employment equity disputes. The Tribunal operates in the same manner and extent of a superior court of record which means that it may 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 it considers necessary for a full review.\(^{242}\) It also conducts any matter, which comes before it as informally and expeditiously as the circumstances and considerations of fairness and natural justice permit.\(^{243}\) Generally, hearings are conducted in public although employer may request for the proceedings to be conducted in camera.\(^{244}\) In order for the employer to succeed with this request, it must present a plausible case citing why the circumstances of the dispute require behind camera proceedings before the Board of Inquiry. Section 29(5) provides that the Tribunal shall give the parties to the proceedings with written reasons for its decision.

\(^{237}\) (2002) 23 *ILJ* 1125 (ARB).
\(^{238}\) (1998) 4 *BLLR* 352 (LAC).
\(^{239}\) (2000) 1 *BLLR* 20 (LAC).
\(^{240}\) Canadian Employment Equity Act of 1995.
\(^{241}\) In fact, the Canadian Human Rights Commission which is founded from section 26 (1) of the Human Rights Act establishes the Canadian Human Rights Tribunal in terms of section 48.1.
\(^{242}\) S 29(1)(a), *supra*.
\(^{243}\) S 29(2).
\(^{244}\) S 29(4).
It is section 30(2) that allows the Tribunal to confirm, vary or rescind its own decisions. An order of a Tribunal is final and, except for judicial review under the Federal Court Act, it is not subject to an appeal or review by any Court. Any order of the Tribunal made under section 30 may, for the purposes of its enforcement, be made an order of the Federal Court and is enforceable in the same manner as an order of that Court. Section 31(2) gives the Tribunal powers to make its order an order of the Federal Court through following the usual practice and procedure of the Court. If this has not been followed a certified copy of the order may be filed with the registrar of the Court, and from the time of filing the order, it becomes an order of the Court.

Part II of the Canadian EEA sets limitations respecting directions and orders by the Tribunal. No Tribunal may make an order under section 30 as cited above where that direction or order would:

(a) cause undue hardship to an employer;

(b) require an employer to hire or promote unqualified persons;

(c) with respect to the public sector, require an employer to hire or promote persons without basing the hiring or promotion on selection according to merit in cases where the Public Service Employment Act requires that hiring or promotion be based on selection according to merit, or impose on the Public Service Commission an obligation to exercise its discretion regarding exclusion orders or regulations;

(d) require an employer to create new positions in its workforce; and,

(e) impose a quota on an employer.

Section 151 of the LRA establishes and gives status to the Labour Court. The counter part of the Labour Court in Canada is the Federal Court. Basically, the Canadian Constitution

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245 R.S., 1985, c. F-7, s. 52; 1990, c.8, s.17.
246 S 30(3) supra.
247 S 31(1).
248 Supra.
establishes Federal Courts, which are *inter alia* tasked to conduct judicial reviews of Human Rights Tribunals set under the auspices of both the Human Rights Act and the Employment Equity Act. It is worth noting that the functions of both Courts also go beyond the confines of reviewing and setting aside CCMA or Tribunal awards, respectively. They also have statutory obligations to serve as Courts of Trial. Federal Courts in Canada are spread all over the country to cover all federal provinces and territories. Likewise, the jurisdiction of the Labour Court in South Africa is geographically wide covering all nine provinces. It is therefore submitted that there is concurrent and comparable existence of the South African Labour Court and the Canadian Federal Court systems to deal with human rights litigation, particularly, complaints of alleged unfair discrimination. These Courts are trial courts.

The Labour Court system in South Africa has concurrent jurisdiction with the country’s High Court system. This coexistence may pose a major confusion in terms of dispute referral since section 157(2) of the LRA accords both Courts concurrent jurisdiction. However, some referrals of employment discrimination cases to the High Court have proven to be successful. Therefore, both Courts may deal with any allegation or threatened violation of any fundamental rights entrenched in Chapter 2 of the Constitution of the Republic of South Africa. It is consequently submitted that both the unfair labour practice and unfair discrimination disputes covered by section 6 of the EEA fall within the ambit and jurisdiction of both Courts respectively.

Both sections 158 of the LRA and 18.1 of the Canadian Federal Court Act give powers to the Labour Court and Federal Court, respectively. Broadly speaking and with particular reference to unfair discrimination disputes, section 158 empowers the Labour Court to

(i) make an award of compensation;

(ii) award damages in any circumstances contemplated by the Act;

(iii) revert the matter back to the CCMA to be heard *de novo*;

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250 They become Courts of Trial if the dispute, like unfair discrimination, has not been resolved through conciliation and parties wanted it to be adjudicated by the competent Court of law.

251 S 24 of the Federal Court Act.

252 S 156 of the Labour Relations Act.

253 *Supra.*
(iv) institute an order for costs; and,

(v) make an arbitration award or any settlement agreement an order of the Court.\(^{254}\)

Section 18.1 allows the Federal Court to

(i) accept an application for judicial review made by the Attorney-General of Canada or by anyone directly affected by the matter in respect of which relief is sought;

(ii) order a federal board, commission or other tribunals to do any act or thing it has unlawfully failed or refused to do or has unreasonably delayed in doing it.\(^{255}\)

The Federal Court may also grant relief if it is satisfied that the federal board, commission or other tribunal

(i) acted without jurisdiction,

(ii) acted beyond its jurisdiction,

(iii) refused to exercise its jurisdiction,

(iv) failed to observe a principle of natural justice, procedural fairness or other procedure that it was required by law to observe,

(v) erred in law in making a decision or an order, whether or not the error appears on the face of the record; based its decision or order on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it.\(^{256}\)

The LRA establishes the Labour Appeal Court.\(^{257}\) It is the final Court of Appeal in respect of

\(^{254}\) Act 66 of 1995.

\(^{255}\) S 18(1), (2) and (3)(b).

\(^{256}\) S 18.1(1)(4)(a) – (d).

\(^{257}\) S 167.
all judgments and orders made by the Labour Court with regard to matters within its exclusive jurisdiction\textsuperscript{258} and its authority is relatively massive in terms of superiority. In Canada, there exists the Federal Court of Appeal that deals with appeals from the Federal Court\textsuperscript{259} The major difference between South Africa’s Labour Court of Appeal and the Federal Court of Appeal is that the former acts like the Supreme Court of Appeal on matters under its jurisdiction whereas the latter Court has its decisions reviewed by the Supreme Court of Canada in terms of section 35 of the Canadian Supreme Court Act\textsuperscript{260}

The South African Constitutional Court has also played a major part in dispute resolution mechanism in regulating unfair discrimination in the workplace\textsuperscript{261} The procedure to bring a constitutional case before the Constitutional Court is that the matter must usually arrive before the High Court because the Constitution\textsuperscript{262} allows for a wide range of individuals and public bodies to raise constitutional questions in litigation before the High Court. The Constitutional Court therefore acts like a Court of Appeal for constitutional related matters where the High Court has unjustifiably failed to offer any relief sought.

The Supreme Court of Canada is the apex of the country’s judicial system. It has discretionary jurisdiction to accept appeals from all other federal or provincial appellate courts and in respect of its interpretation of the Constitution and of all legislation. According to Carter \textit{et al}, appeals from Canadian courts of all jurisdiction, including Quebec, may ultimately be taken to the Supreme Court of Canada, which has a discretionary jurisdiction to entertain the appeal, or to leave unreviewed the decision of the province’s highest court\textsuperscript{263} It is therefore submitted that the Supreme Court of Canada has the final word in all common or civil law controversies, in the interpretation of all federal and provincial status, and in the adjudication of constitutional disputes, which include unfair discrimination cases. It operates at a federal level and its duties and powers are similar to the South African Constitutional Court and Appellate Division. These Courts do not hear evidence or question witnesses. They also do not decide directly whether the persons are guilty or whether damages should be

\begin{itemize}
  \item \textsuperscript{258} S 167(2).
  \item \textsuperscript{259} S 27(1) of the Federal Court Act.
  \item \textsuperscript{260} R.S. 1985, c. S-26.
  \item \textsuperscript{261} See Prinsloo v Van der Linde & another 1997 (3) SA 1012; (1997) 6 BCLR 759 (CC), Harksen v Lane NO & others 1998 (1) SA 300 (CC); (1997) 11 BCLR 1489 (CC), Hoffman v South African Airways (2000) 12 BLLR 1365 (CC), Larbi-Odam v MEC for Education (North West Province) 1998 (1) 745 (CC).
  \item \textsuperscript{262} Act 108 of 1996.
  \item \textsuperscript{263} Supra 28.
\end{itemize}
awarded to an injured person. The Courts’ function is to determine the meaning of the Constitutions in relation to disputes, including unfair discrimination.

If the discrimination dispute has been successfully brought before the CCMA or any other recognised council, Canadian Tribunals, Labour and Federal Courts and a prima facie case for that discrimination has been established and found to be unfair, various orders for the victim may be made. For instance, where discrimination took the form of denying a person employment for a prohibited reason, it was held that an order of instatement requiring that the employer employ the employee is a basic element of the appropriate relief. However, in some cases instatement could be found to be impractical for various reasons. Moreover, re-instatement has been seen possible where discrimination has taken the form of automatically unfair dismissals.

In Pitawanakwat v Canada an employee with the Department of the Secretary of State in Regina who claimed that she was harassed and experienced discrimination because of her Aboriginal ancestry received an amount for lost wages and benefits, a letter of apology and a promise of a job comparable to the one she lost. Furthermore, the Federal Court later ordered that she be given financial compensation for hurt feelings.

Canadian Courts and Tribunals have also shown interest in and provided recourse for most unfair discrimination cases. In the Brown v M.N.R, Customs and Excise case, for example, the Tribunal ordered the employer to accommodate a pregnant employee whose health was affected by working night shift by transferring the employee from night shift to day shift. Also, in Brooks v Canada Safeway Ltd it was held that discriminating against pregnant women on the basis of organisational benefits was unfair. In this regard the employer was ordered to immediately correct the discrepancy.

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264 These are the functions of ordinary courts.
265 Particularly, the Bill of Rights and Charter for Rights and Freedoms, respectively.
266 Both in Hoffman, supra and George v Western Cape Education Department (1996) 2 BLLR 166 (IC), it was held that it was not true that the instatement would open the floodgates for other applicants.
267 See Walters v Transitional Local Council of Port Elizabeth (2001) 1 BLLR 98 (LC).
268 NUTESA v Technikon Northern Transvaal (1997) 4 BLLR 467 (CCMA)
Section 50(2)(a) of the EEA\textsuperscript{273} is not prescriptive in terms of the amount of compensation which may be ordered, beyond the requirement that any remedy must be “just and equitable” in terms of section section 194 of the Labour Relations Act. In \textit{Whitehead v Woolworths (Pty) Ltd},\textsuperscript{274} Waglay AJ was satisfied that, due to inadequate evidence led by the respondent and the suffering that the applicant had endured, the compensation of the two-thirds of a year’s earnings was fair and equitable. In both the \textit{Botha}\textsuperscript{275} and \textit{Sheridan}\textsuperscript{276} cases, the Labour Court found that direct unfair discrimination had taken place and ordered maximum permissible compensation to be paid. Also in \textit{Mashava}\textsuperscript{277} case, Landman J ordered that the applicant be awarded five months remuneration for non-patrimonial loss (\textit{solatium}) and the equivalent of nine months remuneration for patrimonial loss for automatically unfair dismissal on the basis of pregnancy.

From the foregoing, it can be established that both South Africa and Canada are countries, which abhor discrimination if proven unfair. Both countries have promulgated legislation, which supports courts or any Tribunal in dealing with unfair discrimination. The legislation includes the Employment Equity Acts, Human Rights Acts, Federal Court Act, Supreme Court Act, Labour Relations Act, and Constitutional Court Act. Both countries’ statutory structures like the CCMA, Human Rights Tribunals, recognised councils, Labour Court, Labour Appeal Court, Federal Court, Federal Appeal Court, Supreme Court of Canada, High Court and Constitutional Court play a pivotal role in dealing with unfair discrimination disputes.

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\textsuperscript{273} No 55 of 1998.
\textsuperscript{274} (1999) 8 BLLR 862 (LC).
\textsuperscript{275} \textit{Botha v SA Import Export International CC} (1999) 20 ILJ 2580 (LC).
\textsuperscript{276} \textit{Sheridan v The Original Mary Anne’s at the Colony (Pty) Ltd} (1999) 20 ILJ 2952.
\textsuperscript{277} \textit{Mashava v Cuzyn & Woods Attorneys} (2000) 21 ILJ 402 (LC).
\end{flushleft}
The analysis of unfair discrimination on the basis of race, gender, sex, marital status and HIV/AIDS as contended throughout this study suggests that the persuasive evidence with respect to broader employment discrimination requires a complex web of information and analysis. The study has demonstrated that both the South African and Canadian employment discrimination experience is comparable. The manifestation of this is evidenced from both countries’ Constitutional provisions on equality, further pronouncement of the prohibition of unfair discrimination in the Bill of Rights, the Charter for Rights and Freedom and the Employment Equity Acts. These countries also have statutory structures like Tribunals, Commissions and Courts to *inter alia* deal with disputes emanating from employment discrimination. There are rules and regulations established to govern the operations of these structures.

With the foregoing in mind, it is clear that both countries have, respectively yet comparably, developed a fairly strong jurisprudence and rational line of judicial thinking to effectively deal with employment discrimination. It has been shown that, from a legal perspective, human rights legislation is defined as *quasi* constitutional, so it has precedence over other legislation.

The study has also demonstrated that workplace equality is promoted both by introducing affirmative action measures and by making efforts to prohibit unfair discrimination. Both the South African and Canadian laws have shown that the employer defences using affirmative action and inherent requirements of the job or *bona fide* occupational requirements must be used carefully. The employer defence of accommodating people from designated groups, which include the disabled, has gone unabated on the basis that discrimination was justified that the employer cannot accommodate certain employees because that would constitute undue hardship. However, the nature of the selected aspects of discrimination (race, age, sex, marital status, gender, pregnancy, HIV/AIDS) as postulated above may make it inept for the employer to argue that it was justified to discriminate.

Dispute about unfair discrimination has proven to be extremely difficult for the employees. This has been so because of the burden of proof with respect to discrimination. Courts in both
countries have not been lenient if the complainants failed to show a prima facie case for unfair discrimination.

It is accordingly submitted that the scope for further comparable research in other grounds of discrimination is broad. This study has focused on discrimination on the basis of age, sex, gender, race, ethnic origin, nationality and HIV/AIDS. It did not look at other workplace forms of discrimination such as, discrimination on the basis of religion, disability, political affiliation, sexual orientation, sexual harassment and citizenship.
ARTICLES


Bosch, C “Section 187(2)(b) and the Dismissal of Older Workers. Is the LRA nuanced enough?” (2003) 24 ILJ 1283

Casswell, DG “Moving Towards Same-Sex Marriage” (2001) 8 Canadian Bar Review 810


De Villiers, C “Future Challenges: Addressing Systemic Discrimination on the Basis of Pregnancy” (October 2001) SASLAW Conference, Durban


Dupper, O and Garbers, C “Provision of Benefits To and Discrimination Against Same-Sex Couples” (1999) 20 ILJ 772


Grant, B “Labour Law First Discrimination Case” (1998) 19 ILJ 709

Gunderson, M “Pay and Employment Equity in the United States and Canada” (1994) Vol 15 No 7 Canadian International Journal of Manpower

Heywood, M and Joni, J “Judgement on Section 7(2) of the Employment Equity Act Creates Uncertainty Regarding HIV Testing” (2002) 23 ILJ 670


Vettori, S “Operational Requirements as Justification for Discrimination” (2000) 2(33) De Jure

BOOKS
Aggarwal, PA Sex Discrimination: Employment Law and Practices (1994) Butterworths, Vancouver; Canada

Basson, A; Christianson, M; Garbers, C; Le Roux, PAK; Mischke, C; and Strydom, EML Essential Labour Law (2002) Labour Law Publications, Houghton

Brand, J; Lotter, C; Mischke, C and Steadman, F Labour Dispute Resolution (1997) Juta and Co Ltd, Cape Town


Du Toit, D; Woolfrey, D; Murphy, J; Godfrey, S; Bosch, D and Christie, S *Labour Relations Law* (2003) Butterworth, Durban


Vizkelety, B *Proving Discrimination in Canada* (1987) Butterworths, Toronto


**CASES**


*Alsbrook v City of Maumelle* (1998) 156 F.3d 825, 835 n 5


*Association of Professional Teachers and another v Minister of Education and others* (1995) 16 ILJ 1048 (IC)

*Auf der Heyde v University of Cape Town* (2000) 21 ILJ 1758 (LC)

*Bhinder v Canadian National Railway* (1985) CanSc

*Bliss v Canada (Attorney-General)* (1979) 1 S.C.R. 183

*Botha v SA Import Export International CC* (1999) 20 ILJ 2580

*Bradgon v Abbot* (1998) 11b S.Ct 2196, U.S.L Wk 4601

*Brink v Kitshof NO* (1996) 4 SA 197 (CC)

*British Columbia (Public Service Relations Commission) v BCGEU* (1999) 3 S.C.R. 3 (SC)


*Brooks v Canada Safeway Ltd* (1989) 1 S.C.R. 1219


*C v Minister of Correctional Services, TPD, South Africa,* (unreported)

*Carson v Air Canada* (Can.1984) 5 C.H.R.R D/1857 (C.A)

*Canadian Airline Flight Attendants Association v Pacific Western Airlines*

*Canada (Attorney-General) v Herbert* (1996) 122 F.T.R 274

*Canada (Attorney-General) v Irvine* (2003) F.C.T 660

*Canada (Attorney-General) v Robinson* (1994) 3 F.C 228
Canada (Human Rights Commission) v Canada (Armed Forces) (1994) 3 F.C. 188
Christie v Stingray Accessory Manufacturers CC (2003) 3 BLLR 275 (CCMA
Coetzer and others v Minister of Safety and Security (2003) 2 BLLR 173 (LC)
Collins v Volkskas Bank (1994) 5 SALLR 34 (IC)
Costa Rican and Venezuela Supreme Court (unreported)

D v The United Kingdom (146/1996/767/964) (unreported)
Daniels v Campbell NO (2003) JOL 1119 (CC)
Deas v River West, L.P (1998) 152 F3d 471, 478 n.15
De Lange v Smuts NO (1998) 3 SA 785 (CC)
Department of Correctional Services v Van Vuuren (1999) 20 ILJ 2297 (LAC)
Dickason v University of Alberta (1992) (unreported)

Fraser v The Children’s Court, Pretoria-North, and others 1997 (2) SA 261 (CC)

George v Liberty Life Association of Africa Ltd (1996) 17 ILJ 571 (T)
George v Western Cape Education Department (1996) 2 BLLR 166 (IC)

Harksen v Lane NO 1998 (1) SA 300 (CC)
Harmse v City of Cape Town (2003) 24 ILJ 1130 (LC)
Hoffman v South African Airways (2000) 21 ILJ 2357 (CC)

Independent Municipal and Allied Workers union v Greater Louis Trichardt Transitional Local Council (2000) 21 ILJ 1119 (LC)
India MX v XY (1997) High Court of Bombay (unreported)
Investigating Directorate: Serious Economic Offences and others v Hyundai Motor Distributors (Pty) Ltd and others 2001 (1) SA 545 (CC)
Irvin Johnson v Trawler and Line Fishing Union and others (2003) 24 ILJ 565 (LC)

Joy Mining, A division of Harnischfeger (SA), (Pty) Ltd v NUM and others (2002) 23 ILJ 391 (LC)

Kadiaka v Amalgamated Beverage Industries (1999) 20 ILJ 373 (LC)

Larbi-Odam and others v MEC for Education (North-West Province) and other (1997) 12 BCLR 1655 (CC)
Large v Stratford (City) (1995) 3 S.C.R 733
Lavender v Cochrane Station Inn Restaurant and Polizogopoulos (1998) OHRC (unreported)
Law v Canada (Minister of Employment and Immigration) (1999) 1 S.C.R. 497
Lagardien v University of Cape Town (2000) 21 ILJ 2469 (LC)

Mandla v Dowell Lee (1983) ICR 385
Martin v Canadian Forces (1997) CanSc
Matiso v Commanding Officer, Port Elizabeth, (1995) 10 BCLR 1382 (CC)
McInnes v Technikon Natal (2000) 6 BLLR 701 (LC)
McKinney v University of Guelp (1997) 3 BHRC

N v Minister of Defence (Namibia) (2000) 21 ILJ 999 (LCN)
NUMSA v Driveline (Pty) Ltd (2000) 1 BLLR 20 (LAC)
NUTESA v Technikon Northern Transvaal (1997) 4 BLLR 467 (CCMA)


PFG Building Glass (Pty) Ltd v CEPPWAWU and others (2003) 5 BLLR 475 (LC)
PSA v Minister of Correctional Services (1997) 18 ILJ 241 (T)
President of the Republic of South Africa v Hugo 1997 (4) SA 1 (CC)
Prinsloo v Van der Linde (1997) 6 BCLR 759 (CC)
Public Servants Association v Minister of Justice (1996) 18 ILJ 241 (T)

Rubinstein v Price’s Daelite (Pty) Ltd (2002) 5 BLLR 472 (LC)
Rivera v Heyman (1998) 157 F.3d 101

SACCAWU v Speciality Stores (Pty) Ltd (1998) 4 BLLR 352 (LAC)
SACTWU v Rubin Sportswear (2003) 5 BLLR 505 (LC)
SALSTAFF v Spoornet (2002) 23 ILJ 1125 (ARB)
Sheridan v The Original Mary Anne’s at the Colony (Pty) Ltd (1999) 20 ILJ 2952 (LC)
Solidarity obo AL McCabe v South African Institute of Medical Research (2003) 9 BLLR 927 (LC)
Schmahmann v Concept Communications Natal (Pty) Ltd (1999) 8 BLLR 1092 (LC)
Schweitzer v Waco Distributors (a division of Voltex (Pty) Ltd) (1998) 10 BLLR 1050 (LC)
Swart v Mr. Video (1997) 2 BLLR 249 (CCMA)

University of Cape Town v Auf der Heyde (2001) 12 BLLR 1316 (LAC)

Velenisi v Diminion Management and others (1997) (unreported)

Walters v Transitional Local Council of Port Elizabeth and another (2000) 21 ILJ 272 (LC)
Webb v EMO Air Cargo UK Ltd (European Court) (unreported)
Whitehead v Woolworths (2000) 21 ILJ 571 (LAC)
Wong v Ottawa Board of Inquiry (unreported)

X v Y and others (1988) 2 All ER 648 (Queen’s Bench Division, UK)


LEGISLATION
Americans with Disability Act of 1990 USC 12102 – 12213
Basic Conditions of Employment Act 75 of 1997
British North-American Act, 1867
Canadian Constitutional Act of 1982
Canadian Employment Equity Act of 1995
Canadian Charter of Rights and Freedoms, Schedule B of the Constitutional Act, 1982 (79)
Canadian Federal Court Act R.S., 1985, c. F-7
Canadian Supreme Court Act 1983
Canadian Public Service Employment Act R.S 1985, c. P-33
Employment Equity Act 55 of 1998
European Race Relations Act of 1976
Federal Age Discrimination in Employment Act 1967
Finland Constitution Act of 2000
Labour Relations Act 66 of 1995, as amended
Manitoba Human Rights Code H-175, 1987
Namibian Labour Act 6 of 1992
Ontario Human Rights Code
Older Workers Benefit Act of 1990
Promotion of Equality and Prohibition of Unfair Discrimination Act 4 of 2000
South African Human Rights Commission Act 54 of 1994
Yukon Human Rights Act, SY 1987